Local 306, I.A.T.S.E., 7 OCB2d 27 (BCB 2014)

(IP) (Docket No. BCB-4047-14)

Summary of Decision: The Union alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (4) when it assigned non-bargaining unit personnel to perform work that has exclusively been performed by employees represented by Local 306. NYCHA contended that the petition was untimely. Additionally, NYCHA argued that its decision to contract out a portion of its services is an exercise of its management rights, the work was not performed exclusively by employees in the title in question, and that it made a managerial decision to change the level of service and the qualifications for employees in the unit in question. The Board found that the petition was untimely. Accordingly, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 306, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On May 23, 2014, Local 306, I.A.T.S.E. ("Union" or "Local 306") filed a verified improper practice petition against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it assigned non-bargaining unit personnel to perform work that has exclusively been performed

by employees represented by Local 306. NYCHA contends that the petition was untimely. Additionally, NYCHA argues that its decision to contract out a portion of its services is an exercise of its management rights, the work was not performed exclusively by employees in the title Media Services Technician, and it made a managerial decision to change the level of service and the qualifications for employees in the Audio/Visual unit. The Board finds that the petition is untimely. Accordingly, the petition is dismissed.

BACKGROUND

NYCHA is a public benefit corporation that provides affordable housing. Local 306 and NYCHA are bound by a collective bargaining agreement dated October 15, 2008, to October 14, 2010 ("Agreement"), which remains in effect pursuant to the *status quo* provisions of the NYCCBL.[1] Article I of the Agreement provides that the employer "recognizes the Union as the sole and exclusive collective bargaining representative for" employees in the Media Services Technician title. (Pet., Ex. A) Local 306 currently represents approximately 50 employees of the City of New York including one Media Services Technician at NYCHA.[2]

Prior to July 2012, Local 306 represented two Media Services Technicians employed by NYCHA, Andrew Nagy and Maryetta Johnson. Nagy and Johnson worked in NYCHA's Department of Communications in the Audio/Visual Unit. The Audio/Visual Unit provides

[1] In its answer NYCHA notes that it is not a signatory to the Agreement. NYCHA is, however, bound by the Agreement. The Media Services Technician title is a citywide title not unique to NYCHA and, like many other agreements, including the Citywide Agreement, this Agreement was negotiated by the City on NYCHA's behalf. Specifically, the Agreement was entered into "by and between the City of New York and related public employers pursuant to and limited to their respective elections or statutory requirement to be covered by the [NYCCBL] and their respective authorizations to the City to bargain on their behalf." (Pet., Ex. A)

[2] This fact was provided to the trial examiner at the conference in this matter.

comprehensive audio visual services to NYCHA's various departments including transporting, setting up, and operating audio visual equipment.

In July 2012, Johnson resigned. On or about August 8, 2012, NYCHA hired Joseph Luciano, a Department of Citywide Administrative Services ("DCAS") public service intern who does not hold the title Media Services Technician, to work closely with Nagy in providing audio visual services. According to the Union, "Local 306 member Nagy became aware in August 2012 that Luciano was performing functions that had previously been performed by Local 306-represented Media Services Technicians." (Rep. ¶ 33)

Between August 8, 2012, and January 12, 2013, Luciano worked approximately 20 hours a week. On January 13, 2013, NYCHA hired Luciano as a temporary worker through IIT, Inc.[3] As a temporary worker, Luciano works between 20 and 30 hours a week and continues to assist Nagy in performing audio visual duties.

The parties dispute whether the setting up and operating of audio visual equipment was performed exclusively by Local 306 members. NYCHA asserts that the set-up and operation of audio visual equipment was not performed exclusively by Local 306 members. In support of this assertion, NYCHA points to the Audio/Visual Unit Equipment Requisition Form ("AV Request Form"), which asks if a technician is needed to set-up and/or operate the equipment; and a set of emails in June and July of 2012, which show that non-unit personnel set-up and/or operated audio visual equipment on four occasions during that period. (Ans., Ex's. B, D, E) NYCHA also noted that the Media Services Technician II job specification dated 1983 states that employees in that title train employees not in that title "in the operation, general maintenance and minor repair of audio-visual, video production and related equipment." (Ans., Ex. A) The

[3] As of the filing of the answer on June 20, 2014, Luciano was still a temporary worker.

Union acknowledges that in limited circumstances the recipients of audio visual equipment would set-up and operate the equipment themselves but asserted that such was limited, circumscribed, and rare. The Union asserted that in the limited circumstances when non-Audio/Visual Unit personnel in the Department of Communications assisted in the set-up and operation of audio visual equipment, it was done under the supervision and direction of Local 306 members.

According to NYCHA, the focus of the Audio/Visual Unit has shifted towards self-service audio visual services and the increased demand for assistance with web content, social media, graphics, digital video editing, and power points and promotional material. As a result, NYCHA alleges that the Department of Communications decided to change the qualifications associated with Johnson's former position of Media Services Technician and instead hire a New Media and Graphics Coordinator, which requires a college degree and proficiency in graphics software.[4]

Local 306 alleges that on or about January 25, 2014, it learned that NYCHA was using a non-bargaining unit member to assist Nagy in performing functions traditionally performed by Media Services Technicians. On January 27, 2014, Local 306, through its counsel, sent NYCHA's Deputy Director of Human Resources an information request, which provides, in pertinent part:

> This office represents [Local 306]. Local 306 member [Johnson] was employed by [NYCHA] as a Media Services Technician until her retirement in July 2012. Local 306 recently learned that [NYCHA] has been utilizing employees not represented by Local 306 to perform the functions traditionally performed by the Media

[4] In November 2013, NYCHA hired a New Media Graphics Coordinator to manage NYCHA's social media presence, produce visual content, construct web pages for NYCHA's website, and analyze performance data for web and social media.

> Services Technician—a title covered under the [Agreement] between New York City and Local 306.
>
> Accordingly, on behalf of Local 306 and in furtherance of Local 306's collective bargaining obligations, and pursuant to [NYCCBL] § 12-306, we hereby request the name, title and union-affiliation, if any, of any individual employed by NYCHA who at any time since August 1, 2012 has performed any audio/visual work traditionally performed by the Media Services Technician, including but not limited to video projection, setting up audio or visual equipment, recording presentations, editing and archiving such recordings, and replaying such recordings.

(Pet., Ex. B)

On February 6, 2014, NYCHA's Deputy Director of Human Resources responded by stating, in pertinent part:

> As you had indicated, [Johnson] indeed retired from NYCHA service in July 2012. Accordingly, she is no longer employed as an active Media Services Technician. In that Local 306 [ ] does not represent retired employees, as they are not part of the collective bargaining unit, you have no standing pursuant to § 12-306 of the [NYCCBL] to the information requested. Nonetheless, in the interest of furthering good labor-management relations, and without conceding any defense of any adverse claim against this agency, NYCHA responds to your inquiry as follows:
>
> - [Nagy], Media Services Technician III, [Local 306], August 1, 2012 – present
>
> Separate and apart from the above, NYCHA, exercising its management right pursuant to § 12-307 "b" of the NYCCBL to determine the methods, means and personnel by which government operations are to be conducted, has opted to utilize the following external means to augment internal capacity to delivery [*sic*] audiovisual services.
>
> - DCAS Public Service Intern, August 8, 2012 – January 12, 2013 (20 hours per week).
> - IIT, Inc. Temporary Worker, January 13, 2013 – present (20 hours per week, except June 3, 2013 through August 30, 2013 at 30 hours per week).

> The individual who has fulfilled this service by both means specified above is [Luciano]. In that regard, [Luciano] has worked closely with [Nagy] in NYCHA Department of Communications' [ ] Audiovisual Unit to provide audiovisual assistance for both internal and external requests. This work includes set-up, operation, and dismantling of audiovisual equipment; troubleshooting and handling of emergency requests; and the handling of large volumes of film related requests from NYCHA DOC's Film Mailbox where TV/Film production companies are interested in scouting, filming or conducting still photography on NYCHA property. [Luciano] has not been and is not employed by NYCHA.

(Pet., Ex. C)

On May 23, 2014, Local 306 filed the instant improper practice petition. Local 306 requests that the Board find that NYCHA violated the NYCCBL and order NYCHA to cease and desist from utilizing non-bargaining unit members to perform bargaining unit work.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that NYCHA violated NYCCBL § 12-306(a)(1) and (4) when it assigned non-bargaining unit personnel to perform work that has traditionally and exclusively been performed by employees represented by Local 306.[5] The unilateral assignment of work

[5] NYCCBL § 12-306(a) provides, in pertinent part:

> 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 . . .
>
> * * *
>
> (4) 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;

traditionally and exclusively performed by bargaining unit employees to non-bargaining unit employees constitutes a refusal to bargain collectively, a violation of NYCCBL § 12-306(a)(4). The Union also asserts that the unilateral transfer of bargaining unit work diminishes the protected organizational rights of bargaining unit members; thus, NYCHA's transfer of bargaining unit work is also a *per se* violation of NYCCBL § 12-306(a)(1).

The Union contends that its petition is timely because the time to file an improper practice runs from the date the union receives notice of the violation. The Union acknowledges that Nagy was aware in August 2012 that Luciano was performing functions that had previously been performed by Local 306-represented Media Services Technicians, but contends that such does not constitute notice to the Union. It argues that the instant complaint did not accrue until January 2014, when the Union learned that NYCHA was using a non-bargaining unit member to assist Nagy in performing functions traditionally performed by Media Services Technicians.

The Union asserts that an employer should not be encouraged to make personnel decisions covertly in hopes of running out the statute of limitations, emphasizes that it did not have any knowledge of Luciano's existence, and argues that nothing supports imputing to it constructive knowledge of the transferring of Media Services Technician duties to a non-Union personnel. The Union claims that the work at issue is behind the scenes. As a result of "the 'closed' nature of [Media Services Technician] work, there is no way that Local 306, through any of its authorized officers or agents, could have or should have discovered NYCHA's unilateral transfer of bargaining unit work to the subcontractor between August 2012 and January 2014, absent periodically sending NYCHA and other public employers sweeping

inquiries as to whether they have violated Local 306's organizational rights." (Union's July 28, 2014 Submission)

The Union maintains that it has exclusive jurisdiction with regard to Media Services Technician work. It contends that performance of this work by non-Audio/Visual Unit personnel was limited, circumscribed and rare, and thus, it is insufficient to breach exclusivity. Additionally, the Union asserts that NYCHA cannot rely on the unlawful transfer of bargaining unit work to Luciano, which is the basis of this petition, to establish a breach of exclusivity. Moreover, it contends that NYCCBL § 12-307(b) does not confer a right to unilaterally transfer bargaining unit work outside of the unit. Finally, the Union contends that NYCHA's hiring of a non-unit employee, the New Media Graphics Coordinator, to perform non-unit work, is wholly irrelevant to this matter.

NYCHA's Position

NYCHA contends that the instant petition, filed on May 23, 2014, was filed well beyond the applicable limitations period. NYCHA's assignment of audio visual duties to Luciano was open and regular since it began in August 2012. Indeed, Luciano worked with a Union member, Nagy, from the beginning. Thus, any challenge to the transfer of the audio visual assistance duties to Luciano should have been filed within four months of August 2012.

NYCHA argues that the Union cannot establish its claim on the merits either. NYCHA contends that its decision to contract out a portion of its services is a legitimate exercise of it's management prerogative under NYCCBL § 12-307(b).[6] According to NYCHA, the NYCCBL

[6] NYCCBL § 12-307(b) provides, in pertinent part, that:

> It is the right of the city . . . acting through its agencies, to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . maintain the efficiency of

confers a broad grant of managerial rights on public employers, including the right to contract out work, unless the Union can demonstrate that the contracting out causes an adverse practical impact on the terms and conditions of employment. Here, the Union has not and cannot allege that any impact on workload has arisen or that any member of Local 306 has been or will be terminated as a result of the transfer.

NYCHA also asserts that the Union cannot claim exclusive jurisdiction with respect to the audio visual work. Not only has Luciano openly performed the audio visual tasks working closely with a bargaining unit member since August 2012, but NYCHA also alleges that there is evidence that other non-bargaining unit personnel have also performed audio visual tasks in the past. Therefore, because the work at issue has been openly assigned to non-bargaining unit employees for more than one year, the Union cannot claim exclusivity over these tasks. Moreover, even if the Union could establish that the work was performed exclusively, NYCHA still would not need to bargain over the transfer of work because the Department of Communications clearly made a managerial decision to change the level of service and the qualifications for employees in the Audio/Visual Unit by hiring a New Media Graphics Coordinator.

> governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . [and] exercise discretion over its organization and the technology of performing its work . . . Decisions of the [C]ity . . . on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

NYCHA argues that, since Local 306 has failed to establish that NYCHA violated NYCCBL § 12-306(a)(4), there is no derivative violation of NYCCBL § 12-306(a)(1). Additionally, NYCHA contends that since the Union has failed to demonstrate that NYCHA has prevented the Union from representing its members, exhibited interference, or negatively impacted unit members in the exercise of their protected rights, there is no independent violation of NYCCBL § 12-306(a)(1).

DISCUSSION

As a preliminary matter, we consider NYCHA's argument that the petition was untimely. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCHA claims that the alleged improper practice accrued in August 2012, when non-bargaining unit personnel began working openly alongside the remaining bargaining unit member in the Audio/Visual Unit. The Union claims its May 2014 petition was timely because the alleged improper practice accrued in January 2014 when it first learned that NYCHA was using a non-bargaining unit member. As we find that the Union knew or should have known about the reassignment of bargaining unit work before January 2014, we find that the petition is untimely.

Here, the alleged violation began in August 2012 when NYCHA assigned Luciano, a non-bargaining unit member, to perform Media Services Technician duties. Pursuant to NYCCBL § 12-306(e):

> A petition alleging that a public employer … has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

See also § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[7] It is well-settled that "[t]he statute of limitations period does not necessarily begin to run on the date a party announces an intended change; rather, it begins to run after the intended action is actually implemented and the charging party is injured thereby." *DC 37*, 6 OCB2d 24, at 19 (BCB 2013) (quoting *DC 37, L. 1508*, 79 OCB 21, at 19 (BCB 2007) (internal quotations omitted); *see also County of Cattaraugus*, 8 PERB ¶ 3062 (1975).

We are not persuaded by the Union's argument that the statute of limitations began to run in January 2014 when the Union asserts it discovered the injury. The Board has long held that "[t]he statute of limitations begins to run upon the party having actual or constructive knowledge of definitive acts which put it on notice of the need to complain." *DC 37*, 5 OCB2d 22, at 20 (BCB 2012) (quoting *USA, L. 831*, 3 OCB2d 27, at 7 (BCB 2010)); *UPOA*, 43 OCB 38, at 24-25 (BCB 1989); *see also Bd. of Coop. Educ. Serv.'s Sole Supervisory Dist. of Westchester*, 45 PERB ¶ 3031 (2012) (statute of limitations "commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge or *the date that such conduct could have reasonably been discovered*.") (emphasis added). In considering whether a union has constructive notice we make "a context-specific determination of whether facts

[7] OCB Rule § 1-07(b)(4) provides, in relevant part:

> One or more public employees or any public employee organization acting on their behalf … may file a petition alleging that a public employer or its agents … has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation …

surrounding a development would reasonably have alerted a party to the development."[8] *DC 37*, 5 OCB2d 22, at 20 (quoting *USA, L. 831*, 3 OCB2d 27, at 8).

Here, the Union filed its petition more than 21 months after the alleged injury. There is nothing in the record to show that the employer concealed its actions, attempted to deceive the Union, or in any way prevented the Union from being able to discover the reassignment. *Compare USA, L. 831*, 3 OCB2d 27 (finding that the union did not have constructive notice of the implementation of new payroll fees where fewer than ten of the union's 6,500 members were charged payroll fees and its members had no reason to know that the fees were newly implemented). We are not persuaded that the nature of the Media Services Technician work was "closed," or that the only way the Union could have learned of the reassignment would have been to ask NYCHA directly. Luciano began performing Media Services Technician work shortly after the resignation of a Union member. He continued to openly and regularly perform audio/visual duties for over 17 months before the Union alleges it actually learned of the assignment and for over 21 months before the instant petition was filed. Indeed, at all times after the alleged reassignment of bargaining unit work, Nagy, a Media Services Technician and a member of Local 306, remained in the Audio/Visual Unit and performed the same duties alongside Luciano. While there is no evidence that the Union was told about the reassignment prior to January 2014, it was an open and obvious change, and we find that the Union should

[8] We are not persuaded that *PBA*, 73 OCB 12 (BCB 2004), cited by the Union, compels us to find that the time to file a petition only runs from the date the petitioner learned of the action. In that case, the Board found that the statute of limitations commenced on the date of the union's actual knowledge of the unilateral change. No facts were raised to establish that the union had constructive knowledge of the change prior to actual knowledge.

have known about the reassignment.[9] *Compare Bd. of Educ. of the City of New York*; 15 PERB ¶ 3050 (1982) (PERB found a charge untimely stating that "unless the act complained of is performed in secrecy, the time to challenge that act runs from the time of its performance."). Thus, we find that the Union could have discovered the reassignment by exercising reasonable due diligence and that the Union fails to assert any facts or persuasive arguments that explain why the more than 21-month delay in filing its petition was reasonable.

As we find that the Union knew or should have known about the alleged reassignment of bargaining unit work sometime before January 2014, the petition is dismissed as untimely, and we do not reach the merits of the case.

[9] We do not impute constructive knowledge to the Union based solely upon the knowledge of a single Union member. Rather, the record shows that the Union could have learned of the alleged violation with relative ease during the 17 months between the alleged violation and the Union's admitted knowledge of it.

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 verified improper practice petition filed by Local 306, I.A.T.S.E., docketed as BCB-4047-14, hereby is dismissed in its entirety.

Dated: November 10, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER