UFOA v. City & FDNY & von Essen, 69 OCB 5 (BCB 2002) [Decision No. B-5-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Petitioner,

-and-

THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, and THOMAS VON ESSEN, COMMISSIONER OF THE NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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Decision No. B-5-2002
Docket No. BCB-2151-00

DECISION AND ORDER

On October 2, 2000, the Uniformed Firefighters Association ("UFA" or "Union") and the Uniformed Fire Officers Association ("UFOA") filed a verified improper practice petition against the Fire Department of the City of New York ("FDNY") and Fire Commissioner Thomas Von Essen ("Commissioner"). The UFOA later withdrew from participation in this case. The UFA claims that the Commissioner and the FDNY attempted to negotiate directly with the Union's members regarding a plan to change the schedules of the Firefighters, and, after the UFA rejected the proposal, the Commissioner retaliated by castigating the UFA in a FDNY newsletter for disagreeing with him. According to the UFA, the Respondents' actions violated §12-306a(1), (2), (3), and (4) of the New York City Collective Bargaining Law (New York City

Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Commissioner asserts that he has the right to disseminate information among the FDNY's employees and to make staffing changes. Because we find that Respondents engaged in direct dealing, but did not retaliate against the UFA, the petition is granted in part and denied in part.

BACKGROUND

The UFA is the collective bargaining representative for Firefighters. Work and tour schedules were previously negotiated between the UFA and the FDNY, and the schedule is included in their collective bargaining agreement. The contractual schedule is consistent with § 15-112 of the New York City Administrative Code, which prescribes working hours in the FDNY.

The Union alleges that in July 2000, the Commissioner discussed and advocated directly with members of the UFA a proposal to change the work and tour schedules of the Firefighters and Fire Officers. The Union asserts that it met with the Commissioner on August 17, 2000, to discuss the proposal. On August 24, 2000, Labor Counsel for the UFA sent a letter to the Commissioner notifying him that the Union rejected the proposal and requesting that he direct staff to cease making presentations regarding the proposed change to UFA members.

In the September 2000 edition of Fireworks, an FDNY newsletter, the Commissioner published a message, "Rumors, Questions, and Facts," stating his concerns about the current work schedules and the recent Union rejection of his proposed change. He also outlined the advantages of the proposed change.

> Q. Is there an offer to discuss a 24-hour pilot program that would create additional overtime or time off, more annuity and still protect our two-platoon system?
> A. There was, but it has been removed without any discussion at the Office of Labor Relations (OLR), where it would have to be negotiated as a pilot program. After waiting two weeks for a meeting with the UFOA, their Executive Board voted unanimously the next day not to have any further discussions.
> Q. Why wouldn't the UFA present all the details to their membership before voting to end a discussion before it really started?
> A. Who knows? Gary DeleRaba, the President of the Nassau County PBA is quoted in the *New York Times* on August 30, 2000, in response to citizens criticizing a tentative contract, saying he was "a little amazed at how people come out against something without having all the facts."
> Q. What is the Department's problem with the present scenario?
> A. There are several problems:
>> 1. With almost everyone working 24-hour mutuals, we have officers who complain about too much movement, creating a safety issue. A 24-hour chart creates a more cohesive work group. . .
>
> Q. Why does the UFOA seem to oppose almost everything the Department wants to do?
> A. I don't know. Since Chief Parrinello left office, they seem to be unable to negotiate or work things out. Everything is personal. . . .
> Q. Why did you want to do a 24-hour chart?
> A. It's simple – to improve the job, especially from the viewpoint of training and safety, and to get our people more money at the same time.

While the Union claims that the letter was sent to all Firefighters and Fire Officers, Respondents assert that the letter was sent only to each fire house.

POSITIONS OF THE PARTIES

The UFA's Position

The Union asserts that in July of 2000, UFA officials began receiving phone calls from UFA delegates alleging that the senior management staff and Division Chiefs were advocating the Commissioner's plan directly to UFA members. Additionally, the Union alleges it received reports of Division Chiefs going to firehouses and telling Firefighters that they should accept the

Commissioner's proposal or there would be retaliation against the UFA.

Although the Commissioner has the right to negotiate a change in work and tour schedules, he must not circumvent the Union's collective bargaining rights by dealing directly with the general union membership. The UFA claims that the Commissioner's Fireworks message chastised the Union and circumvented the collective bargaining process by communicating directly with the general union membership. The Commissioner indicated, in the Fireworks message, that he could not speak about the proposal, yet he went on to explain the merits of the proposal.

When the Union rejected the Commissioner's proposal, the Commissioner retaliated by castigating the Union for disagreeing with him. The Commissioner's message, with its specific reference to the UFA's refusal to present the details to the membership is not a mere allegation, but blatantly demonstrates improper motive.

The UFA does not challenge Respondents' actions regarding staffing, scheduling, or Firefighters' safety, but it challenges the manner in which the Respondents' proposed the schedule change. The UFA claims that by chastising and circumventing the Union, the Commissioner interfered with their activities at the collective bargaining table, violating § 12-306a(1), (2), (3), and (4) of the NYCCBL.

Respondents' Position

Since the Union fails to allege any protected activity that was a motivating factor behind management's proposal, they have failed to fulfill the first part of the *Salamanca* test. Assuming *arguendo* that Petitioner has satisfied the first element of the test, they have not satisfied the

second. The Board has held that the "mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity . . ., does not state a violation where no causal connection has been demonstrated." *Johnson,* Decision No. B-21-91 at 19; *see also Peshkin,* Decision No. B-30-81 at 9. Respondents contend that Petitioner has made no connection between its union activity and Respondents' actions because it has not shown any anti-union animus.

According to Respondents, the Union does not claim that the City attempted to prevent them or their members from exercising their rights under § 12-305 of the NYCCBL. Respondents note that the Board has held that § 12-307b of the NYCCBL guarantees the City the unilateral right to assign and direct its employees, to determine what duties employees will perform during work time, and to allocate duties among unit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement. *See Uniformed Sanitationmen's Ass'n, Local 831*, Decision No. B-68-90. The Board has previously held – in proceedings involving the City of New York and the UFA – that the City's managerial prerogative extends to the subject of staffing and tactical utilization of employees. *See Uniformed Firefighters Ass'n*, Decision No. B-70-89 at 3.

According to the FDNY, the schedule change was proposed to create a more cohesive work unit and potentially reduce the number of injuries to Firefighters who begin their work tour in the evening.[1] Management's actions were a legitimate response to its concerns regarding staffing and deployment of its workforce, both of which are managerial rights under § 12-307b of

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[1] The proposed schedule change was never put into effect.

the NYCCBL.

Management also has the right to disseminate information to its employees. PERB has dismissed charges alleging unlawful direct dealing with employees when evidence demonstrated that the employer merely advised employees of offers made and rejected at negotiations. *See Monticello Central School District,* 21 PERB ¶ 4575 (1988); *see also City of Rochester and Rochester Fire Fighters*, 9 PERB ¶ 4542. Here, after the Union rejected the proposal without any real consideration, the Commissioner merely voiced his opinions and disseminated information to his employees. The distribution of the Fireworks newsletter did not interfere with the ability to reach an agreement on the implementation of the proposed change in schedules, nor did it amount to negotiations, as no collective bargaining was in progress.

Respondents contend that the Union has failed to allege facts that are specific to establish a violation of any subsection in § 12-306a of the NYCCBL – that Respondents' actions are connected with Union members' right to form, join, assist, or participate in the activities of a public employee organization, that Respondents interfered with the formation of the union, supported its activities, favored the UFA, or that Respondents engaged in conduct designed to dominate or interfere with the Union's formation or administration.

Nor can the Union show that respondents refused the Union's request to bargain. The claim that Respondents violated § 12-306a(4) is conclusory and speculative: the Union rejected Respondent's proposal, apparently without any serious consideration, and refused to have any further discussions.

DISCUSSION

We find that Respondents attempted to negotiate directly with the Union's members regarding the proposed schedule change. Although the NYCCBL has no express direct dealing provision, the Board has found that direct dealing can be a violation of the NYCCBL. *See Committee of Interns and Residents,* Decision No. B-22-92. We have adopted a standard similar to the one utilized by the National Labor Relations Board ("NLRB"). Using the criteria of Section 8(c) of the National Labor Relations Act, the NLRB examines the totality of the employer's conduct on a case by case basis and uses the criteria of Section 8(c) of the National Labor Relations Act in order to determine if there is a direct dealing violation . NLRA Section 8 (c) reads:

> **Expression of views without threat of reprisal or force or promise of benefit**.
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit.

In *Committee of Interns and Residents,* Decision No. B-22-92, this Board held that direct communication by an employer will violate the NYCCBL if the employer made threats of reprisal or force, or promises of benefit, or if the direct dealing otherwise subverted the members' organizational and representational rights. *See id.* at 22; *see also Local 1549, DC 37*, *AFSCME* Decision No. B-17-92. In *Committee of Interns and Residents*, the New York City Health and Hospital Corporation's ("HHC") Chief of Staff distributed a letter containing information about tax code changes and retirement options available to HHC employees. The Board found that the

letter in question was devoid of any promise or threat and that the letter did not subvert the members' rights in any way; therefore, HHC did not violate the NYCCBL.

Committee of Interns and Residents and the present case differ in several aspects. Most importantly, the HHC Chief of Staff's letter merely laid out several options that were available to the HHC employees, whereas the Commissioner's message focuses on the benefits that would be derived from the implementation of his proposed changes which concern a mandatory subject of bargaining. Further, the HHC Chief of Staff's letter did not refer to the union at all, while the Commissioner's message, in the Fireworks publication, assailed the Union and its leadership for failing to present all the facts to their members and for making decisions based on personal reasons. The Commissioner's message made a promise of benefits – extra overtime and increased pay, among other things – and by directly questioning the Union's leadership, the employer subverted the members' organizational and representational rights. These differences lead the Board to conclude that Respondents dealt directly with the general Union membership in a manner that was violative of the NYCCBL.

The Board notes Respondents' argument that employers are allowed to disseminate information to their employees. However, when an employer attempts to subvert the Union's representation with the information, this dissemination constitutes improper direct dealing. Based on the foregoing, the Board finds Respondents violated §12-306a(1) and (4) of the NYCCBL. However, we find insufficient proof of the remainder of the Union's claims, based upon alleged violations of §12-306a(2) and (3) of the NYCCBL, and thus we deny those claims.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

DETERMINED, that the Respondents violated §12-306a(1) and (4) 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) and (4) 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 violations of § 12-306a(2) and (3) of the NYCCBL; and it is therefore

ORDERED, that the Respondents shall cease and desist from all efforts to deal directly with the general Union membership and shall bargain only with the members' certified bargaining representative.

Dated: March 20, 2002
New York, NY

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER