L.1549, DC37 v. Dep't of Social Services, HRA, 49 OCB 17 (BCB 1992) [Decision No. B-17-92 (IP)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding Between

LOCAL 1549 of DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
Petitioner,

-and-

THE CITY OF NEW YORK DEPARTMENT OF SOCIAL SERVICES/HUMAN RESOURCES ADMINISTRATION,
Respondent.

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DECISION NO. B-17-92

DOCKET NO. BCB-1455-92

INTERIM DECISION AND ORDER

On January 17, 1992, Local 1549 of District Council 37, AFSCME, AFL-CIO ("the Union") filed a verified improper practice petition against the New York City Department of Social Services/ Human Resources Administration ("the Department"). The petition alleges that the Department unlawfully excluded Union representatives from a meeting between a Deputy Commissioner and a group of approximately thirty unit members, in violation of Section 12-306a.(1), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] NYCCBL §12-306a. provides as follows:
Improper practices: good faith bargaining.
a. Improper public employer practices.
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

The Department, appearing by the City of New York Office of Labor Relations ("the City"), filed a motion to dismiss the petition on February 27, 1992, on the ground that it contained an inadequate recitation of factual allegations. On the same day, in a separate document, the City submitted a verified answer. The answer also seeks the petition's dismissal on the ground that its claim is speculative and conclusory. On March 23, 1992, the Union filed an affidavit opposing the City's motion to dismiss its petition.

BACKGROUND

On December 27, 1991, a labor-management meeting was held at the request of District Council 37's Council Representative Ronnie Harris, who represents members of Local 1549 working in the Department's Medical Assistance Program. Several of the Department's managers attended the meeting, as did representatives of the three labor organizations that represent many of the other employees in the Department. The purpose of the meeting was to discuss the subject of a staff meeting that was scheduled to be held the following Monday.

During the labor-management committee meeting, one of the Department's managers confirmed that approximately thirty-five employees would be required to attend the staff meeting, and that the subject of the meeting was to discuss these employees' duties and performance. The Council Representative for Local 1549 requested and was denied permission to attend the staff meeting, which was held as scheduled on December 30, 1991.

Positions of the Parties

City's Position

The City contends that it is unable to determine a basis for the violation of the NYCCBL that the Department is accused of having committed because of the inadequacy of factual allegations contained in the petition. It admits that a Deputy Commissioner did conduct a staff meeting on December

30, 1991 with approximately thirty-five Medical Assistance Program employees, during which their duties, performance, evaluation, and maximum efficiency within the unit were discussed. The City argues, however, that staff meetings are the normal means by which management directs its employees. According to the City, discussions of working conditions "occur every hour in every work place in the City," yet rarely is a union representative present during such discussions.

The City maintains that the mere allegation that such a meeting took place is insufficient to state a violation of the law, absent some additional showing that rights granted by the NYCCBL have been interfered with, or that the employer took inappropriate action. The City argues that there is no assertion that grievances or union activity was discussed at the December 30, 1991 staff meeting. In its view, the entire petition is based upon speculation and conclusory allegations, without facts that would tend to support the Union's claim that members were coerced into not filing grievances, or not engaging in other union activity. Thus, the petition assertedly fails to establish a prima facie improper practice case.

Union's Position

In its improper practice petition, the Union charges that the Department discussed working conditions, grievance filings, and other union activities with unit members during the December 30, 1991 staff meeting, after barring Union representatives from attending.

In the affidavit opposing the City's motion to dismiss, the Union's Council Representative explains that the reason for holding the December 27, 1991 labor-management meeting was to inquire about what the Department was planning to discuss at the December 30 staff meeting. The Representative claims that when management specified that one purpose was to increase the productivity of its workers, he replied that productivity, work assignments, and work locations were matters for negotiations that had to be discussed with

the Union, and not with employees directly. He then asked for and was denied permission to attend the staff meeting.

According to the Council Representative, of the thirty-nine employees attending the staff meeting, approximately thirty were members of Local 1549. Of these, nine have filed past grievances, and two have arbitrations pending at this office. In the Representative's view, the criteria used for selecting the employees required to attend the meeting was that they had grievances against the Department, that they had spoken out about working conditions, or that they had been involved in disciplinary proceedings which the Union contested.

After the staff meeting, according to the Council Representative, several employees who attended allegedly told him that the Deputy Commissioner made negative comments about the Union. They allegedly quoted the Deputy Commissioner as saying that "the Union was only concerned with layoffs" and that "the Union spread wild rumors about the purpose of the meeting to stir up trouble."

The Union maintains that the Commissioner's disparaging remarks constitute interference, restraint or coercion of employees from engaging in protected activity. It also contends that the selection process for choosing employees to attend the staff meeting was discriminatory, and that it has had a chilling effect on employees' rights to participate in union activity.

