L. 1180, CWA v. HHC, 71 OCB 28 (BCB 2003) [Decision No. B-28-2003 (IP)]

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

-between-

LOCAL 1180 COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Petitioner,

Decision No. B-28-2003
Docket No. BCB-2320-03

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.
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DECISION AND ORDER

On February 7, 2003, Local 1180, Communications Workers of America, AFL-CIO, ("Union") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC" or "Corporation") violated §§ 12-306(a)(1), (2), and (3) and 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by preventing Union members from holding a meeting at Bellevue Hospital to discuss Union business including, but not limited to, the Union's petition pending before the New York City Board of Certification ("BOC") to represent employees in the HHC title of Coordinating Manager. The Union alleges that HHC interfered with the administration of the Union and discriminated against the Union and its members by prohibiting them from holding their scheduled meeting. HHC denies the claims, asserting that it was simply

following longstanding policy of prohibiting organizing meetings on Corporation premises. HHC also denies that it discriminated against any Union member in violation of the NYCCBL. Because we find that HHC's action was inherently destructive of important employee rights, we hold that the Corporation violated § 12-306(a)(1) and (3) of the NYCCBL. We dismiss the petition with respect to all other claims.

BACKGROUND

In November 1979, HHC promulgated a memorandum addressed to directors of its facilities which outlined guidelines to govern equal access rights of competing unions during an organizational drive. ("Koretsky Memo.") Among other provisions, the Koretsky Memo provides that HHC employees:

> may discuss union organization and solicit membership from other employees only if both parties are on non-working time and the organizational activity does not take place in a patient care area. Such organizational activity is not permissible where the activity engaged in disrupts either patient care or the normal operations of the institution . . . . If an employee representative wishes to service the collectively bargained agreement, it must be given access to carry out this function. However, no organizational campaigning may be permitted during such access periods. These guidelines are to be strictly observed and applied in a non-discriminatory manner to all competing organizations, including the incumbent. All questions regarding interpretation are to be referred to the Corporation's Director of Labor Relations.

The Union and Corporation are parties to a collective bargaining agreement covering employees in the titles of Principal Administrative Associate (Levels I, II and III), Health Care Program Planner Analyst, and Assistant Coordinating Manager employed by HHC ("Agreement"). At Article IX, the Agreement provides:

> The Union may post notices on bulletin boards in places and locations where

> notices usually are posted by the Employer for the employees to read. All notices shall be on Union stationery, and shall be used only to notify employees of matters pertaining to Union affairs. Upon request to the responsible official in charge of a work location the Union may use Employer premise for meeting during employees' lunch hours, subject to availability of appropriate space and provided such meetings do not interfere with the Employer's business.

In May 1994, the Union filed a petition seeking to accrete HHC employees serving in the title of Coordinating Manager ("CM") to its bargaining unit. BOC Docket No. RU-1162-94. The Corporation opposed the petition and contended that such employees were managerial/confidential and, thus, not eligible for collective bargaining. That petition is currently being processed.[1]

The Union asserts, but HHC denies, that on November 15, 2002, a Union Shop Steward at Bellevue Hospital reserved a room for a meeting, to be held on December 2 at which Union members from Bellevue, Gouverneur, Harlem, and Metropolitan Hospitals were scheduled to discuss (a) the status of the Union's effort to organize employees in the Coordinating Manager title, and (b) the possibility of an early retirement offer from HHC.

According to the Union, on November 19, the Union staff mailed a meeting notice to some 200 members employed at the four referenced HHC facilities and posted this notice on designated bulletin boards at the same facilities. The notice stated:

> **Attention Local 1180 Members!**
> *Please come to an important union meeting to discuss building a bigger, stronger union in your hospital*

[1] The representation petition had been held in abeyance pending the outcome of another matter in which eligibility for bargaining was also at issue. Processing of the Union's representation petition resumed after the other matter was settled.

> **Local 1180** is seeking to organize the Coordinating Manager title. This will benefit current Local 1180 members and Coordinating Managers (CMs) alike. CMs will gain the security of union protection and the support of the entire 1180 family. ACMs will gain the ability to promote to a higher title without having to give up their union rights and benefits. PAAs, ACMs and CMs will all benefit by having more 1180 members in the hospital; a bigger union means more power to negotiate better contracts and win more respect on the shop floor.
>
> **But we need your help to do it!**
>
> *The only people who can truly organize the CMs are you, the ACMs and PAAs. You know the workplace, you know the people; you can explain to them from experience how being an 1180 member benefits you, and will benefit them.*
>
> The first step is this meeting.
> We're counting on you.

