L. 371, SSEU v. DOH, 65 OCB 14 (BCB 2000) [Decision No. B-14-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371

Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF HEALTH

Respondent.

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Decision No. B-14-2000
Docket No. BCB-1477-92

DECISION AND ORDER

On March 19, 1992, the Social Service Employees Union, Local 371 ("Local 371" or "Union") filed an improper practice petition against the New York City Department of Health ("DOH" or "City"), alleging that an improper practice was committed when DOH discriminated against, refused to bargain collectively and interfered with members of Local 371, in violation of the New York City Collective Bargaining Law ("NYCBBL") §§ 12-306(a)(1), (3) and (4).[1] The

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[1] Section 12-306(a) of the NYCCBL provides in relevant part:
Improper practices; good faith bargaining. a. 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 section 12-305 of this chapter;

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(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization;

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(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

(continued...)

City filed an answer on May 25, 1992, and on June 11, 1992, the Union filed its reply. On September 24, 1996, the Union served a *subpoena duces tecum* on the City requesting records regarding various personnel actions taken at the Bureau of Maternity Services and HIV Program Services. During a conference in March 1997, at which the Trial Examiner and attorneys for both parties were present, the Union's attorney informed the Trial Examiner that he had issued a *subpoena duces tecum* and that DOH had failed to produce the requested documents. By letter dated March 20, 1997, the Trial Examiner asked DOH to produce the documents by May 1, 1997. The documents were never produced and the Union's attorney did not move to compel DOH's compliance with the subpoena.

On April 16, 1998, the New York City Board of Collective Bargaining ("the BCB"), issued Decision No. B-12-98 in which it dismissed the improper practice petition (the "petition") filed by the Union.[2] On April 27, 1998, the Union filed with the BCB an "appeal" of the Board's Decision and Order dismissing the improper practice petition. Shortly thereafter, on May 18, 1998, the Union filed an Article 78 petition in Supreme Court seeking an order vacating Decision No. B-12-98. By letter dated April 30, 1998, the OCB Trial Examiner assigned to the case stated that the Union's "appeal" would be treated as a motion for reconsideration. On July 17, 1998, the City filed a memorandum in opposition to the Union's motion for reconsideration.

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[1](...continued)
employees.

[2] The decision stated, "In the absence of any evidence or argument that the members of Local 371 were being discriminated against, interfered with, restrained or coerced, or that DOH refused to bargain collectively in good faith, within four months of the filing of the petition herein, we must dismiss the petition as time-barred, pursuant to RCNY §1-07(d)."

By letter dated September 29, 1998, the Board denied the Union's motion for reconsideration.

On April 14, 1999, Hon. Helen E. Freedman granted the Union's Article 78 petition "to the extent that the matter [was] remanded for a preliminary hearing concerning the timeliness of the IPP, with the burden of demonstrating timeliness on the petitioner." Accordingly, on November 10, and November 17, 1999, hearings were held on the foregoing issue. The submission of post-hearing briefs was completed on December 17, 1999.

BACKGROUND[3]

It is asserted that, on June 30, 1991, the City of New York instituted budget cuts affecting the budgets and operations of DOH and specific agencies therein: the Bureau of Maternity Services,[4] which operated an Infant Mortality Initiative Program ("IMI"), a Woman's Health Line and an Adolescent Parenting Training Program, and the Commission on Disease Intervention, which operated the Bureau of HIV Program Services ("BHPS"). Individuals whose positions were eliminated, due to the budget cuts, were redeployed or offered other jobs to the extent possible, in accordance with the Civil Service Law ("CSL") and the Citywide Agreement ("Agreement") between the City and the Union. Some individuals were rehired into different titles based on their qualifications. The City was unable to redeploy all of the individuals.

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[3] The background information herein is derived solely from information submitted by the City in its answer. The Union supplied no information in this regard in its petition; its reply denied knowledge or information sufficient to form a belief as to the truth of the allegations and assertions offered by the City, put forth in this Background section.

[4] It is asserted that prior to June 30, 1991, the Bureau of Maternity Services was operating with a budget of $7.8 million, and after that date the budget was cut by $7.1 million.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that DOH replaced Local 371 employees with permanent appointments in the noncompetitive civil service titles of Community Coordinator and Community Associate in the Department's BHPS unit with employees holding permanent or provisional appointments in the competitive civil service titles of Public Health Educator and Senior Public Health Educator, both of which are represented by Local 237, International Brotherhood of Teamsters ("Local 237").

The Union also contends that members having attained:

i) permanent appointments in the noncompetitive civil service titles of Community Associate and Community Coordinator;

ii) provisional appointments in the competitive civil service title of Assistant Community Liaison Worker;

iii) permanent appointments in the competitive civil service titles of Community Liaison Worker and Senior Community Liaison Worker, in the Department's Maternity Services Unit,

were replaced with employees that held permanent or provisional appointments in the competitive civil service titles of Public Health Advisor and Senior Public Health Advisor, both of which are represented by Health Services Employees Local 768 ("Local 768").

The Union argues that there were no discussions or negotiations regarding the above-mentioned replacements "because of the Department's preference to employ persons in Local 768 [and Local 237]." Therefore, the Union claims that DOH has:

i) discriminated against the Union in order to discourage membership and participation therein in violation of NYCCBL §12-306(3);

ii) interfered with, restrained or coerced employees in the exercise of their rights guaranteed by NYCCBL §12-305 in violation of NYCCBL §12-306(1); and

iii) refused to bargain collectively in good faith, in violation of NYCCBL §12-306(4).

In its post-hearing brief, the Union argues that on September 24, 1996, it served a subpoena on the City requesting certain records "to substantiate its claim that respondent's hiring of employees in the Local 237 and Local 768 titles occurred during the relevant period."[5]

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[5] The following information was requested in the Union's subpoena:
1. All records reflecting the name, civil service title, and starting and ending dates of employment of each person employed in respondent's Bureau of Maternity Services and Bureau of HIV Program Services, from January 1, 1991 to the present.
2. All records reflecting the redeployment of any person holding a position in respondent's Bureau of Maternity Services Infant Mortality Initiative Program or Bureau of HIV Program Services from June 30, 1991 to the present, including for each such person:
 a. his/her name;
 b. position redeployed from;
 c. position redeployed to; and
 d. date of redeployment.
3. All records reflecting the layoff/termination of any person holding a position in respondent's Bureau of Maternity Services Infant Mortality Program or Bureau of HIV Program Services, from June 30, 1991 to the present, including for each such person:
 a. his/her name;
 b. the position held;
 c. the date of layoff/termination;
 d. the reason for layoff/termination.
4. All records reflecting the hiring of any person to a position in respondent's Bureau of Maternity Services Infant Mortality Initiative Program or Bureau of HIV Program Services from June 30, 1991 to the present, including for each such person:
 a. his/her name;
 b. the position to which hired;
 c. the date of hire;

(continued...)

The Union maintains that these documents requested from the City were needed to help prove that its claims are timely. The Union asserts that the City, in response to the Union's request to produce such documents, claimed that it did not have personnel records of the staff hired in the BHPS or IMI Programs during that period. Therefore, the Union argues that "[u]nder these circumstances,...it is extremely unfair for petitioner to be required to demonstrate the dates of such hirings."[6]

In its post-hearing brief, the Union emphasized the testimony of Darryl Henderson ("Henderson")[7] who testified that in the summer of 1990, DOH employees at Maternity Services were laid off. Henderson stated that "just about everybody in the office" was laid off. Henderson also testified that, based upon conversations he had with people who used to work with him, he knew that among the employees being hired as Public Health Advisors ("PHA") in the Maternity Services Unit during the period from mid-November 1991 to mid-March 1992, some were previously employed in L. 371 represented titles. Henderson maintained that these

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[5](...continued)

d. whether still employed; if not, date of termination.

[6] On the issue of timeliness, the Union also argues that the respondent should bear the burden of establishing the untimeliness of the filing of the petition, rather than it being the burden of petitioner to prove that it is timely. The Union states that "[i]t is well settled in other legal contexts that the burden of proof of establishing the untimeliness of a claim is upon the person asserting the defense." In support of its position, the Union cites *Brush v. Olivo*, 438 N.Y.S.2d 857 (2d Dept. 1981); *Doyon v. Bascom,* 326 N.Y.S. 2d 896 (3d Dept. 1971).

[7] Darryl Henderson is a Community Associate at DOH. He previously worked in the Bureau of Maternity Services as an Assistant Community Liaison Worker ("ACLW") from 1988-1990. Mr. Henderson worked at the Bedford-Stuyvesant location with approximately 12 or 13 other ACLW's.

people explained to him what their titles were and what work they were doing at present, which Henderson claimed was "pretty much the same thing they were always doing."[8]

The Union also cited the testimony of their other witness, Garry Dodson ("Dodson"), Assistant Director of Labor Relations at the DOH in support of its argument that the burden to demonstrate the untimeliness of the claim should be shifted to the employer. Dodson stated that he contacted an employee in DOH's personnel department to conduct a search for the documents listed in the Unions subpoena and was informed that DOH did not have any of the requested documents.[9]

City's Position

The City maintains that the Union's petition is untimely. It argues that Title 61, §1-07(d) of the Rules of the City of New York (hereinafter "OCB Rules") clearly states that an improper practice petition must be filed with the Office of Collective Bargaining within four (4) months of the alleged violation of the NYCCBL. The City points out that there is no date mentioned in the petition as to the occurrence of the alleged improper practice. Moreover, the City asserts that none of the relevant positions in Maternity Services or BHPS that had originally been filled by a member of Local 371 has been replaced with individuals from Locals 237 or 768 within four

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[8] Mr. Henderson could remember the name of only one PHA, Henry Brown, who was hired at Maternity Services. Mr. Henderson did not know the date of Mr. Brown's hire as a PHA, nor did he know the dates of any other PHA's hired in Maternity Services after Local 371 layoffs.

[9] Following Dodson's testimony, both parties agreed that the City would provide the Union with an affidavit from an employee of DOH's personnel department to confirm that a search for the subpoenaed documents was indeed conducted. The affidavit was provided by the City on December 7, 1999.

months of the filing of the instant petition. In its post-hearing brief, the City claims that the Union did not supply any evidence of the dates any Local 237 or 768 employees were hired. Furthermore, the City argues that "the Union's witness could only recall one PHA's name that was even hired by DOH" and that by not having supplied names and dates, the Union has "absolutely not met its burden of proof."

In regard to the records requested in the Union's subpoena, the City argues in its post-hearing brief that "[i]t makes no sense to wait approximately four and a half years later to request documents relating to timeliness." The Union further states that "the Union should not be rewarded for its inaction, especially since the City raised a timeliness defense four and a half years before the Union's request."[10] Thus, the City argues that the "Union's failure to obtain the documents they requested is their own fault" and the failure of the City to produce the documents should have no impact on the Board's timeliness decision. The Union has not met its burden to prove timeliness in the preliminary hearing and the case must be dismissed.

The City also claims that its actions in this matter, including those challenged by the Union, are sanctioned by the management rights clause contained in NYCCBL §12-307(b),[11] and

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[10] In its post-hearing brief, the City refers to its answer in which it emphasized that no Local 371 employee was replaced by a member of Local 237 or 768 within the four months preceding the filing of the petition. The City stressed that "[a]t that point it was incumbent on the Union to rebut the City's timeliness defense in its Reply." The City points out that the Union put forth no arguments whatsoever regarding timeliness in its reply. At that time, the Union chose neither to rebut the City's defense nor to subpoena DOH documents.

[11] Section 12-307(b) of the NYCCBL provides in pertinent part:
Scope of collective bargaining; management rights.
b. It is the right of the city, or any other public employer, acting through its
(continued...)

that these rights are unfettered by the collective bargaining agreement. The City states that the Union's claim that its members were being replaced with members of Locals 237 and 768 arises from the fact that DOH could not redeploy those members of Local 371 that worked at the IMI in the same positions.[12] The City views this as an incidental detrimental effect occurring due to the abolition of those positions, and further claims that the City's objective was "to be fair to all laid off workers, to give workers the opportunity to provide city service again, in titles that required similar efforts, skills and experience for a comparable salary."

The City maintains that the Union has failed to allege facts sufficient to satisfy a claimed violation of §12-306(a). The City cites Decision No. B-43-80 for the proposition that employer decisions relating to government operations "are so peculiarly matters of management

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> agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

[12] The City states that on or about July 17, 1991, the City allocated $3.56 million to reinstate four of the original nine IMI sites affected by the budget cuts. IMI was reconfigured to provide cost effective service and to satisfy certain minimum funding standards in order to qualify for federal funding. The services that were discontinued as a result of the reconfiguration were those performed by Assistant Community Liaison Workers and Community Liaison Workers.

prerogative that they would never constitute violations of 12-306(a).[13] The City emphasizes that the demise of the original IMI Program and the later emergence of a "reconfigured IMI" was the direct result of a loss of funding. Therefore, "any movement of staff from one budget line to another was the natural result of massive cuts, implementation of the City's redeployment plan and recognition of the civil service rights." The City insists that the Agency's sole motivation in this matter was to provide the public with the best service after the budget cuts, while retaining as many original employees as possible; DOH was not acting out of anti-union animus.

DISCUSSION

We have consistently held that the four-month limitations period prescribed in § 1-07(d) of the OCB Rules bars consideration of untimely allegations in an improper practice petition.[14] The petition, which the Union filed on March 19, 1992, does not allege that any member of Local 371 had been replaced by members of a different union within four months preceding filing of the petition. In fact, the Union's petition does not make reference to a single date on which the

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[13] The City also refers to Decision No. B-47-89 which stated that "even if the Union's projections are assumed to be sound, in order to establish improper motivation, the Union must also show that the City knew that its revision of the job specifications would adversely affect PAA's representational rights, and it must also show that the negative impact was a motivating factor behind the City's decision to make the revisions."

[14] Section 1-07(d) of the OCB Rules provides, in relevant part, that:

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 §12-306 of the statute may be filed with the Board within four (4) months thereof...

alleged replacement of members of Local 371 occurred.[15]

The City, in its answer, alleges that the budget cuts that resulted in a loss of positions went into effect on June 30, 1991. The City asserts that shortly thereafter, on July 17, 1991, due to a partial restoration of funding, the IMI program was reconfigured which caused IMI staff to be redeployed to positions in areas outside of IMI or in different titles within IMI. The City also contends that the BHPS program did not undergo any program or staff changes nor did it experience any staff layoffs. The City maintains that at no time after November 1, 1991, which was greater than 4 months prior to the filing of the petition, were there any changes outside of ordinary attrition and replacement of staff. In its reply, the Union did not correct or contradict any of the dates offered by the City.

The Union argues that it had issued the *subpoena duces tecum* in an effort to ascertain the dates that its members were allegedly discharged and replaced and that the City's failure to provide them with the information unfairly prevented them from proving timeliness. We do not agree that the Union was disadvantaged in such a manner. The Union filed the improper practice petition on March 19, 1992 and first served a subpoena on the City on September 24, 1996. We find that after the City raised the issue of timeliness in its answer, the Union had a responsibility at that time to gather those documents that were necessary to establish that the petition was indeed timely. Even after serving the City with a subpoena years later, when the Union saw that the documents were not forthcoming, the Union could have sought enforcement of it pursuant to

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[15] To this extent, the petition failed to comply with the pleading requirements of §1-07(e)(3) of the OCB Rules, which in the form in effect at the time the petition was filed, required that the petition specify, inter alia, the relevant dates.

§2308 of the Civil Practice Law and Rules ("CPLR").[16]

The only evidence put forth by the Union regarding the alleged rehirings was the testimony of Darryl Henderson. Mr. Henderson's testimony was that employees, including some former L. 371 members, were being hired as PHAs in the Maternity Services Unit during the period from mid-November 1991 to mid-March 1992 based upon conversations that he had with people with whom he used to work. He further testified that the work the former L. 371 members were performing was the same work they had been doing before.

We find the testimony of Mr. Henderson to be insufficient to establish that the acts of which the Union complained occurred within four months of the petition filing. Mr. Henderson could only recall the name of one PHA, Henry Brown, hired at Maternity Services. He did not know the date Mr. Brown was hired, nor did he know the dates any other PHA was hired. He did not identify any other former co-worker upon whose statement he based his testimony. Furthermore, Mr. Henderson neither saw any documents concerning these PHA hiring dates, nor did he speak with DOH management officials regarding the hiring dates. In summary, the testimony of Mr. Henderson was vague, based on hearsay, and not sufficiently probative to establish that the petition was timely filed. Moreover, no witness with personal knowledge of the facts was called to testify in support of the Union's claim.

In conclusion, we find that the City's defense of untimeliness was based upon specific

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[16] Section 2308 of the CPLR provides in relevant part:

(b) Non-judicial. (1) Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance....

factual allegations set forth in its answer, constituting a *prima facie* showing that the petition was not filed within four months of any relevant act. To this day, the Union has failed to allege any probative facts to rebut those allegations. By its terms, the court's ruling did not relieve the Union from its burden to prove timeliness.[17] Accordingly, the Union's petition is untimely and is dismissed in its 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 docketed as BCB-1477-92, 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

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

[17] *Supra*, at p. 3

RICHARD A. WILSKER
MEMBER