District Council 37, Local 1508, 79 OCB 11 (BCB 2007)

[Decision No B-11-2007] (IP) (Docket No. BCB-2561-06)

Summary of Decision*:** The Union filed an improper practice petition alleging that the Department of Parks and Recreation violated NYCCBL §§ 12-306(a)(1) and (3) and the Citywide Contract, when its EEO Officer asked questions of a Park Supervisor in an email and then drew adverse inferences when the employee sought union representation and when he failed to respond to the email. The City argues that the petition must be dismissed because the employee was never denied access to his Union Representative and the Union cannot establish any anti-union animus. The City further contends that this Board should not assert jurisdiction over the alleged contract violations as they are duplicative of the alleged NYCCBL §§ 12-306(a)(1) and (3) violations. The Board finds that, as the Union's unilateral change claims are founded in a subject that is already addressed in the parties' collective bargaining agreement and requires the interpretation of the agreement itself, we defer the contract based improper practice claims to the parties' contractual grievance process, retain jurisdiction, and hold in abeyance the remaining statutory claims until the resolution of the contractual grievance process. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1508,

Petitioner,

-and-

CITY OF NEW YORK and THE
NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On July 28, 2006, District Council 37, AFSCME, Local 1508 ("Union"), filed a verified improper practice petition on behalf of Park Supervisor Ralph Frissora against the City of New York

("City") and the New York City Department of Parks and Recreation ("DPR"). The Union alleges that the DPR interfered with, restrained, and coerced Frissora in the exercise of rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") in violation of NYCCBL § 12-306(a)(1) and that it discriminated against Frissora in violation of NYCCBL § 12-306(a)(3).[1] The Union makes five improper practice claims. First, it claims that by contacting Frissora directly in an email containing questions, the DPR's Equal Employment Opportunity Officer ("EEO Officer") conducted an investigatory interview directly with Frissora and thereby interfered with Frissora's contractual rights under the Citywide Contract to Union representation, in violation of NYCCBL § 12-306(a)(1). Second, by using the email as an investigatory tool, the EEO Officer summoned Frissora to an interview that could lead to discipline without notifying him two days in advance or stating the reason for the summons and thereby violated Frissora's contractual rights under the Citywide Contract and his statutory rights under the NYCCBL. Third, by asserting Frissora was evasive, suspicious,

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[1] NYCCBL § 12-306(a)(1) 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;
> * * *
> (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. . . .

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 and shall have the right to refrain from any or all of such activities.

uncooperative, and had something to hide based upon his failure to answer the emailed questions and his request for Union representation, the EEO Officer attempted to restrain and/or coerce Frissora in the exercise of his statutory rights. Fourth, by attempting to restrain Frissora's use of Union representation after he had contacted his Union representative, the EEO Officer interfered with Frissora's *Weingarten* rights. Finally, by presuming Frissora's guilt or concluding there was probable cause to conclude Frissora had something to hide based upon his request for Union representation, the EEO Officer discriminated against Frissora. The City argues that the first two claims should be dismissed as alleged contract violations for which the Board should not assert jurisdiction as they are duplicative of the alleged NYCCBL §§ 12-306(a)(1) & (3) violations. The City then argues that the petition's remaining claims must be dismissed because the employee was never denied access to his Union Representative. In addition, the City argues that the Union cannot establish any anti-union animus nor prove any facts showing that the DPR interfered with Frissora's rights or discriminated against him due to union activity. This Board finds that, as the Union's first two claims are founded in a subject that is already addressed in the parties' collective bargaining agreement and requires the interpretation of the agreement itself, the contract based improper practice claims should be deferred to the parties' contractual grievance process. The Board retains jurisdiction and holds in abeyance the remaining statutory claims until the resolution of the contractual grievance process.

BACKGROUND

In an email dated March 23, 2006, Ricardo R. Granderson, the EEO Officer, asked Frissora the following:

> Hi Ralph. Hope that your day is going well. This is going to sound odd, but I need you to respond to the following questions: Do you have "the Godfather" on the back of your office chair at St. Mary's (It's not a problem if you do) and I need you to describe your personal vehicle, i.e. color, make, year, ... Thank you for your help.[2]

The Union alleges that on March 28, 2006, after reviewing the email, Frissora contacted his union representative, Robert Gervasi ("Union Representative"), seeking advice, and faxed him a copy of the email. The Union Representative informed Frissora that he would contact the EEO Officer on Frissora's behalf.

The Union alleges that that same day the Union Representative left the EEO Officer a voicemail: (i) "cautioning Mr. Granderson against contacting and attempting to question Union members via email" (Pet. ¶ 11); (ii) reminding the EEO Officer that Frissora, as a Union member, was entitled to representation when summoned for an interview that could lead to disciplinary action; and (iii) stating that the EEO Officer should schedule an interview. The Union describes this voicemail as admonishing the EEO Officer for "attempting to conduct electronic investigations directly with members and without the intercession, and certainly without the presence, of a Union representative or lawyer, in clear contravention of Article IX, § 19, of the Citywide Contract between the parties." *Id*. The Union further alleges that several similar cautions had been delivered to the EEO Officer in the past.

It is undisputed that the EEO Officer returned the Union Representative's call that day, but

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[2] The parties dispute the exact date the email was received but this issue is not relevant to these proceedings.

the parties dispute the contents of that phone call. According to the Union, the EEO Officer told the Union Representative that "Mr. Frissora had not answered his two simple questions and instead had insisted upon Union representation" and "that he, as EEO Officer, viewed Mr. Frissora's behavior as evasive, suspicious, and uncooperative and as indicating that Mr. Frissora had something to hide." (Pet. ¶ 13) The Union Representative told the EEO Officer that his remarks are "threatening" and described the conversation as "heated." *Id.* The City denies the Union's description of the phone call but has not put forth an alternative description. The City does not dispute that Frissora sought union representation.

Later that same day, the EEO Officer left the Union Representative the following voicemail:

> As a result of your member, and your member's reluctance to answer questions, that now establishes, in my mind, that some sort of probable cause to suggest that maybe there may be something to hide. So with that being said, I will now forward the information that I have to the Advocate's Office with regard to the gentleman's car, the Godfather notes, and any other information. I will also have his Nextel scrutinized. And so there is no reason to meet me with me or to return this call. This information will be formally forwarded to the Advocate's Office. Thank you and have a nice day.

The voicemail also informed the Union Representative that there was no need to schedule an interview as the matter had been formally forwarded to the Advocate's Office.[3]

A Labor-Management meeting was held on July 18, 2006. In attendance were the EEO Officer, the Union Representative, and Frank Burns, Assistant Director of the Union's Research and

[3] The Union alleges that Frissora, after having talked to the Union Representative, called the EEO Officer on March 28, 2006. The City, based on lack of knowledge and information, denies this allegation. It is undisputed that there was no interview of Frissora after his request for Union representation.

Negotiations Department, among others.[4] The EEO Officer's voicemail of March 28, 2006, was played, and Burns questioned the EEO Officer about his "propensity for conducting electronic investigations via email." (Pet. ¶ 17) According to the Union, the EEO Officer responded that (i) it was inaccurate to say his investigations were conducted by email; (ii) the emails were merely to inform an employee that a complaint had been made and that they should contact him; and (iii) the emails offered the employees the choice of contacting the EEO Officer alone or seeking union representation. The EEO Officer allegedly remarked that employees "with nothing to hide" speak directly with him. *Id.* The City admits the meeting occurred and the tape played.

POSITIONS OF THE PARTIES

Union's Position

The Union contends the City's actions constitutes five improper practices, the first two stemming from violations of Article IX, § 19, of the Citywide Contract, which provides that when employees are summoned to an interview which may lead to a disciplinary action, they have the right to union representation and that, whenever feasible, they shall be notified at least two work days in advance about the interview, the reasons for the interview, and the right of the employee to have representation.[5] The email sent by the EEO Officer constitutes such an investigatory interview. The

[4] Numerous other representatives of the Union and the City were present at this meeting, including General Counsel for the Office of Labor Relations.

[5] Although the Union did not cite NYCCBL § 12-306(a)(4) as being violated, the facts asserted state a violation of NYCCBL § 12-306(a)(4) and the City responded to those allegations on the merits. Thus, the Union's subsequent citation in its reply that an inquisition by email can be viewed as an unilateral change in the contract that materially effects employees' working conditions and is thus a violation of NYCCBL § 12-306(a)(4). Therefore, the Board treats the petition as

DPR violated the Citywide Contract, first, by conducting such an investigatory interview directly with Frissora without representation and, second, by not providing the contractually required two days notice or a statement of the reason for the summons. The Union acknowledges that CSL § 205(5)(d) prohibits this Board from exerting jurisdiction over contract violations but argues that these alleged contract breaches also constitute improper practices to which the Board properly can assert jurisdiction as violations of NYCCBL §§ 12-306(a)(1) & (4).

Third, the Union alleges that the EEO Officer violated NYCCBL § 12-306(a)(1) by drawing adverse inferences -- specifically, finding Frissora to be evasive, suspicious, uncooperative, and having something to hide -- from Frissora's failure to respond to the email and from his request for union representation.

Fourth, the Union asserts that the City's actions restrained Frissora from exercising his *Weingarten* rights in violation of NYCCBL § 12-306(a)(1). Once an interview has been initiated, the employer is free to discontinue it upon the employee's request for union representation, but the decision whether to continue the interview without representation or to forgo the interview and any benefits that might result lies with the employee. Since the EEO Officer did not notify Frissora of his option to continue the interview without union representation, the EEO Officer unilaterally denied Frissora the benefits of the interview.

Finally, the Union asserts Frissora was discriminated against in violation of NYCCBL § 12-

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having raised a NYCCBL § 12-306(a)(4) claim. The Union also argued in its reply that Frissora's collective bargaining unit's contract has language similar to the Citywide Contract. For the same reasons that the Union's two claims stemming from the Citywide Contract are deferred, discussed *infra*, we defer the claims related to Frissora's collective bargaining unit's contract. Finally, in its reply the Union argued that Frissora is covered by New York Civil Service Law ("CSL") § 75(2), which is outside of our jurisdiction and would not, in any event, be outcome determinative.

306(a)(3) by the forwarding the matter to the Advocate's Office based on the presumption of probable cause, which was, in turn, based on Frissora's seeking union representation. The EEO Officer was aware of Frissora's union activity and that union activity was a motivating factor in the EEO Officer's decision. Alternatively, the EEO Officer's actions -- drawing adverse inferences from the assertion of the right to union representation - - are inherently destructive.

City's Position

The City argues that the first two claims must be dismissed because CSL § 205(5)(d) prohibits this Board from exerting jurisdiction over contract violations. To the extent these alleged breaches separately constitute improper practices, they are entirely duplicative of the Union's three other claims, our jurisdiction over which the City concedes is proper.

The City asserts that the remaining three claims are, in effect, one allegation -- that the EEO Officer allegedly denied Frissora his right to union representation. The City contends these claims must be dismissed because the facts as laid out in the Union's petition clearly show that Frissora was never denied access to his Union Representative. To violate *Weingarten*, the employer must have have first denied the employee's request for representation and then continued the interview. *Weingarten* allows the employer to discontinue the interview or have no interview at all. Since, as pleaded by the Union, no interview of Frissora continued past his assertion of union representation, there can be no violation of *Weingarten* and no improper practice.

Third, the City contends that the Union has not alleged and cannot establish that any of the EEO Officer's actions were motivated by any alleged union activity. All alleged actions were motivated by legitimate business reasons -- the exercise of the duties of an EEO Officer.

Finally, the City reserves its right to dispute that the email constitutes an interview and that

Frissora had a reasonable belief that responding to the email could lead to disciplinary action.

DISCUSSION

This Board must decide whether to assert jurisdiction over the alleged contract violations which constitute the first two claims. This Board has jurisdiction over an alleged breach of contract where the alleged acts would also constitute an improper practice. *Assistant Deputy Wardens/Deputy Wardens Association*, Decision No. B-4-2003; *see also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31 n. 7 (1967) (In analogous context of employer challenging NLRB jurisdiction; "when the elements of an unfair labor practice are present in a breach of contract, the injured party is not automatically deprived . . . his right to proceed before the Board where his remedy may be speedier and less expensive than a lawsuit.") (*citing NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 429-430 (1967)).

However, this Board, like the Public Employment Relations Board, must comply with CSL § 205.5(d), which states 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.

Id.; *see also City Employees Union, Local, 237, I.B.T.*, Decision No. B-24-2006 at 15. Alleged violations of an agreement between the employer and an employee organization that do not otherwise constitute improper practices are expressly beyond the jurisdiction of this Board. *Local 237, International Brotherhood of Teamsters*, Decision No. B-31-1998.

This Board finds that to the extent that the Union claims that the DPR violated the Citywide Contract by conducting an investigatory interview directly with Frissora without representation and not providing him the contractually required two days notice or a statement of the reason for the summons, such claims should be brought as a grievance/arbitration proceeding not as an improper practice petition. Alleged contractual violations may not be rectified through the filing of improper practice charges. *Local 1182, Communications Workers of America,* B-11-2003 at 4; *Local 237, Int'l Bhd. of Teamsters*, Decision No. B-31-1998 at 7; *Local 1182, Communications Workers of America,* Decision No. B-8-96 at 11.

Further, this Board finds that to the extent that the first two claims can be read as alleging improper practices, the alleged improper practices are intertwined with the contract violation. In such cases, this Board regularly defers the claim to arbitration, to allow for the parties' negotiated dispute resolution to function as agreed to. *Local 621, S.E.I.U.*, Decision No. B-16-90; *District Council 37*, Decision No. B-31-85; *Sanitation Officers Ass'n, Local 444*, Decision No. B-10-85; *District Council 37*, Decision No. B-10-80. There is no question that the subject matter of the contractual provision at issue was validly negotiated, as has been recently reaffirmed by the Court of Appeals in *New York City Transit Authority v. New York State Public Employment Relations Board*, 2007 N.Y. LEXIS 163, 2007 N.Y. Slip. Op. 1387, *5 (February 20, 2007). This Board's deferral policy is well established. We defer the dispute to the arbitral forum where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, "consistent with the declared policy of the NYCCBL 'to favour and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organization.'" *United Probation Officers Ass'n*, Decision No. B-38-91 at 13 (*quoting* NYCCBL

§ 12-302); *District Council 37*, Decision No. B-36-2001 at 7 (same); *see, e.g., Local 621, S.E.I.U.*, Decision No. B-16-90; *District Council 37*, Decision No. B-31-85; *Sanitation Officers Ass'n, Local 444*, Decision No. B-10-85; *District Council 37*, Decision No. B-10-80.

This Board finds claims one and two should be determined in the arbitral forum, while retaining jurisdiction in the event that the arbitration decision does not conform with the NYCCBL. *United Probation Officers Association*, Decision No. B-38-91 at 15; *see also*, *Local 1930, District Council 37*, Decision No. B-70-90; *Local 621, S.E.I.U.*, Decision No. B-16-90.

The City argues the remaining three claims should be viewed as a single claim, one that is duplicative of the first two. This Board recognizes that a controversy arising out of the same set of facts may involve related but separate and distinct rights and that a particular dispute may encompass rights which derive from both the NYCCBL and a collective bargaining agreement. *United Probation Officers Association*, Decision No. B-38-91 at 13. Nevertheless, this Board agrees with the City that the remaining three claims are intertwined, with each other and with the contractual claims.

Accordingly, we find that the contractual matters should be evaluated initially in the arbitral forum and believe that it would be premature, at this point, to adjudicate the remaining three claims as it would likely duplicate that which will be adduced in the arbitration proceeding and might incur the risk of inconsistent determinations.

In so ruling, we stress that this does not end the matter as far as the Union's improper practice charge is concerned. We shall retain jurisdiction over the pending improper practice charge docketed as BCB-2561-06, but we shall hold any further proceedings in that matter in abeyance until such time as an arbitrator has issued an opinion and award upon which we may further determine whether an

improper practice was committed by the Respondent. *See Local 1930, District Council 37*, Decision No. B-70-90 at 10-12; *Local 621, S.E.I.U.*, Decision No. B-16-90 at 12. Generally we have not exercised our improper practice jurisdiction when the same claim and issues are pending in another forum in order to avoid unnecessary duplication of effort and the risk of an inconsistent determination. *Local 1930, District Council 37*, Decision No. B-70-90 at 12; *Local 621, S.E.I.U.*, Decision No. B-16-90 at 12.

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 contract based claims in the improper practice petition filed by District Council 37, AFSCME, Local 1508, docketed as BCB-2561-06, and the same hereby is, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

Dated: New York, New York
March 29, 2007

MARLENE A. GOLD
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