Brengel v. L. 30, IUOE, 65 OCB 10 (BCB 2000) [Decision No. B-10-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
KENNETH J. BRENGEL,	:	
	:	Decision No. B-10-2000
Petitioner,	:	Docket No. BCB-2068-99
	:	
-and-	:	
	:	
LOCAL 30, INTERNATIONAL UNION OF OPERATING ENGINEERS,	:	
	:	
Respondent.	:	

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] Kenneth J. Brengel, ("Petitioner") filed a verified improper practice petition on June 21, 1999, against Local 30, International Union of Operating Engineers, AFL-CIO ("Local 30" or "Union") alleging, in essence, a breach of the duty of fair representation. The petition alleges that the Union violated § 12-306 by presenting its membership with one consent determination for five different titles. On July 15, 1999, the Office of Collective Bargaining received a facsimile from the Petitioner of the names and signatures of 41 individuals seeking to be added as parties to the

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[1] Section 12-306(b) of the NYCCBL provides in pertinent part:
b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
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(3) to breach its duty of fair representation to public employees under this chapter.
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improper practice petition along with Mr. Brengel.[2] The Union filed a verified answer on August 20, 1999. The Petitioner, after retaining counsel on September 17, 1999, filed a verified reply on November 5, 1999 and the Union filed a verified sur-reply on December 10, 1999.

Background

Local 30 represents the bargaining unit of municipal employees in the civil service titles of Senior Stationary Engineer ("Seniors"), Stationary Engineer, and Stationary Engineer (Outside NYC). Local 30, in a joint bargaining certificate with Local 15, International Union of Operating Engineers, also represents the titles of Oiler and Plant Maintainer (Hospitals)/Oiler ("Plant Maintainers"). These five titles are prevailing rate titles and the wages and benefits for the titles are negotiated or determined by the Office of the Comptroller in accordance with § 220 of the New York State Labor Law.

The Comptroller's Determinations for these titles prior to the instant negotiations covered the period of October 1, 1991 through June 30, 1995. In these Determinations, there was a disparity between the benefits received by the Oilers and Plant Maintainers and the Stationary Engineers and Senior Stationary Engineers. The Oilers and Plant Maintainers, who report to the Engineers and Seniors received a higher hourly annuity, an additional holiday, and more annual leave days than the Engineers and Seniors. In addition, the Oilers and Plant Maintainers received yearly grants of sick leave, death in the family leave, and jury duty leave while the Engineers and

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[2] By letter dated October 20, 1999, Local 30, *inter alia,* objected to the inclusion of new parties without amendment of the petition or a motion to do so. Petitioner's counsel did not cure this defect and thus additional parties will not be considered. Nevertheless, whether or not the additional parties are named in the petition has no bearing on the Board's ultimate decision in this matter.

Seniors received none.

Negotiations took place in late 1996 and throughout 1997, with the City offering a "Citywide package" for all five titles that did not address the disparity in benefits. According to the Union, the "overwhelming response of the membership" was to reject the Citywide package, "with Engineers and Seniors asking Local 30 to go back into negotiations and to address the disparity of benefits."

On May 26, 1999, the City presented an offer covering the period of July 1, 1995 through June 30, 1999. It provided some benefit improvements for the Engineers and Seniors during the term of the proposed Determination in the areas of sick leave, annuity, jury duty leave and death in the family leave. The major changes were to be effective June 30, 1999, when it equalized benefits among all five titles by giving them the same annual leave progression, sick leave, jury duty leave, death in the family leave, annuity, and holidays.

Regarding wages, the offer provided certain increases throughout the term of the proposed Determination, but on June 30, 1999, the difference in wage rates between the titles would be compressed, setting a wage rate promotional formula. In the final period of the prior Consent Determinations, the Oiler's wage rate was $25.09 per hour and the Plant Maintainer's rate was $25.67 per hour. However, as of June 30, 1999, the wage rates of the two titles would be the same at $28.19 per hour. In the final period of the prior Determinations, the wage rate of the Stationary Engineer (Outside NYC) was $25.93 per hour, the Stationary Engineer rate was $27.85 per hour and the Senior rate was $32.27 per hour. However, as of June 30, 1999, the wage rate for these higher titles would be pegged to the Oiler rate with the Engineer outside NYC

being $28.22 per hour, the Engineer being $30.00 per hour, and the Senior rate being $32.30 per hour. The City presented its offer as one Comptroller's Consent Determination for all five titles and provided for the withdrawal of the entire offer if the Union rejected its terms as to any of the included titles.

A meeting of Shop Stewards and the Negotiating Committee was held on June 7, 1999 to review the offer and it was thereafter sent to the entire municipal membership for a single ratification vote among the employees in all five titles.[3] The result of the vote was 322 votes to accept the offer and 175 votes to reject the offer.

Positions of the Parties

Petitioner's Position

The Petitioner, a Senior Stationary Engineer, asserts that the Union has violated its duty of fair representation by presenting one Consent Determination for five titles. The Petitioner asserts that one Consent Determination undermines the effectiveness of an individual's vote in his own title. He claims that the vote is watered down by the inclusion of the other titles and that while one title could unanimously vote against ratification, the contract could still be approved.

The Petitioner also asserts that past practice for ratification voting on Consent Determinations was always on an independent title basis and he contends that the membership was never informed that there would be a change.

The Petitioner believes that Local 30 chose to have one Consent Determination so that the

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[3] The term "municipal membership" is used to distinguish Local 30 members who are covered by the Comptroller's Determination from Local 30 members employed in the private sector.

Senior Stationary Engineers could not reject its package even though it was inferior to those offered to other titles. According to the Petitioner, the members made it clear in the 1996 survey that a wage increase was the most important requirement of that group. The Petitioner claims that contrary to the Union's assertion, no canvass of the membership took place in early 1998. Instead, Negotiating Committee members advised the Union leadership at the April 20, 1998 Negotiating Committee meeting that a majority of Seniors were concerned with wage rate increases and wanted to "purchase" more annual leave and sick leave with the waiver of a portion of retroactive compensation.

Furthermore, the Petitioner alleges that at the June 7, 1999 Negotiating Committee meeting, President Ahern was faced with heated opposition to the proposed Consent Determination. He also stated that the City's proposed offer was such that "all of the employees in different bargaining units had to vote on the Consent Determination collectively." On June 23, 1999, Local 30 held a special meeting and was unanimously told by the 43 Seniors present that the contract was unacceptable.

The Petitioner maintains that the Union had an obligation to provide equal, non-discriminatory representation to employees in all five titles.

Union's Position

The Union asserts that the City presented its offer on May 26, 1999, as one Comptroller Consent Determination for all five titles. The Union contends that since the offer was made by the City in the form of one Consent Determination, and since the Union believed that the City's reasons for doing so were not arbitrary, capricious, or discriminatory, Local 30 sent the offer to

the entire municipal membership for ratification in the manner it was offered.

The Union explains that the City's reasoning for presenting the offer as one consent determination was in order to equalize benefits among the five titles and to thereby improve the City's ability to recruit into the Engineer title. The City also planned to set up a promotional wage progression through the five titles which would equalize wages in the Oiler and Plant Maintainer titles in order to avoid disparity and promotional problems with these titles.

The Union asserts that the coverage of all five titles by the one Comptroller Determination is part of the terms of the Determination governed by § 220 of the New York State Labor Law. According to the Union, the decision to put all five titles within one Determination can only be reviewed in accordance with § 220(8) by an aggrieved party in accordance with Article 78 of the CPLR. The Union suggests that the Board does not have jurisdiction to review the consolidation of all five titles into one Determination or the resultant ratification.

Furthermore, the Union asserts that the ratification of a Consent Determination or contract is an internal union matter. According to the Union, the manner of membership ratification is not governed by the NYCCBL and the duty of fair representation does not extend to internal union affairs such as contract ratification. In addition, the Union contends that even if the Board has jurisdiction over this issue, Local 30's actions throughout this matter have not been arbitrary, capricious, discriminatory, or in bad faith. The Union contends that municipal members advised the Union that they wanted the disparities among titles corrected and equalized. In order to accomplish this, the Union negotiated all five titles at the same time. The Union argues that the ratification vote for one Comptrollers Determination was presented in good faith.

Furthermore, the Union asserts that if ratification would have been by title, a majority of voting Seniors which is less than five percent of the membership could have rejected an agreement approved by 65 percent or 315 municipal members. This would have given each Senior too much power and have been unfair to the overall municipal membership of Local 30.

The Union also argues that the Petitioner's assertion regarding the past practice of ratification by title does not apply to joint negotiations. Local 30 further disputes Petitioner's claim that the prior ratification by title has served the membership well. The prior separate negotiations and ratifications resulted in the disparity in wages and benefits between the titles creating dissension within the Union. The Union maintains that the City proposal received on May 26, 1999, was reviewed with the Negotiating Committee and Municipal Shop Stewards at a meeting called for that purpose on June 7, 1999. At the meeting, the Consent Determination was reviewed and discussed before it was sent to the municipal membership for a ratification vote.

In its sur-reply, the Union argues that it has always interpreted its Bylaws and Constitution as authorizing contractual voting by the overall bargaining unit of an employer. The Union argues that it determined the best method of contractual voting was by the overall bargaining unit to whom the offer was made.

The Union asserts that on July 1, 1999, a membership meeting of Local 30's municipal members was held. The members were advised that the proposed agreement would be voted on as one agreement for all five titles "based upon the manner in which this proposal was submitted by the [City]." The Union asserts that a meeting of the Negotiating Committee and City Shop Stewards was held on June 7, 1999, where they were again advised that the City proposal would

be voted on as one agreement by all five titles because of the manner in which the proposal was submitted by the City. The Union further asserts that it is the Local, not the Shop Stewards or the Negotiating Committee, that determines if a contract proposal goes to the membership for a vote, and the Local decided in good faith that it should.

The Union further states in its sur-reply that the survey conducted by Local 30 in 1996 was of all five titles of the Local 30 municipal membership and the results of the survey were that the municipal membership first wanted the benefits to be equalized among the five titles and second wanted the wages to be increased. According to the Union, the Local 30 municipal membership was surveyed in 1998 after the City offered Local 30 the Citywide package of wage increases. The package was rejected in that survey by the City membership and Local 30 was told by the membership to go back to negotiations for benefits and wages. Prior to April 20, 1998, Local 30 had attempted to purchase annual or sick leave by waiving a portion of retroactive wage increases, however, the City rejected it. The Negotiating Committee was advised at the April 20, 1998 meeting that the trading of retroactive wage increases for annual leave and sick leave was attempted by Local 30 but not viable and rejected by the City.

The Union argues that the Petitioner's benefit improvements of five vacation days a year, twelve sick leave days a year, jury duty, bereavement leave, and one additional holiday are sizable improvements. Similarly, an increase in annuity by $2.13 per hour is a major improvement.

The Union also states that at the time of the June 23, 1999 meeting, the ratification vote ballots had already been mailed out to the membership and the Senior Stationary Engineers at the

meeting were advised that they were free to vote "no" if they opposed the agreement and to lobby their fellow members to vote "no."

Discussion

A threshold issue is presented concerning our jurisdiction to consider allegations related to the terms of a Comptroller's Determination under §220 of the State Labor Law. Section 12-307(a)(1) of the NYCCBL provides that, "with respect to those employees whose wages are determined under section two hundred twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section." Recognizing that the Comptroller administers the bargaining provisions of §220 of the State Labor Law, this Board will not exercise jurisdiction to review the terms of a Consent Determination. We will, however, exercise our exclusive authority to consider Petitioner's claims to the extent that they involve allegations of a violation of the NYCCBL.[4]

Petitioner alleges that the Union violated its duty of fair representation when it asked five different titles to vote on one Consent Determination. The pivotal issue in determining the existence of a breach of the duty of fair representation is whether the union acted arbitrarily, discriminatorily, or in bad faith in the negotiation, administration or enforcement of a collective bargaining agreement.[5] It has long been held that, absent a showing of intentional and hostile discrimination, a union does not breach its duty of fair representation simply because a

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[4] *Melvin Shapiro v. Dept. Of Sanitation, City of New York and District Council of New York City United Brotherhood of Carpenters and Joiners of America,* Decision No. B-9-86 at 12.

[5] *Kiah Miller v. Sewage Treatment and Senior Sewage Treatment Workers, Local 1320,* Decision No. B-21-94 at 18.

negotiated bargain favors one group of employees over another or because all the employees in the unit are not satisfied with the outcome.[6] The duty to represent all employees impartially does not necessarily prevent a union from making a contract that is disadvantageous to some members of the unit in relation to others. Consequently, the existence of contract terms that affect individual employees differently does not mean that the bargaining agent has failed to meet its legal obligations, since the Union is allowed considerable latitude in this respect.[7] The central question is whether the bargaining representative has acted in bad faith — a determination that essentially must be made according to the facts in a particular case.[8]

After evaluating the record, it appears that the leadership of the Union believed that it was acting in its members' best interest when it presented one Consent Determination to its membership for ratification. The Union explains that the municipal membership advised the Union that it wanted there to be less disparity between the titles and in order to accomplish this the Union negotiated all five titles at the same time. As stated above, a union does not necessarily violate the duty of fair representation because it negotiates a contract that is disadvantageous to some members of the unit and we see no legal basis that would support a different outcome here because the members belong to two separate units. Furthermore, the Union believed that the City, in presenting its offer as one Consent Determination, was acting in good faith as well. The City explained that its reason for doing so was to equalize benefits

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6 *Shapiro,* Decision No. B-9-86 at 17.

7 *Miller,* Decision No. B-21-94 at 18-19.

8 *Id.* at 19.

among the five titles, to set up a fair promotional wage progression through the titles, and to equalize wages in the Oiler and Plant Maintainer titles. Since the offer was made by the City in the form of one Consent Determination for all five titles and in the Union's view the reasons cited by the City were not arbitrary, capricious, or discriminatory, Local 30 sent the offer to the entire municipal membership for ratification in the manner it was offered.

The Petitioner has not demonstrated that the Union discriminated against him or against any minority interest when it presented its members with one Consent Determination that was more favorable to certain titles than others. It is not our task in determining a question of fair representation to evaluate or to pass judgment upon the business decision of a union in presenting a contract for ratification.[9] There is no evidence that the Union acted in a way that was arbitrary or improperly motivated. The Petitioner's allegation that his vote was watered down because all titles voted together as opposed to separately does not indicate unlawful discrimination. The Union explains that the membership asked that there be less disparity between the titles and the Union negotiated accordingly. Even though the titles had voted separately in the past, the record shows that voting by title occurred where the wages and benefits for the titles had been negotiated separately. Here, the Union and the City negotiated for the five titles together, and the resulting proposed Consent Determination was presented to all five covered titles for ratification. We find no evidence that the Union acted in a way that was arbitrary, improperly motivated, or in bad faith.

Furthermore, the circumstances under which membership ratification is required are not

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[9] *Shapiro,* Decision No. B-9-86 at 18.

defined by the NYCCBL, but constitute a matter internal to the union. We have previously held that the duty of fair representation does not extend to internal union affairs unless the matters complained of affect terms and condition of employment or have an effect on the nature of the representation accorded employees by the union.[10]

In conclusion, we find that the record contains no evidence that Local 30 displayed intentional or hostile discrimination against the Petitioner or other similarly situated employees, or that the Union's leadership acted in bad faith, or in a way that was arbitrary or improperly motivated. Accordingly, we shall dismiss the improper practice petition.

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 be, and the same hereby is, dismissed in its entirety.

Dated: June 27, 2000
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

[10] *Id.,* Dec. No. B-9-86 at 18.

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER