

LEEBA, 12 OCB2d 20 (BCB 2019)

(IP) (Docket No. BCB-4313-19)

Summary of Decision: The Union filed an improper practice petition that alleged that the City and DEP violated the NYCCBL. After the Union failed to appear at two conferences and failed to provide an explanation for its absence at the second one, the City filed a motion to dismiss the improper practice petition. The Union did not respond. The Board found that the Union failed to prosecute this matter and dismissed the petition. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Respondents.

DECISION AND ORDER

On February 8, 2019, the Law Enforcement Employees Benevolent Association (“Union” or “LEEBA”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Department of Environmental Protection (“DEP”) (collectively “Respondents”).¹ On May 8, 2019, the City filed an application to dismiss the petition with

¹ The Union alleges that Respondents violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by ordering the Union Treasurer to divulge information about an alleged improper

prejudice based on the Union's failure to appear at two pre-hearing conferences.² On May 10, 2019, the Trial Examiner informed the Union that it had 10 business days to respond and that failure to do so might result in dismissal of the improper practice petition. To date, the Union has not responded. The Board finds that the Union failed to prosecute this matter and grants the City's motion to dismiss. Accordingly, the improper practice petition is dismissed.

BACKGROUND

The Union is the certified collective bargaining representative for DEP employees in the civil service title of Environmental Police Officer ("EPO").

With the parties' consent, a pre-hearing conference was scheduled for April 17, 2019, at the Office of Collective Bargaining ("OCB").³ The City appeared for the conference, but the Union did not. Twenty-five minutes after the conference was scheduled to commence, the Trial Examiner emailed the Union's attorney inquiring about his whereabouts. A few minutes later, the Union's attorney apologized for "mis-calendar[ing]" the conference, stated that he would no longer

firearm discharge by another bargaining unit member. The City answered asserting that it did not violate the NYCCBL. The Union did not file a reply. This decision does not address the claims in the underlying petition, it only addresses the City's motion to dismiss.

² We are deeming the City's application to dismiss a motion to dismiss under § 1-12(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). While the motion was not supported by an affidavit, the only facts relevant to this motion to dismiss concern the Board's administrative processes so a sworn statement was not necessary here.

³ Notice of the conference was sent by email on March 6, 2019 to counsel for both parties and to the Union President, Kenneth Wynder.

be representing LEEBA on this matter, and noted that future communication should be sent to the Union President. (April 17, 2019 Email from Union Counsel to the Trial Examiner)

On April 26, 2019, the Trial Examiner sent an email to the City's attorney and the Union President for the purpose of scheduling a new conference date and offered six new dates for a telephone conference at the beginning of May. Later that day, the City responded that it was available on all of the proposed dates. On April 30 and May 2, 2019, the Trial Examiner continued to seek the Union's availability without substantive reply.⁴ The May 2, 2019 email to the parties stated that:

As a reminder, a new conference date must be scheduled in this matter. I am available to conference this case in the afternoon on May 6, 7, or 8. I will also do my best to accommodate an alternate date if the parties can mutually agree upon one and send it to me by close of business tomorrow, May 3.

If I do not receive a proposed conference date from the parties by close of business tomorrow, then the conference will be held on Wednesday, May 8, at 3 p.m.

(May 2, 2019 Email from the Trial Examiner to the Union President and City Counsel) The City responded with its availability, but the Union did not. On Monday, May 6, 2019, the Trial Examiner sent an email confirming that the conference would be held on May 8 at 3 p.m.⁵

On May 8, 2019, the Trial Examiner began the conference call at 3 p.m. The City participated, but the Union did not. There was no communication from the Union prior to the

⁴ Between April 26 and the start of the conference on May 8, 2019, the only response the Trial Examiner received from the Union was a one sentence email on April 30, 2019, stating in total that the Union President "[w]ill confirm dates tomorrow." (April 30, 2019 Email from the Union President to the Trial Examiner) The Union neither copied the City on this email, nor sent any other email, nor confirmed dates.

⁵ On May 7, 2019, the Trial Examiner sent the parties an email with the dial-in information for the conference call.

conference, or at the time the conference was scheduled to commence. Approximately ten minutes after the conference was scheduled to commence, the Trial Examiner sent an email to the Union President inquiring about his whereabouts. At 4:40 p.m., the Union President sent an email to the Trial Examiner and the City stating, that:

The union apologizes for not making [the] conference. Send update if there is anything you need from the union. And yes we will be representing [*sic*] moving forward.

(May 8, 2019 Email from the Union President to the Trial Examiner and City Council) The Trial Examiner responded explaining that four hearing dates had been selected in July. Later that day, the City emailed the Trial Examiner and the Union requesting that the improper practice petition be dismissed given the Union's failure to appear at the April 17 and May 8, 2019 conferences, in addition to the reasons set forth in its answer.

On May 10, 2019, the Trial Examiner sent the parties the following email:

The City has made an application to dismiss this improper practice petition pursuant to OCB Rule § 1-07 (c)(6)(i). LEEBA has ten business days from when the City's application was made to respond to the application. If LEEBA does not respond showing good cause for its failure to appear, then the improper practice petition may be dismissed.

(May 10, 2019 Email from the Trial Examiner to the Union President and City Council) No response was received from the Union. On May 23, 2019, the City again sent an email to the Trial Examiner and the Union President requesting that the improper practice be dismissed. On May 31, 2019, the Trial Examiner sent the parties an email informing them that the City's request was being referred to the Board.⁶ The Union has not responded to any of the Trial Examiner's emails since April 30, or otherwise contacted the OCB to explain its failure to appear.

⁶ On July 2, 2019, the Trial Examiner sent an email to both parties clarifying that since this matter has been referred to the Board, the hearing dates are cancelled.

POSITIONS OF THE PARTIES

City's Position

The City requests that the petition be dismissed given the Union's failure to appear at either conference and its failure to respond to the City's motion to dismiss. The City argues that good cause has not been shown for the Union's failure to appear on April 17 or May 8, 2019.

In addition, the City argues that the instant petition must be dismissed as DOC has not violated the NYCCBL. It asserts that the failure to submit a Reply in this action further demonstrates the appropriateness of dismissal as additional facts or new matters alleged in the answer shall be deemed admitted unless denied in the reply.

Union's Position

The Union did not provide any explanation for its failure to appear at the May 8, 2019 conference or to respond to the Trial Examiner's May 10, 2019 request for a response to the motion to dismiss. To date, the Union has not opposed the City's motion to dismiss the petition.

DISCUSSION

The OCB Rules expressly provide that “[a]bsent good cause shown, the failure of a party to appear at a case conference may constitute grounds for dismissal of the absent party’s pleading.” OCB Rules § 1-07(c)(6)(i). *See generally CEA*, 28 OCB 29, at 9 (BOC 1981) (dismissing the City’s petition for failure to timely prosecute its claim when City did not comply with the Board’s request that it clarify and substantiate its claim); *Local 237, IBT*, 40 OCB 16, at 6 (BOC 1987) (“a petitioner’s failure timely to submit such clarification and substantiation, when requested by the Board, may result in dismissal of the petition.”).

The New York State Public Employment Relations Board (“PERB”) has repeatedly held that a charging party’s “unexcused failure to appear at a scheduled PERB proceeding constitutes a failure to prosecute a charge[,] which is grounds for dismissal.”⁷ *Intl Bhd. of Teamsters, Local 237 (Jouldach)*, 34 PERB ¶ 3010, at 3020 (2001) (PERB affirmed dismissal for failure to appear at hearing). In *Smithtown Fire District*, 28 PERB ¶ 3060 (1995), PERB affirmed an administrative law judge’s dismissal of a charge where the charging party failed to appear at a conference and failed to submit any response to the other party’s motion to dismiss. *See also United Fedn. of Teachers, Local 2 (Goldstein)*, 42 PERB ¶ 3035 (2009) (unopposed motion to dismiss granted where the charging party failed to respond to the ALJ’s directive that it explain its absence at the scheduled hearing).

Here, all parties were on notice of the May 8, 2019 conference date. At no point before or after the conference did the Union request an adjournment, express an inability to appear, or provide a reason for its failure to appear. Subsequent to the City’s motion to dismiss, the Trial Examiner clearly advised that “[i]f LEEBA does not respond showing good cause for its failure to appear, then the improper practice petition may be dismissed.” (May 10, 2019 Email from the Trial Examiner to the Union President and City Counsel) Thus, the Union had express notice that the improper practice petition could be dismissed. Nevertheless, the Union has neither provided an explanation for its failure to appear nor opposed the City’s motion. By these actions, the Union has indicated that it no longer wishes to pursue this matter. Moreover, the Union’s failure to appear

⁷ Similar to the OCB Rules, § 212.2 of PERB’s Rules of Procedure provides that “failure of a party to appear at the conference may, in the discretion of the administrative law judge, constitute grounds for dismissal of the absent party’s pleading and a default determination.” *See also Civ. Serv. Empls. Assn, Local 1000 (Josey)*, 49 PERB ¶ 3022 (2016) (PERB affirmed dismissal for failure to appear at a conference); *United Fedn. of Teachers, Local 2 (Celli)*, 51 PERB ¶ 4513 (ALJ 2018); *United Fedn. of Teachers, Local 2 (Torres)*, 50 PERB ¶ 4568 (ALJ 2017); *United Fedn. of Teachers, Local 2 (Celli)*, 50 PERB ¶ 4514 (ALJ 2017).

for the conference on May 8, 2019, and to respond to the Trial Examiner's inquiries demonstrates a disregard for the Board's processes. Accordingly, the petition is dismissed in its entirety.

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 verified improper practice petition filed by Law Enforcement Employees Benevolent Association, docketed as BCB-4313-19, against the City of New York and the New York City Department of Environmental Protection, hereby is dismissed in its entirety.

Dated: July 30, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER