DC 37 v. City & HRA, 71 OCB 20 (BCB 2003) [Decision No. B-20-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

Decision No. B-20-2003
Docket No. BCB-2271-02

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.

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DECISION AND ORDER

On March 8, 2002, District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union"), on behalf of its locals: Local 371, Social Service Employees Union ("Local 371"), and Local 1549, Clerical Administrative Employees ("Local 1549"), filed an improper practice petition alleging that the City of New York and the New York City Human Resources Administration ("City" or "HRA") violated Section 12-306(a)(1), (2) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 13) ("NYCCBL"). Petitioner alleges that HRA unilaterally granted merit pay only to employees in the Job Opportunity Specialist ("JOS") and Associate Job Opportunity Specialist ("AJOS") titles (collectively, the "JOS title series"), thus penalizing DC 37 members in the titles Eligibility Specialist, Caseworker and Supervisor, Levels I - III. Petitioner alleges that such conduct was done in order to discourage participation in the Union and undermine the Union's position as a bargaining agent

and its ability effectively to represent bargaining unit members. The City denies all Petitioner's claims alleging they are conclusory and speculative, fail to allege facts sufficient to demonstrate a violation of the NYCCBL, and because the City had a legitimate business reason for granting merit pay.[1]

Previously we issued two decisions – *District Council 37*, Decision, No. B-23-2002, and *Local 1180, Communications Workers of America*, Decision No. B-28-2002 – which arose from the same facts involved herein. In both those cases, we found that the City's implementation of the "Merit Pay Plan" during the pendency of a representation proceeding was interference in violation of NYCCBL §12-306(a)(1) and ordered that the implementation cease. Because of the Board's Orders granting the petitions and requiring HRA to cease implementation of the Merit Pay Plan, the Board presumed that no further decision in this matter would be necessary. However, Petitioner has requested that the Board issue a decision in this case.

For the reasons set forth below, Petitioner's § 12-306(a)(1) claim is dismissed because the issue presented was decided in Petitioner's favor in *District Council 37*, Decision, No. B-23-2002 and no further relief can be granted. In addition, as in *Local 1180, Communications Workers of America*, Decision No. B-28-2002, we dismiss the § 12-306(a)(1) and (3) claim because there are no allegations of fact to support a finding that the City discriminated against employees based on their union activity by granting merit pay to JOS and AJOS employees and not to other titles represented by DC 37. Further, we dismiss the alleged violation of §12-

[1] The City also raised defenses to refusal to bargain claims which were not made by Petitioner in this case.

306(a)(2) for failure to state a claim.[2]

Prior Decisions

The parties and facts in this case are exactly the same as those in *District Council 37*, Decision, No. B-23-2002. In that case we found that in fall 2000, HRA announced that it was changing its Income Support Offices to Job Centers, creating the JOS title series to staff those centers, and consolidating certain existing positions into positions which would be held by employees in the new titles. By spring 2001, HRA began recruiting employees to fill the new titles from its current employees in the following titles: Principal Administrative Associate ("PAA"), Eligibility Specialist ("ES"), Supervisor ("SUP"), and Caseworker. The JOS title was filled with employees who were formerly ESs and Caseworkers and the AJOS title was filled with employees who were formerly SUPs and PAAs. SUPs and Caseworkers are represented by Local 371, PAAs are represented by Local 1180, Communications Workers of America ("CWA"), and ESs are represented by Local 1549. *Id.* at 2-3. In February and March 2001, all three local unions filed petitions seeking to accrete the JOS and/or AJOS titles to existing

[2] Section 12-306(a) of the NYCCBL provides, in part that 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.

bargaining units.[3] *Id.* at 3. The City agreed that employees in the JOS title series would continue to be represented by their current bargaining representatives until the issues concerning representation were resolved. *Id*. at 3-4. In September 2001, the City announced that it was implementing a "Merit Pay Plan" for employees in the JOS titles series. The plan provided that eligible employees would receive lump sum amounts on various dates in 2001 and 2002. *Id.* at 4.

The Board found that HRA's implementation of merit pay to JOS and AJOS employees subsequent to the filing of a representation petition was a change in the employees' existing terms and conditions of employment and therefore violated § 12-306 (a)(1) of the NYCCBL. *Id.* at 12. In addition, the Board found that granting of merit pay to JOS employees without first bargaining with DC 37 concerning the criteria and procedures for implementing merit pay violated §12-306 (a)(1) and (4) of the NYCCBL. However, because the representation petitions were still pending, no bargaining order was issued. Rather, the Board ordered that HRA cease and desist from any further granting of merit pay. *Id.* at 16-17.

Our decision in *Local 1180, Communications Workers of America*, Decision No. B-28-2002, also arose from the same facts. In that case, CWA claimed that the City: (a) implemented a merit pay plan for employees in the AJOS title without first negotiating with Local 1180, and/or without regard to the terms set forth in the parties' collective bargaining agreement; (b) changed terms and conditions of employment during the pendency of a representation petition and encouraged Local 1180 members to abandon their support for the union; and (c) discriminated against union members by granting merit pay only to employees in the JOS title series and not employees in other titles represented by Local 1180. *Id.* at 1-2. As in *District*

[3] A hearing on those representation petitions is currently in progress.

Council 37, the Board found that the City's implementation of merit pay to AJOS employees during the pendency of the representation process was a change in the employees' existing employment conditions and violated § 12-306(a)(1) of the NYCCBL. *Id.* at 11. Further, we found that implementation of the Merit Pay Plan for AJOS employees was a unilateral change in a mandatory subject of bargaining and a breach of the City's agreement to extend the terms of the PAA contract to AJOS employees in violation of § 12-306(a)(1), and (4) of the NYCCBL. *Id.* at 13. Because there was insufficient evidence to show that the City granted merit pay to AJOS employees and not PAAs based on the PAAs' union membership, we dismissed the claim that the granting of merit pay was discriminatory. *Id.* at 14-15.

The Instant Case

Claim of Interference in Violation of § 12-306(a)(1)

The facts in this case – HRA's unilateral implementation of the "Merit Pay Plan" for employees in the JOS title series – are the same as those in prior cases, *District Council 37*, Decision, No. B-23-2002, and *Local 1180, Communications Workers of America*, Decision No. B-28-2002, brought by both DC 37 and CWA. Here Petitioner's claims differ from those it asserted in its prior improper practice petition. In the instant case, Petitioner claims that the City's implementation of the Merit Pay Plan, without first bargaining over criteria and procedures for implementation, constitutes interference with the Union's ability to represent its bargaining unit members in violation of §12-306(a)(1), and discrimination against bargaining unit members in violation of §12-306 (a)(1) and (3).

Petitioner's present claim concerning interference with its ability to represent its bargaining unit members, although not specifically articulated in its prior petition, was addressed

by the Board in *District Council 37*. We have previously held that when an employer violates its duty to bargain in good faith, there is also a derivative violation of §12-306 (a)(1) of the NYCCBL. The Board has stated:

> where there has been a refusal to confer with the certified employee representative regarding a change affecting terms and conditions of employment, there is, in our judgment, interference with the effectiveness of the employee representative and, consequently, the rights of the employees which it represents, in violation of Section 1173-4.2(a)(1) [§ 12-306(a)(1)] of the NYCCBL.

Committee of Interns and Residents, Decision No. B 25-85I at 10-11. *See Uniformed Fire Officers Association, Local 854,* Decision No. 17-2001 at 7 (refusal to confer with certified bargaining representative regarding a change affecting terms and conditions of employment, a violation of §12-306(a)(4) of the NYCCBL, is also interference in violation of §12-306(a)(1) of the NYCCBL).

Our conclusion in *District Council 37* was that HRA's unilateral implementation of merit pay violated both §12-306 (a)(1) and (4) of the NYCCBL because "absent the status quo required by the filing of the representation petition, the implementation of the Merit Pay Plan would have required bargaining." *Id.* at 16. Accordingly, although not expressly stated, our finding that the unilateral granting of merit pay prohibited by § 12-306(a)(4) also constituted interference with the effectiveness of the employees' bargaining representative prohibited by §12-306(a)(1) of the NYCCBL. In addition, the Board's Order in *District Council 37* provided the same cease and desist remedy as is being sought here. Accordingly, the claimed violation of §12-306(a)(1) presented in the instant matter was previously decided and remedied by the Board. Inasmuch as no new claims or additional remedy is sought herein, we dismiss the interference claim.

Claim of Discrimination in Violation of § 12-306(a)(1) and (3)

Petitioner's second claim seeks a finding that the granting of merit pay to only JOS and AJOS employees, to the exclusion of its bargaining unit members, was discriminatory. The premise of this claim is that the City has unlawfully discriminated against employees who remain in the ES, Caseworker and SUP titles because of their membership in or activities on behalf of DC 37. This issue was raised in *Local 1180, Communications Workers of America*, Decision No. B-28-2002, in which CWA claimed that the City granted merit pay to AJOS employees and not PAAs because of PAAs' union membership. In that case, the Board held:

> Since all the Unions have continued to represent members who have transferred to positions in the JOS title series, the vast majority of merit pay recipients are indeed union members. Further, the City has not objected to the addition of the AJOS title to either the pre-existing Local 1180 or Local 371 bargaining units, and the AJOS employees will remain union members once the representation process is completed. As a result, we do not find that merit pay was granted only to AJOS employees in order to discourage union membership.

Id. at 14.

No arguments or evidence presented in the instant case justify a departure from our finding in *Local 1180, Communications Workers of America*. Here, DC 37 has continued to represent former ESs, SUPs, and Caseworkers who transferred to the JOS and AJOS titles. Therefore, members of the DC 37 locals who transferred to the new titles were eligible for, and some did receive merit pay.[4] Furthermore, in the representation proceeding, the City has not indicated any preference as to which bargaining unit and/or union represents the new titles. Thus, no evidence shows that the granting of merit pay only to employees in the JOS title series and to the exclusion of ESs, SUPs, and Caseworkers was intended to encourage or discourage

[4] For discussion of those employees who received merit pay, *see District Council 37*, Decision No. B-23-2002 at 17.

union membership or support. Moreover, to the extent Petitioner asserts that intentionally selecting employees in the JOS title series for merit pay "penalized employees in the Caseworker, ES and SUP titles due to their retention of the titles," or the employees' failure to move voluntarily into the new titles, such a claim is not actionable under the NYCCBL. Petitioner's Reply at 11. Accordingly, we dismiss the claim that the granting of merit pay discriminated against employees in violation of NYCCBL § 12-306 (a)(1) and (3).

Claim of Interference in Violation of § 12-306(a)(2)

Finally, Petitioner also claims a violation of NYCCBL §12-306 (a)(2). This Board has stated:

> A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.

District Council 37, Decision No. B-36-93 at 18. Petitioner asserts that the same conduct described above, which purportedly violates Section 12-306 (a)(1) and (3) of the NYCCBL, also constitutes a violation of NYCCBL §12-306(a) (2). However, the alleged conduct does not claim any preferential treatment of one union over another, interference with the formation or administration of the Union, or assistance in the nature of that which has been found to violate the NYCCBL. Therefore, the claimed violation of NYCCBL §12-306 (a)(2) is dismissed.

For all the reasons set forth above, we dismiss the 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 docketed as BCB-2271-02 be, and the same hereby is, denied in its entirety.

Dated: June 9, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I Dissent.

BRUCE H. SIMON
MEMBER