OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION, DISTRICT COUNCIL 37, AFSCME, — Decision No. B-31-2003

Petitioner,

-and-

THE CITY OF NEW YORK, and THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, — Docket No. BCB-2336-03

Respondents.
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DISTRICT COUNCIL 37, AFSCME,

Petitioner,

-and-

THE CITY OF NEW YORK, and THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION — Docket No. BCB-2338-03

Respondents.
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DECISION AND ORDER

On April 10 and 11, 2003, the Social Service Employees Union, Local 371 ("Local 371") and District Council 37, Local 1549 ("Local 1549") (collectively "Unions") filed separate verified improper practice petitions, Docket Nos. BCB-2336-03 and BCB-2338-03 respectively, against the New York City Human Resources Administration ("HRA" or "City"). The petitions allege that HRA unilaterally implemented a merit pay program resulting in salary increases to

certain bargaining unit employees and that this action violated the City's duty to bargain in good faith and interfered with the exercise of employees' rights in violation of § 12-306(a)(1), (2), (3), and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The City argues that HRA made "salary adjustments" to employees who "voluntarily assumed an overall increase in responsibilities" and did not award merit pay or breach its duty to bargain concerning criteria and procedures for implementation of merit pay.

The parties were advised by letter dated July 7, 2003, that because both Case Nos. BCB-2336-03 and BCB-2338-03 allege the same improper practices arising from the same facts and circumstances, the Board intended to consolidate the petitions. The parties did not object and a hearing was held on July 30, 2003. We find that HRA's implementation of simultaneous pay increases to 39 employees was a merit pay program, and the unilateral implementation therefore breached HRA's duty to bargain in good faith.

BACKGROUND

HRA maintains a Division of HIV and AIDS Related Services ("HASA") which provides, among other things, public assistance, Medicaid, and food stamp benefits to clients and their families who are living with AIDS and HIV. HASA is staffed by approximately 1200

[1] Simultaneous with the filing of the improper practice petitions, both Petitioners filed requests that the Board grant them leave to seek injunctive relief to stop any further award of merit pay pending the outcome of the improper practice charges. On April 22, 2003, the Board of Collective Bargaining granted Petitioners' request and authorized them to seek injunctive relief in Supreme Court, New York County. Local 371 and Local 1549 then filed such petitions. By stipulation resolving that action, the parties agreed that the City would cease granting pay adjustments until the Board resolved the underlying improper practice claims.

employees. The employees include Caseworkers and Supervisors, Levels I and II, who are represented by Local 371, Eligibility Specialists, who are represented by Local 1549, and other employees who are represented by other unions. According to documents submitted by the City, 933 employees in HASA are represented by Local 371 and 190 employees are represented by Local 1549.

In October 2002, the City offered an Early Retirement Incentive Program. At the hearing, Jane Corbett, Executive Deputy Commissioner of HRA's Office of Policy and Program Development, who was then acting as Deputy Commissioner for the HASA unit, estimated that about seven or nine percent of the non-managerial staff in the HASA unit retired as a result of the Incentive Program. Due to a citywide hiring freeze, HASA was unable to fill most of these vacancies. Therefore, all HASA employees had " to do more work than they normally would to get the same work done." (Hearing Transcript 19.)[2]

Corbett testified that as early as January 2003 the HRA executive team, comprised of the highest level managers, began discussing ways to reward employees who had, as a result of the staffing shortages, gone "the extra mile to get the work done." (Tr. 20.) At some point the head of HRA's Finance Department indicated there was money available and the Commissioner decided, based on the executive team's recommendation, that in-title salary increases would be given to those employees "who were deemed to have really gone beyond what they were normally expected to do in their job descriptions." (Tr. 21.) Corbett explained that the in-title "salary adjustments" were not merit pay because merit pay is something that can be broadly

[2] Numbers in parentheses refer to the transcript of the July 30, 2003, hearing hereinafter abbreviated as "Tr."

given to any employee who is performing well. The pay increases were different because they were for employees "who were not just doing their job well . . . , but who were going beyond what their job would normally be because of the impact of the early retirement and the hiring freeze." (Tr. 37-38.) For example, she explained that one data entry clerk, whose work she had observed, was recommended for and received an in-title salary adjustment because she was doing data entry for several units instead of just one.

Recommendations for the pay increases were solicited from the Center Directors within 48 hours after the decision to grant the increases was made. Corbett testified that she told the HASA Directors to provide quickly short lists of employees who were most worthy of salary increase and whom "they deemed . . . , had really worked beyond their normal tasks and standards, and especially since late summer, where they really stepped up to the plate when we were in a situation with less staff to do the same work." (Tr. 23.) She explained that eligible persons were those employees who were "doing way beyond what was normally expected of them" and "persons who stayed and worked overtime in order to get the job done." (Tr. 22, Tr. 23.)

Leon Rozenbaum, Deputy Director of HASA's Office of Personnel and Labor Relations, similarly stated in an affidavit that employees who assumed additional duties as a result of the early retirements were recommended for salary increases. Supervisors' additional duties included covering more units and supervising more caseworkers than previously. Caseworkers additional duties included being responsible for more cases, home visits, and collateral contacts than before. Rozenbaum described the additional duties assumed by Eligibility Specialists as "an increased volume of eligibility determinations, additional face-to-face recertification

meetings, additional budget calculations . . . ." (City's Answer, Ex. A – Rozenbaum Affidavit, ¶ 8.)

Local 371 claims that on February 19, 2003, it learned from its members that HRA was in the process of granting merit increases to a select group of HASA employees. It is undisputed that, on February 20, 2003, Local 371 Vice-President, Faryce Moore, called the New York City Office of Labor Relations ("OLR") and advised that HRA was granting merit increases without bargaining, an action which would be illegal. A senior OLR negotiator told Moore that he would call HRA and tell the agency to stop implementing the increases.

Local 371 alleges that on February 21, 2003, HRA Commissioner Verne Eggleston told Lillian Roberts, the Executive Director of District Council 37, that "if Charles [Ensley, Local 371's President] doesn't back me up, I'm going to call all the staff in and tell them that I wanted to give them more money, but Charles blocked it." Local 371's Petition, ¶ 4. In an affidavit submitted in support of the City's Answer, Eggleston denies having made such statement.

On or about February 24, 2003, Corbett drafted memoranda recommending in-title salary increases for HASA employees deemed worthy by Center Directors or supervisors. These memoranda along with the Director's recommendations and/or the employee's most recent performance evaluation were forwarded to Jean Matthews, the Executive Deputy Administrator in the Office of Staff Resources, who implemented the recommended adjustments. The most recent performance evaluations submitted covered the period October 1, 2001, through September 30, 2002, a time that preceded the implementation of the Early Retirement Incentive Program.

Summary documents submitted by the City indicate that 39 HASA employees, 15 who

are represented by Local 1549 and 24 represented by Local 371, all at different locations within HASA, received the identical 8% salary increase.[3] Corbett issued memoranda recommending in-title promotions for the 39 employees. With respect to five of these employees, the memoranda describe a high quality of work performance and increased workload or responsibilities as a result of recent staffing shortages. The remaining memoranda do not focus on any particular time period or relate employee performance to the staffing shortages. The justifications for the increases describe an overall high quality of work performance. Some describe specific duties that employees performed in addition to their normal responsibilities, other recommendations generally note that additional responsibilities were performed, and still others do not specify any additional assignments. Most of the recommendations include such statements as "goes above and beyond the call of duty," volunteers or is available for additional duties or responsibilities, and "is available for emergencies." (City Ex. 2.) Finally, letters for two employees, written by an Acting Director to a Deputy Director of Field Operations, state that the employees are recommended "for a much deserved merit increase."

It is undisputed that the employees' salaries remained within the contractual salary range for each title. Also undisputed is that all selected employees were given the 8% salary increases on or about the same date. According to Local 1549, the increases were implemented in the March 28, 2003, payroll.

The Unions seek an order directing HRA to rescind prospectively the salary increases granted, to cease and desist from paying future merit increases without bargaining, to cease

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[3] In its post-hearing brief, Local 371 asserts that increases were given to about 70, rather than 24 of its 780 members at HASA. However, there is no support in the record for this fact.

interfering with employees' rights under the NYCCBL, and to post appropriate notices to employees.

POSITIONS OF THE PARTIES

Unions' Position

Local 371

Local 371 claims that HRA granted merit pay without bargaining, in violation of NYCCBL § 12-306(a)(1) and (4), for the unilateral implementation of a merit pay plan without negotiating the procedures and criteria constitutes an improper practice. Local 371 argues that the evidence shows that the salary increases granted were indeed based on merit inasmuch as the City concedes they were given to reward employees who performed additional duties or were outstanding workers. In addition, Local 371 argues the City did not have the authority under the collective bargaining agreement to unilaterally grant salary increases as it did in this instance. Local 371 also claims that HRA is deliberately interfering with, restraining and coercing employees in the exercise of rights guaranteed under NYCCBL §12-305.[4] Local 371 further

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[4] NYCCBL § 12-306(a) provides 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;

(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. . . .

NYCCBL § 12-305 provides in relevant part: Public employees shall have the right

asserts that the HRA Commissioner's statements to DC 37's Executive Director threatening to blame a failure to grant pay increases on Local 371's President was an unlawful threat in violation of §12-306(a)(1).

Local 1549

Local 1549 also asserts that HRA unilaterally implemented a merit pay plan without first bargaining with the Unions concerning the procedure and criteria for granting merit pay in violation of NYCCBL § 12-306(a)(1) and (4). Local 1549 argues that the salary increases granted were merit pay because they were awarded based on work performance factors such as quality and quantity of work. Local 1549 adds that HRA is blatantly disregarding the Board's previous order to bargain over the criteria and procedures for a merit pay program. *See District Council 37*, Decision No. B-23-2002. Further, the conferral of an economic benefit constitutes interference and is inherently destructive of the Unions since it conveys the message that a union is ineffectual. The interference is magnified by the fact that the current fiscal condition of the City is weak and the City has entered bargaining with its Unions stating that it has no resources for wage increases. Thus HRA's action undermines the Unions' ability to bargain for all of its members and violates NYCCBL § 12-306(a)(1), (2), and (3).

City's Position

According to the City, the Unions have failed to establish that an improper practice has occurred. Granting employees the "salary adjustments" within the minimum and maximum range for the specific titles under the collective bargaining agreement does not violate § 12-

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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. . . .

306(a)(4). The City relies on *Orleans-Niagara BOCES*, 20 PERB ¶ 4627 (1987), in which a Public Employment Relations Board ("PERB") Administrative Law Judge ("ALJ") found that the unilateral grant of a salary increase to a single individual was permissible. Further, the City asserts that to the extent the Board should find that the contract language on its face does not permit "salary adjustments," the Board should defer the claim to arbitration to resolve issues of fact concerning the interpretation of the contract.

According to the City, Petitioners have not made out claims of interference or discrimination because the Unions cannot establish that HRA had an improper motive in granting salary increases. The City argues that since the salary increased were intended to compensate employees who had gone beyond what they would normally be expected to do, there is no evidence that HRA intended to frustrate or undermine the Unions' rights under the NYCCBL. Moreover, HRA had a legitimate business reason for the salary increases since they were linked to increases in employee workload; therefore, the claims of violation of Sections 12-306(a)(1) and (3) should be dismissed.

DISCUSSION

First, we decline to defer Petitioner's claims to arbitration as the City requests. Implementation of a merit pay plan, not contemplated by the collective bargaining agreement, is not deferrable as it is an unlawful unilateral change and is inherently destructive of a union's representation rights. This case raises the issue as to whether HRA's unilateral implementation of simultaneous and identical 8% salary increases to 39 employees in the HASA division was a merit pay plan rather than salary adjustments contemplated by parties' collective bargaining

agreements. While it is undisputed that employees' salaries remained within the contractual salary range after the increases were granted, it is also undisputed that the parties' collective bargaining agreements do not specify criteria or procedures for the granting of merit pay. We find that resolution of the issue does not require interpretation of the contract, but a determination as to whether HRA's action was indeed implementation of a merit pay plan. *See Aide Staff of Holley Central School District*, 28 PERB ¶4506 (1995); *Connetquot Central School District*, 19 PERB ¶3045 (1986.) Accordingly, we will not defer Petitioners' claims to the arbitral process. *Cf. Patrolmen's Benevolent Ass'n*, Decision No. B-4-99.

As to the substantive issues, this Board has held that the decision to grant merit pay increases and the aggregate amounts thereof are within the scope of management's rights set forth in NYCCBL §12-307(b), but the criteria and procedures for determining eligibility for merit increases are mandatory subjects of bargaining. *Social Service Employees Union, Local 371*, Decision No. B-22-2002; *United Probation Officers Ass'n*, Decision No. B-44-86; *Civil Service Bar Ass'n*, Decision No. B-9-69. In two recent cases involving HRA, the Board held that the unilateral implementation of a merit pay program for Job Opportunity Specialists violated § 12-306(a)(1) and (4) of the NYCCBL. *Local 1180, Communication Workers of America*, Decision No. B-28-2002; *District Council 37*, Decision No. B-23-2002.

In *Patrolmen's Benevolent Ass'n*, Decision No. B-4-99, the Board found that the City violated the NYCCBL when it refused to bargain over a plan to designate 2,000 police officers as being on "Special Assignment," for which they would have been paid a pensionable differential of $1,400 for one year. The City argued that the Special Assignment Differential ("SAD"), which has existed since 1972, had already been bargained for and that it was within

management's discretion to select the police officers for special assignment as well as the differential received for such an assignment. The Board found that the granting of SAD was expressly "intended as a means to award certain officers merit pay" for outstanding work performance. Therefore, the Board concluded that "disguising the incentive/merit pay increase as an assignment does not suffice." *Id.* at 12-13.

Similarly, PERB has held that a school district violated its duty to bargain and interfered with the union when it unilaterally granted per annum salary stipends to certain employees based upon their additional responsibilities and outstanding work performance. *Brookhaven-Comsewoque Union Free School District*, 22 PERB ¶ 4503 (1989), *aff'd*, 22 PERB ¶ 3037 (1989), *aff'd sub nom. Public Employment Relations Board v. Brookhaven-Comsewoque Union Free School District*, 23 PERB ¶ 7009 (Sup. Ct. Albany Co. 1990). In *County of Suffolk*, 15 PERB ¶ 3021 (1982), PERB found that the county legislature's granting of raises to certain employees without bargaining with the union violated the duty to bargain when justification for the increases was to attract and retain qualified personnel. PERB stated that the county acted with knowledge that its action would be "so destructive of CSEA's status as to interfere with the right of the unit employees to organize. Such is the inevitable effect of salary increases granted by an employer unilaterally over the objections of a union." *Id.*

Here, we find that the 8% "salary adjustment" given simultaneously to 39 HASA employees was a merit pay plan which required HRA to bargain over criteria and procedures prior to implementation. The evidence presented demonstrates that the employees who received merit pay were unilaterally selected by HRA managers from the entire staff. Although HRA asserted that the increases were granted to employees who performed additional work

assignments as a result of staffing shortages, most of the recommendations for increases described good work performance and/or a positive work attitude. Very few of the written recommendations for increases described additional work assignments employees had performed. In some instances the memoranda explained that employees had performed a greater quantity of work – but not necessarily new or different duties. Our finding here is consistent with *Brookhaven-Comsewoque Union Free School District*, 22 PERB ¶ 4503, in which the ALJ found wage increases given to reward outstanding work performance and additional responsibilities were indeed merit pay.

The instant case is distinguishable from *Orleans-Niagara BOCES*, 20 PERB ¶ 4627 (1987), cited by the City. There the ALJ found, based upon an extensive review of bargaining history, that BOCES had the authority under the collective bargaining agreement to increase wages so long as they fell within a specified range. Given this bargaining history, the ALJ held that the unilateral grant of a wage increase to a single employee within the agreed-upon salary range was not improper. In the instant case, the record provides no evidence that the implementation of a merit pay program within the parties' negotiated salary range was contemplated. Therefore, the City's mere assertion that, on its face, the existence of a salary range encompasses the right to make salary adjustments as part of a merit pay plan lacks merit. Further, unlike the situation in *Orleans-Niagara BOCES*, the granting of salary increases in this instance was not an isolated salary adjustment for an individual, but a coordinated plan of granting simultaneous increases to bargaining unit members to reward work performance. As noted above, since HRA managers selected the employees who received merit pay from the entire staff, the entire staff was considered for the salary increases. Therefore, we find that HRA

violated § 12-306(a)(1) and (4) of the NYCCBL by unilaterally implementing a merit pay plan for bargaining unit members without negotiating concerning criteria and procedures for implementation.

Local 1549 also alleges a separate claim that by granting merit pay unilaterally HRA violated NYCCBL § 12-306(a)(1) because it interfered with employees' rights to bargain through their certified bargaining representative. 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 25-85 at 10-11. *See Uniformed Fire Officers Ass'n, 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); *Connetquot Central School District*, 19 PERB ¶ 3045 (1986) (provision of benefits that are more than what is called for in contract "is inherently destructive of a union's representation rights. It can be construed to give a message that the unit employees would do better if they abandoned their union."); *City of Ithaca*, 20 PERB ¶ 4510 (1987) (ALJ found that city committed an interference violation when it unilaterally granted to two employees salary increases greater than one provided by contract). Accordingly, as stated above, we find that HRA's unilateral actions violated both § 12-306(a)(1) and (4) of the NYCCBL.

Local 1549's remaining allegations concerning violations of § 12-306(a)(1), (2), and (3) of the NYCCBL are dismissed. We do not reach the merits of Local 371's claim that the HRA Commissioner threatened employees in violation of § 12-306(a)(1) because insufficient evidence was presented to support this claim. Although Local 371 alleged that Commissioner Eggleston threatened to blame a failure to grant pay increases on Local 371's president, no probative evidence – affidavits or testimony – was submitted to demonstrate that this statement was in fact made. On the other hand, in an affidavit submitted by the City, Commissioner Eggleston denies having made such a threat. Accordingly, this allegation is dismissed.

Further, Local 1549's claimed violation of NYCCBL § 12-306(a)(2) is misplaced. 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. However, DC 37 did not claim that HRA's conduct was intended to or resulted in any preferential treatment of one union over another, interfered with the formation or administration of DC 37, or provided assistance in the nature of that which has been found to violate the NYCCBL §12-306(a)(2). Therefore, the claimed violation of NYCCBL §12-306(a)(2) is dismissed.

Similarly, Local 1549 raises no facts or arguments which would form a basis for concluding that the conduct complained of was discriminatory in violation of NYCCBL §12-

306(a)(3). Therefore, the claimed violation of NYCCBL §12-306(a)(3) is dismissed.

We order that the City cease and desist from implementing any additional merit pay plan for HASA employees until such time as it negotiates criteria and procedures for implementing merit pay with Locals 371 and 1549 and post the attached Notice to Employees. This Board has found that HRA unilaterally implemented merit pay plan in violation of §12-306(a)(1) and (4) on two prior occasions since 2001. *Local 1180, Communication Workers of America*, Decision No. B-28-2002; *District Council 37*, Decision No. B-23-2002. Although our order does not include recission or recoupment here, should a similar violation by HRA be found in the future, our order will include recission and/or recoupment.

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 HRA immediately cease implementing any additional merit pay plan for HASA employees; and

ORDERED, that HRA maintain the terms and conditions of employment for its employees until it negotiates criteria and procedures for implementation of merit pay with Locals 371 and 1549; and

ORDERED, that HRA post the attached Notice to Employees for no less than thirty days at all locations used by HRA for written communications with bargaining unit employees; and

ORDERED, that Petitioner's remaining claims alleging violations of Sections 12-306(a)(1), (2), and (3) of the NYCCBL be, and the same hereby are, dismissed.

Dated: October 30, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

VINCENT J. BOLLON
MEMBER

I Dissent. ERNEST F. HART
MEMBER

I Dissent. M. DAVID ZURNDORFER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

That the New York City Human Resources Administration **committed an improper practice when it unilaterally granted merit pay without negotiating concerning criteria and procedures for implementation with Locals 371 and 1549of District Council 37, AFSCME, AFL-CIO.**

It is hereby:

ORDERED, that the New York City Human Resources Administration cease and desist from implementing any additional merit pay plan for HASA employees until such time as the parties negotiate criteria and procedures for implementation.

New York City Human Resources Administration
(Department)

Dated: _____ (Posted By) (Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.