OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

UNIFORMED SANITATION CHIEFS ASSOCIATION,

Petitioner,

Decision No. B-32-2001
Docket No. BCB-2196-01

-and-

CITY OF NEW YORK, OFFICE OF LABOR RELATIONS and NEW YORK CITY DEPARTMENT OF SANITATION,

Respondents.
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DECISION AND ORDER

The Uniformed Sanitation Chiefs Association ("USCA" or "Union") filed a Verified Improper Practice Petition alleging that the City of New York, the Office of Labor Relations, and the New York City Department of Sanitation (hereinafter collectively referred to as "City"), unilaterally changed its practice and refused to pay USCA members, upon retirement, an accrued lump sum payment for unused annual leave plus compensatory time and terminal leave that had accrued.[1] Because the Board finds that this alteration was a change in the *status quo* during a period of negotiations,[2] the petition is granted.

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[1] The Union claims that the City's actions violated §§ 12-306a(1), (3), (4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

[2] NYCCBL § 12-311d.

BACKGROUND

Prior to October 10, 2000, Department of Sanitation employees in the titles of General Superintendent II ("GS II") and General Superintendent III ("GS III") were not represented by a union. They were considered managerial and were covered by a modified version of the managerial pay plan applicable to uniformed employees. Upon retirement, employees in that managerial pay plan are entitled to a lump sum payment for their accrued, unused, annual leave, compensatory time, and "terminal leave" – an additional amount of time accrued by Sanitation employees. On October 10, 2000, the USCA was certified as the collective bargaining agent of employees in those titles, except for certain confidential employees.[3]

On October 23, 2000, several representatives of the Union met with representatives of the City. At this meeting, the City agreed that any bargaining unit members who had previously filed their retirement papers would be entitled to the lump sum payment for their accrued leave. The City advised the Union that the lump sum payment would be negotiable for those employees who had not yet filed their retirement papers. The Union asserts that at this meeting, the City recognized its obligation to maintain the *status quo* pending the completion of bargaining, but the City disagrees with this contention.

On October 31, 2000, the Union filed a Bargaining Notice pursuant to NYCCBL §12-311a(2). In the months following the October 23, 2000, meeting, the Union ascertained that at least one GS III wished to retire as soon as possible. The Union inquired if the lump sum payment would be available to that GS III, and the City responded that the leave would be paid in installments over

[3] Decision No. 4-2000.

time, consistent with the Citywide practice for Career and Salary Plan employees. Since then, other employees have indicated their desire to retire.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that § 12-307 of the NYCCBL requires the City to bargain over wages, hours, and working conditions. The duty to bargain over wages includes the duty to bargain over a lump sum payment based on accumulated or accrued annual leave, sick leave, or the number of years of service.[4]

The Union notes the City's argument that the employees received their lump sum payment when they were covered by the managerial pay plan but they can no longer receive those payments because they are now in collective bargaining. According to the Union, the contention is tantamount to saying that because the employees received their wages under the management pay plan and their leave benefits pursuant to the management time and leave rules, the employees are no longer entitled to their pay or benefits. This entirely ignores the *status quo* provisions of § 12-306a(5) and § 12-311d of the NYCCBL.

According to the Union, the City does not cite any case for its contention that the *status quo* provisions apply only when there is an expired collective bargaining agreement. By their own terms, § 12-306a(5) and § 12-311d of the NYCCBL require that the public employer "refrain from [any] unilateral changes in wages, hours, working conditions" during a period of negotiations. The City

[4] *Incorporated Vill. of Lynbrook and Lynbrook PBA*, 10 PERB ¶¶ 3065 and 3067, *aff'd.,* 48 N.Y.2d 398 (1979) (city violated Taylor Law by unilaterally discontinuing termination pay).

does not dispute that the Union filed a bargaining notice and that the parties are in negotiations. As of the filing of the reply, the parties have met to bargain over the unit agreement three times.

The GS II and GS III employees are uniformed employees who are not in the "career and salary" plan, as the City asserts, and are not covered by the terminal leave provisions of the Citywide Agreement.[5] Also, the City's discussion of *City of Salamanca*[6] is irrelevant because the Union complains of a unilateral change in a mandatory subject of bargaining. The City has refused to bargain collectively in good faith on matters within the scope of collective bargaining.[7] Refusal to pay the GS III in question, or any other GS II or GS III the lump sum payment also violates the NYCCBL because of its restraint or coercion of employees who sought and recently obtained representation by the USCA[8] and its discrimination against employees for becoming members of the USCA bargaining unit.[9]

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[5] The Union does not claim that the bargaining unit members are now covered by the Management Pay Plan, but the amount previously received as a lump sum is part of their compensation and may not be withdrawn unless the Union agrees.

[6] 18 PERB ¶ 3012 (1985).

[7] Section 12-306a(4) of the NYCCBL provides that it shall be an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining. . . ."

[8] Section 12-306a(1) of the NYCCBL provides that it shall be an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in § 12-305 of this chapter. . . ."

[9] Section 12-306a(3) of the NYCCBL provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . ."

City's Position

The City contends that the Union has failed to state a *prima facie* case of an improper practice under § 12-306a(5) of the NYCCBL. In order to invoke the *status quo* provisions of the NYCCBL, the Union must demonstrate that a bargaining notice was filed, that the parties have an expired collective bargaining agreement, and that they are engaged in bargaining for the subsequent period with the City. The Union's reliance on § 12-306a(5) of the NYCCBL is misplaced because the employees were treated as managerial prior to certification and were not covered by a collective bargaining agreement. The City must treat these employees, for *status quo* purposes, as though they were in a new title for which wages and benefits have not yet been negotiated.

Section 12-311d of the NYCCBL provides for the preservation of the *status quo* for terms which constitute mandatory subjects of bargaining in an expired collective bargaining agreement pending negotiations for a successor agreement or pending completion of impasse panel proceedings and appeal.[10] In this case, there is no expired collective bargaining agreement, and, thus, no basis for a *status quo* claim.

The Union's claims regarding the other provisions of § 12-306a of the NYCCBL also must fail. Section 12-306a(1) of the NYCCBL prohibits employer interference and is violated derivatively whenever an employer commits improper practices found in §§ 12-306a(2), (3), or (4) of the NYCCBL. Although an employer may violate § 12-306a(1) of the NYCCBL directly, the Union has failed to demonstrate that the City interfered employees in the exercise of their rights to form, join, or bargain through a union. In order for the Union to establish that an employer committed an

[10] *See* Decision No. B-18-99.

improper practice under § 12-306a(1) and (3) of the NYCCBL, the Board has adopted the standard set forth by the Public Employment Relations Board ("PERB") in *City of Salamanca*. The Union, here, has failed meet the standard elicited in that case.

The Union's allegations that the City refused to bargain in good faith, in violation of § 12-306a(4) of the NYCCBL, are conclusory and speculative and inconsistent with the facts. The Union filed a bargaining notice, and the Union has been bargaining with the City both as part of the Uniformed Forces Coalition and separately. Furthermore, the Union acknowledges that the parties are waiting for the completion of that bargaining before proceeding with unit bargaining.

DISCUSSION

Section 12-306a of the NYCCBL states that it shall be an improper practice for a public employer or its agents:

> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

Section 12-311d of the NYCCBL, entitled "Preservation of status quo," states in part:

> During the period of negotiations . . .the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . . For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

The City has violated the *status quo* provisions of the NYCCBL by unilaterally changing a subject of mandatory bargaining during a period of negotiations. An employer violates §12-306a(5) of the NYCCBL, the *status quo* provision, by unilaterally making a change to any mandatory subject

of bargaining or as to any term and condition of employment established in the prior contract during a period of negotiations.

The language of the statute is unambiguous – an existing collective bargaining agreement is not a condition precedent to invoking the *status quo* provision. The City cites *New York City Human Resources and District Council 37, Local 1549*, Decision No. B-18-99, in support of its contention that a prior collective bargaining agreement is required before the *status quo* provision takes effect. That case, a petition challenging arbitrability, merely mentioned *part of* what §12-311(d) of the NYCCBL provides in the course of holding that the contract under which arbitration was sought continued in effect.[11] The present case differs from that case and, in fact, is one of first impression in that it deals with a claimed violation of the *status quo* provision when there is no prior collective bargaining agreement. Section 12-306a(5) does not provide, and this Board has never stated, that a condition precedent to gaining protection under the provision is the existence of a prior agreement.

Here, the lump sum payment is a form of compensation; consequently, it is a mandatory subject of bargaining. There is no question that the parties were negotiating, since the Union had

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[11] *New York City Human Resources and DC 37, Local 1549*, Decision No. B-18-99. ([Section 12-311(d) of the NYCCBL], as amended, provides, *inter alia*, for the preservation of *status quo* with respect to terms which constitute mandatory subjects of bargaining in an expired collective bargaining agreement pending negotiations for a successor agreement or pending completion of impasse panel proceedings and appeal.)

Similarly, in several other decisions, the Board has made reference, in dicta, to the element of an existing collective bargaining agreement in *status quo* cases. Those cases dealt with violations of the *status quo* provision when there was a prior collective bargaining agreement. In addition, § 12-306a(5) of the NYCCBL was added in 1998, and the cases that mention the existence of a prior collective bargaining agreement were decided prior to the addition of this section.

filed its bargaining notice. Because of its refusal to provide lump sum payments that previously were available to these employees, the Union has demonstrated that the City has violated the *status quo* provisions of the NYCCBL, §§ 12-306a(5) and 12-311(d).

The Board recognizes that there has been some bargaining between the parties, but because the City has made a unilateral change in a mandatory subject of bargaining, the City has violated its duty to bargain in good faith under § 12-306a(4) of the NYCCBL. When an employer violates its duty to bargain in good faith, there is also a derivative violation of §12-306a(1) of the NYCCBL.[12]

Finally, the Union's allegations, in its petition, that the City's actions were discriminatory are insufficient to sustain a claim under §12-306a(3) 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,

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[12] *Uniformed Fire Officers Association, Local 854 and The City of New York,* Decision No. 17-2001 at 7 (refusing to confer with certified employee representatives regarding a change affecting terms and conditions of employment, a violation of §12-306a(4) of the NYCCBL, is considered interference in violation of §12-306a(1) of the NYCCBL).

DETERMINED, that the City's refusal to provide retiring GS II and GS III employees with a lump sum payment upon retirement constitutes an improper public employer practice, in violation of §§ 12-306a(1), (4), and (5) of the NYCCBL; and it is therefore

ORDERED, that the improper practice petition filed herein be, and the same hereby is, granted in relation to the alleged violations of §§ 12-306a(1), (4), and (5) of the NYCCBL; and it is further

ORDERED, that the improper practice petition filed herein be, and the same hereby is, denied in relation to the alleged violation of § 12-306a(3).

DIRECTED, that the City shall resume payment of the lump sum for retiring GS II and GS III employees until the parties have bargained for a new provision in a collective bargaining agreement.

Dated: July 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

VINCENT BOLLON
MEMBER

GABRIELLE SEMEL
MEMBER

EUGENE MITTELMAN
MEMBER