COBA v. DOC, 63 OCB 9 (BCB 1999) [Decision No. B-9-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
CORRECTION OFFICERS BENEVOLENT ASSOCIATION,	:	DECISION NO. B-9-1999
Petitioner,		DOCKET NO. BCB-1983-98
-and-	:	
NEW YORK CITY DEPARTMENT OF CORRECTION,	:	
Respondent.	:	

DECISION AND ORDER

On May 1, 1998, the Correction Officers Benevolent Association ("COBA" or "Union") filed a verified improper practice petition alleging that the New York City Department of Correction ("Department" or "City") failed to provide information in violation of the New York City Collective Bargaining Law ("NYCCBL"), specifically, §§ 12-306(a)(4) and 12-306(c)(4). The City filed a verified answer on May 28, 1998. The Union filed a verified reply on July 8, 1998.

After this matter was initially considered by the Board of Collective Bargaining ("Board"), the Trial Examiner informed counsel for the parties, on January 22, 1999, that the Board requested additional information related to the Union's demand that the Department supply the Union with names and commands of unit members on indefinite sick leave during the time period in question. Specifically, the Board wished to know why the Union believed the

information to be relevant to the function of contract administration. The parties' submissions in response to the Board's request were completed by February 12, 1999.

Background

Sick leave has been the subject of continuing labor-management discussions and correspondence between the Union and the Department. It has also been the subject of a pilot program designed to reduce sick leave usage.

On January 9, 1998, Union Treasurer Elias Husamudeen wrote to James Bird ("Bird"), Deputy Warden in Command at the Department's Health Management Division, requesting information about Correction Officers on sick leave. On January 30, 1998, Bird provided a spreadsheet with some of the requested information. The names and commands of Correction Officers who were out more than 30 days, which Husamudeen had requested, was not included in the information Bird sent.

On March 11, 1998, Husamudeen again requested information about Correction Officers on sick leave, this time, covering a later time period. On March 27, 1998, Bird responded by again providing a spreadsheet with some of the information requested. Information identifying Correction Officers out more than 30 days was not included.

On April 7, 1998, Husamudeen wrote the Department's General Counsel, Elizabeth Loconsolo, in advance of a Labor-Management meeting scheduled for April 9, 1998. He sought the following information, which was similar to his earlier requests:

a) a breakdown of the average number of sick days for the twelve-month period beginning January 1, 1997, and ending December 31, 1997,
b) what area is increasing concerning the sick leave activity according to analysis, for the months of November and December, 1997, and January, February, and March,

1998,

c) the sick leave rate for those same months, and what percentage of the sick leave rate for those months "in part" is attributed to:

1. Indefinite sick
2. Compensation cases
3. Line of duty incidents
4. Assaults on staff
5. Use of force
6. Maternity

By letter dated April 24, 1998, Husamudeen reiterated his request. He stated that, at the April 9 Labor-Management meeting, Loconsolo said the Union would receive the information.

Loconsolo responded by letter on April 30, 1998. She also referred to the April 9 Labor-Management meeting during which the Department's sick leave policies were discussed "at length," particularly the calculation of the first eight days of sick leave and a departmental, pilot project authorizing 24 hours "out of residence" in certain cases whereby a Correction Officer on sick leave is permitted to leave his or her residence. Loconsolo added that the Department would advise COBA of any concerns it has about the implementation and use of the Department's sick leave policy "prior to effectuating changes in [its] policies." As for COBA's request for names of officers on indefinite sick leave, as well as other statistics, Loconsolo said that statistics are forwarded quarterly from the Health Management Division to COBA and that they include information regarding "indefinite sick cases." She insisted, however, that the Department would not provide COBA with the names of those members on indefinite sick leave.

Enclosed with her letter of April 30 were copies of reports from the Department's facilities to the U.S. Occupational Safety and Health Administration for the first three months of 1998. These "facility OSHA reports," she said, are posted in each facility every month in areas

accessible to all staff assigned to those locations. She suggested that the Union obtain the information contained in the reports from COBA delegates assigned to the various facilities throughout the Department.[1]

By letter also dated April 30, 1998, counsel for the Union complained that Loconsolo's letter failed to address COBA's request for information that the Union maintained was readily available to the Department and was essential to enable COBA to conduct its own analysis of what the City asserted was an increase in sick leave usage. This was important, he said, because abuse of sick leave is a ground for discipline. The instant improper practice proceeding ensued.

Positions of the Parties

Union's Position

The Union contends that, "[s]ince the Department of Correction's sick leave policy and daily disciplinary decisions related thereto are formed largely by the sick leave rate," it is "essential" that the Union's president or his designee, in this case, Elias Husamudeen, be informed of "all factors affecting the sick leave rate." Specifically, the Union argues that it needs the names of its members on indefinite sick leave "in order to knowledgeably negotiate with the City of New York on sick leave and to effectively process grievances on behalf of its members. . ." and "to preserve the rights of the members." The Department's failure to provide

[1] It is unclear whether the OSHA reports contain names and commands of unit members on indefinite sick leave, because neither party has provided a copy of such reports for the record. The OSHA reports appear to be different from the teletype order lists of individuals on sick leave or returning to duty which were provided for the record.

this information, COBA argues, has violated §§ 12-306(a)(4)[2] and 12-306(c)(4)[3] of the NYCCBL.

In support of its argument, the Union asserts that the Board of Collective Bargaining has held that a demand seeking to notify a union president of assaults on unit members relates to information pertaining to their working conditions and aids in the union's representation of public employees and the promotion of the collective bargaining relationship by keeping the union informed of serious incidents involving its members.[4] As such, the Union argues here that a public employer may be compelled to release information concerning its members at a union's request. This is true, COBA argues, notwithstanding the fact that the parties are not engaged in collective bargaining. Sick leave information, it continues, is as important to carrying out a

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[2] Section 12-306(a)(4) provides as follows:

> It shall be an improper practice for a public employer or its agents:
> * * *
> (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. . . .

[3] Section 12-306(c)(4) provides as follows:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
> * * *
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. . . .

[4] The Union cites a scope of bargaining case, *City of New York v. Correction Officers' Benevolent Association*, Decision No. B-16-81.

union's representative functions as information about assaults on members in the earlier case.[5]

The Union also cites private sector case law to support its contention that the employer's duty to furnish information to the exclusive collective bargaining representative does not end with the signing of the contract[6] but continues through the life of the agreement to enable the parties to administer it, to resolve grievances, and to apprise unit members of their benefit entitlements.[7]

COBA argues that, initially, the City did not challenge the relevancy of the requested information to the function of contract administration. "[T]herefore," it argues, " neither should this Board." However, in response to the Board's request for more information on the relevancy question, the Union asserts, in pertinent part, as follows:

> COBA members placed on indefinite sick leave by the Department of Correction ["DOC"] are frequently not advised as to their rights when on such leave. It is the duty of COBA to advise the members what protections they have, who at the union can advise with them, what their legal rights are, and to whom they may turn for assistance. Too often the member learns how serious the problem is when he/she receives a notice of termination, without being given adequate information as to what rights the COBA members has.
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> Furthermore, while COBA is given overall statistics, the information is given in such fashion that it requires COBA to check it. Substantial rights rest on this information. Let it not be forgotten that after an agreement had been made

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[5] The Union asserts that the information at issue here, as well as in the cited case, is a mandatory subject of bargaining.

[6] The Union cites *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436, 64 LRRM 2062 (1967). The Union also cites *Western Mass. Elec. Co. V. NLRB*, 589 F.2d 42, 100 LRRM 2315 (1st Cir. 1978), *Sinclair Ref. Co v. NLRB*, 306 F.2d 569, 50 LRRM 2830 (5th Cir. 1962), and *Budde Publications*, 242 NLRB 243, 101 LRRM 1140 (1979).

[7] The Union cites *Prudential Ins. Co. V. NLRB*, 412 F.2d 77, 71 LRRM 2254 (2nd Cir. 1969), *cert. den.* 396 U.S. 928, 72 LRRM 2695 (1969).

> regarding sick leave (albeit on a trial basis) without further negotiation the DOC terminated the agreement allegedly based upon the substantial increase in sick leave usage. In order for COBA to perform its duty of fair representation, in order to verify the sick leave usage, more than overall statistics are required; COBA must be able to check the information.

In response to the City's argument that the managerial prerogative to place or remove an employee from indefinite sick leave removes the requested information from the mandatory scope of bargaining, the Union maintains that it is not challenging the Department's prerogative to add or remove names from the indefinite sick leave list.

The Union asserts that the City's argument that it cannot be required to create data which do not exist is specious, because the City does not claim that the names and commands of Correction Officers on indefinite sick leave do not exist or cannot readily be made available. In fact, the Union contends that the Department not only possesses the information but also routinely posts the names of Correction Officers on sick leave in every command.

The City's contention that confidentiality prohibits it from disclosing such names is a "red-herring," the Union states, adding that it seeks names, not confidential medical records. The City's reliance on the PPPL is unavailing, the Union argues, because the New York State Personal Privacy Protection Law ("PPPL")[8] applies only to state agencies and does not include the Department herein. The Union cites § 92(1) of that law, defining "agency," in pertinent part, as follows:

> The term "agency" means any state board, bureau, committee, commission, counsel, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary

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[8] Article 6-A of the Public Officers Law.

> function for the state of New York, *except* the judiciary or the state legislature or *any unit of local government* and shall not include offices of district attorneys. (Emphasis added.)

The Union asserts that the Committee on Open Government has determined that the privacy law does not apply to records of units of local governments, which continue to operate under the permissive provisions of the Freedom of Information Law ("FOIL").[9] Moreover, the Union contends that the City's reliance on *United Federation of Teachers v. New York City Health and Hospitals Corporation*[10] is unavailing because it is factually inapposite to the instant case, as it includes no mention of the PPPL on which the City relies in the instant proceeding. Finally, the Union insists that the City has offered no factual support for the Department's contention that it could not divulge the information the Union seeks because "various" Correction Officers had requested privacy.

City's Position

The City argues that it has not violated § 12-306(a)(4) or § 12-306(c)(4), because it assertedly has no duty to provide COBA with the names and commands of unit members on indefinite sick leave. The City bases its argument in part on the contention that no collective bargaining was in progress at the time of the events on which the instant petition is based.[11] The

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[9] The Union cites Committee on Open Government PPPL-AL-3.

[10] 428 N.Y.S.2d 823 (involving a request for disclosure under FOIL of grievance information containing employees' names).

[11] COBA and the Department are party to a collective bargaining agreement for the period of time covering April 1, 1995, through July 31, 2000.

City maintains that the Union does not deny that the information requested was not used for collective bargaining.

The City also argues that any decision with regard to placing or removing an employee from indefinite sick leave is a managerial prerogative over which it cannot be compelled to bargain. It cites Board precedent for the proposition that a demand is non-mandatory which would have the employer relinquish control over the use of sick leave.[12] The City contends that, because it has no obligation under § 12-306(a)(4) to bargain over what it argues as a non-mandatory subject of bargaining, it has no obligation under NYCCBL § 12-306(c)(4) to provide the requested information.

The Department maintains as well that it has provided the Union with data which were reasonably available and normally maintained in the course of business following each of its requests, including statistical breakdown of the numbers and types of sick leave cases. The City contends that it has never refused to provide this information to COBA when the Union asked for it.

For the Union to be entitled to information under § 12-306(c)(4), the City argues, COBA must first allege that it is relevant and necessary for the purpose of collective bargaining. The City cites Board precedent on this point.[13] The names of Correction Officers on indefinite sick leave are confidential and "not necessary for collective negotiations," it argues. Therefore, it

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[12] *City of New York and Correction Officers' Benevolent Association*, Decision No. B-16-81.

[13] *Committee of Interns and Residents v. New York City Health and Hospitals Corporation*, Decision No. 8-85.

continues, there is no relationship between the names of specific Correction Officers on indefinite sick leave and any subject of collective bargaining.

In response to the Union's submission on the Board's question of relevancy to the issue of contract administration, the City reiterates its position that it has no duty to provide the Union with the names of Correction Officers on indefinite sick leave because "the information [requested] is not necessary for the union to properly administer its contract. . . ." To the Union's assertion that it needs the names so that it may advise its members on indefinite sick leave of their rights, the City maintains that "COBA has the ability to advise all of its members what their rights are with respect to indefinite sick leave at any point during each Correction Officer's tenure as a union member." The City further asserts, "It is not the City's responsibility to aid COBA in providing this information to a selected number of members and the New York City Collective Bargaining Law does not obligate the City [to] provide the union with the names of those on indefinite sick leave under those circumstances."

With respect to what the City asserts is a demand for information in a form which would require no checking on the part of the Union, the City contends that the NYCCBL does not require it to "create information or to revise its method of recording data in order to eliminate the need for the union to verify this information through some effort of its own. The Department has provided to COBA, and continues to provide, information related to sick leave. The Department cannot be forced to change the way it maintains its data."

For the proposition that a request for disclosure of information may be denied, the City

also cites *United Federation of Teachers,*[14] where the Supreme Court of New York directed that, while grievance information could be released, "personal identifying details [must] be redacted and deleted from the records produced."[15] The City also relies on § 92(3) of the PPPL to support its contention that the Department is under a statutory obligation not to disclose "personal information without a written request or the voluntary written consent of the data subject. . . ."[16] Once COBA obtains written consent from its members stating that information about sick leave usage can be released, the City asserts, the information can be released. The City also argues that the information is currently available to the Union through its members who are on sick leave. If the Union were to obtain it directly from them, the City argues, the Department would not be placed in the position of infringing on any member's privacy rights.

In sum, the City contends that the Union has failed to state a *prima facie* claim, and it urges that the instant petition be denied.

Discussion

Under our statute, a union may request information from a municipal employer (a) for purposes of collective negotiations on mandatory subjects of bargaining as well as (b) on matters necessary for the administration of the collective bargaining agreement, such as grievance

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[14] 428 N.Y.S.2d 823.

[15] *Id.* at 825.

[16] *Id.* at § 96(1)(a).

administration.[17]

Section 12-306(c)(4) of the NYCCBL states, *inter alia*, a public employer's duty to bargain in good faith includes a duty to furnish to the "other" party at its request "data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. . . ." [18] In Decision No. B-8-85, the Board stated that the duty to provide information extends to that which is "relevant to and reasonably necessary for purposes of collective negotiations *or contract administration* which our statute and the processes of this Board are designed to protect." (Emphasis added.)[19]

In the instant case, the Union argues that the names and commands of unit members on indefinite sick leave which it seeks are indeed necessary "in order to preserve the rights of the members." The Union asserts that its duty of fair representation encompasses advising members

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[17] *Correction Officers' Benevolent Association v. City of New York, et al.*, Decision Nos. B-39-88; *Committee of Interns and Residents v. New York City Health and Hospitals Corporation*, Decision No. B-8-85. *See*, also, *Sergeants' Benevolent Association v. City of New York, et al.*, Decision No. B-56-88.

[18] *See Civil Service Technical Guild, Local 375, v. New York City et al.*, Decision No. 41-80 at10 (holding that the employer has a duty to furnish certain information relating to "subjects within the scope of collective bargaining" and finding no such subjects in this case); *see*, also, *Sergeants Benevolent Association v. City of New York, et al*, Decision No. B-56-88 at 18 (finding no practical impact resulting from managerial, unilateral implementation of program aimed at reducing street crime and also finding no duty to provide information relating to subjects within the scope of collective bargaining).

[19] Decision No. B-8-85 at 14 (holding, *inter alia*, that a nexus must be established between the information sought and rights protected by the NYCCBL, but that, on these facts, no nexus was found here); *see*, also, *Committee of Interns and Residents v. New York City Health and Hospitals Corporation*, Decision No. B-22-92 at 18.

placed on indefinite sick leave by the Department "as to their rights when on such leave." The Union further specifies these rights as "what protections they have, who at the union can advise with [*sic*] them, what their legal rights are, and to whom they may turn for assistance." The Union also asserts that some information which the Department forwards "is given in such fashion that it requires COBA to check it," and that "in order to verify the sick leave usage, more than overall statistics are required" and "COBA must be able to check the information," because "[s]ubstantial rights rest on this information."

There is no dispute that unit members are entitled to sick leave under the applicable contract; nor is there any dispute that the rights which the Union addresses here concern sick leave. We find, therefore, that the Union has articulated the requisite relationship between rights established through the collective bargaining process which the NYCCBL protects and the information which the Union seeks.[20]

Although both parties address the question of whether the requested information concerns a mandatory subject of bargaining, we need not reach it. The cases which the City cites for the proposition that a public employer has no duty to provide information unless the information relates to a mandatory subject of bargaining are inapposite.

Decision No. B-41-80 concerned a claim that the employer's decision to decentralize its Capital Design Unit resulted in a practical impact because of the attendant reassignment or

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[20] Because there is no dispute with respect to the relevance of the requested information, we need not reach the issue of relevancy.

relocation of unit members.[21] The Board found no practical impact and no duty to bargain. Because it found no duty to bargain, the Board also found no subject or subjects within the scope of collective bargaining.

In Decision No. B-39-88,[22] the employer exercised its right under New York State Civil Service Law to place on leaves-of-absence employees disabled due to occupational injury. The Union argued that there was a duty to bargain over what it contended was a "practical impact on mandatory subjects of bargaining." The union also requested a list of employees being considered for the same action. The Board found that the claim derived from an assertion that the parties' collective bargaining agreement had been violated and that such a claim should have been raised in the context of the grievance procedure, not an improper practice proceeding. The Board noted that "since it had found that there are no subjects on which the City was required to bargain under the present circumstances, there is no duty to furnish the information requested."[23]

Our holding in the instant case is grounded, not on the bargainability of the information and rights asserted by the Union but on the use to which the information indisputably will be applied, *i.e.*, contract administration. For this, we rely on our reasoning in Decision No. B-8-85, where we said that the duty to provide information pertains in the collective bargaining context "*or* contract administration."[24] (Emphasis added.)

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21 *Civil Service Technical Guild, Local 375, v. New York City, et al.*

22 *Correction Officers Benevolent Association v. City of New York, et al.*

23 *Id.* at 17-18.

24 *See* n. 19.

We now turn to the claim that the Department failed to provide information required for administration of the collective bargaining agreement. Although the City contends that it has never refused the Union's request for data reasonably available to the Department and normally maintained in the course of its business, there is no dispute that the Department has declined to turn over information on names and commands of unit members on indefinite sick leave. Having determined that the requested information relates to the Union's duty to represent unit members with respect to contractually provided sick leave benefits,[25] we find that the names of unit members on indefinite sick leave are relevant to the Union's obligation to administer its collective bargaining agreement with the City. As for whether the names are reasonably necessary for the Union to fulfill its obligation to administer the contract, we find that they are. In reaching this finding, we note that there is no dispute that the individuals whom the Union seeks to assist are those on indefinite sick leave pursuant to a contractual, unlimited sick leave benefit. The City's argument is directed, not at the relevancy of the information, but at the availability of it. We hold, therefore, that, by failing to forward the names and commands of Correction Officers who have been placed on indefinite sick leave for the time period at issue herein, the Department has violated §§ 12-306(a)(4) and 12-306(c)(4) of the NYCCBL.

With respect to the City's privacy argument, the City contends, that, if the Department were to relay the requested information directly to the Union, the Department would infringe on employee privacy rights. The City relies on what it says are requests from unit members for privacy as well as the PPPL which arguably prohibits an agency under its aegis from disclosing

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[25] *See* text surrounding n. 20.

personal information without a written request or voluntary written consent of the individual about whom the information is sought.

We need not address the question of whether the Department falls under the aegis of the PPPL; nor do we need to determine whether unit members have requested that the Department not divulge their names.[26] Our reasoning is based on the undisputed fact that the names of Correction Officers on sick leave are already a matter of public record.[27] The City itself states, in fact, that the information could be obtained by unit members in each command where the names of unit members on sick leave are posted routinely in plain view of members of the Department. Moreover, the statutory duty to provide information is not vitiated by the possibility that the information sought is obtainable by other means.[28] We concur with private sector precedent,[29] which holds that the duty to provide information is not altered by the fact that the information sought may be available from another source.[30]

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[26] Parenthetically, we note that the City does not dispute the Union's contention that confidential, medical records are not part of its request.

[27] This fact, plus the fact that the instant petition is in the nature of an improper practice petition, distinguish the case at bar from a recent case considered by the New York State Public Employment Relations Board. *Organization of Staff Analysts v. New York City Transit Authority*, 31 PERB 3080 (December, 1998). That case concerned the release of home addresses of unit employees for use in conducting a representational election, not at issue here.

[28] *Committee of Interns and Residents v. New York City Health and Hospitals Corporation*, Decision No. B-22-92 at 18.

[29] *Asarco, Inc. v. NLRB*, 805 F.2d 194, 123 LRRM 2985 (6th Cir. 1986).

[30] *Id. at 19.*

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 docketed as BCB-1983-98 is granted, and it is further

ORDERED, that the New York City Department of Correction release to the President of the Correction Officers' Benevolent Association or his designee, forthwith, the names and commands of members of the Correction Officers' Benevolent Association on indefinite sick leave during the time period relevant herein.

Dated: March 2, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

ROBERT H. BOGUCKI
MEMBER

JEROME E. JOSEPH
MEMBER

RICHARD A. WILSKER
MEMBER