Sergeants Benevolent Ass'n, 75 OCB 32 (BCB 2005)
[Decision No. B-32-2005] (Docket No. BCB-2473-05).

Summary of Decision: The SBA filed an improper practice petition alleging that NYPD violated NYCCBL § 12-306(a)(1), (2), (3), and (4) when it denied a request to have SBA delegates excused for a union meeting on May 3, 2005. The City argued that the matter should be deferred to arbitration, or, alternatively, that the Union failed to show how NYPD's action constituted an improper practice. The Board found that NYPD interfered with employees' rights to engage in protected activity, in violation of NYCCBL § 12-306(a)(1). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

- between -

SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Petitioners,

- and -

CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On April 29, 2005, the Sergeants Benevolent Association ("SBA" or "Union") filed a verified improper practice petition against the City of New York and the New York City Police Department ("City" or "NYPD"). The Union alleges that NYPD violated § 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"), when NYPD denied a request to have SBA delegates

excused for a meeting on May 3, 2005.[1] The City argues that the matter should be deferred to arbitration, or, alternatively, that the Union has failed to show how any action taken by NYPD constitutes an improper practice. The Board finds that NYPD interfered with employees' rights to engage in protected activity, in violation of NYCCBL § 12-306(a)(1).

BACKGROUND

Article XVI, § 1, of the 2002-2003 SBA collective bargaining agreement ("Agreement"), which is currently in *status quo* pursuant to NYCCBL § 12-311(d), provides:

> Time spent by Union officials and representatives in the conduct of labor relations shall be governed by the provisions of Mayor's Executive Order No. 75, as amended, dated March 22, 1973, or any other applicable Executive Order or local law, or as otherwise provided in this Agreement. No employee shall otherwise engage in Union activity during the time the employee is assigned to the employee's regular duties.

Section 3(1) of The Mayor's Executive Order No. 75 ("EO 75"), referenced in the Agreement, provides in relevant part:

> Employee representatives, duly designated by certified employee organizations, shall be permitted to take time off without pay for or to charge to their annual leave allowance or compensatory time credits, time spent in the following activities performed in behalf of an affected union and its members:
>
> > a. Organization of and attendance at union meetings, conferences or conventions. . . .

Requests for time off to conduct labor relations pursuant to EO 75 must be approved in advance by NYPD's Office of Labor Relations. EO 75 stipulates that, regarding "ad hoc" assignments,

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[1] Although the Union's pleadings addressed a claim that NYPD unilaterally altered an established practice of the parties regarding a mandatory subject of negotiation, the Union did not specifically cite NYCCBL § 12-306(a)(4). However, during the conference held in this case, the parties agreed that the Union's claim includes a violation of § 12-306(a)(4).

the head of each agency, with the approval of the Commissioner of Labor Relations shall establish reasonable limits on the number of employee representatives who may be permitted and the amount of time required to participate in the activities enumerated. It also states that organizing or participating in any way, in strikes, work stoppages, or job actions of any kind, are expressly excluded from the coverage of EO 75.

On April 27, 2005, SBA submitted a written request to the Police Commissioner requesting that all SBA delegates performing a tour of duty on May 3, 2005, be excused for the purpose of attending a delegates' meeting at 9:00 a.m. There are approximately 140 SBA delegates.

On April 28, 2005, the NYPD's Deputy Commissioner of Labor Relations sent a letter to the SBA denying the request without stating a reason. For the first time, in its pleadings, the City claims that the request was denied because the Deputy Commissioner believed, based upon information he received, that SBA made the request so that delegates could participate in a demonstration, an activity which is not eligible for approved leave under EO 75, § 3. The City states no facts as to the basis of the Deputy Commissioner's belief.

As a remedy, the Union asks that the Board order the NYPD to rescind its denial of Union leave for the May 3, 2005, SBA delegates' meeting, to cease and desist from arbitrarily denying SBA requests for delegate leave for activities performed on behalf of the Union and its members, and to post an appropriate notice.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that leave time for employees to engage in union activities is a mandatory subject of negotiation. The parties had an established practice, reflected in Article XVI of the Agreement and in EO 75, § 3, in which SBA delegates were granted leave for organizing and attending union meetings. In denying the SBA request for leave for delegates to attend the May 3, 2005, Union meeting, NYPD unilaterally altered the parties' established practice regarding a mandatory subject of negotiation, in violation of NYCCBL § 12-306(a)(1), (2), (3), and (4).[2]

The Union also argues that in denying the SBA request for leave, NYPD violated NYCCBL § 12-306(a)(3) by seeking to restrain union activity. The SBA letter specifically informed NYPD of the reason for union leave, and, without an articulated reason or any legitimate basis, NYPD denied the request. Thus, the only conclusion that may be drawn is that

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[2] NYCCBL § 12-306(a) provides, in relevant 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;
(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 to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

NYPD's denial was based on knowledge of and intent to chill union representation of its membership.

Finally, in its reply, the Union argues that deferring this matter to an arbitrator would not be appropriate because the petition alleges independent violations of NYCCBL § 12-306(a)(1), (2), (3), and (4), and because there is no filed grievance proceeding to which this petition may be deferred.

City's Position

The City argues that the Board has no jurisdiction in this matter since the issue concerns a contract dispute. Article XVI of the Agreement mandates that time spent by union officials is governed by EO 75, under which employee representatives are permitted to take time off only for activities specifically enumerated in EO 75, § 3. The Deputy Commissioner had a reasonable belief, based upon information he received, that SBA made the request to have all delegates excused to participate in a demonstration. Since taking part in a demonstration is not a union activity specified as eligible for leave time in EO 75, § 3, he denied the request. As this dispute requires contract interpretation regarding the types of union activities eligible for leave time under EO 75, the Board should defer the matter to an arbitrator.

The City further argues that the Union has failed to show how any action taken by NYPD constitutes improper interference or discrimination in violation of NYCCBL § 12-306(a)(1) and (3). First, the Union cannot show that it engaged in protected activity. Since demonstrations are not on the EO 75 list of union activities eligible for release time, the activity cannot be considered protected activity. Second, even if the Union could show that it was engaged in protected activity, it cannot prove that the activity was the motivating factor in denying the leave

request. The mere denial of a request for leave time based on an honest belief that the Union's actions were not covered by the Agreement cannot support a claim of improper motive. Furthermore, NYPD's decision was made pursuant to a legitimate reason, based on the language in the parties' Agreement and the information available at the time.

Finally, the Union has not presented any evidence to indicate that NYPD's actions dominated their employee organization in violation of NYCCBL § 12-306(a)(2). The Union did not describe how NYPD interfered with the formation or the administration of the Union.

DISCUSSION

At the outset, we find that the Board has jurisdiction over the SBA's claims. Pursuant to § 12-309(a) of the NYCCBL, this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306.[3] On their face, all of SBA's allegations – interference with employees' protected rights, domination or interference with the administration of the Union, discrimination, and breach of the duty to bargain in good faith – raise statutory claims over which the Board has jurisdiction.

However, the City argues that because the SBA claims a breach of a policy governed by EO 75, which is incorporated by reference in the parties' Agreement, the Board must defer this claim to arbitration. It is an improper practice under § 12-306(a)(4) of the NYCCBL for a public

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[3] Under NYCCBL § 12-309(a)(4), the Board 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. . . .

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. . . .

While an employer's unilateral action on a mandatory subject of bargaining may violate this provision, *e.g.*, *LaRiviere,* Decision No. B-36-87 at 9, we have held that when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement, this Board's jurisdiction under NYCCBL §12-306(a)(4) may not be invoked. *Correction Officers Benevolent Ass'n,* Decision No. B-39-88 at 15. In such instances, the union should raise its claim in the context of the grievance procedure and not in an improper practice proceeding. *See Civil Serv. Technical Guild*, Decision No. B-11-99 at 9; *United Probation Officers Ass'n*, Decision No. B-38-91 at 17*; Patrolmen's Benevolent Ass'n*, Decision No. B-24-87 at 7, *aff'd sub. nom. Caruso v. Anderson*, 138 Misc.2d 719, 525 N.Y.S.2d 109 (N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004, 536 N.Y.S.2d 689 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 709, 540 N.Y.S.2d 1004 (1989).

These holdings are consistent with the mandate in § 205.5(d) of the Taylor Law (Civil Service Law, Article 14), which applies to this Board as well as to PERB, stating, in pertinent part:

> . . . the board shall not have the 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.

PERB has consistently interpreted this provision of the Taylor Law to deprive it of jurisdiction over improper practice charges of failure to negotiate when the underlying disputes are

essentially contractual. *E.g., County of Nassau*, 25 PERB ¶ 3071 (1992).

Nevertheless, in accord with § 205.5(d) of the Taylor Law, this Board may exercise jurisdiction over an alleged breach of a collective bargaining agreement when the acts constituting the breach also constitute an independent improper practice under the NYCCBL. *Local 1180, Communication Workers of America*, Decision No. B-28-2002 at 8. Where the facts alleged to constitute a unilateral change claim are inextricably related to a claim of unlawful interference and to other statutory claims, the claim cannot be deferred to be resolved separately in arbitration. *Id.* at 8-9; *see Connetquot Central School District*, 19 PERB ¶ 3045 (1986) (jurisdiction asserted over claim that a unilateral change in a contract term was inherently destructive of employees' protected rights.)

Here the Union's allegations concerning the denial of leave time raise statutory claims, not simply a breach of contract claim, encompassing interference with union activity, a claim which may be inherently destructive of employees' protected rights, domination or interference with the administration of the Union, and discrimination, as well as a unilateral change in a mandatory subject of bargaining. We find that the facts alleged to constitute the unilateral change claim are inextricably related both to the claim of unlawful interference with union activity and to the other statutory claims and, therefore, cannot be resolved separately. *Local 1180, Communication Workers of America*, Decision No. B-28-2002 at 8-9; *Schulyer-Chemung-Tioga Board of Cooperative Educational Services*, 34 PERB ¶ 3019 (2001); *Connetquot Central School District*, 19 PERB ¶ 3045 (1986). Therefore, we will not defer the SBA's claim.

The issue in this case is whether, in violation of NYCCBL § 12-306(a)(1), NYPD's decision to deny the SBA's request for leave time for its delegates to attend a union meeting

constituted interference with employees' § 12-305 rights to engage in protected union activity. 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. *Local 1180, Communications Workers of America*, Decision No. B-28-2003; *District Council 37*, Decision No. B-23-2002. Actions that 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 (Sup. Ct. N.Y. Co., Nov. 29, 1993). 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; *Local 1180, Communications Workers of America*, Decision No. B-28-2003*; Security and Law Enforcement Employees*, 18 PERB ¶ 3081 (1985).

Employees' rights to conduct and attend union meetings are fundamental activities under NYCCBL § 12-305. In *Local 1180, Communications Workers of America*, Decision No. B-28-2003 at 11, the Board held that the New York City Health and Hospitals Corporation ("HHC") violated NYCCBL §12-306(a)(1) by preventing union members from holding a meeting at Bellevue Hospital to discuss union business including the union's petition to represent certain employees. Prior to this denial, HHC had a practice of permitting union membership meetings on premises. We found that HHC prohibited the membership meeting because it objected to one of the subjects that the union intended to discuss, specifically organizing those employees. Preventing the meeting under the circumstances constituted interference with protected employee

rights.

Here, NYPD had a policy of permitting requests for union leave time. NYPD does not raise any claims that the Union failed to follow established procedures when it scheduled the May 3 meeting and requested leave for its delegates. Neither does NYPD claim that the number of employees or the amount of time involved would exceed reasonable limits as provided in EO 75. While the Union made the request several days prior to the delegates' meeting, the request was rejected the very next day, without a reason. The City waited until it filed its pleadings to allege that the rejection of the request for leave time was based on a reasonable belief that the delegates were going to participate in a demonstration instead of a union meeting. Furthermore, the City supplied absolutely no allegations of fact to support or establish a basis for the Deputy Commissioner's belief or that it would otherwise be outside the scope of protected union activity.

In these circumstances we find that NYPD's denial of the request for union leave time interfered with employees' rights to engage in union activity and was inherently destructive of those rights. In cases like this, no proof of improper motive is required. *Local 1180, Communications Workers of America*, Decision No. B-28-2003*; Security and Law Enforcement Employees*, 18 PERB ¶ 3081 (1985). Accordingly, we find that, in this instance, NYPD's decision to deny leave time for the purpose of attending the delegates' meeting is a violation of NYCCBL § 12-306(a)(1).

We need not reach the Union's remaining claims under NYCCBL § 12-306(a)(2), (3), and (4), as we have found NYPD'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 than if there were also an independent violation of § 12-306(a)(2), (3), or (4). *Local*

1180, Communications Workers of America, Decision No. B-28-2003 at 11-12.

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 NYPD has violated § 12-306(a)(1) by denying delegates of the Sergeants Benevolent Association leave time to attend a delegates' meeting scheduled for May 3, 2005; and it is

ORDERED, that NYPD cease and desist from interfering with requests by the Sergeants Benevolent Association for delegate leave time for activities performed on behalf of the Union and its members; and it is further

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

Dated: October 20, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent.

M. DAVID ZURNDORFER
MEMBER

I dissent.

ERNEST F. HART
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 in the matter of ***Sergeants Benevolent Ass'n, Decision No. B-32-2005*** **(Docket No. BCB-2473-05)**:

The New York City Police Department **committed an improper practice when it interfered with employees' rights to engage in union activity by denying a**

Sergeants Benevolent Association request for union leave time for a delegates' meeting.

It is hereby:

ORDERED, that the New York City Police Department cease and desist from interfering with requests by the Sergeants Benevolent Association for delegate leave time for activities performed on behalf of the Union and its members.

New York City Police Department
(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.