L. 1508, DC 37 v. Dept' of Parks and Recreation, 67 OCB 11 (BCB 2001) [Decision No. B-11-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
DISTRICT COUNCIL 37, AFSCME AFL-CIO, on behalf of its affiliated LOCAL 1508,	:	
	:	Decision No. B-11-2001
Petitioner	:	Docket No. BCB-2150-00
	:	
-and-	:	
	:	
NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,	:	
Respondent.	:	

DECISION AND ORDER

District Council 37 on behalf of Local 1508 ("Union") filed a verified improper practice petition against the New York City Department of Parks and Recreation ("City" or "DPR"). The petition alleges that DPR violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL") by systematically failing to process Local 1508 grievances regarding transfers. For the reasons stated below, we grant the Union's petition.

BACKGROUND

In May 2000, DPR executed several intra-borough transfers of supervisors. Jose Sierra, Director of District Council 37's Blue Collar Division, contacted DPR Labor Relations Director Joe Bernstein and opposed the transfers arguing that in violation of §8 of the DPR Working Conditions Agreement, DPR did not take into account employees' seniority or transfer requests

before making the transfers.[1] Sierra also argued that DPR did not meet with the Union prior to the transfers in violation of the Agreement. Bernstein responded that he would not reverse the transfers because the Agreement applies to inter-borough transfers and the grievants are complaining of intra-borough transfers.

The Blue Collar Agreement contains a four-step grievance procedure in which a grievance is first heard at Step I by an employee's supervisor, at Step II by the agency, and at Step III by the New York City Office of Labor Relations. The procedure culminates in binding arbitration under the auspices of the New York City Office of Collective Bargaining.

Local 1508 filed Step I grievances concerning the transfers on behalf of nine of its members. The Union filed all but one of the grievances on June 6, 2000.[2] DPR did not respond to the grievances at Step I. The Union then submitted the grievances at Step II on June 15, 2000. Again, DPR did not respond. On July 6, 2000, the Union submitted the grievances at Step III.

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[1] Section 8 of the DPR Working Conditions Agreement provides in pertinent part: 8. Transfer Policy- Any employee serving in a permanent position may request a transfer within title to another location by making written application to the Personnel Officer. The applications shall be placed on file in accordance with seniority in a transfer registry, copies of which shall be available in all Borough Offices.... Voluntary transfers shall be made on the basis of seniority in title. Transfers based upon responsibility and ability to perform the work required can be made after notice to and discussion with th Union. The DPR reserves the right to make a transfer for the good of the agency, after notice to and discussion with the Union. Transfer will not be made for arbitrary and capricious reasons.

Involuntary transfers shall be made on the basis of least seniority in title ... In filling available vacancies, transfer requests shall have priority over the assignment of new employees.

[2] On April 15, 2000, two members filed a grievance on behalf of all supervisors in the Bronx. The grievance was denied at Step I on April 20, 2000 and at Step II on June 6, 2000. The Step II hearing officer denied the grievance because it was "no longer relevant."

After receiving no response, the Union filed nine Requests for Arbitration on August 16, 2000.

The Union includes as exhibits photographs allegedly taken on August 16, 2000, at the DPR Office of Labor Relations. Two of the photographs are of signs affixed to office computers stating, "No transfer Arbitrations until June 1, 2001." A third photograph is of a button allegedly beside Director of Labor Relations Joe Bernstein's desk that states, "I'm a hard-working Union Buster." The City does not dispute the accuracy of the photographs.

The Union then filed the instant improper practice petition.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City has attempted to delay the processing of the transfer grievances in order to undermine the Union's case. This argument is bolstered by the fact that there are signs attached to the computers in the Office of Labor Relations stating, "No transfer arbitrations until June 1, 2001." Bernstein even told Anthony Mammalello, a union representative, that he would not schedule hearings for the cases. According to the Union, such an intentional failure to process the grievances is a violation of the grievance procedure. Michael Hook, President of Local 1505 of DC 37, gave Bernstein the union button that originally read, "I'm a hard-working _____." Members could fill in their title. The button beside Bernstein's desk was altered to say, "I'm a hard-working Union Buster." In addition, a list of the names of grievants who filed transfer grievances is prominently displayed in the office, and a "Wall of Fame" lists statements made by grievants during grievance hearings.

The grievance mechanism contemplates good faith on the part of both parties to resolve

disputes. The Union asserts that its ability to submit a grievance to the next Step if the employer does not respond in the specified time, does not give the DPR the right to ignore grievances altogether. Furthermore, the DPR Working Conditions Agreement covers both inter-borough and intra-borough transfers. Even if DPR believed that the Agreement deals only with inter-borough transfers, DPR may not disregard the grievances.

DPR's actions, the Union asserts, are "inherently destructive" of the Union's rights, and it does not have to establish that the City had an improper motive in order to prove an improper practice.

City's Position

The City argues that the Board of Collective Bargaining does not have jurisdiction to decide this case because it involves enforcing the terms of a collective bargaining agreement, and the grievances will be heard at arbitration. An employer does not commit an improper practice by failing to respond to a grievance because the Agreement provides that when a grievance is not heard within the specified time limit, the Union may invoke the next step of the procedure. The Union could invoke impartial arbitration when a Step III decision is not issued.

Further, the Union fails to establish a *prima facie* case of improper practice under the standards of the *Salamanca* test. The Union fails to establish a causal connection between protected activity and DPR's conduct.

According to the City, the Union has not included any probative evidence to support a conclusion that DPR, in violation of 12-306(a)(1), interfered with, restrained or coerced the employees in their exercise of their rights to form, join, assist or participate in Union activities.

Also, the City argues that it did not violate 12-306(a)(4) because the Union's allegations of refusal to bargain are speculative and conclusory. The button was merely a joke between Bernstein and the president of another Local. In addition, the signs in the Office of Labor Relations stating "No transfer arbitrations until June 1, 2001," represented a "reasonable projection" of the date when the grievances could be expected to be heard arbitration**.**

Furthermore, the Parks Working Condition Agreement relates only to inter-borough transfers and not intra-borough transfers, and, therefore, management had the right to transfer the grievants. Finally, DPR provided Step I and II decisions to two grievants who submitted a grievance on behalf of all supervisors in the Bronx. Since the remaining grievances stated identical claims, any response would have likely been identical.

DISCUSSION

Pursuant to § 12-306(a) of the NYCCBL:

> 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;
> ***
> (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;

In *Communication Workers of America, Local 1180 v. New York City Human Resources Administration,*[3] this Board, citing PERB's *Addison Central School District*,[4] recognized that "a refusal to process grievances which is of such magnitude as to constitute not merely a violation of a collective bargaining agreement, but also a repudiation of it, would present the basis for a

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[3] Decision No. B-58-87.

[4] 17 PERB ¶ 4566 (1984)*, aff'd* 17 PERB ¶ 3076 (1984).

finding of improper practice."[5] In *Addison*, PERB affirmed the ALJ's findings that the district "arbitrarily abandoned" the grievance procedure when the union was granted a hearing in only four of sixteen grievances, and the remaining grievances were either disposed of summarily or received no response.[6] In *Addison*, there was a contractually established grievance procedure requiring written responses to grievances as well as hearings at the Board of Education before grievances could be brought to arbitration. The ALJ stated that the District's actions constituted a failure to bargain in good faith, and that the District's "reckless, undefended and indefensible actions, wholly ignoring a quintessential aspect of the collective agreement and negating its existence constitutes a deliberate interference and restraint upon employee rights ...."[7]

In *Local 74, Service Employees International Union, AFL-CIO v. Monticello Central School District*,[8] PERB found that a school district failed to bargain in good faith when the "patterned behavior" of the Assistant Superintendent of Schools demonstrated "a refusal to meet with the employees and an unwillingness to discuss a pending grievance in good faith."[9]

In the present case, DPR failed to respond to at least eight transfer grievances at Steps I, II, or III of the grievance process. Signs stating "No transfer arbitrations until June 1, 2001," were placed in DPR's Office of Labor Relations as a reminder to employees not to process the

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5 Decision No. B-58-87 at 23-24.

6 17 PERB ¶ 4566 at 4629-30, *aff'd* 17 PERB ¶ 3076 at 3115.

7 *Id.*

8 21 PERB ¶ 4577 (1988), *aff'd* 22 PERB ¶ 3002 (1989).

9 22 PERB ¶ 3002 at 3006.

transfer grievances. We reject the City's argument that the signs served any legitimate purpose. Furthermore, whether or not DPR believed the grievances to be meritorious, the Department still had an obligation to comply with the grievance procedures prescribed in the Blue Collar Agreement. We find that the Department's refusal to process the transfer grievances was an attempt to frustrate the entire grievance process. We also believe that the notices posted in the DPR Office of Labor Relations and the button displayed beside Bernstein's desk, together with the refusal to process the transfer grievances, would have a chilling effect on union activity. Accordingly, DPR's actions constitute a repudiation of the collective bargaining agreement in violation of §12-306 (a)(1) and (4) of the NYCCBL.

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 filed by District Council 37 on behalf of its affiliated Local 1508 be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Parks and Recreation cease and desist from failing to process the grievances submitted by Local 1508; and it is further

ORDERED, that the New York City Department of Parks and Recreation remove indicia of anti-union animus from its Office of Labor Relations.

ORDERED, that the New York City Department of Parks and Recreation post the attached notice for no less that thirty days at all locations used by the Department for written communications with unit employees.

Dated: March 28, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
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:

All employees that the New York City Department of Parks and Recreation committed an improper practice by failing to process Local 1508, DC 37, grievances regarding transfers.

It is hereby:

ORDERED, that the New York City Department of Parks and Recreation cease and desist from failing to process the grievances submitted by Local 1508, DC 37; and it is further

ORDERED, that the New York City Department of Parks and Recreation remove indicia of anti-union animus from its Office of Labor Relations.

New York City Department of Parks and Recreation
(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.