L.300, SEIU v. HHC, 51 OCB 53 (BCB 1993) [Decision No. B-53-93 (ES)]

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

DECISION NO. B-53-93 (ES)
LOCAL 300, SERVICE EMPLOYEES DOCKET NO. BCB-1550-93
INTERNATIONAL UNION,
Petitioner,
-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,
Respondent.
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DETERMINATION OF EXECUTIVE SECRETARY

On February 1, 1993, Local 300,Service Employees International Union ("Union" or "Petitioner") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC" or "Respondent").

In its improper practice petition, the Union makes the following allegations against HHC:

> Upon information and belief, there are HHC personnel doing purchasing work who should be in Local 300 SEIU pursuant to its Collective Bargaining contract with the City of New York. These members are not in Local 300's union in violation of New York City Collective Bargaining Law Section 1173-4.2 (2), 4 [recodified) as §12-306a (2) and §12-306a(4)].[1]

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[1] Section 12-306a of the NYCCBL provides as follows:

> 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 §12-305 of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;

(continued...)

As a remedy, the Union requests the inclusion of these employees in Local 300, the payment of union dues, and the cessation of the practice of unit work being assigned to non-unit members.

Pursuant to Title 61 of the Rules of the City of New York §1-07(d) (previously Section 7.4 of the Revised Consolidated Rules of the office of Collective Bargaining, hereinafter "OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that the improper practice claim asserted therein must be dismissed because it does not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. The Board's jurisdiction may not be invoked if the claimed statutory violation derives solely from an alleged violation of a collective bargaining agreement.[2] The Board is without authority to enforce the terms of a collective bargaining agreement and may not exercise jurisdiction over an alleged violation of an agreement unless the acts constituting such

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1 (...continued)

(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.

[2] Decision Nos. B-60-88; B-55-88; B-36-87.

a violation would otherwise constitute an improper practice.[3]

These principles flow from §205.5(d) of the Taylor Law which states:

> [The Public Employment Relations Board, hereinafter "PERB"] shall not have authority to enforce an agreement between an 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.

Accordingly, neither PERB nor this Board has jurisdiction over an alleged violation of a collective bargaining agreement unless the offending party's actions "otherwise constitute an improper ... practice."

In the instant case, although the Union uses the terminology of an improper practice in framing its dispute, it in actually alleging a contractual violation. The Union's claim that unit work is being given to non-unit employees is akin to a "reverse out-of-title" grievance. When presented with a challenge to the arbitrability of a "reverse out-of-title" grievance, the Board examines the contractual language at issue in order to determine whether such a claim is permitted thereunder.[4]

The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees set forth therein, i.e., the right to bargain collectively through certified public employee

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[3] Decision Nos. B-36-87; B-29-87; B-8-85.

[4] See Decision No. B-10-92 for examples of when such claims are and are not permitted.

organizations; the right to organize, form, join, and assist public employee organizations; and the right to refrain from such activities.

Petitioner has failed to allege that Respondent has committed any act in violation of §12-306a of the NYCCBL, which defines improper public employer practices. Since the instant petition does not allege that Respondent's actions were intended to, or did, affect any rights protected under the NYCCBL, it must be dismissed. I note, however, that dismissal of the petition is without prejudice to any rights the Petitioner may have in another forum.

Dated: New York, New York
December 7, 1993

Loren Krause Luzuore
Executive Secretary
Board of Collective Bargaining

TITLE 61 OF THE RULES OF THE CITY OF NEW YORK (FORMERLY REFERRED TO AS THE REVISED CONSOLIDATED RULES OF THE OFFICE OF COLLECTIVE BARGAINING)

Section 1-07(d) (formerly § 7.4) Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 (formerly 1173-4.2) of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. 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 as alleged may constitute an improper practice as set forth in section 12-306 (formerly 1173-4.2) of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law constitute a violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness ir insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

Section 1-07(h) (formerly § 7.8) Answer-Service And Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to Title 61, Section 1-079d) of the Rules of The City of New York (formerly Rule 7.4), that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon the petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) days.

OTHER SECTIONS OF THE LAW AND RULES MY BE APPLICABLE CONSULT THE COMPLETE TEXT