L.246, SEIU v. City, 49 OCB 41 (BCB 1992) [Decision No. B-41-92 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding
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-between-

LOCAL 246, S.E.I.U., AFL-CIO, DECISION NO. B-41-92

Petitioner, DOCKET NO. BCB-1380-91

-and-

THE CITY OF NEW YORK,
FIRST DEPUTY MAYOR NORMAN STEISEL,
ACTING LABOR RELATIONS COMMISSIONER
JAMES HANLEY and DIRECTOR OF
PERSONNEL DOUGLAS WHITE,

Respondents.
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DECISION AND ORDER

On April 11, 1991, the Service Employees International Union Local 246 ("Local 246" or "the Union") filed an improper practice petition against the City of New York ("the City"), First Deputy Mayor Norman Steisel, Acting Labor Relations Commissioner James Hanley and Director of Personnel Douglas White. The petition charges that the City, represented by its First Deputy Mayor and the other above-named parties, met on April 10, 1991 and on two prior occasions "with several unions which represent City employees and discussed matters of wages, supplements and work practices which affect directly the City employed members of New York City Local 246, S.E.I.U.," and that representatives of Local 246 were excluded from those meetings.

On April 24, 1991, the Office of Collective Bargaining ("OCB") acknowledged receipt of the petition and directed the

respondent to serve and file its answer within ten days of receipt. On May 7, 1991 the City requested that the OCB extend its time to answer, ssnoting that the parties were attempting to resolve the petition. On May 14, 1991, the Union objected to an extension of time to file an answer. On May 16, 1991 the OCB requested a firm date for an answer from the City, or an explanation of any other resolution reached between the parties. On June 7, 1991 the OCB requested the City submit its answer or, with the Union's consent, an explanation of the circumstances to justify continuing to hold the case in abeyance. The OCB directed that failure to do either by June 21, 1991 would be deemed a default.

On June 21, 1991 the City proposed the date of July 21, 1991 for the City to answer the petition, noting that the parties were attempting to resolve the matter before that date.

On July 19, 1991 the City served and filed an answer to the petition. On November 12, 1991, the OCB Trial Examiner inquired whether the Union wished to continue to hold the matter in abeyance pending possible settlement or, alternatively, whether it intended to submit a reply to the City's answer. The Union attorney responded that it would advise the OCB of its answer at a later date. The OCB Trial Examiner left messages during November and December, 1991 for the Union attorney to respond regarding the petition, but no response was received.

On April 21, 1992 the OCB again requested that the Union apprise the OCB of the status of the case, noting that if there was no response by May 22, 1992, the case would be deemed "active" and a decision by the Board would be forthcoming. Again, no response was received.

Having given the Union ample opportunity to reply to the City's answer to the improper practice petition, the Board will proceed on the facts before it.

POSITIONS OF THE PARTIES

Union's Position

The Union alleged in its petition that the City violated New York City Collective Bargaining Law ("NYCCBL") § 12-306a(1) and (4) when:

> On April 10, 1991 and on two prior occasions the City... did meet with several unions which represent City employees and discussed matters of wages, supplements and work practices which affect directly the City employed members of New York City Local 246, S.E.I.U. The duly elected representatives of Local 246 members were excluded from said meeting.[1]

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[1] NYCCBL § 12-306: **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;

(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.

City's Position

The City admits that a meeting took place on April 10, 1991. The City alleges that the Petition states a conclusory allegation and fails to state facts "wherein any form of response is possible." The City maintains that no specific term and condition of employment affecting Local 246 members has been identified, "nor has there been any identification of how many of these terms and conditions of employment were affected in any way as to create the right to bargain." The City points out that there has been no allegation of anti-union animus, intent to interfere with the administration of the union, to discriminate against the local for any reason, or to frustrate the statutory rights of any employees.

DISCUSSION

Public employers and certified employee organizations have the duty to bargain in good faith on wages, hours and working conditions under NYCCBL § 12-307a. The statute expressly places those subjects within the scope of bargaining. The Board has interpreted the term "working conditions" to require that a bargaining demand, in order to qualify as a mandatory subject of bargaining, be "plainly germane to the working environment" under the Ford Motor Co. v. NLRB test of the U.S. Supreme Court.[2] For

[2] 441 U.S. 488, 101 LRRM 2222 (1979).

a management action to be found to constitute a mandatory subject of bargaining, it must first be determined that the action is plainly germane to the working environment.[3] The Union in this case has failed to state how a meeting between the City and several other unions which represent City employees affected a matter germane to the working environment of members of Local 246, S.E.I.U.

NYCCBL § 12-307b. states that the city may make certain decisions in the exercise of its managerial prerogative.[4] In the absence of any allegation of improper motive or of any demonstrated harm to the petitioner, it appears that a decision concerning which unions to invite to a meeting constitutes an exercise of the management prerogative. In the event that the allegations of the petition are intended to state a claim of

[3] Decision No. B-1-90.

[4] NYCCBL § 12-307b. states: "It is the right of the city, ... to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city ... on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

practical impact resulting from the management decision, it is clear that the duty to bargain arises only after this Board determines that the employer has taken action or has failed to take action in the face of changed circumstances in the exercise of its managerial prerogative, that has created a practical impact on its employees.[5]

Based on the record before us, we cannot conclude how the City's failure to include Local 246, S.E.I.U. in a meeting with several unions which represent City employees affected directly or has had any practical impact upon members of Local 246, S.E.I.U. The mere assertion of an improper practice without factual allegations evidencing the violative activity will not sustain the requisite burden of proof placed on the charging party.[6]

The OCB Trial Examiner requested that the Union respond to the City's answer. Under 61 RCNY § 1-107(i) of the Practice and Procedure of the Office of Collective Bargaining, (hereinafter "the OCB Rules"), new matter alleged in the answer is to be deemed admitted unless denied in a reply.[7]

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[5] Decision No. B-69-88.

[6] Decision Nos. B-33-80; B-13-81.

[7] 61 RCNY § 1-107 (1) of the OCB Rules states: "Reply-contents; service and filing. Within ten (10) days after service of respondent's answer, petitioner may serve and file a verified reply which shall contain admissions and denials of any additional facts or new matter alleged in the answer. Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply ...."

The Union fails to allege with any specificity how a meeting between the City and several unions violated the City's duty to bargain in good faith or S.E.I.U. Local 246's rights as a certified representative of public employees under the NYCCBL. There was no evidence presented to demonstrate which work practices affecting members of Local 246 were discussed, or how members of the Union were affected. In fact, no evidence was presented to show that matters of wages, supplements and work practices were discussed at all.

Pursuant to the Board's well-established policy of liberally construing pleadings, this case was not dismissed for insufficiency by the Executive Secretary under 61 RCNY § 1-107(d) of the OCB Rules.[8] However, after issue was joined, the union failed to avail itself of the opportunity to reply to the City's answer and substantiate the facts alleged in its petition. Deeming as we must, the facts alleged in the City's answer to have been admitted, we find that the petition is entirely conclusory and fails to state a cause of action inasmuch as no actions which give rise to a duty to bargain have been presented.

[8] 61 RCNY § 1-107(d) of the OCB Rules, states: "... Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts sufficient as a matter of law constitute a violation ... it shall be dismissed by the Executive Secretary...

Our determinations in prior cases in which we found the City to have violated its duty to bargain in good faith under § 12-306a.(4) were based upon our findings that the Union, in each case, had presented facts sufficient to establish its claim under the NYCCBL. No such basis has been presented in this case.

Similarly, a violation of §12-306a.(1) occurs when there is an interference with the exercise of rights granted in §12-305 of the NYCCBL.[9] In the instant case, no facts have been presented in support of this claim.

In addition, we previously have determined that § 12-306a.(1) provides a broad prohibition on employer interference that is derivatively violated whenever an employer commits any of the other improper practices found in Sections 12-306a.(2), (3), or (4) of the law.[10] Since we have determined that there have been insufficient facts pleaded to establish a violation of § 12-306a.(4), there is also not a sufficient basis to find a violation of § 12-306a.(1).[11]

ORDER

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

[9] Decision Nos. B-21-87; B-20-86; B-25-85.

[10] Decision No. B-47-89.

[11] Id.

ORDERED, that the improper practice petition filed by Local 246, Service Employees International Union be, and the same hereby is, dismissed.

Dated: New York, New York
October 27, 1992

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER