UFA & Bohan v. City & FDNY, 59 OCB 33 (BCB 1997) [Decision No. B-33-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK and CHARLES BOHAN, SERGEANT-OF-ARMS,	:	DECISION NO. B-33-97 DOCKET NO. BCB-1887-97
Petitioners,	:	
-and-	:	
CITY OF NEW YORK and the NEW YORK CITY FIRE DEPARTMENT,	:	
Respondents.		

DECISION AND ORDER

On January 21, 1997, the Uniformed Firefighters Association of Greater New York (the "UFA" or the "Union") and Charles Bohan, the Union's Sergeant-of-Arms, filed a verified improper practice petition against the City of New York (the "City"), and the New York City Fire Department ("FDNY" or the "Department"). The petition charges that the City committed an improper practice by preventing Bohan from attending meetings concerning construction and renovation of firehouses, in violation of Sections 12-306a. (1), (2), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1] On March 6, 1997, the Union filed an amended

[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
(continued...)

petition accompanied by a memorandum of law in support of its claim. The City, appearing by its Office of Labor Relations, filed a verified answer to the amended improper practice petition on March 24, 1997. The Union filed a verified reply on April 11, 1997, accompanied by the sworn affidavit of Charles Bohan and an affirmation by its attorney.

BACKGROUND

The Building Maintenance Division of the New York City Fire Department is responsible for planning the renovation and reconstruction of the City's older firehouses, and for overseeing the construction of the Department's new fire headquarters. Planning for the firehouses currently under renovation started about two years ago. In the course of this activity, plans were discussed with the firefighters to ensure that the final product

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[1](...continued)
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;
(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.

would address their special needs, and were then passed to the captains of the affected firehouses, who signed off on them.

Cynthia Crier is the Department's Chief Architect. Part of her responsibility is to schedule and attend three or four meetings per day in various locations throughout the City to plan, implement and monitor the renovation and reconstruction of Department property. In addition, once per month, Crier and Roy Katz, the Department's Assistant Commissioner in the Bureau of Support Services, meet with representatives of the City's Department of Design and Construction ("DDC") to discuss the planning and implementation of capital construction projects.[2] Petitioner Charles Bohan is responsible for representing the Union in discussions on all planned construction and design of Department property.

Beginning in December, 1996, Bohan began being excluded from the monthly FDNY-DDC construction meetings. In addition, the Union learned that the Department's Construction Manager was disciplined, allegedly for giving Bohan information concerning the December 19, 1996, DDC meeting. By letter dated January 3, 1997, the Union's attorney complained of these developments to

[2] According to the Green Book Directory, the DDC was established in 1995 to centralize the City's capital construction program. It is composed of design and construction units from the departments of Environmental Protection, Transportation, and former Department of General Services, and has general responsibility for street, sewer, water main and most non-housing building construction funded by the capital budget.

FDNY Commissioner Thomas Von Essen. By letter dated January 24, the Commissioner responded to the Union's complaint as follows:

> I have received your letter . . . concerning Mr. Charles Bohan, the UFA Sergeant-at-Arms and representatives of the Department's Building Maintenance Division. While I certainly recognize the legitimate right of Mr. Bohan to be involved in the process of firehouse renovations and repairs, it is not appropriate that he attend meetings between this Department and other City agencies. Mr. Bohan is of course, welcome to attend in-house meetings, but should notify Ms. Crier or Mr. Fazio whenever he plans to attend.
>
> Assistant Commissioner Roy Katz and our Chief Architect Ms. Cynthia Crier will assure that Mr. Bohan, as representative of the UFA, is supplied with whatever information is necessary to allow him to perform his duties with regard to projects which impact UFA members.

The Commissioner's response did not satisfy the Union. According to the Bohan affidavit, the DDC meetings that he had attended in the past dealt solely with the progress of construction, and, in his view, there is no legitimate reason for the Union now to be excluded from them.