In addition, the Union posted a second notice on those bulletin boards. That notice stated:

> **CWA LOCAL 1180 SITE MEETING**
> BELLEVUE HOSPITAL
> NEW BUILDING
> Monday, December 2, 2002
> 462 1ST Avenue
> 12TH Floor - Rose Room
> 5:00 pm
>
> **AGENDA**
> - Coordinating Manager Organizing
> - HHC Early Retirement
>
> President, Arthur Cheliotes & Staff Representatives, Gloria Middleton & Joseph Calderon will be attending.

There is no dispute that, between November 20 and 26, 2002, HHC's counsel and the Union's attorney called each other several times about whether HHC would allow the meeting to occur on the Corporation's premises. HHC acknowledges that it informed the Union on

November 26 that the Bellevue meeting scheduled for December 2 "had been canceled." Thereafter, the Union sent notices of cancellation of the meeting to its 200 members.

As relief, the Union seeks an order directing HHC to cease and desist from prohibiting the Union from holding membership meetings on HHC premises solely on the basis of the Union's intention to discuss organizing; an order directing the posting of a notice in HHC facilities and work sites with respect to such cease and desist orders; an order directing HHC to reimburse the Union for the costs of mailing notices to its members at Bellevue, Gouverneur, Harlem, and Metropolitan Hospitals about the cancellation of the scheduled meeting; and such other relief as the Board determines is proper.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that by prohibiting its members from discussing the organizing of employees in the Coordinating Manager title at a scheduled Union meeting, HHC has interfered with Union members' right to organize, form, join and assist an employee organization in violation of NYCCBL §§ 12-305 and 12-306(a)(1).[2] It was only after the Union indicated that

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[2] 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;
(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 pertinent part:

the meeting agenda would include discussion of the pending representation proceeding that HHC "change[d] the *status quo*" with respect to Article IX of the Agreement allowing union meetings at HHC facilities, space and time permitting. Thus, the Union argues, HHC interfered with employees' rights under NYCCBL § 12-305 in violation of NYCCBL § 12-306(a)(1).

In addition, by refusing to permit the Union membership to meet as scheduled "solely because" a planned topic of discussion was the organizing of employees in the CM title, HHC sought to regulate the content of the Union business that could be discussed at the meeting. In this way, the Union further argues, HHC has dominated and interfered with Union members' rights under NYCCBL § 12-305 in violation of § 12-306(a)(2).

Finally, by prohibiting Union members from meeting based solely on the content of the planned discussion, HHC violated NYCCBL § 12-306(a)(3) by discriminating against public employees in the exercise of their rights under NYCCBL § 12-305. The Union contends that the rights not only of individual employees but of an employee organization in the representation of individual employees may be violated under NYCCBL § 12-306(a)(3). The Union cites *District Council 37*, Decision No. B-36-93 at 24, for the proposition that a discrimination claim may lie for public employer action against an employee organization.

The Union contends that the factual circumstances in the instant matter are distinguishable from those at issue in *New York State Nurses Ass'n*, Decision No. B-12-80 ("*NYSNA*"), cited by HHC. The notices which the Union had posted announced a "*membership* meeting . . . not an '*organizing* meeting' for non-members." (Emphasis in original.) That is, the

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> 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 . . . .

Union "had planned a meeting for its own members," with no other individuals specifically invited to attend. Further, the Union did not intend to conduct organizational business under the guise of a membership meeting as part of any attempt to organize its own members and convince them to support the Union. The Union asserts that no other union has filed a petition to represent the bargaining unit members as was the case in *NYSNA*. HHC has provided no evidence that the meeting was intended to be the type of "organizing meeting" which the Board found in *NYSNA*.

Further, the announced agenda for the meeting included other Union business, in particular, "HHC Early Retirement." Moreover, the Union is not required to state in its meeting notices that a proposed meeting is exclusively for its members. Finally, contrary to HHC's assertion, the Union does not claim that HHC has violated the rights of CMs to organize.

HHC's Position

HHC contends that the Union has no standing to file the instant improper practice petition claiming violation of organizational rights on behalf of employees in the CM title because the Union does not represent those employees. The Corporation cites *Uniformed Firefighters Ass'n*, Decision No. B-33-97, in support of this proposition.

As to the merits of the claims, although HHC does not deny that it has a policy of allowing union membership meetings on its premises during off-hours and space permitting, the Corporation has disallowed organizing meetings in its facilities since 1979. As no term or condition of employment has been changed under the factual circumstances of the present case, HHC denies that it has changed the *status quo* with respect to its policy of allowing union meetings. Thus, it contends that it has not violated Union member rights under either § 12-305 or § 12-306(a)(1) of the NYCCBL by disallowing the meeting at issue here.

HHC also argues that no factual allegations have been made to state a *prima facie* claim that HHC dominated or interfered with the Union in violation of NYCCBL § 12-306(a)(2). Similarly, HHC argues that no factual allegations have been presented to support any claim that it took any discriminatory action against individual employees in violation of NYCCBL § 12-306(a)(3). Assuming that legally sufficient factual allegations could support such a claim, HHC had a legitimate business reason for disallowing what would have been an organizational meeting on HHC premises because HHC maintains a neutral position with respect to representational issues, and its policy of disallowing such meetings applies equally and without discrimination to all unions. As no violation under § 12-306(a)(3) has been articulated, there is also no violation of § 12-306(a)(1).

DISCUSSION

As a preliminary matter, HHC argues that the Union lacks standing to enforce the rights of CMs, employees it is not certified to represent. The focus of NYCCBL § 12-306(a) is the protection of public employees. Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) entitles "one or more public employees or any public employee organization acting on their behalf "to file an improper practice petition under NYCCBL § 12-306(a). There is no dispute that the Union posted membership meeting notices on HHC bulletin boards announcing that a topic on the agenda would be the Union's petition to represent the non-unit employees. One notice seeks the attention of "Local 1180 members" and addresses specific comments to unit employees in the ACM and PAA titles. The other notice advertises a "Local 1180 site meeting." Thus, we find

that the meeting at issue was directed at current bargaining unit members, not unrepresented employees in the CM title. Therefore, the Corporation's argument with respect to standing is without merit. The facts in *Uniformed Firefighters Ass'n*, Decision No. B-33-97, which was cited by the Corporation and which dealt with an improper practice petition brought by a union on behalf of an employee whom it did not represent are distinguishable from the facts of the instant case.

The main issue in this case is whether HHC's decision not to allow the meeting of December 2, 2002, constituted interference with employees' rights to engage in union activity – specifically, to attend union meetings and discuss organizing efforts. It is the policy of the City to favor and encourage the right of municipal employees to organize and be represented. NYCCBL §§ 12-302, 12-305. A public employer commits an improper practice if it is found to interfere with such rights. *District Council 37*, Decision No. B-23-2002 at 12 (employer violated § 12-306(a)(1) by granting merit pay to employees after union filed petition to represent them).

Actions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive. *Assistant Deputy Wardens Ass'n*, Decision No. B-19-95 at 27. *See also Committee of Interns and Residents*, Decision No. B-26-93, *aff'd sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93, slip op. at 47 (Sup. Ct. N.Y. Co., Nov. 29, 1993). Similarly, the New York State Public Employment Relations Board ("PERB") has stated:

> The Taylor Act guarantees to public employees in this State the right to participate in an employee organization and to be represented by an employee organization in the negotiation of their terms and conditions of employment. Conduct of an employer or one acting in his behalf which has a predictably chilling effect on such employee organization's activities clearly discourages membership in or participation in the activities of the employee organization. Thus, conduct of an employer which is inherently

> destructive of such employee rights is a violation of § 209.a-l(c) even in the absence of proof of any intention to weaken the employee organization.

United Federation of College Teachers, Local 1460, 5 PERB ¶ 3018 (1972), *rev'd on other grounds*, *sub nom. Fashion Institute of Technology v. Helsby*, 44 A.D.2d 550, 7 PERB ¶ 7005 (1st Dept. 1974). PERB has also held that "the right to form, join and participate in an employee organization . . . is intimately related to the . . . right to be represented by an employee organization. Action taken for the purpose of frustrating the right of representation necessarily has a chilling effect on the [Civil Service Law] § 202 right of organization and is inherently destructive of that right." *Security and Law Enforcement Employees*, 18 PERB ¶ 3081 (1985). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *Assistant Deputy Wardens Ass'n*, Decision No. B-19-95 at 35.

Employees' rights to conduct and attend union meetings are fundamental pursuant to their rights to engage in union activity set forth in NYCCBL §12-305. Similarly, employees' rights to discuss employment issues with other employees on their employer's premises is protected by the statute. *Staten Island Rapid Transit Operating Authority*, 29 PERB ¶ 3080 (1995) (employer's removal of employee from its property because he was discussing union business with other employees unlawful.) However, an employer also has the right to direct and control its operations, limit the use of its premises, and maintain productivity. *Id.*; *see District Council 37*, Decision No. B-30-82 at 8-9.

Here, the Corporation had a practice of permitting union membership meetings on its property. The Corporation does not raise any claims that the Union deviated from that practice or failed to follow established procedures when it scheduled the December 2 meeting. Rather,

HHC prohibited the Union from holding the membership meeting because it objected to one of subjects that the Union intended to discuss, specifically organizing the CMs. We find that the circumstances that gave rise to the Koretsky memo are not applicable. The Union here sought to discuss – with members of the *existing* bargaining unit – its efforts to bring unrepresented employees into the unit. The discussion was not addressed to unrepresented employees. Thus, we find that HHC's prohibition of the union membership meeting had a chilling effect on the employees' rights to engage in union activity and is inherently destructive of those rights. In these circumstances, no proof of improper motive is required. *Security and Law Enforcement Employees*, 18 PERB ¶ 3081 (1985). Accordingly, we find that the Corporation's decision not to allow the Union to hold its scheduled meeting because the union intended to discuss organizing is a violation of NYCCBL § 12-306(a)(1).

The Corporation's position is that its prohibition of the scheduled union meeting was consistent with its policy of maintaining neutrality with respect to organizing issues. Indeed, when faced with competing representation claims for the same group of employees, an employer must remain neutral and not demonstrate favoritism to one union over another. *District Council 37*, Decision No. B-30-82 at 12. However, there were no competing representational claims in this instance. The Union's intention to hold a union meeting on the employer's premises during non-work time was consistent with the access policy established by the Corporation. Therefore, the Corporation could not prohibit the meeting based on the topics the Union proposed to discuss.

With respect to the Union's claim that the Corporation's actions also discriminated against Local 1180 in violation of NYCCBL § 12-306(a)(3), we need not decide that issue as we

have found HHC's conduct inherently destructive of rights conferred on the Union and its members in violation of NYCCBL § 12-306(a)(1), and no greater remedy could be ordered if there were also an independent violation of § 12-306(a)(3).

Concerning the claim that the Corporation's action dominated or interfered with the formation or administration of the Union in violation of NYCCBL § 12-306(a)(2), we observe that 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. In the instant case, there is no allegation that the Corporation favored or recognized a rival union or gave improper privileges to any employees to put the Union at a disadvantage. Further, there are no allegations that the Corporation's conduct rose to the level of "domination" or "interference" as we have interpreted those terms under this section of the law. Petitioner asserted no specific facts to show how the refusal to allow the Union to hold the meeting at issue resulted in "domination" of Local 1180. Therefore, we dismiss the claim that the Corporation violated §12-306(a)(2) of the NYCCBL.

Finally, with regard to the Union's assertion that HHC changed a prior practice of allowing union meetings at HHC facilities, as provided for in Article IX of the Agreement, such a claim is more appropriately heard before an arbitrator, not before this Board on an improper practice petition. Section 205.5(d) of the N. Y. Civil Service Law (Article 14) ("CSL") provides,

in part, that this Board, in addition to PERB, "shall not have authority to enforce an agreement between an 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."

Insofar as this claim may be read as asserting that HHC has violated the *status quo* which must be maintained during the pendency of a representation question in violation of NYCCBL § 12-306(a)(1), *see Assistant Deputy Wardens Ass'n*, Decision No. B-19-95 at 36, the Union has not alleged that HHC changed the employment conditions of employees in the Coordinating Manager title, who are the subject of the Union's representation petition; therefore, we find no interference with the representation process. Instead, the violation which we find here is of the rights of existing unit members.

In sum, we find that the Corporation has interfered with the rights of current members of Local 1180 under NYCCBL § 12-306(a)(1) to participate in the Union meeting at issue. We do not reach Petitioner's claim with respect to an alleged violation of NYCCBL § 12-306(a)(3), and we dismiss as legally insufficient the claim with respect to NYCCBL § 12-306(a)(2).

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 HHC has violated § 12-306(a)(1) by not permitting the members of Local 1180, Communications Workers of America, to hold a membership meeting scheduled for December 2, 2002; and it is

ORDERED, that HHC immediately cease and desist from interfering, for the reasons stated herein, with membership meetings to be held by Local 1180, Communications Workers of America, in violation of NYCCBL § 12-306(a)(1); and it is further

ORDERED, that, within 30 days of issuance of this Order, HHC shall send a letter to Local 1180, CWA, acknowledging the Board's decision finding an improper practice, and representing that it will not interfere with the holding of union membership meetings on HHC property during off-hours, space permitting; and it is further

ORDERED, that, in all other respects, the improper practice petition docketed as BCB-2320-03 be, and the same hereby is, denied.

Dated: September 25, 2003
New York, New York

MARLENE A. GOLD
CHAIR

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