L. 371, SSEU v. ACS, 65 OCB 37 (BCB 2000) [Decision No. B-37-2000 (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-

NEW YORK CITY ADMINISTRATION FOR
CHILDREN'S SERVICES
Respondent.

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Decision No. B-37-2000
Docket No. BCB-2082-99

DECISION AND ORDER

On August 19, 1999, Social Service Employees Union, Local 371 ("Union" or "L. 371") filed a verified improper practice petition against the New York City Administration for Children's Services ("ACS"). The petition alleges that ACS violated §12-306(a)(1)[1] of the New York City Collective Bargaining Law ("NYCCBL") when ACS refused to allow the Union access to inspect its 7 Laight Street premises after the Union notified ACS of its intent to inspect on a certain date and time.[2] The City filed a verified answer on October 6, 1999 and the Union

[1] Section 12-306(a)(1) of the NYCCBL provides:
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;

[2] The Union alleges that it was in compliance with the May 25, 1984 Memorandum from the Office of Municipal Labor Relations. The Memorandum provides in relevant part:

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Subject: Access to City Premises to Union Representatives Performing Safety Inspections

filed a verified reply on July 31, 2000.

BACKGROUND

At the time that L. 371 filed the improper practice petition, there was an ongoing arbitration proceeding between ACS and the Union regarding health and safety at the 7 Laight Street facility.[3] In preparation for arbitration, the Union wished to inspect the 7 Laight Street facility and attempted to comply with the City's May 25, 1984 Memorandum regarding safety inspections.[4] Pursuant to the Memorandum, on April 6, 1999, the Union notified ACS by letter that it would be conducting a health and safety inspection on April 30, 1999 at 3:00 p.m. at its facility. The letter stated that the inspection was in preparation for arbitration. By letter dated April 20, 1999, Carol Jordan, Deputy Administrator of ACS, informed the Union that management would not be available at 3:00 p.m., but suggested, instead, that the inspection take

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> We are herein setting forth a policy regarding access to City premises for safety inspections by Union representatives while maintaining the safety and efficiency of City operations...
>
> ...a union representative who wishes access to City premises for safety inspection in areas no open to the public, shall give notice to the Agency Safety Coordinator. Such access shall then be permitted to take place, unless at the time requested the safe and efficient operation of the Agency would be disrupted. In such case, the Agency Labor Relations Office should be notified and the inspection should be scheduled at the earliest time possible.
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> It is recommended that the safety officer or a designee, if available, accompany the Union representative on such inspections.
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[3] The subject of the arbitration was whether ACS violated Article XIV § (2)(a) of the Citywide contract. Article XIV § 2(a) provides:

Article XIV:	Occupational Safety and Health
Section (2)(a):	Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.

[4] *See supra* note1.

place at 10:30 a.m. or 1:00 p.m. on April 30, 1999.

According to the City, following the April 20, 1999 letter, Elliot Sussman, a Hearing Officer at ACS's Office of Labor Relations, had approximately two conversations with the Union in which Arnie Goldwag, the Union's Health and Safety Coordinator, suggested as an alternative a 2:30 p.m. inspection. ACS contends that it could not agree to that time because ACS's facilities representative who is essential to on-site visits was not available at 2:30 or 3:00 p.m.

On April 30, 1999, Goldwag and Edward Olmstead, the Union's consultant, arrived at 7 Laight Street at 3:00 p.m. and were denied entrance. The Union subsequently filed the instant improper practice petition.

POSITIONS OF THE PARTIES

Union's Position

ACS and L. 371 were in the midst of arbitration proceedings in which the Union alleged that the City failed to provide "an adequate, clean, structurally safe and sanitary working facility" for its employees assigned to the 7 Laight Street facility. Included in the grievance was an allegation of insufficient outside air and overcrowding.

According to the Union, 7 Laight Street is ACS's Emergency Children's Services facility. Children are typically brought to the facility at the end of the day. Thus, the facility is generally empty early in the day and is quite busy in the late afternoon. On April 6, 1999, Goldwag notified ACS that the Union wanted access to the facility for an inspection in preparation for the May 27, 1999 arbitration. In its reply, the Union states that the reason Goldwag specified that the inspection should take place at 3:00 was because at that time of day the facility would be in full

operation with full staff and children.

The Union contends that on April 30, 1999, Goldwag and Olmstead arrived at 7 Laight Street to conduct an inspection. The Union alleges that they were informed that they would not be allowed access to the facility to conduct the inspection and that they would be arrested if they did not leave the building immediately. The Union maintains that faced with the threat of arrest, both men left the premises.

The Union further contends that on December 16, 1999, Arbitrator Stuart Elliot Bauchner issued an Opinion and Award in the arbitration proceeding and found that ACS's facility failed to satisfy the standards of Article XIV, § 2(a) of the Agreement.

The Union argues that it complied with the City's policy of giving advanced notice before performing an inspection and, therefore, the ACS violated 12-306(a)(1) of the NYCCBL when it refused to grant the Union entry to the premises.

City's Position

The City asserts that the Union has failed to allege facts sufficient to support a violation of 12-306(a)(1). The City argues that ACS has met its obligation under the May 25, 1984 Memorandum and that ACS is not required to give access to its premises for a safety inspection if "at the time requested the safe and efficient operation of the Agency would be disrupted." The City claims it told Goldwag that an inspection on April 30, 1999 at 2:30 or 3:00 p.m. would interfere with the safe and efficient operation of ACS facilities, but it was willing to have the inspection at 10:30 a.m. or 1:00 p.m. on April 30.

Furthermore, the City contends that since no ACS facilities representative was available

at 2:30 or 3:00 p.m., no one could have evaluated or corrected any problems revealed during an inspection. The City argues, moreover, that if the inspection started as late as 2:00 or 2:30 p.m., it would have disrupted employees who handle emergency placements in the late afternoon. ACS argues that 4:00 p.m. is the busiest time for the pre-placement and emergency service unit and it would be unreasonable to hold an inspection that would run into the 4:00 time period.

The City further argues that PERB has applied a balancing test to decide the whether union officers have access rights to unit employees while on the job. The City argues that in the present case ACS's need to run its programs in a safe and efficient manner without disruption is reasonable.

DISCUSSION

The Petition alleges that ACS violated §12-306(a)(1) when it refused to allow the Union's inspectors into its facility after the Union, in compliance with the City's 1984 Memorandum, gave ACS advanced notice that it would be sending inspectors to its 7 Laight Street facility on April 30, 1999 at 3:00 p.m. The Union argues that it has the right to perform safety inspections in connection with a pending arbitration case and the City argues that 3:00 p.m. would have been disruptive to its operations.

PERB case law is instructive for its analysis of this issue. In *Charlotte Valley Central School District*,[5] PERB establishes a balancing test to determine whether or not a union has the right to access an employer's property. In that case, PERB states that "In some circumstances, it may be necessary for us to weigh the needs of the organization against the impact of the demand

[5] 18 PERB ¶ 3010 (1985).

upon the property rights of the employer."[6] In *Public Employees Federation*,[7] PERB reiterates its balancing test and states that its decisions on unions' access rights "reflect a balance between the basic right of an employer to control its property and the needs of the union officer and the unit employees."[8] PERB has also stated that "the duty of the employer to provide necessary information may include permitting a representative of the employee organization to inspect facilities."[9] Applying such a balancing test in the instant case, it seems that the Union's need to inspect the facility in preparation for an arbitration on a health and safety matter may very well outweigh the City's right to control its property.

Upon review of the record, however, we find no evidence that the Union notified ACS that the particular time of day was essential to the inspection. Without notice, ACS cannot be faulted for denying the Union's request that the inspection take place at 3:00 p.m. nor can it be faulted for offering, instead, to permit the inspection at two earlier times on the same day. PERB has explained that the Taylor Act entitles an employee organization to such reasonable access to the public employer's property as is needed to investigate a grievance, "subject to a proper showing of need or relevant contractual provisions."[10] In *Deputy Sheriff's Benevolent Ass'n of*

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[6] *Id.* at 3024.

[7] 24 PERB ¶ 4532 *aff'd* 25 PERB ¶ 3016 (1992) .

[8] *Id.*

[9] *City School District of the City of Albany*, 6 PERB ¶ 3012 (1973) at 3030.

[10] *Id.* at 3031; *see also Deputy Sheriff's Benevolent Ass'n of Onondaga County,* 23 PERB ¶ 4591 (1990) at 4711.

Onondaga County,[11] the ALJ stated that since the Petitioner in that case failed to provide evidence that he made an access request to the employer, "setting forth the reason for his visit or his need to inspect," and since there was no contractual access provision, the charge would be dismissed. Similarly, in the present case, we find that there is no evidence of a contractual access provision nor is there any evidence that the Union explained to ACS the reason it needed to inspect the facility at that particular time.

In its reply, the Union explains that it requested a 3:00 p.m. inspection because one of the issues at arbitration was whether the facility was overcrowded. The Union contends that the facility begins to get crowded at approximately 3:00 p.m. and an inspection during the early part of the day would have been meaningless. While the Union alleges that in Goldwag's April 6, 1999 request letter it explained its reason for the 3:00 inspection to ACS, the record does not indicate that ACS received such explanation. The Union's April 6, 1999 letter to ACS states:

> This letter is to advise you that on Friday April 30, 1999 at 3:00 p.m. Edward Olmsted, CIH, CSP and Arnie Goldwag, Health & Safety Coordinator, will be conducting a Health & Safety inspection at ECS, 7 Laight Street, N.Y. This inspection is in preparation for arbitration hearing scheduled for May 27, 1999 and a grievance hearing for the 6th floor.
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> This notification is in accordance with the attached procedure issued by the Office of Municipal Labor Relations and Citywide Occupational Safety and Health Programs.

The letter merely states that the inspection is "in preparation for arbitration"[12] and does not

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[11] 23 PERB ¶ 4591 (1990).

[12] At arbitration, the Union alleged over sixty health and safety violations. Thus, simply stating that the "inspection is in preparation for arbitration" does not convey that the Union was specifically examining the overcrowding issue.

explain the need for an inspection to take place at that particular time.

Furthermore, whether or not the Union complied with the City's 1984 Memorandum is not dispositive of the case. When ACS ascertained that an inspection at the time requested would disrupt its operation, it did not attempt to deny the Union of its inspection nor did it cause undue delay. Rather, ACS offered two earlier times on April 30, 1999 for the inspection to take place.

Absent evidence that the employer was on notice of the basis for the Union's desire to inspect at a particular time, we find that the Union has not sustained its claim that ACS violated § 12-306(a)(1) of the NYCCBL when it refused the Union access to inspect its facility at 3:00 p.m. on April 30, 1999.

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: October 10, 2000
New York, New York

MARLENE A. GOLD
CHAIR

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