L. 1549 & 2627, DC 37 v. City & ACS, 69 OCB 30 (BCB 2002) [Decision No . B-30-2002 (IP)]

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

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCALS 371, 1549, and 2627,

Petitioners,

Decision No. B-30-2002
Docket No. BCB-2247-01

-and-

THE CITY OF NEW YORK AND NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.
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DECISION AND ORDER

District Council 37 ("Union") and its affiliated Locals 371, 1549, and 2627 filed a verified improper practice petition against the City of New York and the New York City Administration for Children's Services ("City" or "ACS") on October 30, 2001. The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), ACS improperly denied the Union's request for access to ACS's offices at 150 William Street for the purpose of conducting a health and safety inspection. ACS argues that the petition must be dismissed because the Union has failed to allege facts sufficient to support its claims. ACS's refusal to grant access to the Union on a specific date does not constitute an improper practice; accordingly we deny the Union's petition.

BACKGROUND

Article XIV, § 2 of the Citywide Agreement ("Agreement") between the Union and ACS states: "Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees." The Union is responsible for investigating health and safety complaints to ensure that the City fulfills its obligation under the Agreement.

Following the September 11, 2001, collapse of the World Trade Center ("WTC"), which sent dust and debris into the surrounding area, ACS's headquarters at 150 William Street was evacuated for two weeks. At the landlord's request, an outside consulting engineering firm examined the building on September 20, 2001, and issued a report the following day finding the building structurally sound and safe to use. A September 24, 2001, report concerning air quality concluded that all substances measured were within recommended guidelines.

ACS employees returned to 150 William on September 24, 2001. On September 28, representatives of the Citywide Office of Safety and Health ("COSH"), ACS, and the Union's health and safety unit, conducted a walk-through of the building. Sometime between October 1 and 9, 2001, the Union received calls from members complaining about the air quality in the building. On October 9, 2001, Local 371's President reported the complaints to the ACS Commissioner and requested access to the building so that a consultant hired by the Union could test the building's air quality on Friday, October 12, 2001. The parties disagree whether the Commissioner initially agreed to the Union's request, or referred the Union to ACS's Office of Labor Relations to schedule an inspection. On October 10, ACS and the Union had further discussions concerning testing, and on October 11, ACS denied the Union's request for access because the City's consultant and a COSH representative were not available to participate in an inspection on October 12. ACS offered to provide access to the building two business days later,

on Tuesday, October 16.

On October 12, Union officers appeared at 150 William Street and were denied access to the building. A number of non-managerial ACS employees left their work stations to gather in front of the building. Without prior notice, the Union requested to speak with bargaining unit members in the building to investigate their health and safety complaints. ACS denied the request, but offered to hold a labor-management meeting at a nearby location to discuss those matters and release several employees working at 150 William Street to attend the meeting. The Union declined ACS's offer.

Sometime during the day of October 12, the Union's consultant managed to conduct air quality testing without obtaining the permission of ACS or the landlord. The consultant issued a report dated October 17, 2001, stating: "All sampling was performed using personal sampling pumps placed on three workers that were in the building." The report concluded that all elements tested for were within permissible limits.

Also on October 12, ACS called the Union to reiterate that testing was scheduled for October 16. The Union told ACS that its consultant was unavailable that day but that it would inform ACS as to whether a Union representative would accompany the City's consultant. The Union did not call back. On October 15, ACS called the Union again to inquire whether the Union wanted to proceed with the testing on October 16. The Union never responded and ACS cancelled the October 16 testing.

On October 15, the Union requested that ACS cancel a health and safety meeting scheduled for October 17, and reschedule it for January 2002.

In response to complaints filed by the Union with the New York State Department of

Labor, Public Employee Safety and Health ("PESH"), inspectors tested the air at 150 William Street on November 7 and 8, 2001. At least one Union representative was present during each testing. The results of the tests were still pending when the Union filed its improper practice petition on October 30, 2001, and neither party has informed the Office of Collective Bargaining as to the results of the tests.

On November 14, 2001, the Union filed a petition for injunctive relief, which the Board of Collective Bargaining ("Board") denied on November 26. The record indicates that by letter dated November 28, 2001, ACS sent the Union a letter expressing its desire to settle the matter "by agreeing to a mutually convenient time in the very near future for air quality testing . . . with the understanding that ACS needs to have sufficient time to arrange for its expert to perform tests at the same time as the Union's expert." The record does not reflect any response by the Union nor does it indicate whether any further air quality testing was scheduled.

The Union requests that the Board grant immediate access to 150 William Street to conduct testing, order ACS to pay any costs incurred by the Union in hiring a consultant to perform air quality testing, order ACS to cease and desist from engaging in activities that interfere with, restrain, or coerce union members from exercising their rights, and post appropriate notices at all ACS facilities.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that ACS's refusal to grant the Union and its consultant access to 150 William Street on October 12, 2001, to investigate members' health concerns constitutes interference with the Union's right to assist its members in violation of NYCCBL § 12-306(a)(1)

and (2). Additionally, the Union argues that since the Union's consultant could not enter the building on October 12 to speak with members regarding their health concerns, ACS discriminated against union members for the purpose of discouraging membership in and participation in the Union in violation of NYCCBL § 12-306(a)(3).[1]

ACS's Position

ACS argues that the Union has failed to prove any violation of NYCCBL § 12-306(a)(1), (2) and (3). ACS's refusal to grant access to the building on October 12 was not a denial of the Union's request to inspect the premises. Rather, ACS offered "a very reasonable alternative" by proposing that the inspection take place two work days later. The Union presented no evidence to explain why it was necessary for the testing to be performed only on October 12. Furthermore, the Union's consultant managed to conduct air quality testing without obtaining the permission of ACS or the landlord, and the resulting report concluded that "all elements tested for were within permissible limits."

ACS argues that the Union did not request that ACS provide it with a place to meet until

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[1] NYCCBL § 12-306(a) provides:
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) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

* * *

§ 12-305 provides in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

October 12, 2001, when several employees were already gathered on the street. Since no prior request had been made, ACS argues that it had no obligation to provide the Union with a place to meet at that precise moment. Nevertheless, ACS offered the Union an opportunity to meet at a another nearby building and offered to release a reasonable number of employees to attend the meeting. Despite ACS's effort to accommodate the Union, ACS's offer was refused.

DISCUSSION

The issue in this case is whether ACS committed an improper practice by refusing to grant the Union access to 150 William Street on a specific date. We find that ACS did not intend to prevent the Union from testing the premises, but rather merely sought to schedule the testing at a mutually convenient time. The Union's insistence on the date specified was based upon the convenience of its consultant and not on a particularized need for inspection on that date.

In *Social Service Employees Union, Local 371*, Decision No. B-37-2000, we addressed a similar issue involving the same parties. In that case, the Union alleged that ACS improperly refused to allow the Union access to inspect its 7 Laight Street premises on a certain date and at a specific time. ACS stated that no ACS representative was available to accompany the Union's consultant at 3:00 p.m. and that an inspection at that hour would disrupt its operation. Instead, ACS offered to permit the inspection at two earlier times on the same day. Finding that ACS did "not attempt to deny the Union of its inspection nor did it cause undue delay," we dismissed the Union's petition, and stated: "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." In so holding, we cited *Matter of Charlotte Valley Central School District*, 18 PERB ¶

3010 (1985), which stated: "In some circumstances, it may be necessary for us to weigh the needs of the organization against the impact of the demand upon the property rights of the employer." 18 PERB ¶ at 3024. In *Matter of Public Employees Federation*, 24 PERB ¶ 4532, *aff'd*, 25 PERB ¶ 3016 (1992), PERB reiterated its balancing test and stated 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 its unit employees."

Here, we also balance ACS's rights with those of the Union. The record shows that an outside consultant conducted air quality testing on September 23, 2001, before ACS employees returned to work and concluded that the building was safe. Since there was no evidence of an immediate threat to Union employees, ACS sought to schedule the requested testing on a mutually convenient date. While ACS was unwilling to grant the Union's request for access on October 12, because the City's consultant and a COSH representative were not available to participate in the inspection, ACS did offer to grant access two business days later, on October 16. Although the Union's consultant was unavailable to perform the tests on that particular day, the record does not indicate that the tests could not have been conducted on another mutually convenient date during that week. Therefore, we determine that ACS did not violate NYCCBL § 12-306(a)(1) and (2).

Furthermore, to determine whether an alleged discrimination or retaliation violates NYCCBL § 12-306(a)(3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate that: (1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and (2) the employee's union activity was a

motivating factor in the employer's decision. If petitioner proves these two elements, the employer may refute petitioner's showing or demonstrate legitimate business motives that would have caused the employer to take the action complained of even in the absence of the protected activity.

Since ACS knew that the Union hired a consultant to test the building at the request of union members, we find that the first prong of the *Salamanca* test is satisfied. However, the Union has failed to show that ACS's decision to deny access to the Union on October 12, 2001, was motivated by union activity. Allegations of improper motivation must be based on statements of probative facts, rather than conclusory allegations based upon surmise, conjecture or suspicion. *Social Service Employees Union, Local 371*, Decision No. B-13-2002 at 6; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. The Union's sole allegation that ACS refused to grant access to its premises on October 12 is insufficient to support a showing of improper motivation. The Union rejected ACS's offer to hold a labor-management meeting at a nearby location and release several union employees to attend the meeting, and failed to respond to ACS's second inquiry concerning whether the Union wanted to proceed with the October 16 testing. Since the Union has failed to prove retaliation or discrimination under the *Salamanca* test, this Board dismisses the instant improper practice petition in its entirety.

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, AFSME, AFL-CIO, and its affiliated Locals 371, 1549, and 2627, be, and the same hereby is, dismissed in its entirety.

Dated: September 23, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

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CHARLES G. MOERDLER
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