UFA v. NYFD, 49 OCB 4 (BCB 1992) [Decision No. B-4-92 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
The Uniformed Firefighters
Association of New York,

Petitioner,

-and-

The Fire Department of the City of
New York,

Respondent.

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Decision No. B-4-92

Docket No. BCB-1409-91

DECISION AND ORDER

On August 8, 1991, the Uniformed Firefighters Association of New York ("the Union") filed a verified improper practice petition alleging that the Fire Department of the City of New York ("the Department") committed an improper practice in violation of §§ 12-306 (1) and (3) of the New York City Collective Bargaining Law ("NYCCBL"). The Department, by the New York City Office of Labor Relations ("OLR"), filed an answer on October 18, 1991. The Union filed a reply on November 15, 1991. On December 5, 1991, the Department submitted an "Amended Answer/Surreply" which it requested be admitted into the record.[1]

[1] The Rules of the office of Collective Bargaining do not provide for pleadings subsequent to the reply. It is the policy of the Board not to encourage the filing of such submissions unless special circumstances warrant their consideration. The original pleadings of the parties have been deemed sufficient for the Board to reach a decision in this matter. Therefore, it is not necessary for us to consider the document.

## Background

On June 7, 1991, the Union requested bargaining on the issue of transporting firefighters, detailed to other units during their regular tours of duty, back to their assigned units, on the grounds that it is a mandatory subject of bargaining. By letter dated June 25, 1991, OLR informed the Union that "inasmuch as the parties are currently engaged in collective bargaining negotiations on the prospective agreement, the issue will be considered as included within those negotiations." In a letter to OLR dated June 28, 1991, the Union maintained that the matter was a subject of mid-term mandatory collective bargaining requiring separate and immediate bargaining.

On June 30, 1991, Firefighter Greg McLaughlin was asked to appear at Department headquarters, where he was questioned about his use of public transportation, and the time required to reach the location of his assigned detail. The questioning was conducted by Chief Shaw, Executive Assistant to the Chief of Department, in the presence of Chief Feehan, Chief of Department, and Chief Fusco, Chief of Operations.

On July 2, 1991, the Union issued "Communication Bulletin #11 of 1991" to its membership. The bulletin stated, in relevant part:

> In light of the Department's latest "Friday Night Special" regarding details to other units, be advised that the U.F.A. specifically disagrees with the position that the Department is not responsible for transportation on details.
>
> Pending ultimate resolution of the issues surrounding

details, and pending further direction, the U.P.A. advises its members as follows:

1. Do not arrive at your assigned unit prior to 0900 or 1800 hours;
2. Request Department transportation to every detail;
3. If transportation is refused, request advance compensation for public transportation. YOU CANNOT BE REQUIRED TO ADVANCE THIS COST OUT OF YOUR OWN POCKET.
4. If advance compensation for public transportation is refused, begin WALKING to your detail;

5. The U.F.A. advises its members not to use their private vehicles for transportation to details. You will not be compensated for same, nor will you be insured by the City in the event of an accident AND YOU CANNOT BE REQUIRED TO USE YOUR OWN VEHICLE.

The U.F.A. dedicates this GREAT WALKATHON to the cause of Unionism, and in protest of the stupidity of the Fire Department administration...

During July, 1991, each firehouse in the 54th Battalion (Queens) received an increased number of visits from Battalion Chiefs, Deputy Chiefs and Borough Commanders. On August 8, 1991, the Union filed the instant improper practice petition, claiming that the actions of the Department interfered with protected union activity. As a remedy, the petition asks that the Department be ordered to cease and desist from such conduct.

## Positions of the parties

### The Union's Petition

The Union claims that the Department has interfered with, restrained and coerced public employees in the exercise of their rights guaranteed in § 12-305 of the NYCCBL, and have discriminated against employees for exercising such rights. The Union alleges that the Department harassed firefighters who were exercising their right to use public transportation under the contract and were engaging in protected union activity. It argues that such conduct on the part of the Department constitutes a violation of §§ 12-306 (1) and (3) of the NYCCBL.

### The City's Answer

The City maintains that the petition fails to allege facts sufficient to satisfy the elements of the Salamanca test, the standard adopted by the Board to determine viable charges of improper practice. The City argues that the petition neither identifies protected union activity nor demonstrates that the Department was aware of protected activity.

The City states that, from the allegations made in the petition, it hypothesizes that the union activity in question is the advice given by the Union to its members to engage in a "walkathon". It relies on Island Trees Public Schools, 14 PERB 3020 (1981), Dowling v. Bowen, 53 A.D.2d 862, 385 N.Y.S.2d 355 (2nd Dept., 1976), and Van Vlack v. Ternullo, 74 A.D.2d 827 (2nd

Dept., 1980) for the proposition that this advice constitutes illegal strike activity under the NYCCBL and the Taylor Law, and thus is not protected union activity.

The City maintains that the petition fails to demonstrate that any employee has suffered adversely from the alleged interference or discrimination. Therefore, the City concludes, without demonstrating adverse action or protected union activity, the petition fails to satisfy the element of the Salamanca test which requires that the Union show that the Department's actions were motivated by the alleged protected activity.

The City asserts that the petition appears to allege a violation of a contract right. If this is the case, the City maintains, the Board does not have jurisdiction to consider a claim of improper practice. Should the board find that the instant claim is based on a violation of the contract, the City states, it must defer the issue to arbitration.

The Union's Reply

The Union claims that since July, 1991, each firehouse in the 54th Battalion (Queens) has received an increased number of visits from Battalion Chiefs, Deputy Chiefs and Borough Commanders for the purpose of conducting roll calls, uniform inspections and an inquiry into the scheduling of mutuals. The Union asserts that these inspections have been limited to the 54th Battalion, and that this Battalion has the greatest amount

of overtime for firefighters awaiting relief.

The amount of overtime, the Union maintains, demonstrates that the 54th Battalion had the largest number of firefighters using public transportation, an activity which the Union claims is protected by the collective bargaining agreement between the City and the Union. The Union alleges that Department officials were aware, from negotiations and reports in the news media, that the Union had advised its members earlier in July, 1991, that it opposed the Department's policy of denying Department transportation or advance compensation for public transportation to details. According to the Union, Department officials also knew that Union members were engaged in protected activity to demonstrate their support of the Union's position regarding transportation to details.

The Union further claims that on June 30, 1991, officials of the Department, including the Chief of Department and his Executive Assistant, interrogated Firefighter McLaughlin regarding his use of public transportation to reach the location of an assigned detail. The Union maintains that McLaughlin received a letter from the Chief of Command, outside the chain of command, ordering him to appear at Department headquarters. When he arrived, the Union alleges, he was "read his rights", indicating that discipline might result from the interrogation. The questioning concerned McLaughlin's use of public transportation, which the Union claims is activity permitted

under the terms of the collective bargaining agreement.

The Union maintains that the Department discriminated against McLaughlin by singling him out for interrogation and potential discipline for his activity in support of the Union, and that this activity is protected by the collective bargaining agreement. The Union further asserts that the Department's conduct toward McLaughlin has had an intentional chilling affect on union activity, and is a violation of rights guaranteed to union members under § 12-305 of the NYCCBL.

## Discussion

The City claims that the Union's petition is insufficient on its face to satisfy the initial test used by the Board to determine charges of improper practice because it consists of a conclusory allegation devoid of objective evidence including dates, times, places and acts. For this reason, the City argues, the Union has failed to state a valid claim of improper practice. It is the Board's long-established policy that the OCB Rules regarding pleadings be liberally construed.[2] Since the City did not move to dismiss the petition, we have allowed the instant claim to go forward. We note, however, that a petitioner risks dismissal of a claim which fails to provide information sufficient to enable respondent to formulate its defense or this

[2] Decision Nos. B-78-90; B-28-89; B-21-87; B-44-86; B-8-77; B-5-74.

Board to reach informed conclusions.

In its petition and reply, the Union alleges that the Department has violated the rights of firefighters to "use public transportation under the contract." The Board may not enforce the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[3] Here, however, the Union has not supplied us with enough information to enable us to decide whether there is any foundation to its charge of a contractual violation. Without more, we cannot ascertain which provision of the contract the Union claims has been violated, nor can the City defend itself against the charge.[4]

We are thus left with the Union's conclusion, unsupported by argument or citation, that the Department committed improper practices because the activities engaged in by the Union and its

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[3] Civil Service Law § 205.5(d), which applies to this agency, provides:

> ... the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

See also, Decision Nos. B-53-89; B-39-88; B-57-87; B-37-87; B-36-87; B-29-87; B-24-87.

[4] In Decision No. B-63-91, the same Union argued, and we agreed, that the contract is silent on the issue of transportation of firefighters to and from units to which they have been detailed. Article XV of the contract provides for transportation only "to" and from fires and in emergencies." If there is another provision of the contract applicable here, the Union has not identified it in its pleadings.

members are protected by statute. The City theorizes from the allegations made in the petition that the activity in question is the advice given by the Union to its members to engage in a "walkathon," and the members' subsequent activity of engaging in such a "walkathon." While not expressly admitting that the City's theory is correct, the Union replies that Department officials "were well aware that the UFA had advised its members earlier in July, 1991, that it was opposed to the FDNY's policy of denying FDNY transportation or advance compensation for public transportation to details." The Union further states that "FDNY officials were also aware that UFA members were engaged in this activity in demonstration of their support for the UFA's position ...." Without evidence or argument to the contrary from the Union, we also conclude that the advisory to its members "earlier in July" to which the Union refers is Communication Bulletin #11, in which it advised firefighters to walk to assigned details to protest Department policy.

We recently discussed the Union's "walkathon" of July, 1991, in Decision No. B-63-91, where the Union brought a charge of improper practice against the City because it would not engage in mandatory interim bargaining over the order and activities in question here. Encouraged by the Union, some firefighters walked to assigned details, in some cases from one borough to another, to support the Union's protest of an order that firefighters pay in advance for the required use of public transportation.

Although we found that the Department had committed an improper practice by instituting the order before bargaining or impasse procedures had been exhausted, we concluded that "neither party is blameless in this case... [The Union] organized and encouraged its members to participate in what amounted to a job action... before the parties had completed negotiations in good faith."

The Union now asks us to make a finding of improper practice in the instant case, thereby implying that its advice in Communication Bulletin #11, and its members' subsequent job action, are protected union activities under the law. This we will not do. The fact that a Union gives advice, or that its members follow it, does not automatically entitle such actions to the protection of the law. We have found no basis, nor has the Union provided us with a basis to find, that the activity in question is protected.

In considering claims of improper practice, we have adopted the test set forth in City of Salamanca.[5] Petitioner has the burden of showing initially that the employer's agent responsible for the challenged action knew of the employee's protected union activity, and that the employee's union activity was a motivating factor in the employer's decision to act.[6] As a prerequisite for

[5] 18 PERB 3012 (1985).

[6] Decision Nos. B-23-91; B-4-91; B-67-90; B-36-89; B-8-89; B-7-89.

a finding of improper practice, therefore, the union activity in question must be protected by the relevant statutes.

Here, the Union has presented us with what appears to be its conclusion that any activity carried out in support of its aims is protected. This is a fatal assumption when prosecuting a claim of improper practice. The mere fact that a Union or its members engage in activity does not guarantee that such activity is absolutely entitled to be protected. Accordingly, we find that the Union has not satisfied the requisite elements of the Salamanca test because it has failed to establish that the conduct in question is protected under the law, and the instant improper practice petition is dismissed.

**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 improper practice petition filed by the Uniformed Firefighters Association be, and the same hereby is, dismissed.

Dated: New York, New York
January 28, 1992

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

DEAN L. SILVERBERG
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MEMBER