POSITIONS OF THE PARTIES

Union's Position

The Union's petition reiterates the contention that its attorney made in his January 3 letter to the Commissioner: There are extensive renovations being done to firehouses throughout the City, and it is important that the UFA's representative be included in all meetings and have the opportunity to respond on

projects that impact its membership. In its view, meetings dealing with design, repair and construction of firehouses relate to a mandatory subject of bargaining, because they clearly impact upon members' health, safety and convenience. In addition, Bohan's presence at these meetings assertedly is necessary because the NYCCBL obligates a public employer to provide information concerning the administration of a collective bargaining agreement. The Union claims that there are several provisions within the unit agreement that could be grieved in the event of a violation of existing procedures and/or health and safety. To protect its contractual rights, adequate notice of, and admission to construction meetings allegedly is necessary.

According to the Union, not only is Bohan not getting appropriate and adequate notice of these meetings, but on one occasion, February 19, 1997, when he was able to gain entry, the Chief Architect ordered him to leave. When he refused, she canceled the meeting. Later that same day, she reconvened the meeting at a different location, thereby effectively excluding Bohan from attending.

The Union acknowledges that the statutory management rights clause in the NYCCBL explicitly reserves decisions on design, costs and planning of capital budget projects to management. It contends, however, that it is not seeking to consult with the City before it makes changes in its physical plant -- it is merely seeking to be present when these matters are discussed and

to have the right to speak out in support of or in opposition to the work during the planning stages. Discounting the City's claim that DDC meetings are "internal managerial meetings," Bohan maintains that capital budgets and finances were never discussed; the sole issue dealt with the progress of construction. In support of Bohan's claim, the Union submits a packet of documents that comprised the agenda of the March 19 DDC meeting, which Joseph Mastropietro, Director of the Building Maintenance Department allegedly gave to him. In Bohan's view, none of these matters were so confidential or controversial to mandate his exclusion from the meeting.

In further justifying his claimed right of access, Bohan notes that the Department OSHA representative attends DDC meetings "for virtually the same reason for which I wish to be present, to wit: so that I can take note of the issues which impact the safety, comfort and health of members, to learn what the department plans are so that we can insure that these plans are coordinated throughout the department, and so we can advise our delegates as to these plans so that they in turn can better represent their constituents." The UFA adds that the employer knows of Bohan's union activity and has not acted appropriately in response. It claims that the totality of the circumstances shows that keeping information from Bohan is intentional, and that his attempts to exercise his union rights clearly are a motivating factor in the Department's efforts to deny him the

opportunity to perform his appropriate responsibilities.

Finally, Bohan contends that although the Commissioner acknowledges in his January 24 letter that the Union has a right to be involved in the process of firehouse renovations, there is a lack of compliance by FDNY subordinates. He asserts that neither he nor the UFA have ever been given notice or the opportunity to attend the daily meetings where the Chief Architect and others go to affected firehouses and talk with the captains of the house about changes. To the contrary, he denies that he and Crier have ever spoken, "except at the meeting which she ordered me to leave."

The UFA concludes that in refusing to provide Bohan with adequate notice of meetings and access to them, the Department has interfered with the exercise of rights granted to public employees, has interfered with the administration of a public employee union, has discriminated against Union representatives for the purpose of discouraging participation in lawful activities, has taken inappropriate actions against an employee who cooperated with the UFA in notifying it of departmental meetings, and has refused to bargain in good faith.

City's Position

The City replies that bids are opened, awarded and registered at DDC meetings, and participants discuss budgets for capital projects, and the progress and quality of their work.

Managers from the Fire Department and the DDC also discuss the staffing for specific projects, assess problems with consultants and contractors, and review consultants' drawings and schedules. According to the City, given the nature of these meetings, it has no obligation to invite Bohan to them, or, for that matter, to include Union representatives in internal managerial meetings of any City agency. It maintains that Bohan, contrary to direction and apparently on his own initiative, attended two or three of these FDNY-DDC meetings, but he was not notified or invited to be present.

The City acknowledges that it must provide an employee organization with the information it needs to conduct meaningful negotiations and contract administration, but it contends that there are ways other than union attendance at DDC meetings to satisfy this obligation. For example, it asserts that Crier, the Chief Architect, offered Bohan the opportunity to discuss the planned reconstruction and renovation projects with her in personal talks.

