SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL E. HUFF
Justice

PART 32

Index Number : 401425/2011
CITY OF NEW YORK, ET AL.
vs.
NYS NURSES ASSOCIATION, EL AL.
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . 002.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 03 2012

_____, J.S.C.
CAROL E. HUFF

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Mater of the Application of THE CITY OF NEW YORK; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; JAMES HANLEY, as the Commissioner of the New York City Office of Labor Relations; and THE NEW YORK CITY OFFICE OF LABOR RELATIONS,	:	Index No. 401425/11
Petitioners,	:	
- against -	:	
NEW YORK STATE NURSES ASSOCIATION; KAREN A. BALLARD, as the President of the New York state Nurses Association; THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK; and MARLENE GOLD, as Chair of the Board of Collective Bargaining,	:	
Respondents,	:	
For a Judgment Pursuant to CPLR Article 78.	:	

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CAROL E. HUFF, J.:

Motions with sequence numbers 002 and 003 are consolidated for disposition.

In this Article 78 proceeding, petitioners seek to annul the determination of respondent Board of Collective Bargaining of the City of New York ("BCB"), dated April 28, 2011 (the Determination). Respondents New York State Nurses Association and Winifred Kennedy, as successor to Karen A. Ballard, the former NYSNA president ("NYSNA" or the "Union"), move to dismiss the petition (002). Respondent BCB also moves to dismiss the petition (003).

In its Determination, BCB partially granted an improper practice petition, requiring

petitioners City of New York and New York City Human Resources Administration (together, the "City") to provide certain discovery in connection with an employee disciplinary proceeding involving two Union members.

Background. The Taylor Law, New York Civil Service Law ("CSL") Article 14, grants public employees the right to organize and bargain collectively with their employer. CSL § 212 authorizes certain local governments, including the City, to enact their own labor relations laws and procedures so long as they are substantially equivalent to the Taylor Law. Pursuant to CSL § 212, the New York City Collective Bargaining Law, 12 NYC Admin. Code ch. 3, ("NYCCBL") regulates the conduct of labor relations between the City and its employees. The Taylor Law created the Public Employment Relations Board ("PERB") to adjudicate disputes between public employers and unions. CSL § 212 allowed for the creation of local "mini-PERBs," and respondent BCB is the City's mini-PERB.

In October 2009, two Union nurses were served with disciplinary charges in connection with allegations that, among other things, they had falsified time records and received payment for days when they did not work. At their underlying disciplinary hearing they sought discovery from the City, including such items as copies of time sheets, patient records and witness statements, and copies of certain City policies. The City refused to produce the discovery, and the charges against the nurses were substantiated with recommendations of termination.

The Union then filed an improper practice proceeding against the City before BCB, contending that the failure to provide discovery violated NYCCBL §§12-306(a)(1) and (4). NYCCBL §12-306(a)(1) provides that it is an improper practice "to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 of this chapter."

NYCCBL §12-305 provides, in relevant part, that "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 such activities." NYCCBL §12-306(a)(4) provides that it is an improper practice "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."

BCB granted the improper practice petition in part, finding that the duty to bargain in good faith pursuant to NYCCBL §12-306(a)(4) "includes the obligation to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining," and that the duty applies for purposes of "contract administration." Determination at 9, citations omitted. "Accordingly, we hold that the obligation to provide information reasonably necessary for contract administration applies to requests made in the context of disciplinary grievances, and that failure to provide such materials upon request violates §12-306(a)(1) and (4)." Determination at 11.

In the Determination (approved four to two with a dissent), BCB for the first time extends the acknowledged right of a union to obtain information relevant to contract interpretation grievances, to include employee disciplinary proceedings. Procedure for employee disciplinary proceedings is established in detail in CSL § 75(2), and there is no explicit provision for discovery. CSL § 76(4) authorizes collective bargaining to establish disciplinary procedures that differ from the procedures set forth in § 75, and those procedures, contained within the parties' negotiated Collective Bargaining Agreement ("CBA"), are at issue. The CBA also does not

explicitly provide that the City is obligated to provide discovery in a disciplinary proceeding. It is uncontroverted that prior to the Determination, there has not been discovery in employee disciplinary proceedings held pursuant to the CBA.

In support of its conclusion, BCB cites a line of Third Department cases upholding the right of a union to obtain discovery "for contract administration in the context of disciplinary grievances." Determination at 10. See Hampton Bays Union Free School Dist. v Public Empl. Relation Bd., 62 AD3d 1066 (3rd Dept 2009), lv. den. 13 NY3d 711 (2009); Civil Serv. Empl. Assn. v Public Empl. Relation Bd., 46 AD3d 1037 (3rd Dept 2007); and County of Erie v State of New York, 14 AD3d 14 (3rd Dept 2007). The City implicitly contends that these cases are superceded by the more recent Third Department case Pfau v Public Empl. Relation Bd., 69 AD3d 1080 (3rd Dept 2010). While the Pfau Court cites the three previous cases with approval for the proposition that the CSL "provide[s] firm footing for the recognized right of an employee organization to obtain information relevant to a potential contractual grievance about the interpretation, application or alleged violation of a provision of a collective bargaining agreement" (id. at 1081), it also finds:

> However, disciplinary proceedings, which involve alleged misconduct by an employee, serve a significantly different function than a grievance. Disciplinary proceedings are intended to promptly resolve allegations of employee misconduct. The specifications of alleged misconduct must, of course, be sufficiently detailed to permit the charged employee to prepare and present a defense. Significantly, however, there is no general right to disclosure in a disciplinary proceeding.

Id. at 1082, citations omitted.

In the Determination, BCB attempts to distinguish Pfau from the previous cases by stating that it dealt with "a hybrid disciplinary process – created by the Rules of the Chief Judge

and supplemented by additional procedures agreed upon by the parties." Determination at 11. This is unconvincing, however, in light of the Pfau Court's explanation of the rationale behind the no-discovery policy, which applies to the issues underlying this petition as well:

> [The petitioner] had taken a consistent approach to disclosure demands in employee disciplinary matters for over 20 years, spanning the life of several collective bargaining agreements. Established precedent undergirding the general rule that there is no right to disclosure in disciplinary proceedings and the fact that the parties' agreement addressed disciplinary procedures without providing for disclosure lend further support to [the petitioner's] position. If the agreement did provide for disclosure, undoubtedly, it would necessarily provide an expedited manner for resolving disputes about disclosure. . . . [W]e agree with Supreme Court's conclusion that, in light of, among other things, the starkly disparate roles of contractual grievances and employee disciplinary proceedings, it was arbitrary to import the established right to information in contractual grievances into employee disciplinary proceedings.

Id. at 1083, citations omitted.

In the Determination, BCB similarly altered decades of consistent practice without citing direct precedent, and while acknowledging that BCB itself has previously "not had occasion to rule . . . in the context of a disciplinary grievance." Determination at 10. Its action amounts to a unilateral amendment of the negotiated CBA.

To prevail in their motions to dismiss, respondents must demonstrate that the Determination, as a matter of law, was not "affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). Because they have failed to do so, the motions are denied. Accordingly, it is

ORDERED that the motions of NYSNA (002) and BCB (003) to dismiss the petition are denied; and it is further

ORDERED that the respondents are directed to serve their answer to the petition within twenty-eight days following service of notice of entry of this order, and the petitioners are directed to serve their reply within fourteen days following that.

FILED

MAY 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

MAY 03 2012

CAROL E. HUFF
J.S.C.