Discussion

When deciding a motion to dismiss a petition that alleges a violation of the NYCCBL, we deem the moving party to concede the truth of the facts alleged by the Petitioner. In addition, we will accord the petition every favorable inference, and we will construe it to allege whatever may be implied from its

statements by reasonable and fair intendment.[2]

Thus, for the purposes of deciding the City's motion in this case, we will accept Local 1549's contention that the Department intentionally circumvented the Union when one of its Deputy Commissioners ordered a group of unit members to attend a staff meeting from which union representatives were excluded. We also will accept the Union's contention that working conditions, grievance filings, and other union activities were discussed with the members during the meeting. These allegations, if true, may raise questions of direct dealing and captive audience speech, which we have not before addressed.

In the private sector, Section 8(c) of the National Labor

[2] Decision Nos. B-36-91; B-34-91; B-9-91; B-6-91; B-51-90; B-26-90; B-32-90; and B-34-89.

Relations Act[3] applies in situations where the employer is charged with interfering with union activity by dealing directly with union members or giving captive audience speeches to employees. A vast number of National Labor Relations Board decisions relate to this provision, about three-fourths of which stem from union organizing campaigns.[4] The decisions all are fact-based. The NLRB examines the totality of the employer's conduct and uses the language of §8(c) itself as the test for deciding, on a case-by-case basis, whether the captive audience speech or the direct dealing violated the Act.

There is no counterpart to NLRA Section 8(c) in either the Taylor Law or the NYCCBL. The Public Employment Relations Board ("PERB") has not had the opportunity to decide a case where the employer is accused of dealing directly with members of a bargaining unit, although there are three reported decisions by PERB hearing officers who have dealt with the subject. In Rochester Fire Fighters,[5] the City manager wrote a letter to all employees concerning pension costs, which the union regarded as a "scare tactic." In his decision, the Director held:

> [T]he City has a right to disseminate information and to express its opinions or positions to its employees so long as this expression is not intended, nor inevitably serves to impede reaching agreement with employee organizations, or subverts the employee's right of organization and representation.

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[3] NLRB Section 8(c) reads as follows:

> **Expression of views without threat of reprisal or force or promise of benefit.**
>
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit.

[4] See LRRM Cumulative Digest and Index, §§ 50.691 to 50.761.

[5] 9 PERB ¶4542 (Director's Decision 1976).

This principle was reiterated in two subsequent decisions. In 1981, a PERB Hearing Officer ruled that a letter written to Association members by a school district's chief negotiator commenting on negotiations did not, on its face, violate the Rochester Fire Fighters standard.[6] Four years later, a PERB Administrative Law Judge held that a school district's distribution of a memorandum on the status of negotiations, on the afternoon of a general membership meeting, was not improper. However, because the memorandum contained new proposals that had not yet been presented to the union, the ALJ ruled that it did present an improper impediment to the negotiating process.[7] Thus, even in the absence of statutory language equivalent to NLRA Section 8(c), the PERB hearing officers seem to have adopted a similar standard. Their decisions imply that an employer's direct dealing with union members may not be a violation of law, provided there is no threat of reprisal or promise of benefit, and that the direct dealing does not always interfere with employees' organizational rights.

The case now before us, viewed according to the standards followed by PERB and the NLRB, contains sufficient unrebutted material allegations to withstand the City's motion to dismiss. If proved, the Union's allegations that the Department discussed grievance filings and other union activities with unit members during the December 30, 1991 staff meeting, after barring Union representatives from attending, might be sufficient to sustain a claim of an improper practice under Section 12-306a. (1), (3) and (4) of the NYCCBL.

Because the City has filed its answer already, we see no point in prolonging matters by waiting for the submission of the Union's reply to the City's answer. We shall order a hearing before a Trial Examiner designated by the Office of Collective Bargaining to give the parties the opportunity to

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[6] Brentwood Clerical Association, 14 PERB ¶4630 (1981).

[7] North Colonie Central School District, 18 PERB ¶4600 (1985).

present evidence concerning the objective of the December 30, 1991 staff meeting, and such other evidence as may enable us to determine what, if anything, was said, how it was said, and by whom it was said, with regard to grievance filings and other union activities. The burden will be on the Union to prove that the Deputy Commissioner's remarks during the staff meeting contained a threat of reprisal or force, or that they otherwise subverted the members' organizational and representational rights.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the motion of the City of New York to dismiss the improper practice petition docketed as BCB-1455-92 be, and the same hereby is, denied; and it is further

ORDERED, that the parties shall present evidence at a hearing before a Trial Examiner designated by the Office of Collective Bargaining on the issues set forth in the decision herein.

DATED: New York, N.Y.
April 30, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER

JEROME E. JOSEPH
MEMBER

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