ADW/DWA v. City & DOC, 71 OCB 4 (BCB 2003) [Decision No. B-4-2003 (IP)]

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

-between-

ASSISTANT DEPUTY WARDENS/DEPUTY WARDENS ASSOCIATION,

Petitioner,

Decision No. B-4-2003
Docket No. BCB-2279-02

-and-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.
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DECISION AND ORDER

On April 5, 2002, the Assistant Deputy Wardens/Deputy Wardens Association ("Union"), filed a verified improper practice petition alleging that the City of New York ("City") and the Department of Correction ("DOC") violated § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to abide by an oral agreement between the Union and the DOC concerning the posting of vacancies for Deputy Warden-in-Command. The City argues that the petition should be dismissed for a lack of jurisdiction or, alternatively, that the posting of vacancies is a permissive subject of bargaining. Since the City's accession to the posting of vacancies in response to the Union's request does not, under these circumstances, qualify as a binding agreement, the breach of which could give rise to an improper practice, we dismiss the petition.

BACKGROUND

The job specification for the title of Warden (Correction) has four assignment levels. Each level encompasses one or more ranks or office titles. An employee in the Civil Service title Warden (Correction) Level I has the office title "Assistant Deputy Warden" ("ADW"). An employee at Level II has the office title "Deputy Warden" or "Deputy Warden-in-Command" ("DWIC"). DWIC is the highest rank in Level II. Employees at Level III are "Wardens" or "Assistant Chiefs," and employees at Level IV are "Bureau Chiefs" or "Chief of Department." The Union represents Level I and II employees, with one exception, the Chief of Administration Office. DOC Directive 2224B sets forth a procedure, including posting, that DOC follows when a vacancy occurs in the rank of Deputy Warden (Warden Level II). Directive 2224B exempts certain discretionary cabinet-level office titles from the procedure, including the titles Chief of Staff to the Commissioner (formerly referred to as Executive Assistant to the Commissioner) and DWICs.

On May 17, 2000, the Union and DOC held a Labor/Management Meeting. Present at the meeting for the Union were Sidney Schwartzbaum, the Union President; Peter Mahon, a Deputy Warden Representative; Vincent Caputo, the Union Vice President; Terrance Skinner, a DWIC; and the Union's attorney, and, for DOC, James Psomas, Chief of Administration; Joseph Guarino, Deputy General Counsel; and the DOC Director of Labor Relations. The Director of Labor Relations subsequently sent a detailed summary of this meeting to the Union, which did not dispute the summary's accuracy.

According to the summary, the Union used this meeting to, among other things, express its concerns about the way DOC made appointments to the rank of DWIC. The Union

"recognized that appointment to DWIC position was a managerial prerogative" but stated that it would like the selection "to be more level." DOC responded that it "wanted to address the Union's concern without diminishing its prerogatives" and that "DOC will issue a teletype whenever it plans to appoint a DWIC, except in the case of appointment to be assistant to the Chief of Department." The teletype would announce that a vacancy was anticipated and all Deputy Wardens were invited to send resumes for consideration. The Union requested that DOC allow two weeks for resume submission and inform the Union which of its members had applied. According to the summary, DOC responded that "it would follow those recommendations." The Union also recommended limiting eligibility for the DWIC position to those with one year or more in rank, but DOC rejected that idea.

DOC also refused to agree to a stipulation in which the Union would withdraw a federal lawsuit it had filed against DOC protesting alleged discrimination against women in return for the agreement to post teletypes for vacant positions. One reason for DOC's refusal was that "DOC intended to issue the teletypes without regard to the Union's lawsuit."

After the May 17, 2000, meeting, DOC posted several vacant DWIC positions in conformity with the procedure that was agreed to at the meeting, and the Union withdrew its lawsuit. On August 10, 2001, DOC amended the promotion selection criteria for the Deputy Warden position. Prior to this amendment, a candidate for Deputy Warden was required to have a minimum of one year in each rank to be eligible for promotion. After August 10, 2001, each candidate was required to have successfully completed probation and met certain educational requirements.

On December 14, 2001, DOC sent a teletype announcing several promotions. According

to that teletype, Darryl Harrison was promoted from Assistant Deputy Warden, a position he had held since February 2001, to DWIC. Harrison also holds the title of Chief of Staff to the Commissioner, a position he has retained through his promotions and since November 2000, when he was a Captain. The City did not post a notice for Harrison's position.

As a remedy, the Union asks that the Board direct DOC to abide by the May 17, 2000, agreement and to negotiate in good faith with the Union, order DOC to refrain from retaliating against the Union for instituting this action, and order DOC to post conspicuous notices throughout DOC facilities stating that DOC violated the NYCCBL.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that by not posting for Harrison's position, DOC violated § 12-306(a)(4) of the NYCCBL by reaching an agreement on May 17, 2000, and then failing to abide by it.[1] The Union argues that while the agreement to post and make the position eligible for Deputy Wardens was not a collective bargaining agreement, it was a binding agreement reached in good faith between the Union and the City at a Labor/Management meeting. According to the Union, DOC acknowledges that the parties reached an understanding, and the agreement meets all of the legal criteria for a valid contract. The Union even withdrew its lawsuit in reliance on DOC's word that it would post DWIC vacancies. Furthermore, regardless of what the agreement

[1] It is an improper practice under § 12-306(a)(4) of the NYCCBL for a public employer or its agents:

> 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.

is called, DOC's own summary reflects its responsibility to post DWIC vacancies and solicit Deputy Wardens for the position. DOC Administrators and DOC's Director of Labor Relations have the authority to make agreements which bind DOC with its collective bargaining agents.

The Union also contends that DOC amended the Deputy Warden promotional requirements on August 10, 2001, as a device designed to promote a favored employee and thereby circumvented the terms of the agreement reached on May 17, 2000. DOC agreed to issue a teletype announcing that a vacancy is anticipated in the DWIC position and inviting all Deputy Wardens to send their resumes for consideration. Harrison was not a Deputy Warden, but an Assistant Deputy Warden who had not even completed probation and, according to the May 17, 2000, agreement, was ineligible to be promoted to DWIC.

The Union argues that the matter may not be deferred to an arbitrator because Article XXVII, § 2, of the parties' collective bargaining agreement, which states that "[m]atters subject to the grievance procedure shall not be appropriate items for consideration by the Labor/Management Committees," precludes the Union from filing a grievance, and an improper practice is the only means available to challenge the City's actions. In any event, once DOC agreed to a posting procedure and then failed to abide by it, DOC violated § 12-306(a)(4) of the NYCCBL.

Although the management rights clause of the NYCCBL grants the City great flexibility in selecting employees to fill vacancies, posting a position before it is filled would not impact any managerial prerogative. Finally, the refusal to post notices of vacancies or provide some application process impacts on terms and conditions of employment since DOC's failure to post vacancies removes the chance of Deputy Wardens to obtain promotions due to lack of notice and

procedure.

City's Position

The City argues that the only portion of the petition that is timely concerns management's decision to promote Harrison and that any claims regarding the May 17, 2000, meeting, or the general exclusion of DWICs from posting requirements in 1995, are untimely. The City also argues that the Labor/Management meeting did not result in a binding agreement since neither the Commissioner of the Office of Labor Relations nor one of his designees ("OLR") was present, and they are the only persons with the authority to bind the City to such a contract. Even if the Board determines that the understanding reached at the May 17, 2000, meeting could legally bind the City and DOC, the Board lacks jurisdiction to hear this issue because it involves an alleged contract violation.

According to the City, the Board has held that the management rights clause gives the City the absolute right to make promotion determinations and set qualifications for promotion even when an employee is upgraded from one level to another within his or her Civil Service title. Although the Union sought greater promotional opportunities for its members, it acknowledged, as the summary of the May 17, 2000, meeting demonstrates, that this issue falls within the employer's management prerogative.

Even if there were an obligation to bargain regarding the posting of vacancies, the Union's petition must still be dismissed because it never demanded that OLR, on behalf of DOC, bargain regarding the subject of posting for vacant DWIC positions, and an improper practice petition cannot substitute as a demand for bargaining.

DISCUSSION

Initially, we find that despite the City's argument that the Union's claim is solely contractual, this Board has jurisdiction in this case. Pursuant to § 12-309(a) of the NYCCBL, this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306.[2] The Union's allegation that DOC engaged in bad faith bargaining raises a statutory claim under § 12-306(a)(4) and is thus properly before this Board. Furthermore, we may exercise jurisdiction over an alleged breach of an agreement when the acts constituting the breach also constitute an improper practice.[3] *Local 1180, Communications Workers of America*, Decision No. B-28-2002 at 8; *see District Council 37*, Decision No. B-36-2001 at 5. Because the Union's allegation that the unilateral promotion of an employee without posting constitutes a violation of § 12-306(a)(4) of the NYCCBL, jurisdiction attaches. In considering this allegation, we determine whether the parties reached an enforceable agreement.

Also as a preliminary matter, we find that the petition is timely. Section 12-306(e) of the NYCCBL and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action occurred. Here, the

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[2] Under NYCCBL § 12-309(a)(4), the board of collective bargaining shall have the power and duty "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders. . . ."

[3] Section 205(5)(d) of the Civil Service Law, Article 14, provides that the Board shall not have authority to "enforce an agreement between a public 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."

Union's claim that on December 14, 2001, DOC promoted an Assistant Deputy Warden to DWIC in contravention of an agreement reached at a Labor/Management meeting is timely because it was filed within four months of that promotion.

The substantive issue in this case is whether the Union and DOC reached a binding agreement concerning the posting of vacancies for the DWIC position. This Board finds that the statements made at the May 17, 2000, meeting do not rise to the level of an enforceable agreement, the breach of which could contravene NYCCBL § 12-306(a)(4).

Here, the record shows that only one party – the Union – thought that the parties had reached a binding agreement at the meeting on May 17, 2000. However, according to the summary of the meeting, even as the Union raised its concerns about appointments to the rank of DWIC, the Union also recognized that making those appointments was a management prerogative. DOC specifically asserted that while it would address the Union's concerns, DOC did not wish to diminish its discretion. In agreeing to post vacancies, DOC characterized its assent as an acceptance of part of a series of Union recommendations, while rejecting others.

Moreover, DOC declined the Union's request to enter into a stipulation whereby the Union would withdraw its lawsuit in return for DOC's posting of vacancies. According to the summary, DOC stated that "the withdrawal of the lawsuit was up to the union and that the DOC intended to issue the teletypes without regard to the union's lawsuit." Although the Union argues that it withdrew its suit in reliance on DOC's word that it would post DWIC vacancies, the City's refusal to enter into a written stipulation evinces no exchange of promises.

The City's accession to the posting of vacancies in response to the Union's request does not, by itself, qualify as a binding agreement, the violation of which could support a claim of bad

faith bargaining. Thus, the City's promotion of Harrison to the DWIC position without prior posting did not constitute a breach of the duty to bargain. Because of our finding, we need not reach the parties' other arguments. Accordingly, the Union's claim is dismissed.

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 filed by the Assistant Deputy Wardens/Deputy Wardens Association is denied.

Dated: January 27, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER