CWA, L. 1180, 6 OCB2d 31 (BCB 2013)

(IP) (Docket No. BCB-3082-13)

Summary of Decision: The Union alleged that the City breached its duty to bargain in good faith, in violation of NYCCBL § 12-306(a)(4), by filing a "meritless" and "frivolous" refusal to bargain petition against the Union for the sole purpose of delaying negotiations indefinitely and by setting a precondition to bargaining by refusing to resume negotiations until after resolution of the petition. The City denied the allegations and contends that it simply suggested that the scheduling of dates for bargaining be deferred until after the resolution of the petition. It argued that the Board's decision in the pending claim is necessary to ensure that good faith bargaining can occur. The Board found that the City breached its duty to bargain in good faith. Accordingly, the Union's petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1180,

Petitioner,

-and-

THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS,

Respondent.

DECISION AND ORDER

On June 13, 2013, Communications Workers of America, Local 1180 ("Union"), filed a verified improper practice petition against the New York City Office of Labor Relations ("City"). The Union alleges that the City breached its duty to bargain in good faith, in violation

of § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by filing a "meritless" and "frivolous" refusal to bargain petition against the Union for the sole purpose of delaying negotiations indefinitely, and by setting a precondition to bargaining by refusing to resume negotiations until after resolution of the petition. The City denies the allegations and contends that it simply suggested that the scheduling of dates for bargaining be deferred until after the resolution of the petition. It argues that the Board's decision in the pending claim is necessary to ensure that good faith bargaining can occur going forward. The Board finds that the City breached its duty to bargain in good faith. Accordingly, the Union's petition is granted.

BACKGROUND

The facts in this case are substantially similar to those adduced in *CWA, L. 1180*, 6 OCB2d 30 (BCB 2013) (Docket No. BCB-3068-13), decided by the Board this same day. In the interest of avoiding unnecessary repetition, the background facts set forth in the decision in that matter are incorporated by reference herein, except as supplemented below.

The parties met for two formal bargaining sessions on May 7, 2012 and January 23, 2013. *See* 6 OCB2d 30 (BCB 2013). On February 7, 2013, the City filed a verified improper practice petition against the Union, docketed as BCB-3068-13. *Id*. In that petition, the City alleged that the Union engaged in surface bargaining and set preconditions to negotiation relating to the salary of employees in the Administrative Manager NM title during the parties' contract negotiations. *Id*. It contended that the alleged actions violated NYCCBL § 12-306(b)(2). *Id*.

The Union denied the allegations and contended it bargained in good faith and did not impose any preconditions. *Id*.

On April 9, 2013, the Trial Examiner in that matter asked the parties if they would be amenable to attempting to resolve their dispute through mediation. (Pet. ¶ 7); (Ans. ¶ 13, 16) On May 7, 2013, the City sent an email to the Trial Examiner and the Union declining the Board's offer of mediation. (Pet. Ex. A) Thereafter, on May 14, 2013, the Union sent a letter to the City requesting that the parties resume bargaining "with or without a mediator" and offering to meet on multiple dates in late May and early June. (Pet. Ex. B, at 1) In response, on May 20, 2013, the City sent a letter to the Union stating, in pertinent part:

> OLR reminds you that an improper practice charge (BCB-3068-13), for which a hearing date has been scheduled, is pending before the Board of Collective Bargaining. The City believes that this matter should be adjudicated before bargaining proceeds. Accordingly, we respectfully suggest that any scheduling of dates be deferred until a decision by the Board is reached.

(Pet. Ex. B, at 2)

On June 13, 2013, the Union filed the instant improper practice petition. As a remedy for the City's actions, the Union requested that the Board find that the City violated NYCCBL § 12-306, dismiss the City's petition, issue an interim award directing the City to immediately negotiate in good faith, and order that a notice of violation be posted. On July 2, 2013, the City filed its verified answer.

On or about July 10, 2013, the Union delivered a letter to the City, which stated, in pertinent part: "We disagree with your rejection of our previous request to hold our third bargaining session. This union again requests that we hold our third bargaining session and

subsequent sessions with or without a mediator on any of the following new dates…" (Union's July 10, 2013 Letter)

On or about July 18, 2013, the City responded by sending the Union a letter reaffirming its belief "that the most efficacious approach is to await the Board's soon-to-be-issued decision in [BCB-3068-13]." The City did not offer any dates for bargaining.[1] (City's July 18, 2013 Letter)

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the City violated NYCCBL § 12-306(a)(4) by filing a "meritless" and "frivolous" refusal to bargain petition for the sole purpose of delaying negotiations, and by refusing to resume bargaining with or without a mediator until after resolution of the City's petition. (Pet. at 1)

According to the Union, NYCCBL § 12-306 states that good faith requires parties to meet at reasonable times with the intent to reach an agreement and avoid unreasonable delay. The reasonableness of a delay is judged against the totality of the circumstances, including the reasonableness of the parties' explanation of the basis for the delay. Here, the Union argues that the City's reason for delaying further negotiation is not reasonable. Additionally, the Union

[1] The City objected to the admission into the record of the July 10, 2013 and July 18, 2013 letters because it asserts that the letters were submitted after the pleadings were completed and thus constituted a new allegation not raised in the petition. The City also objected on the grounds that it had agreed to close the record prior to being notified that the Union had submitted the July 10, 2013 letter to the Board for inclusion in the record. The Trial Examiner in the instant case overruled the City's objection and advised the parties that the letters would be part of the record because they are directly relevant to this case and neither party raised any objections about authenticity. (Trial Examiner's September 12, 2013 Letter)

asserts that setting preconditions to negotiations violates good faith bargaining. The Union avers that the City's filing of a frivolous improper practice petition alone would not violate the duty to bargain in good faith. However, in addition to filing the improper practice petition, the City also refused to go to mediation, and set a precondition to bargaining by refusing to bargain until after resolution of the improper practice petition. Thus, the City violated its duty to bargain in good faith.

City's Position

According to the City, the reasonableness of the time between a demand for negotiation and its commencement is judged by the totality of the circumstances. Additionally, in some instances it may be reasonable for an employer to delay negotiations in order to confer with other interested parties and gather information pertinent to the negotiations. Here, the City contends that the Board's ruling on the Union's behavior in negotiations, which is the basis of the City's petition, is pertinent to future labor negotiations. Specifically, the City asserts that guidance from the Board is vital for good faith bargaining to resume. Therefore, the City's May 20, 2013 response to the Union's request "respectfully suggest[ed]" that the next bargaining session be delayed until after the Board resolved the City's improper practice petition. (Pet. Ex. B) The City also contends that if the Union truly wanted to bargain, it would have responded to the City's letter, dated May 20, 2013, rejecting the City's suggestion.

Additionally, the City contends that it has a right to file an improper practice petition and that doing so may not be construed as a violation of the NYCCBL. This is especially true where, as here, the City asserts that it has sufficiently alleged that the Union has committed an improper practice. Finally, the City contends that it declined the Board's offer of mediation because it

believed it was unnecessary at that point. The parties had only had two bargaining sessions, and the City believed that the Union had engaged in bad faith tactics that would prevent any future agreement. Thus, the City contends that it has not violated NYCCBL § 12-306(a)(4).

DISCUSSION

NYCCBL § 12-306(a)(4) provides that it is an improper practice for a public employer "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." Additionally, NYCCBL § 12-306(c) provides that the duty to bargain in good faith "shall include the obligation: (1) to approach the negotiations with a sincere resolve to reach an agreement; … (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays." Similarly, the New York State Public Employment Relations Board ("PERB") has stated that:

> [T]he duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's word and deeds; and where there is a variance between the two, experience would dictate that greater reliance be place[d] on the latter. Thus, whether one had approached the negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard. This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct.

Matter of Erie Co. Water Auth., 35 PERB ¶ 4560, at 4696 (ALJ 2002) (citing *Town of Southampton*, 2 PERB ¶ 3011, at 3274 (1969)).

Based on the record, we do not find that the City's filing of an improper practice petition itself caused an unreasonable delay or otherwise breached its duty to bargain. This Board has held that "the City's exercise of its right to file an improper practice with the Board – which has exclusive jurisdiction over such matters – cannot be construed to constitute an improper practice under any provision of the NYCCBL." *LEEBA*, 79 OCB 18, at 23 (BCB 2007) (internal citations omitted). Moreover, although we found that the City's claims in that petition were not meritorious, we cannot conclude that they were frivolous. *See* 6 OCB2d 30 (BCB 2013). Therefore, we do not find that the City's improper practice petition violated the NYCCBL.

It appears that the City's failure to schedule additional bargaining was premised on an assumption that its duty to bargain was suspended by its filing of an improper practice petition. However, neither the NYCCBL nor the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("Rules") provide for any such suspension of the duty to bargain during the pendency of an improper practice petition, and the City did not urge any decisional or statutory basis for its assumption. Similarly, the duty of a party to bargain collectively is not suspended by the filing or pendency of unfair labor practice charges under the National Labor Relations Act ("NLRA"). *See Benjamin Franklin Plumbing*, 352 NLRB 525, at 536 (2008) (respondent violated the NLRA by declaring in two letters that it refused to negotiate with the union until after the unfair labor practice charges filed against respondent had been resolved); *see also Harris*, 200 F.2d 656, at 658 (1953) (union's filing or pendency of unfair labor practice charges does not eliminate an employer's duty to bargain collectively under the NLRA). The Board acknowledges that some circumstances may exist such that continuation of bargaining while an improper practice is pending may not be fruitful. Nevertheless, we do not

find that such circumstances exist here. Therefore, we cannot conclude that a resolution of the City's improper practice claims was necessary to the continuation of good faith bargaining in this case.

The City argues in its answer that "[i]f the Union truly wished to bargain, it would have followed up on the [May 20, 2013] letter and rejected OLR's suggestion." (Ans. at 3) However, the City's refusal to bargain had already taken place by the time the answer was filed. Additionally, the City offers no support for its contention that the Union was under an obligation to persuade the City to return to the table. In fact, the City's continuing refusal to bargain is further illustrated by its actions in July 2013. Shortly after receiving the answer, the Union sent the City a letter dated July 10, 2013 in which it rejected the City's suggestion to delay bargaining, made another request for bargaining, and provided the City with additional dates. Nevertheless, the City sent a response dated July 18, 2013 that was substantially similar to its letter dated May 20, 2013 and suggested that "the most efficacious approach is to await the Board's soon-to-be-issued decision in the above-referenced matter." (City's July 8, 2013 Letter) The City did not offer any dates for bargaining.[2] Thus, it was clear that the Union communicated

[2] According to the National Labor Relations Board, refusing to collectively bargain is a *per se* violation of the NLRA, regardless of a party's subjective good or bad faith. In *Katz*, 369 U.S. 736, 742-743 (1962), the United States Supreme Court explained:

> The duty 'to bargain collectively' enjoined by [NLRA] § 8(a)(5) is defined by § 8(d) as the duty to 'meet *** and confer in good faith with respect to wages, hours, and other terms and conditions of employment.' Clearly, the duty … may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—'to meet *** and confer'—about any of the mandatory subjects."

to the City that it did not agree to the City's suggestion that bargaining be suspended, and still the City declined to resume bargaining.

It is contrary to the policy stated in the NYCCBL to find that if a party engages in bad faith bargaining, all future bargaining is tainted because that party intends to frustrate all attempts to reach agreement. Additionally, even assuming the Board had found from the City's improper practice claim that the Union had set unlawful preconditions to negotiations or had engaged in surface bargaining prior to May 14, 2013, the Board's customary remedy to a finding of bad faith under NYCCBL §§ 12-306(a)(4) or (b)(2) is to order the respondent to bargain in good faith. Therefore, with or without the finding of an improper practice, bargaining in good faith is required.

Accordingly, we find that in this instance the City's obligation to bargain continued through its filing of an improper practice and therefore its failure to schedule future negotiation sessions violated NYCCBL §12-306(a)(4).

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 verified improper practice petition filed by the Union, Communications Workers of America, Local 1180, docketed as BCB-3082-13, is hereby granted; and it is further

ORDERED, that the City of New York bargain in good faith with the Union; and it is further

DIRECTED that the City of New York post this Notice for no less than thirty (30) days at all locations it uses for written communications with employees represented by Communications Workers of America, Local 1180.

Dated: October 23, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 6 OCB2d 31 (BCB 2013), determining an improper practice petition between Communications Workers of America, Local 1180, and the City of New York.

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 Communications Workers of America, Local 1180, Docket No. BCB-3082-13, be, and the same hereby is, granted regarding a violation of NYCCBL § 12-306(a)(4); and it is further

ORDERED, that the City of New York bargain in good faith with the Union; and it is further

DIRECTED that the City of New York post this Notice for no less than thirty (30) days at all locations it uses for written communications with employees represented by Communications Workers of America, Local 1180.

The City of New York
(Department)

Dated: **_____(Posted By)**
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.