L. 237, CSBA v. City & NYCHA, 69 OCB 17 (BCB 2002) [Decision No. B-17-2002 (IP)]

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

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237, IBT,

Petitioner,

Decision No. B-17-2002
Docket No. BCB-2229-01

-and-

CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Respondents.
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**DECISION AND ORDER**

On July 31, 2001, the Civil Service Bar Association, Local 237, IBT ("Union"), filed a verified improper practice petition alleging that the City of New York and the New York City Housing Authority ("City" or "NYCHA") violated § 12-306a(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") by negotiating wage rates directly with its members. The Union also claims that the NYCHA violated § 12-306a(5) when it failed to maintain the *status quo* while a successor agreement was negotiated. The NYCHA contends that because the claim is derived from a provision of the collective bargaining agreement ("agreement"), the Union's claims should be raised in the context of the grievance procedure and not in an improper practice proceeding. Since the Union's claims are founded in a unilateral change to a subject that is addressed in the agreement, we defer the improper practice claim to the parties' contractual grievance process.

**BACKGROUND**

The Union represents employees in the title Agency Attorney. The City and the Union are parties to an agreement covering the period of January 1, 1995, to December 31, 1999. A successor agreement is currently being negotiated. Although the NYCHA is not a signatory to the agreement, it has consented to be bound by the results of bargaining concerning matters related to wages and salaries, among other things. Article III, § 4(d)(i), of the agreement states:

> The appointment rate for any employee newly hired after July 14, 1996, shall be the applicable minimum "hiring rate" set forth in subsections 2(a)(i)(1), 2(b)(i)(1), 2(c)(i)(1) and 2(d)(i)(1) of this Article III. . . .

The applicable minimum hiring rate for Agency Attorney Level III employees set forth in § 2(d)(i)(1) is $56,244 per annum.

The NYCHA hired five attorneys in the title of Agency Attorney Level III between April 10, 2000 and February 26, 2001, at salaries above the minimum hiring rate. On July 20, 2001, the Union filed a group grievance at Step III of the grievance procedure, alleging that the NYCHA violated Article III, § 4, of the agreement by paying the newly hired attorneys at salaries higher than those mandated. The Union's improper practice petition alleges that the same actions by the NYCHA also constitute violations of the NYCCBL.

As a remedy in the instant matter, the Union seeks an order prohibiting the NYCHA from negotiating wage rates individually with unit employees, directing the NYCHA to negotiate in good faith with the Union over such wage rates, and requiring the NYCHA to maintain the *status quo* under the agreement during the present negotiations. The Union also requests that the NYCHA post appropriate notices acknowledging its violation of the NYCCBL and stating that it will refrain from further violations.

## POSITIONS OF THE PARTIES

**Union's Position**

The Union, while conceding that the NYCHA's violation of the agreement is also subject to arbitration under the agreement, contends that the violations of the NYCCBL alleged here are independent violations and will not necessarily be remedied in an arbitration brought pursuant to the agreement. The Union also contends that there is no substantial issue as to the interpretation of the agreement. The NYCHA determined the salaries of these newly hired bargaining unit employees by negotiating directly with the affected employees and bypassing the Union, in violation of § 12-306a(4) of the NYCCBL.[1] Additionally, by increasing the applicable minimum hiring rate during negotiations for a new agreement, the NYCHA violated § 12-306a(5) and 12-311d of the NYCCBL.[2] In response to the NYCHA's arguments regarding timeliness, the Union

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[1] It is an improper practice under § 12-306a(4) of the NYCCBL for a public employer or its agents:

> 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.

[2] It is an improper practice under § 12-306a(5) of the NYCCBL for a public employer or its agents:

> 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.

learned only after a FOIL request, and within four months of the filing of the petition, that the newly hired employees were being paid at higher rates. While the Union does not specify when it received the requested documents, it made a payment in accordance with the FOIL request on May 4, 2001.

**City's and NYCHA's Position**

The NYCHA argues that the parties should resolve the dispute – which involves the interpretation of the salary provisions in Article III of the agreement – in arbitration. Although the agreement has expired, Article III, at the heart of the issue, remains in effect pursuant to the *status quo* provision of the NYCCBL. Thus, the dispute derives solely from the extension of the expired terms and conditions of the agreement and should be deferred to an arbitrator.

The NYCHA argues that it did not make any unilateral changes to the salary provisions of the agreement because Article III, § 2, states that the salary range specifies a range of salaries, from $56,244 to $78,007. Lastly, the NYCHA contends that the petition is untimely because it was filed in excess of the statutory four-month limitation, and that one of the Agency Attorneys is in a position that was held to be confidential by the Board of Certification and should not be considered part of the bargaining unit.

## DISCUSSION

As a preliminary matter we shall discuss timeliness. The four-month limitation period described in § 12-306(e) of the NYCCBL and in Title 61, § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) bars our consideration of untimely filed improper practice claims. Using May 4, 2001, the date on which the Union made payment for the FOIL request, as the earliest date the Union became aware of the higher salaries,

we find that the petition, filed on July 31, 2001, is timely. The Respondents did not provide any evidence that the Union had knowledge of the higher salaries at an earlier time.

Under § 12-306a(4) of the NYCCBL, a public employer may not refuse to bargain collectively in good faith with the representatives of its public employees on matters within the scope of collective bargaining. An employer's unilateral action on a mandatory subject of bargaining may violate this provision. *E.g.*, *LaRiviere,* Decision No. B-36-87 at 9. However, this Board, in accordance with § 205.5(d) of the Taylor Law (Civil Service Law, Article 14),[3] has declined to exercise jurisdiction over improper practices when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement. *District Council 37*, Decision No. B-36-2001; *Correction Officers Benevolent Ass'n*, Decision No. B-39-99. The Union should raise any such claim in the grievance process and not in an improper practice proceeding. *See Patrolmen's Benevolent Ass'n*, Decision No. B-24-87 at 7, *aff'd sub. nom. Caruso v. Anderson*, 138 Misc.2d 719, 525 N.Y.S.2d 109 (N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004, 536 N.Y.S.2d 689 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 709, 540 N.Y.S.2d 1004 (1989).

The Union has filed a grievance based on Article III of the agreement, and it has also filed an improper practice charge alleging that the Respondents have refused to bargain under § 12-306a(4) of the NYCCBL and violated the *status quo* provision, § 12-306a(5), of the NYCCBL. Since the Union's alleged violation of § 12-306a(4) is founded in a unilateral change to a subject addressed in Article III of the agreement, we defer the improper practice claim to the contractual

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[3] Section 205.5(d) of the Taylor Law provides, in pertinent part:

> the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

grievance process, which has already commenced. Furthermore, under these circumstances, we will defer the *status quo* claim arising under § 12-306a(5) because the underlying facts are identical to those in the contractual claim. In so doing, we acknowledge that not every claim arising under § 12-306a(5) will be appropriate for deferral. However, here, the underlying facts of the § 12-306a(5) claim are substantially the same as the § 12-306a(4) claim, therefore deferral is appropriate.[4]

Therefore, the charge is deferred without prejudice to reopen, should a determination on the merits of the grievance be foreclosed or should any award be repugnant to rights under 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 the Civil Service Bar Association

[4] *Cf. State of New York (SUNY Health Science Center of Syracuse)*, 30 PERB ¶ 3019 (1997)(while a violation of the *status quo* provision constitutes an improper practice, PERB used its discretion to defer).

be, and the same hereby is, deferred without prejudice to reopen at the request of the Union, should a determination on the merits of the grievance be foreclosed or should any award be repugnant to rights under the NYCCBL .

Dated: May 28, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER