OSA, 11 OCB2d 40 (BCB 2018)

(IP) (Docket No. BCB-4274-18)

Summary of Decision: Petitioners alleged that HHC terminated an employee in retaliation for her participation in a union organizing campaign in violation of NYCCBL § 12-306(a)(1) and (3). In its pleadings, HHC requested dismissal of the petition on the grounds that neither the Union nor the employee has standing to file the instant claim. Petitioners argue that both a public employee and a public employee organization have standing to file petitions. The Board found that the Union has standing and that it need not determine the employee's standing at this time. Therefore, we decline to dismiss the petition and refer the matter to the Trial Examiner for further processing. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

ORGANIZATION OF STAFF ANALYSTS and LETITIA BIGGS,

Petitioners,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent.

INTERIM DECISION AND ORDER

On May 25, 2018, the Organization of Staff Analysts ("Union" or "OSA") and Letitia Biggs (collectively, "Petitioners") filed an improper practice petition against NYC Health + Hospitals ("HHC").[1] Petitioners allege that HHC violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

[1] We refer to the New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Interim Decision and Order.

("NYCCBL") by terminating Biggs from her employment at HHC in retaliation for her participation in a union organizing campaign. In its answer and surreply, HHC requested that the Board dismiss the petition on the basis that neither the Union nor Biggs has standing to file the instant claim. Petitioners argue that both a public employee and a public employee organization have standing to file petitions. The Board finds that the Union has standing and that we need not determine Biggs' standing at this time. Therefore, we decline to dismiss the petition and refer the matter to the Trial Examiner for further processing.

BACKGROUND

When considering a request to dismiss a petition, the Board "accepts as true for the purposes of deciding the [request] the facts alleged in the petition and draw all permissible inferences in favor of Petitioner from the pleadings." *See Kingsley*, 1 OCB2d 31, at 2 (BCB 2008); *see also James-Reid*, 77 OCB 6, at 11-12 (BCB 2006). Accordingly, for the purposes of this interim decision, we credit the factual allegations in the petition.

HHC hired Biggs on January 19, 2016 and terminated her approximately two years later, on January 26, 2018. At all times relevant to this proceeding, she was assigned to the HHC Home Care program ("Home Care") and held the title of Assistant Director of Nursing ("ADN").

In November 2016, Biggs learned that the Union was attempting to accrete the titles "Assistant Director, Hospitals" and "Associate Director, Hospitals" to its Staff Analyst bargaining unit.[2] Shortly thereafter, she contacted Union Chairperson Robert J. Croghan to inquire into

[2] The pending representation petition for these titles is docketed as AC-57-10.

whether the Union could accrete her title as well. Croghan stated that the Union would consider filing a representation petition.

In late January 2017, the Union recruited Biggs to be a union organizer, and she began working with a colleague, ADN Jamilah Yusif, to help promote the organizing campaign. On February 8, 2017, the Union filed three accretion petitions with the Board of Certification ("BOC") seeking to add the titles of Deputy Director of Nursing and Associate Director of Nursing, as well as Biggs' ADN title to its Staff Analyst bargaining unit.[3] On October 25, 2017, the Union withdrew its petition to accrete ADNs.[4] Thereafter the Union, with the assistance of Biggs and other organizers, continued to organize employees in these titles and solicit representation cards.

In January 2018, Biggs began meeting with Home Care ADNs regarding the Union's organizing campaign. She also frequently met with Home Care ADNs to solicit representation cards on behalf of the Union, accompanied by Union organizer Lurine McRae.

On January 26, 2018, Biggs was terminated on the basis that she had failed to meet certain performance goals. In the petition, the Union alleges that Biggs was terminated in retaliation for her union activity.

[3] These petitions were docketed as AC-1640-17, AC-1641-17, and AC-1642-17.

[4] We take administrative notice that, on June 18, 2018, the Union filed a petition, docketed as RU-1654-18, to represent employees in the three nursing titles, including ADN, in a new bargaining unit. On August 27, 2018, HHC filed a petition, docketed as RE-1655-18, requesting that the BOC designate employees in the three titles managerial and/or confidential. Both of these petitions are currently being processed.

POSITIONS OF THE PARTIES

HHC's Position

HHC contends that the Board should dismiss the petition because neither the Union nor Biggs has standing to bring the instant claim. It claims that the Union lacks standing because it was never certified as the duly recognized bargaining representative of employees holding the ADN title. In support of this position, HHC relies primarily upon *UFA*, 59 OCB 33 (1997), for the proposition that only the certified bargaining representative of a particular title may file improper practice petitions on behalf of employees in that title. Here, it asserts that since the Union is not the certified bargaining representative for employees in the ADN title, it does not have standing to file an improper practice claim on Biggs' behalf.

HHC additionally argues that Biggs lacks standing to file the instant claim. It contends that it has designated the ADN title as managerial under § 7385(11) of the New York City Health and Hospitals Corporation Act ("HHC Act") and that such a designation renders the ADN title ineligible for collective bargaining. Moreover, it claims that, because the BOC has never determined that the ADN title is eligible for collective bargaining, public employees in that title are ineligible to assert claims arising under the NYCCBL. HHC also argues that, even absent a finding that employees in the ADN title are ineligible for collective bargaining, the Board cannot presume such employees are eligible because the Union voluntarily withdrew a representation petition concerning that title.

Finally, HHC asserts that even if the Board were to find that Biggs alone has standing, the petition must be dismissed because only the Union requests a remedy in the petition.[5] HHC asserts

[5] The petition provides, in relevant part that "[*t*]*he Union requests* that the Board":

that Biggs herself has requested no remedy and, moreover, that the Union's "prayer for relief cannot be assigned" to Biggs. (HHC Sur. Memorandum of Law at 10) Lastly, it argues that the Board cannot permit Biggs, as an individual, to file an amended petition because it would unfairly prejudice HHC by enabling her to circumvent the NYCCBL's timeliness and pleading requirements.

Union's Position

The Union urges the Board to deny HHC's request to dismiss the petition. It asserts that it has standing to enforce Biggs' "organizational rights" and to ensure that she may participate in union activity free from retaliation. (Rep. ¶ 29) Further, the Union contends that the precedent cited by HHC is factually distinguishable and legally inapplicable. For example, *UFA* arose in the

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> (a) Order [HHC] to reinstate Petitioner Biggs to her position as an Assistant Director of Nursing, with no break in service and full back pay;
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> (b) Direct [HHC] to send a formal notice to all AD[N]s that Respondent's actions in terminating Petitioner Biggs based upon her union activity was in violation of [NYCCBL] §§ 12-305, 12-306(a)(1) and (3), that Biggs is being reinstated with full backpay and benefits, and HHC will not discriminate or retaliate against any employees because of their union activity;
>
> (c) Direct [HHC] to call a meeting with all AD[N]s and [Home Care] management to notify them that Respondent violated NYCCBL §§ 12-305, 12-306(a)(1) and (3), that Petitioner Biggs is being reinstated will full backpay and benefits, and that HHC will not discriminate or retaliate against any employees because of their union activity;
>
> (d) any and all further just relief as may be appropriate to make Petitioner Biggs whole; and
>
> (e) post notices at all [HHC] facilities notifying the employees that Respondent violated NYCCBL §§ 12-305, 12-306(a)(1) and (3), that Petitioner Biggs is being reinstated will full backpay and benefits, and that HHC will not discriminate or retaliate against any employees because of their union activity.

(Pet. ¶ 62) (emphasis added).

context of an information request, not a representation proceeding. Further, other cases cited by HHC address allegations that the public employer has refused to bargain. Those are not the claims presented here.

Turning to the issue of Biggs' standing, the Union argues that HHC employees are within the jurisdiction of the NYCCBL and that it is "well-settled" that only the BOC has the prerogative to determine whether public employees are managerial and/or confidential. (Rep. ¶ 38) Further, as a factual matter, the Union filed a petition seeking to represent Biggs' title on February 8, 2017. Although it withdrew that petition on October 25, 2017, it continued organizing employees in the ADN title and re-filed the petition on June 18, 2018. It contends that Biggs has remained part of the Union's organizing efforts since at least February 8, 2017. Therefore, the Union argues that Biggs also has standing to file the petition.

DISCUSSION

For the reasons set forth below, we find that the Union has standing to file the claims before the Board. Since a hearing on these claims will cover the same facts asserted by Biggs, we need not determine at this time whether she would also have standing.

Our analysis begins with the plain language of the NYCCBL. Section 12-306(e) provides:

> A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining . . . . Such petition may be filed by one or more ***public employees*** **or** ***any public employee organization acting on their behalf*** . . .

NYCCBL § 12-306(e) (emphasis added). Similarly, the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") set forth:

> One or more ***public employees*** **or** ***any public employee organization acting on their behalf*** . . . may file a petition alleging

> that a public employer or its agents . . . has engaged in or is engaging in an improper practice . . .

OCB Rules § 1-07(b)(4) (emphasis supplied).

We find that the Union has standing to file this improper practice petition. The NYCCBL defines "public employee organization," as "any municipal employee organization and any other organization or association of public employees, a primary purpose of which is to represent public employees concerning wages, hours and working conditions." NYCCBL § 12-303(j). This definition does not require that the organization or association be the certified bargaining representative. In addition, the Board has found that the phrase "any public employee organization," contained in both NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4), permits unions to file improper practice petitions on behalf of nonmembers. *OSA*, 33 OCB 22 (BCB 1984), *rev'd in part on other grounds*, 18 PERB ¶ 3067 (1985) (remanded for hearing), arose amid an ongoing representation proceeding involving several unions. The union's improper practice petition alleged that the City of New York ("City") intended to undermine a potential bargaining unit by unilaterally reclassifying the employees at issue as managerial and/or confidential. The City argued that the union lacked standing to bring the claim because at the time that the petition was filed, it was purportedly not a *bona fide* labor organization and did not represent the employees in issue, but was merely seeking to represent the bargaining unit of another union. Although the Board ultimately dismissed the union's claims, it rejected the City's standing challenges. In doing so, the Board explained that the OCB Rules "do[] not require that the petitioning organization be

certified to represent the employees on whose behalf it is acting; nor does it require that the petitioning organization have sought to represent them."[6] *OSA*, 33 OCB 22.[7]

The union sought review before the New York State Public Employment Relations Board ("PERB"), charging that the Board had improperly dismissed the petition without holding a hearing regarding the City's motivation for reclassifying the employees. In remanding the Board's decision, PERB also underscored the importance of permitting unions to file claims on behalf of nonmembers. PERB explained that unrepresented employees have more than the "potential right to a negotiating unit." *OSA*, 18 PERB ¶ 3067, at 3145. The "potential right must be seen as *the present right of employees to seek a negotiating unit*." *Id.* at 3145-46 (emphasis added); *see Bd. of Educ. of the City School Dist. of the City of New York*, 18 PERB ¶ 3068, at 3149 (1985) (reversing the dismissal of an interference claim brought by the Union on behalf of employees whom the employer asserted were managerial or confidential in a pending representation case).

Indeed, our decisions resolving allegations that an employer has improperly interfered in an organizing drive have also relied upon the premise that unions may file petitions on behalf of nonmembers. *ADWA*, 55 OCB 19 (BCB 1995), is illustrative. There, a union filed an improper practice petition on behalf of then-unrepresented Deputy Wardens employed by the Department of Corrections ("DOC") alleging that the DOC improperly withheld a pay raise in order to coerce the union into withdrawing a pending representation petition. The Board granted the improper practice petition, explaining that the refusal to grant the pay raise "contained an innate element of

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[6] The Board relied upon OCB Rule § 7.4, the predecessor to OCB Rule § 1-07(b)(4).

[7] We do not find persuasive HHC's claim that *OSA*, 33 OCB 22, applies only to standing questions arising in the context of alleged interference with union activity. A retaliation finding pursuant to NYCCBL §12-306(a)(3) is interference with the employee rights set forth in §12-305 and derivatively violates §12-306(a)(1). *See e.g., Local 621, SEIU*, 5 OCB2d 38, at 2 n. 1 (BCB 2012). In addition, the Union here alleges an independent claim of interference under § 12-306(a)(1).

coercion, irrespective of motive, and constituted conduct which, because of its potentially chilling effect on the organizing drive by Deputy Wardens and the Union, is inherently destructive of important rights guaranteed by the NYCCBL." *ADWA*, 55 OCB 19, at 40; *see also DC 37*, 69 OCB 23 (2002) (citing *ADWA* in concluding that the public employer could not implement certain merit pay increases during the pendency of a representation petition; improper practice petition filed by the union seeking to represent the affected employees).

In finding that unrepresented employees have the right to participate in an organizing campaign free from employer interference, the Board in *ADWA*, 55 OCB 19, relied upon PERB's conclusion that a public employer's obligation during an organizing drive under N.Y. Civil Service Law Article 14 ("Taylor Law") was "to maintain the status quo so as to not give the impression to the employees covered by the [representation] petition that the [public employer] might take any steps to punish or reward employees for their exercise of protected rights." *Id.* at 35 (quoting *Hudson Valley Community College*, 18 PERB ¶ 3057 (1985)); *accord Dorr Glover*, 34 PERB ¶ 3008 (2001) (PERB has "consistently found a violation of [the Taylor Law] whenever the employer changes the status quo of the terms and conditions of employment during the pendency of a representation petition.").

Here, we decline to rely upon *UFA*, 59 OCB 33, which HHC cites to support its claim that the Union lacks standing. In *UFA*, among other things, the union alleged that the public employer committed an improper practice by disciplining a Construction Manager, who was not a member of the union's bargaining unit, for providing information to a union official. The Board concluded that "an employee organization is not authorized to file a charge unless it stands in a representative capacity to the employee whose rights are being asserted." *Id.* at 15. The Board has never relied on its decision in *UFA*. In addition, *UFA* is at odds with our earlier reading of the NYCCBL and

OCB Rules in *OSA*, 33 OCB 22, as well as the public policies underlying the NYCCBL and Taylor Law.

Our conclusion concerning the Union's standing is consistent with PERB's interpretation of the same provision in the Taylor Law and similar language in the PERB Rules of Procedure ("PERB Rules").[8] In *Canandaigua City School Dist.*, 27 PERB ¶ 3046 (1994), PERB determined that a union need not be certified to represent a public employee in order to have standing to file a claim on that employee's behalf. It found:

> Our Rules of Procedure permit a charge to be filed on behalf of individuals by "an employee organization." SEIU is plainly an employee organization within the meaning of the Act . . . . SEIU did not have to be the certified or recognized bargaining agent of the individuals who had been denied public employment . . . as a condition to its entitlement to file a charge on their behalf.

In support of this holding, PERB explained:

> A public employer violates the Act by denying employment to persons because it suspects . . . that they may or will exercise rights afforded to them by the Act. To hold otherwise would leave these individuals without any remedy for what may have been a violation of the Act because the District's refusal to hire is not subject to the jurisdiction of any other labor relations agency. Having held this, it is clear that SEIU has standing to file. . . .

Id. Thus, PERB found that the text and policy objectives of the Taylor Law compelled it to conclude that a union has standing to file an improper practice petition on behalf of a non-member. *See also Local 1180, CWA*¸ 28 PERB ¶ 4675, at 4977 n. 1 (ALJ 1995) (concluding that *Canandaigua City School Dist.* was dispositive in finding that a union had standing to file a petition on behalf of employees represented by another union); *Oswego County L. 838*, 27 PERB ¶ 4649, at 4962 n. 17 (ALJ 1994) (noting that, pursuant to § 204.1(a)(1) of PERB's Rules of Procedure,

[8] PERB Rule 204.1 provides that "an improper practice [petition] may be filed . . . by one or more public employees or any employee organization acting in their behalf."

"even nonbargaining agent employee organizations have standing to file improper practice charges on behalf of employees") (citing *Canandaigua City Sch. Dist.*); *Local 237*, 6 PERB ¶ 3043 (1973); *Holbrook Fire District Ass'n*, 30 PERB ¶ 4559 (ALJ 1997); *SEIU*, 25 PERB ¶ 4538 (ALJ 1992).[9]

Regarding Biggs' standing, we note that both NYCCBL § 12-306(e) and OCB Rules § 1-07(b)(4) provide that "public employees" may file a petition alleging an improper practice. The NYCCBL broadly defines "public employees" as "municipal employees and employees of other public employers." NYCCBL § 12-303(h). The NYCCBL provides that "public employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification." NYCCBL § 12-305;[10] *see also Matter of Lippman v. Pub. Empl. Relations Bd.*, 263 A.D.2d 891, 904 (3d Dept. 1999).

Contrary to HHC's assertion, "[a] public employer may not designate a position as managerial or confidential." *Bd. of Educ. of the City School Dist. of the City of New York*, 18 PERB ¶ 3068, at 3148. Only the BOC is authorized to determine whether a public employee is managerial and/or confidential for the purposes of the NYCCBL. *See* NYCCBL § 12-309(b)(4) (setting forth the power of the BOC to determine whether public employees are managerial and/or confidential within the meaning of the Taylor Law).[11]

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[9] Further, the PERB cases cited by HHC in support of its position are inapposite, as none involve allegations of retaliation or interference in union activity.

[10] We note that Biggs seeks to vindicate rights expressly set forth in NYCCBL § 12-305: among other rights, public employees have "the right to self-organize" and the right "to form, join, or assist public employee organizations."

[11] Further, HHC employees are subject to the managerial and/or confidential employee standard set forth in the Taylor Law and the BOC's determinations. *See OSA*, 10 OCB2d 2, at 17 (BOC 2017) (applying the doctrine of *stare decisis* to determine that the appropriate standard of managerial and/or confidential status is found in the Taylor Law, not the HHC Act), *affd., Matter*

The managerial and/or confidential status of employees in the ADN title is the subject of two pending representation petitions, and the BOC has not yet determined whether or not ADNs are managerial or confidential.

In any event, it is not necessary to determine the issue of Biggs' standing at this time. Given that the Petitioners allege the same facts, the nature and scope of the hearing would be the same irrespective of whether Biggs has standing.

In reaching our conclusions here, we note that the BOC's determination on the representation petitions may have an impact on our ultimate determination of the merits of the claims presented here and/or the possible remedies. Nevertheless, the timely and efficient presentation and preservation of evidence on the improper practice claims is needed while the representation process continues. Accordingly, we decline to dismiss the petition and refer the matter to a Trial Examiner for further processing.

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of NYC Health + Hosp. v. Organization of Staff Analysts, 2017 NY Slip Op 32393(U) (Sup. Ct. N.Y. Co. Nov. 13, 2017, Edwards, J.); *see also* HHC Act § 7390.5 (providing that HHC is subject to the Taylor Law and the NYCCBL); *Local 375, CSTG*, 22 OCB 45, at 31 (BOC 1978) (finding that because the HHC Act "provides that the employees of the HHC be treated like other public employees, they can only be excluded from collective bargaining based on a finding of managerial-confidential status by [the BOC]"); *DC 37*, 10 OCB 41, at 13 (BOC 1972) (finding that the Taylor Law § 201.7(a) applies to HHC employees).

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 Board declines to dismiss the improper practice petition, docketed as BCB-4274-18; and it is further

ORDERED, that the proceedings in BCB-4274-18 be, and the same hereby is, referred to a Trial Examiner designated by the Office of Collective Bargaining for further processing.

Dated: December 12, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA S. SILVERBLATT
MEMBER

DANIEL F. MURPHY
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER