L. 237, CSBA v. City & DOC, 69 OCB 18 (BCB 2002) [Decision No. B-18-2002 (IP)]

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

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237, IBT,

Petitioner,

Decision No. B-18-2002
Docket No. BCB-2238-01

-and-

CITY OF NEW YORK and the NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.
----------X

DECISION AND ORDER

On August 29, 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 Department of Correction ("City" or "DOC") 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 DOC violated § 12-306a(5) when it failed to maintain the *status quo* while a successor agreement was negotiated. The DOC 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. 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 I employees set forth in § 2(d)(i)(1) is $44,234 per annum. The minimum hiring rate for Agency Attorney Level III employees is $56,244 per annum.

Between July 10, 2000, and July 9, 2001, the DOC hired seven attorneys in the titles Agency Attorney Level I and III. On July 24, 2001, the Union filed a grievance at Step III alleging that the DOC violated Article III, § 4, of the agreement by paying the newly hired attorneys at higher salaries than those mandated. The Union's improper practice petition alleges that the same actions also constitute violations of the NYCCBL.

As a remedy in the instant matter, the Union seeks an order prohibiting the DOC from negotiating wage rates individually with unit employees, directing the DOC to negotiate in good faith with the Union over such wages, and requiring the DOC to maintain the *status quo* under the agreement during the present negotiations. The Union also requests that the DOC post 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 argues that the DOC, in hiring employees at pay rates far in excess of those provided for in the agreement, has refused to bargain with 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 DOC has violated § 12-306a(5).[2] The DOC's failure to bargain and its unilateral alteration of working conditions are improper practices within the jurisdiction of this Board and will not necessarily be remedied in arbitration.

In response to the DOC's arguments regarding timeliness, the Union learned that the newly hired employees were being paid at the higher rates only after the DOC provided the salary information, in response to a FOIL request made by the Union, on July 12, 2001. Additionally, the City's publication of new hires in the *City Record* does not fulfill the DOC's bargaining obligation under the NYCCBL or excuse its individual dealing with employees.

---

[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 Section 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.

City's Position

The DOC argues that the Board dismiss the petition because it does not have jurisdiction over alleged contract violations, or, in the alternative, deferred to arbitration because the resolution of the charge is contingent upon an interpretation of the salary provisions in Article III of the agreement. The DOC argues that if the Board retains jurisdiction, the Union's claims are untimely because the petition must be filed within four months of the alleged improper conduct. Here, the challenged hirings occurred more than four months before the petition was filed. Moreover, since the appointments were recorded in the *City Record*, the Union knew, or should have known, that the DOC was continuing its long-standing practice of hiring attorneys at annual salaries above the hiring rates but within the ranges listed in the agreement.

DISCUSSION

As a preliminary matter we shall discuss timeliness. The four-month limitation period described in § 12-306(e) of the NYCCBL and 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 July 21, 2001, the date on which the DOC provided the Union with the FOIL documents, as the date the Union became aware of the higher salaries, we find that the petition, filed on August 29, 2001, is timely. In so holding, we disagree with the DOC's contention that mere publication of the new hires in the *City Record* constitutes sufficient notice to the Union of the hirings above the contractual minimum rates.

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-36-01; *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 improper practice claim is founded in a unilateral change to a subject addressed in Article III of the agreement, we defer the improper practice claim to the parties' contractual 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-

---

[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.

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.

[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).

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 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