The City further argues that decisionmaking regarding the structure, cost and design of FDNY facilities is a management prerogative, and is not a mandatory subject of bargaining. It notes that this Board has held that union bargaining demands pertaining to renovation of facilities infringe on the City's

managerial prerogative, and are not bargainable.[3]

Finally, the City maintains that the Department preferred disciplinary charges against its Construction Manager for reasons other than those described in the petition, and notes that the charges were dropped in February 1997. The City points out that the Manager is not a member of the UFA bargaining unit, and consequently, the Union lacks standing to assert a retaliation claim in his behalf.

DISCUSSION

In the circumstances of this case, there are three alternate bases for the Union to attempt to validate its claim for access to managerial meetings concerning renovation and reconstruction of firehouses: First, that design and construction of Department facilities implicates a subject that is mandatorily bargainable; second, that the City must give the Union access to satisfy its obligation to provide information to the bargaining unit for purposes of negotiations and contract administration; or third, that the exclusion of Charles Bohan from FDNY-DDC meetings and the disciplining of the Department's Construction Manager were motivated by anti-union animus.

With regard to construction of facilities as a mandatory subject of bargaining, we begin with the premise that the New

[3] Citing Decision No. B-4-89.

York City Collective Bargaining Law imposes a duty upon both the employer and the employees' representative to bargain in good faith on matters that are within the scope of collective bargaining. These matters, which include wages, hours and working conditions, are classified as mandatory subjects of bargaining. While every decision of a public employer that may affect a term and condition of employment does not automatically become a mandatory subject of negotiation, the City's prerogative with respect to capital improvements is not absolute. For example, in Decision No. B-43-86, we found that the union's demand for clean-up and storage facilities, while implicating management's right to allocate use of its physical plant, was nonetheless mandatory. On the other hand, we held in Decision No. B-4-89, that a union demand that would require consultation with employees before management could make capital improvements infringed upon the manner in which the City manages its property, and is a nonmandatory subject of bargaining.[4] The circumstances of the present case nearly match those existing in Decision No. B-4-89. Thus, we find that, as a scope of collective bargaining matter, the Department has the unilateral right to convene meetings with the DDC concerning renovation and reconstruction of firehouses without a concomitant obligation to invite or include the UFA in the discussions. By implication, this finding applies

[4] Decision No. B-4-89, at 190-194.

to intra-departmental meetings as well. The Union has no independent right to insist that its representatives attend any departmental meeting where the subject is the design, planning or cost of alterations in the physical plant. In the absence of a mandatory bargaining obligation, the City did not commit an improper practice when it prohibited Bohan from attending DDC construction meetings.

With respect to the Union's second claim, management's duty to provide information, we recognize that under the NYCCBL, the parties have a mutual duty to provide information that arises out of their basic obligation to bargain in good faith.[5] The employer must provide such information as may be reasonably required by the certified bargaining representative for the fulfillment of its representational duties.[6] The execution of a negotiated agreement does not discharge this duty. It continues into the administration of a contract to deal with grievances arising thereunder.[7] However, to sustain an improper practice charge alleging failure to provide information, the union bears the burden of showing that the information it is requesting is relevant to, and necessary for, purposes of collective

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[5] Decision No. B-22-92.

[6] Decision No. B-8-85.

[7] See Board of Education and City of Albany, 6 PERB ¶ 3012 (1973).

negotiations or contract administration.[8]

Collective negotiations is not an issue in this case. With respect to contract administration, the Union asserts that there are several provisions contained in the UFA's collective bargaining agreement that could be grieved, should a violation of existing procedures and/or health and safety occur. This allegation, standing alone, is insufficient to establish the necessity for Bohan's admission to managerial meetings where the subject is renovation and reconstruction of firehouses, so that he may partake of information that may be discussed. Although we do not require a union's request for information to be accompanied by a specific statement of the reasons why it is needed, at the very least, a request must put the employer on general notice why the information is being sought.[9] Speculation that grievances might arise in the event that existing procedures and/or health and safety may be violated as a result of decisions made during FDNY-DDC planning meetings is an insufficient ground upon which to meet this standard. We note that as reconstruction of firehouses takes place, the Union is free to avail itself of the contractual grievance and arbitration procedures to the extent that alterations may violate contractual health or safety provisions.

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[8] Decision No. B-8-85.

[9] See Salmon River Central School District, 21 PERB ¶ 3006 (1988).

Finally, we consider the petitioners' discrimination and anti-union animus claims. The Union asserts that the Department excluded Bohan from DDC planning meetings as an act of discrimination, and that it imposed discipline upon the Construction Manager, allegedly in retaliation for giving Bohan information about a DDC meeting that occurred on December 19, 1996. The City does not deny that the Manager was disciplined, but contends that discipline was imposed for other unspecified reasons, and further points out that the Manager is not a member of petitioners' bargaining unit.

With respect to discrimination alleged against Bohan, the petitioners must, at a minimum, show that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity.

2. The employee's union activity was a motivating factor in the employer's decision.

If both parts of the test are satisfied, the burden will shift to the employer to show that the same action would have taken place even in the absence of protected conduct.[10] The mere assertion of discrimination or retaliation, however, is not sufficient to prove that management committed an improper practice. Rather, a petitioner, when making a claim involving an alleged violation of

[10] Decision Nos. B-26-96; B-9-95; B-16-94; B-20-93; B-16-92; B-59-91; B-50-90; B-17-89; B-3-88; and B-51-87.

Section 12-306a.(3) of the NYCCBL, must establish that the protected union activity was the motivating factor behind the alleged discriminatory act.[11] To support such a charge, a complaint must set forth more than conclusory allegations based upon surmise, conjecture or suspicion.[12] In this case, the record does not establish the requisite causal connection between Bohan's exclusion from FDNY-DDC construction meetings and the allegation of anti-union animus. Moreover, we find that the Commissioner's letter of December 19, 1996, establishes a legitimate business reason for excluding Bohan from these meetings, and there is insufficient allegations of fact to warrant further inquiry into the employer's motivation.

With regard to the discipline imposed on the Construction Manager, there is a threshold issue of standing. The focus of NYCCBL Section 12-306a. is the protection of public employees, and the Practice and Procedures of the Office of Collective Bargaining[13] entitles only "one or more public employees or any public employee organization acting in their behalf" to file under that section. This means that where the employer is accused of interfering with an employees' statutory right, only the affected individual or his or her certified representative

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[11] Decision No. B-51-87

[12] Decision Nos. B-21-92; B-21-91 and B-28-89.

[13] RCNY § 1-07(d) - Improper practices.

has the authority to file the charge. An employee organization is not authorized to file a charge unless it stands in a representative capacity to the employee whose rights are being asserted. Although the UFA is an employee organization, it is not recognized or certified to act in behalf of the Fire Department's Construction Manager. It therefore has no independent right to file an improper practice charge for what it perceives as an act of retaliation against the Manager.[14]

The Public Employment Relations Board ("PERB") has made similar decisions in cases involving this issue. In a 1983 decision, for example, PERB held that a union had no standing to prosecute an improper practice claim alleging that the state improperly rescinded a wage increase previously granted because the affected employees were not represented by the union making the charge.[15] One year later, PERB reiterated that a union had no standing to charge the state with violating a bargaining obligation because the union had not been recognized or certified as the representative of the employees who purportedly were victims of the employer's refusal to "meet, consult and or

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[14] Compare RCNY § 1-07(d) and § 204.1(a)(1) of PERB's Rules of Procedure to § 102.9 of the Rules and Regulations of the NLRB, which permits the filing of a charge by any person (emphasis added).

[15] State of N.Y. v. CSEA Local 1000, 16 PERB ¶ 3076 (1983).

bargain."[16]

Therefore, for all of the foregoing reasons, we will dismiss the charges filed by the Union and by Charles Bohan in their entirety.

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 of Greater New York and docketed as BCB-1887-97 be, and the same hereby is, dismissed.

Dated: New York, New York
July 31, 1997

STEVEN C. DECOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

DENNISON YOUNG, JR.
MEMBER

[16] State of N.Y. v. Doctors Council, 17 PERB ¶ 3034 (1984).

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER