SUPREME COURT OF THE NEW YORK
COUNTY OF NEW YORK - PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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In the Matter of DISTRICT COUNCIL 37, American Federation of State, County and Municipal Employees, AFL-CIO, LILLIAN ROBERTS, as Executive Director of DC37,

Petitioners,

Index No: 112450/03
DECISION/ORDER

For a Judgement Pursuant to CPLR Article 78

-against-

THE CITY OF NEW YORK, et al.,

Respondents.

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Petitioners District Council 37, American Federation of State, County, and Municipal Employees, AFL-CIO (DC 37), and Lillian Roberts, as Executive Director of DC 37, bring this Article 78 proceeding seeking to annul Decision No. B-20-2003 (Decision) of the Board of Collective Bargaining (Board) of the City of New York (City), dated June 9, 2003. The Decision dismissed petitioners' charge that the City, acting through its Human Resources Administration (HRA), committed an improper practice in violation of the New York City Collective Bargaining Law (CBL). Petitioners contend that the Decision was arbitrary and capricious, and contrary to law.

As held in the Decision, in the fall of 2000, the City announced a plan to change the name of HRA's Income Support Offices to "Job Centers"; to create new titles, including Job Opportunity Specialist (JOS) and Associate Job Opportunity Specialist (AJOS), to staff those centers; and to consolidate certain existing positions into positions which would be held by employees in the new titles. By the spring of 2001, HRA began recruiting employees to fill the new titles from its then current employees in the titles Principal Administrative Associate (PAA), Eligibility Specialist (ES), Supervisor (SUP), and Caseworker. The JOS title was filled with employees who had been ESs and

Caseworkers, and the AJOS title was filled with former SUPS and PAAs. HRA employees who were placed in the JOS title series retained their previous union affiliations, pending completion of the representation process regarding JOSs and AJOSs. Thus, former SUPS and Caseworkers, as well as employees who remained in those titles, were represented by Local 371 of DC 37; former and continuing PAAs were represented by Local 1180, Communication Workers of America (CWA); and former and continuing ESs were represented by Local 1549 of DC 37. In addition, as of November 2001, approximately 200 new employees had been hired to fill JOS title series positions. Those workers were not represented by any union.

In February and March 2001, Local 371 and CWA each filed a petition, seeking to "accrete" (or combine) the AJOS title to its existing bargaining units. In February 2001, Local 371 and Local 1549 each filed a petition, seeking to represent employees in the JOS title and to accrete that title to existing bargaining units.

On or about October 15, 2001, HRA informed DC 37 that it had decided to implement a policy, initially announced on September 10, 2001, to confer merit pay bonuses on employees in the JOS title series. DC 37 thereupon filed an improper practice charge with the Board, along with a request for injunctive relief. The union charged that HRA had violated the CBL by, among other things, failing and refusing to bargain over the procedures and criteria to be used in conferring merit bonuses, and by conferring such bonuses during the pendency of a representation proceeding. The CWA filed a similar charge on November 29, 2001, claiming, in addition, that the conferring of merit pay discriminated against employees who had remained PAAs.

CBL § 12-305 provides, in relevant part, that:

> [p]ublic 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.

CBL § 12-306 (a) provides that:

[i]t 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 * * *;
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

CBL § 12-311 (d) provides that:

[d]uring the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, * * * the public employer shall refrain from unilateral changes in wages, hours, or working conditions. * * *

By decision dated July 9, 2002, and docketed as B-23-2002, the Board sustained DC 37's charges that HRA had violated CBL §§ 12-306 (a) (1) and (4) by failing to bargain about the merit pay issue, and that it had violated CBL § 12-306 (a) (1) by conferring merit pay during the pendency of a representation process. The Board ordered HRA to cease and desist from paying the merit increases. DC 37 did not seek, and the Board did not order, recission of the merit increases that HRA had already paid.

By decision dated September 23, 2002, and docketed as B-28-2002, the Board upheld CWA's similar claims as to CBL §§ 12-306 (a) (1) and (4). In addition, it ruled that, inasmuch as the PAA contract had expired, the conferral of merit pay violated the status quo provision of CBL § 12-306 (a) (5). However, the Board dismissed CWA's allegation that the conferral of merit pay was discriminatory, and that it therefore violated §§ 12-306 (a) (1) and (3).

On or about March 8, 2002, DC 37 filed a second improper practice charge which is the subject of the instant proceeding. This charge alleged, among other things, that HRA had violated the CBL by unilaterally awarding merit pay to employees in the JOS title series, only some of whom (former Caseworkers, SUPS and ESs) were and still are represented by DC 37,

but not awarding such increases to employees who had remained in the Caseworker, SUP, or ES titles, all of whom were and still are represented by DC 37. Specifically, DC 37 claimed that HRA's implementation of its merit pay policy interfered with the union's ability to represent its members in violation of CBL § 12-306 (a) (1), and discriminated against bargaining unit members, in violation of §§ 12-306 (a) (1) and (3).

In its Decision of the second improper practice charge, which is challenged here, the Board explained that it had held, in an earlier proceeding, that an employer's unilateral change in a term or condition of employment constitutes not only a refusal to bargain, but also an interference with the collective bargaining representative's ability to represent its members. Accordingly, the Board dismissed the claim of interference, on the ground that it had implicitly ruled on that claim in its decision (B-23-2002) of the prior improper practice proceeding brought by DC 37, and that it had there granted "the same cease and desist remedy as is being sought here." (June 6, 2003 Decision at 6.) The Board further dismissed the discrimination claim, noting that the issue had been decided and the claim of discrimination rejected in the Board's prior decision (B-28-2002) of CWA's improper practice petition, which held:

> Since all the Unions have continued to represent members who have transferred to positions in the JOS title series, the vast majority of merit pay recipients are indeed union members. Further, the City has not objected to the addition of the AJOS title to either the pre-existing Local 1180 or Local 371 bargaining units, and the AJOS employees will remain union members once the representation process is completed. As a result, we do not find that merit pay was granted only to AJOS employees in order to discourage union membership.

(Decision at 7, quoting B-28-2002 at 14.)

The Board further found that "[n]o arguments or evidence presented in the instant case justify a departure from our finding in Local 1180, Communications Workers of America." (Id.) Specifically, the Board reasoned:

> Here, DC 37 has continued to represent former ESs, SUPS, and Caseworkers who transferred to the JOS and AJOS titles. Therefore, members of the DC 37 locals who transferred to the new titles were eligible for, and some did receive merit pay. Furthermore, in the representation proceeding, the City has not indicated any preference as to which bargaining unit and/or union represents the new titles. Thus, no evidence shows that the granting of merit pay only to employees in the JOS title series and to the exclusion of ESs, SUPs, and Caseworkers was intended to encourage or discourage union membership or

support.

(Id.) The Board accordingly dismissed the claim that the conferral of merit pay discriminated against union members in violation of CBL §§ 12-306 (a) (1) and (3). The Board also dismissed the claim that the City's merit payments constituted domination of a union in violation of CBL § 12-306 (a) (2), on the ground that those payments did not constitute preferential treatment of one union over another, interfere with the formation or administration of the DC 37 Locals, or give them such assistance as to make them the employer's creation.

Petitioners contend that while the City's stated reason for granting merit pay was HRA's success in moving many of its clients into the labor force, and in providing work experience for many of those who were still receiving benefits, those developments had been brought about well before the creation of the JOS title series. Petitioners conclude that HRA employees who remained Caseworkers, SUPs and ESs, as well as those who had transferred to the JOS title series, should accordingly have been eligible to receive merit pay. However, the question of whether the City's decision to grant merit pay exclusively to employees in that title series was wise or fair was not at issue before the Board, and it is not at issue here.

Petitioners further argue that the Decision merely reiterates the holding and rationale of its determination of DC 37's prior improper practice claim (Decision B-23-2002). However, as review of the Decision shows, the Board carefully considered and discussed each of DC 37's charges, holding that it had already implicitly ruled on the interference claim, and dismissing all the other claims on the merits.

Petitioners also contend that contrary to the Board's claim that it had granted DC 37 all the relief to which it was entitled in its earlier decision (B-23-2002), the Board failed to order the City to extend the merit pay policy to employees who remain in the pre-existing titles. This argument is without merit. The Board could not order the City to bargain over the implementation of merit pay during the pendency of the representation petitions. (See Decision B-23-2002 at 16.) Moreover, the Board held in Decision B-23-2002 that the City's unilateral conferral of merit pay violated CBL § 12-306 (a) (1) and (4) and, as petitioners had

requested, ordered the City to cease conferring such pay. In the instant Decision, the Board therefore could not rationally have required the City to confer merit pay on employees in titles other than the JOS title series, without first bargaining with the DC37 Locals (and CWA) over the implementation of such pay.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: New York, New York
March 15, 2004