DC37 v. City, OLR, 49 OCB 37 (BCB 1992) [Decision No. B-37-92 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Petitioner,

-and-

CITY OF NEW YORK; NEW YORK CITY
OFFICE OF LABOR RELATIONS,

Respondents.

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DECISION NO. B-37-92
DOCKET NO. BCB-1439-91

INTERIM DECISION AND ORDER

This proceeding was commenced on November 19, 1991, by the filing of a verified improper practice petition by District Council 37, AFSCME, AFL-CIO and its affiliated locals ("DC 37" or "the Union") against the City of New York ("the City") and the New York City Office of Labor Relations ("OLR"), jointly referred to as "respondents." DC 37 alleges that a certain pattern and practice of the City, in connection with its preparation of arbitration cases involving out-of-title work, violates §§12-306a(l), (2), (4) and §12-306c(4) of the New York City Collective Bargaining Law ("NYCCBL").[1] The specific allegations

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[1]NYCCBL §12-306, in pertinent part, provides:

> **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;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;

(continued...)

comprising the pattern and practice alleged as violative of the statute were set forth in the Union's petition as follows:

> "Specifically, after the Union-has filed for arbitration [of an out-of-title claim]:
>
> 1. the City orders interrogations of the individual grievant;
> 2. the City refuses to permit the Union to be present at the interrogation of the grievant; and
> 3. the City refuses to provide the Union, upon demand, with a copy of the 'Desk Audit' and notes taken during the interrogation by the City representatives."

On November 27, 1991, the City filed a Motion to Dismiss and a Memorandum of Law in Support of Respondent's Motion to Dismiss. According to the City, the Union's improper practice charges are time-barred under 61 RCNY §1-07(d) (formerly §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining,

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1(... continued)

> (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.
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> **c. Good faith bargaining.** The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; ....

hereinafter referred to as "the OCB Rules.")[2] The City maintained that the petition should be dismissed because '"[a]ll of the alleged acts which comprise the basis of [the petition) occurred more than four months prior to the date on which the petition was filed."

On December 23, 1991, DC 37 filed a document entitled "Affirmation in Opposition to Motion to Dismiss." Therein, the Union argued that the City's motion was baseless on two grounds: "First, because the two examples of the City's pattern and practice ... are both timely. Second, because the City's pattern and practice of violating the [NYCCBL] continues and must be stopped." In support of the latter claim, the Union set forth facts and circumstances surrounding three other pending out-of-title arbitrations.

By a letter dated December 24, 1991, the City objected to DC 37's pleading, complaining that it was "an inappropriate response to a motion to dismiss." Therein, the City argued that the claims asserted on behalf of the individuals named in the original petition "are certainly not made timely by the mere addition of claims regarding other, unrelated, individuals."

On January 3, 1992, DC 37 filed a document entitled

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[2] Section 1-07(d) of the OCB; Rules, in pertinent part, provides:

A petition alleging that a public employer or its agents ... has engaged in or is engaging in an improper practice in violation of §12-306 of the statute may be filed with the Board [of Collective Bargaining] within four months thereof ....

"Supplemental Affirmation in opposition to Motion to Dismiss." Therein, the Union objected to the City's attempt to limit the scope of its petition to named individuals when the gravamen of the dispute concerns a challenged "pattern and practice" of the City.

By another letter dated January 6, 1992, the City objected to the Union's supplemental pleading. The City once again urged the Board to consider only those claims asserted on behalf of the individuals named in the Union's original petition.

On February 23, 1992, the Trial Examiner assigned to handle this matter informed the parties that the record was closed on the question of whether the improper practice petition was timely filed.

Background

In support of the allegations set forth in the original improper practice petition, the Union gave, as examples of the alleged pattern and practice it complains of, the details of the following two cases:

The Case of Aria Gray

On April 1, 1991, DC 37 filed a request for arbitration on behalf of Aria Gray, a Computer Aide employed by the Department of Finance. On the morning of May 17, 1991, OLR allegedly ordered Gray to appear for a "desk audit" to be conducted later that day by a representative from the City's Department of Personnel ("DOP"). The Union maintains that whenever an

unresolved out-of-title grievance becomes the subject of a request for arbitration, OLR orders the grievant "to submit to an interrogation (euphemistically referred to as a 'desk audit') by an employer representative concerning the subject matter of [the] grievance."

According to the Union, Gray called DC 37's Office of the General Counsel, seeking Union representation at the desk audit. Thereupon, counsel for the Union called OLR to object to the "interrogation" of Gray, to request that an attorney or other Union representative be permitted to attend if OLR intended to proceed with the audit, and, in the alternative, to request that OLR provide a copy of the desk audit and notes taken by the City's agent during the audit. OLR refused all of the Union's requests and DOP proceeded with the desk audit.

By a letter addressed to OLR's General Counsel dated May 17, 1991, the Union reiterated its demand for "a copy of the completed 'desk audit' and any notes made by the City during its interrogation of the grievant." In a letter dated the same day, OLR replied that because the information you requested is available from other sources, this Office is denying your request."

Construing OLR's response as a suggestion that the audit may be obtained from DOP, on May 31, 1991, the Union requested same from DOP's Associate General Counsel. By a letter dated June 14, 1991, DOP denied the request and informed the Union that the desk audit, which was not yet complete, would be forwarded to OLR when

completed.

On November 12, 1991, DC 37 made a final attempt to obtain a copy of the Gray desk audit and notes from OLR, in anticipation of the arbitration scheduled for November 27, 1991.[3] once again, OLR denied the Union's request. Consequently, and with the consent of OLR, the arbitration of Gray's out-of-title grievance was adjourned pending disposition of the instant improper practice proceeding.

The Case of Rhoda Wyler

On October 13, 1988, the Union filed a request for arbitration on behalf of Rhoda Wyler, an Office Aide employed by the Human Resources Administration ("HRA"). Unbeknownst to the Union, DOP conducted a desk audit of Wyler's duties in November 1988. on February 22, 1989, Wyler was transferred to another position in HRA.

On July 15, 1991, the Union learned from Wyler that DOP performed a desk audit in June 1991, and questioned her regarding the duties which were the subject of her pending out-of-title grievance. On July 16, 1991, the Union requested a copy of the June 1991 desk audit and any notes made during the City's "interrogation" of the grievant. The Union demanded that the requested material be made available no later than July 18, 1991,

[3] It should be noted that this information was alleged, for the first time, in the Union's pleading entitled "Affirmation in opposition to Motion to Dismiss."

"in order for the Union to prepare for the arbitration" scheduled for July 22, 1991. According to the Union, the City denied the. request.

At the arbitration on July 22, 1991, the Union reiterated its request for the June 1991 desk audit and notes. In response, the City stated that it would not offer the June 1991 desk audit into evidence since Wyler's out-of-title duties ceased upon her transfer in February 1989. OLR admitted at the hearing for the first time, however, that it was in possession of the other desk audit, which was conducted in November 1988, approximately one month after the Union filed the request for arbitration.

According to the Union, it had no prior knowledge of this other desk audit and Wyler was unable to recall the event. When permitted to review the audit, however, the grievant denied the representations made in the November 1968 desk audit regarding the content of her job duties. OLR did not provide any notes made during the desk audit. At DC 37's request, the arbitrator adjourned the hearing to allow the Union time to investigate the allegations raised by the November 1988 desk audit of Wyler.

In support of its claim that the City continues to engage in conduct which violates the NYCCBL, and in response to the city's Notion to Dismiss, the Union alleged the following:[4]

By a letter dated November 18, 1991, DC 37 demanded a copy

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[4] **Id.**

of the desk audit and notes from the "interrogation" of Gloria Arthur, an employee of the Department of Finance, whose out-of title arbitration was pending. By letter dated November 27, 1991, OLR denied the Union's request, stating:

> It is the City's position that it is not required to produce the desk audit report. As you are aware, there is nothing in the collective bargaining agreement that requires the disclosure of information or otherwise provides for discovery. we are aware the NYCCBL requires that a party produce certain information in connection with its bargaining obligation. The NYCCBL, however, does not require the production of the desk audit report.....

According to the Union, on July 19, 1991 it learned of the "interrogation" of Michael Rodgers, a Computer Programmer Analyst employed by the Financial Information Services Agency, for whom an out-of-title grievance was filed. The desk audit allegedly occurred the previous day. By a letter dated November 20, 1991, the Union demanded a copy of the desk audit and notes. According to its letter, the Union needed the information to prepare for the pending arbitration. By a letter dated November 22, 1991, OLR denied the Union's request.

On July 22, 1991, the Union filed a request for arbitration on behalf of Leila Gonzalez, concerning an out-of-title grievance. According to the Union, the City conducted an “interrogation" of Gonzalez on or about October 24, 1991. The Union alleges that it "was never informed by the City of its intention to interrogate Gonzalez" and that, to date, OLR has

failed to provide the Union with a copy of the audit.

Positions of the Parties

city's Position

The City argues that the instant improper practice petition should be dismissed as time-barred under §1-07(d) of the OCB Rules since the acts which comprise the basis of the petition occurred more than four months prior to the date on which it was filed. According to the City, the instant petition was filed on November 19, 1991, whereas, November 18, 1991 is the last date on which the improper practice charges set forth in the original petition could be considered timely filed.[5]

In the case of Aria Gray, the City submits that the petition is based on acts allegedly performed by OLR on May 17, 1991, the date of the alleged "interrogation," the date OLR did not allow a union representative to attend the audit and the date of OLR's first clear refusal in connection with the Union's request for a copy of the desk audit and notes. As for the case of Rhoda Wyler, the pleadings refer to June 1991 as the approximate date of the alleged "interrogation" and July 16, 1991 as the date of OLR's first clear refusal in connection with the Union's request for a copy of the desk audit and notes. The City points out that even the most recent of these events (July 16, 1991), fails to fall within the applicable four-month limitations period.

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[5] The City cites as relevant, §I-13(d) (formerly §13.4) of the OCB Rules, which pertains to the computation of time.

Therefore, the City argues, any examples relating to the so-called "interrogations" and OLR's refusal to permit Union representation at the desk audits in question are time-barred and must be dismissed.

In connection with the charge concerning the information requested by the Union, the City asserts that it made clear its refusal to provide the Union with copies of the sought-after desk audits and notes for Gray and Wyler on May 17, 1991, and July 16, 1991, respectively. In support of its argument, the City cites Binghamton Teachers Association v. Binghamton School District,[6] for the proposition that the first clear refusal triggers the four-month limitation period in cases alleging a wrongful refusal to provide information.

Finally, the City objects to the Union's attempt to cure the defective petition by alleging for the first time in the "Affirmation in Opposition to the Motion to Dismiss," details of cases of three individuals not mentioned in the original improper practice petition. The City asserts that "the Union missed the filing deadline for the Gray and Wyler claims and is now attempting to disguise this oversight."

Union's Position

The Union asserts that the City's Motion to Dismiss should be denied because all the incidents which form the basis of the

[6] 20 PERB ¶4635 (1987).

petition either occurred within the four-month limitations period or came to the Union's attention within the prescribed period. In any event, the Union contends that the petition is timely because the challenged pattern and practice of violative conduct is ongoing and continuous.

Specifically, DC 37 alleges that the City violates NYCCBL §§12-306a(l), (2), (4) and NYCCBL §12-306c(4): "[b]y its conduct and threats in ordering employee/grievants to submit to interro gations regarding the allegations of a grievance after the Union has filed a request for arbitration of the grievance ... [by its refusal] to permit the Union to attend the interrogations, [and by its refusal to] provide the Union with a copy of the 'desk audit' of grievants and the notes upon which such interrogations are based."

In support of its claim that the examples cited in the original petition are timely, the Union maintains that the charge concerning OLR's refusal to provide copies of the Gray desk audit and notes is timely because the refusal was not made clear until November 12, 1991. DC 37 argues that since the desk audit was not complete on May 17, 1991, OLR could not have made a clear, refusal at that time. For this reason, the Union submits that this charge is timely even under the City's analysis of **Binghamton.**

As for the allegation concerning the "interrogation" of Wyler, DC 37 asserts that this claim is timely because the union did not become aware of the November 1988 desk audit until July

22, 1991, the day of the arbitration. The Union argues that because OLR failed to divulge the existence of a desk audit needed by the Union to adequately investigate the out-of-title grievance which was the subject of the hearing, the four-month limitations period relating to this charge did not begin to run until July 22, 1991.

Finally, the Union contends in its pleading entitled, "Affirmation in Opposition to Motion to Dismiss," setting forth additional "examples of the continuing illegal practices of the [City]," that the facts submitted arise from the same cause of action alleged in the original petition. The Union argues that it cited two timely examples in the petition, and that the additional facts concerning Arthur, Rodgers and Gonzalez merely constitute three more examples of a "systematic" and "ongoing practice" which is violative of the NYCCBL.

Discussion

At the outset, we note that for purposes of evaluating a motion to dismiss, the facts as alleged by the petitioner are deemed to be true.[7] In addition, "we will accord the petition every favorable inference, and ... will construe it to allege whatever may be implied from its statements by reasonable and

[7] Decision Nos. B-17-92; B-59-88; B-36-67; B-15-87; B-20-86.

fair intendment."[8] Thus, for purposes of deciding the City's notion, we must determine, assuming as true the facts set forth by the Union, whether any of the acts complained of occurred within the four-month period in which an improper practice charge may be filed.[9]

The City submits that because the events which form the basis of the original improper practice complaint occurred more than four months before the petition was filed, the instant motion should be granted. The City also objects to the Union's attempt to cure the defective petition by adding claims regarding other, unrelated, individuals. The Union denies that the acts complained of in the original petition are time-barred. Moreover, DC 37 maintains, the motion is baseless because the City's pattern and practice of violating NYCCBL §§12-306a(l), (2), (4) and NYCCBL §12-306c(4) is ongoing and continuous.

As the City points out, we have consistently held that the four-month limitation period contained in Rule 1-07(d) will bar the consideration of an untimely filed improper practice petition.[10] This may be the case even where the delay in filing has not been found to have prejudiced the party charged.[11] Nor

[8] See Decision No. B-17-92, at 6, and the cases cited therein.

[9] Section 1-07(d) of the OCB Rules, **supra**, note 2, at 3.

[10] Decision Nos. B-30-88; B-9-88; B-47-86; B-18-86; B-24-83; B-11-83; B-5-83; B-11-82; B-26-80.

[11] Decision Nos. B-26-80; B-16-80.

is a defective petition cured by the belated assertion of relevant evidence which was available to the petitioner upon the initial filing of the matter.[12] It is true, however, that when a petition alleges a continuing violation of the NYCCBL, even though the allegedly violative course of conduct commenced more than four months prior to the date of filing the petition, the allegation may not be time-barred in its entirety.[13] In such cases, although a specific claim for relief is time-barred to the extent a petitioner seeks damages for wrongful acts which occurred more than four-months before the petition was filed,[14] evidence of the wrongful acts may be admissable for purposes of background information when offered to establish an ongoing and continuous course of violative conduct.[15]

Applying these principles to the examples given by the Union as illustrative of the City's alleged "illegal practices" (set forth, supra, at 2), we find as follows:

First, because the so-called "interrogations" of Gray and

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[12] Cf. Decision No. B-37-91 (wherein, we stated: "[t]his Board generally will not reopen and reconsider a case based on the mere failure of a party to present relevant evidence and argument which was available to it upon the initial litigation of the matter."); Part-Time Instructional and Research Staff Union v. The Professional Staff Congress/CUNY, 20 PERB ¶4623 (1987) (wherein PERB, in considering whether to grant a motion to reopen, required "that the evidence offered in support of the motion could not have been earlier discovered by an exercise of due diligence.")

[13] Decision No. B-7-84.

[14] Decision Nos. B-59-88; B-7-84.

[15] Decision Nos. B-25-89; B-7-84; B-2-83; B-2-82; B-20-81.

WYler (i.e.,) the desk audits conducted on May 17, 1991, and in June 1991, respectively) occurred before the four-month period prior to the filing of the petition, the City is correct in its assertion that these alleged violations of the NYCCBL are time-barred. For the same reason, the claim that OLR refused to permit a Union representative to attend the alleged "interrogation" of Gray on May 17, 1991, also is time-barred.

With respect to the alleged "interrogation" of Wyler in November 1988, we find that DC 37's claim that the limitations period did not begin running for this particular incident until the Union first learned of its occurrence on July 22, 1991 is without merit. We find that knowledge of the November 1988 audit reasonably may be imputed to the Union given that it was actively engaged in representing Wyler in the out-of-title grievance, the very matter that gave rise to the audit, at the very time the audit took place.[16] Under these circumstances, we find that the time to challenge this specific alleged violation ran from the time of its occurrence in November 1988 and, thus, the claim is time-barred.

Similarly, we find that the claims concerning the City's alleged refusal to provide information requested by the Union on

[16] We take administrative notice of the following facts: 1) The grievance was filed initially at Step I on January 8, 1988; 2) A Step III Decision denying Wyler's out-of-title claim was rendered on July 7, 1988; 3) The request for arbitration was filed by DC 37 on October 13, 1988; 4) A fully executed waiver was submitted by the Union on October 31, 1988; 5) An arbitrator was assigned to the case and that fact communicated to the parties on November 23, 1988.

behalf of Gray and Wyler (i.e., the completed desk audits and notes upon which the audits were based), are time-barred. on the basis of the record before us, we find that the City clearly refused to provide Gray's desk audit and notes to the Union on May 17, 1991, and clearly refused to provide a copy of Wyler's June 1991 desk audit on July 16, 1991. Accordingly, these dates start the running of the four-month limitations period for these specific incidents.[17]

Since all of the specific examples alleged in the original petition occurred beyond the four-month limitations period, they will not be considered as independent violations of the NYCCBL. However, they may be admissible as background evidence. As previously stated, if a course of conduct, allegedly violative of the NYCCBL, commenced more than four months prior to the date the petition was filed, the allegation will not be time-barred in its entirety if the purported action proves to be ongoing and continuous.[18]

The Union maintains that the Board should permit the amendment of the instant petition and consider "the pertinent facts of three other pending out-of-title arbitrations" concerning grievants Arthur, Rodgers and Gonzalez. The Union alleges that these additional facts establish "that even during

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[17] **See Binghamton Teachers Association v. Binghamton School District, 20 PERB ¶4635 (1987); United Federation of Teachers. Inc. v. Dessler, 16 PERB ¶3082 (1983).**

[18] **See note 15, supra, at 14.**

the pendency of this petition, the City is continuing its illegal interrogations."

Our review of the facts submitted by the Union in support of the alleged "interrogations" of Rodgers and Gonzalez reveals that the desk audits were conducted within the four-month period prior to November 19, 1991 and, thus, should have been included in the original petition.[19] Therefore, to the extent that the additional examples occurred before the petition was filed, we agree with the City that this pleading is an "inappropriate response to a motion to dismiss." We will not allow the belated assertion of claims, the existence of which was or should have been known to the Union at the time the original petition was filed.[20]

Finally, we shall deem the petition amended by the inclusion of facts to show that the City refused to provide the Union with a copy of the desk audits and notes for Rodgers and Arthur in that the alleged refusals occurred on November 22, 1991 and November 27, 1991, respectively, and post-date the filing of the original petition.[21] We find that those examples, which were submitted in connection with the claim that the City has engaged

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[19] We make no determination with respect to the alleged "interrogation" of Arthur, inasmuch as the Union failed to specify the date on which it allegedly took place.

[20] See note 12, supra, at 14.

[21] We make no determination with respect to the alleged failure to give DC 37 a copy of the desk audit of Gonzalez, inasmuch as the Union failed to indicate that a demand was made or to specify a date on which any refusal might have occurred.

and is engaging in conduct which violates NYCCBL §12-306a(4) and §12-306c(4) when it refuses to provide the Union, on demand, with a copy of a grievant's desk audit and accompanying notes, are additional incidents claimed to be part of a continuing pattern and practice arising out of the cause of action set forth in the original petition. It is well-settled that this Board will allow amended pleadings that raise additional incidents which arise out of the same cause of action set forth in the original petition and which occur subsequent to the filing of the original petition.[22]

We emphasize, however, that in permitting the instant amendment, we are granting the Union leave to include in their petition only allegations of additional incidents claimed to be part of the City's alleged continuing pattern and practice of refusing to provide the Union with copies of desk audits and notes, when such audits were ordered after the Union filed a request for arbitration of a grievance. Such an allegation constitutes an arguably valid claim under NYCCBL §12-306a(4), which states that "[i]t shall be an improper practice for a public employer ... to refuse to bargain collectively in good faith on matters within the scope of collective bargaining;" and under §12-306c(4), which states that "[t]he duty of a public employer ... to bargain collectively in good faith shall include the obligation ... to furnish to the other party, upon request

[22] Decision Nos. B-2-83, B-27-81.

data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." we have previously held, with respect to a claim that the City failed to provide information required by a contract:

> [A] duty to provide information which may reasonably be required by the certified bargaining representative for the fulfillment of its representative duties is a component of an employer's obligation to bargain in good faith under our statute. This obligation would be enforceable under the NYCCBL notwithstanding the existence of a contractual duty to provide information.[23]

Based on the above, we deny the City's motion to dismiss the petition insofar as it alleges that respondents arguably violate NYCCBL §12-306a(4) and §12-306c(4) by refusing to provide the Union, upon demand, with a copy of the desk audit and notes taken during the desk audit ordered by the City after the Union files a request for arbitration of an out-of-title grievance. We shall direct the City to submit an answer with respect to this claim within ten (10) days of receipt of this interim Decision and Order. The City's motion to dismiss the remaining allegations contained in the improper practice petition shall be granted.

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[23] Decision No. B-8-85, at 14. See also, Decision No. B-22-92; Schuyler-Chemung-Tioga BOCES, 15 PERB ¶3036 (1982); Village of Johnson City, 12 PERB ¶3020 (1979); City of Albany, 6 PERB ¶3012 (1973); Asarco Inc. V. NLRB, 805 F.2d 194F 123 LRRM 2985 (6th Cir. 1986); C&P Telephone Co. v. NLRB, 687 F2d 633, 111 LRRM 2165 (2d Cir. 1982); Torrington Co. v. NLRB, 545 F.2d 840, 94 LRRM 2079 (2d Cir. 1976); NLRB v. ACME Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967) ; Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 59 LRRM 2433 (3d Cir. 1965).

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-1439-91 be, and the same hereby is, denied with respect to the allegation that the City violates NYCCBL §12-306a(4) and §12-306c(4) by refusing to provide the Union, upon demand, with a copy of the desk audit and notes taken during the desk audit ordered by the City after the Union files a request for arbitration of an out-of-title grievance; and it is further

ORDERED, that the City file a verified answer to the petition within ten days of the receipt of this decision, with respect to the allegation that the City violates §12-306a(4) and §12-306c(4) by refusing to provide the Union, upon demand, with a copy of the desk audit and notes taken during the desk audit ordered by the City after the Union files a request for arbitration of an out-of-title grievance; and it is further

ORDERED, that the notion of the City of New York to dismiss the remaining allegations in the improper practice petition docketed as BCB-1439-91 herein be, and the same hereby is, granted.

DATED: New York, New York
October 15, 1992

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

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MEMBER

JEROME E. JOSEPH
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