

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

JANICE CERRA,

Petitioner,

DECISION NO. B-27-81

DOCKET NO. BCB-459-80

-and-

CITY OF NEW YORK; HUMAN RESOURCES
ADMINISTRATION: DEPARTMENT OF SOCIAL
SERVICES, BUREAU OF CHILD SUPPORT;
HERBERT SIMON, DEPUTY ASSISTANT
COMMISSIONER, OFFICE OF INCOME
SUPPORT,

Respondents.

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DECISION AND ORDER

The petitioner, Janice Cerra, filed a verified improper practice petition on October 27, 1980, in which she claimed that the respondents had committed improper practices within the meaning of §1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL") by engaging in harassing tactics designed to discourage petitioner from pursuing an out-of-title work grievance under the applicable collective bargaining agreement. The respondents filed their verified answer on November 13, 1980. On November 14, the petitioner's attorney filed a letter, dated November 11, 1980, in which he asked to amend the petition to include an allegation of an additional act of harassment.

Hearings were held in this matter before a Trial Examiner designated by the Office of Collective Bargaining on January 28, February 26, April 1, and April 24, 1981, at which

times the parties were afforded a full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. A transcript of the proceedings was taken. Thereafter, the petitioner's post-hearing brief was submitted on May 26, 1981, and the respondents' post-hearing brief was submitted on June 10, 1981.

Additionally, the petitioner moved orally, at the hearing on January 28, 1981, to further amend the petition to include additional incidents of alleged harassment, occurring subsequent to the date of filing of the original petition. The oral motion was reiterated in writing in a letter dated March 27, 1981. The City submitted a letter, dated February 25, 1981, objecting to the allowance of such an amendment to a petition at the time of hearing.

STATEMENT OF FACTS

Petitioner is an employee of the Department of Social Services, assigned to the Bureau of Child Support. She holds the permanent Civil Service Title of Supervisor I. From February 1979 to October 1980, she served in the in-house title of Acting Director of Training and/or Director of Training. In this capacity, petitioner supervised several employees serving in the in-house title of Trainer. Her own immediate superior was Herbert Simon, Deputy Assistant Commissioner of the Office of Income Support.

After unsuccessfully attempting to obtain provisional promotions for herself and the Trainers working under her supervision, on or about September 15, 1980 petitioner filed a grievance, dated August 26, 1980, alleging the performance of out-of-title work. The remedy requested in the grievance was a promotion and retroactive salary adjustment.

In response to the grievance, petitioner's supervisor, Herbert Simon, advised petitioner that he was requesting the classification division of the agency's Office of Personnel Services to conduct a job classification investigation of petitioner's position and those of the Trainers under her supervision. The investigation and "desk audit" occurred on October 3, 1980. Subsequently, on October 8, 1981 petitioner was advised by Simon that, based upon the "desk audit", the office of Personnel Services had recommended that the position being filled by petitioner properly should be allocated to the title of Associate Staff Analyst. Petitioner was further advised that,

"However, since there is an eligible list for Associate Staff Analyst, it will be necessary for us to discuss this recommendation in relation to your present assignment and civil service title."

Finally, by letter dated October 31, 1980, petitioner was informed by Simon that her position had been evaluated as one

which should be filled by an Associate staff Analyst, and that as a consequence, petitioner, whose title was Supervisor I, would be reassigned to duties as a Trainer in the Training Unit, effective November 3, 1980.

Other facts claimed to constitute evidence of retaliatory harassment against petitioner include the following:

On September 17, 1980, Simon informed petitioner of the implementation of a new training reporting system which would be required to be completed by petitioner, and which was more extensive and difficult than the system previously utilized.

On September 19, 1980, petitioner was informed that Francine Rose, a Trainer in petitioner's unit, was being transferred to a different section, effective immediately.

On October 20, 1980, Ed Hysysk, another Trainer in petitioner's unit, was transferred out of the unit. His transfer, together with that of Francine Rose, represented a 50% reduction in the number of Trainers in the unit under petitioner's supervision.

On November 26, 1980, Herbert Simon disapproved petitioner's request for annual leave for attendance at a professional conference. This request for leave was subsequently granted by Simon upon the direction of his agency's

Office of Labor Relations.

On December 8, 1980, petitioner and the other Trainers in the unit were advised by memorandum that there would be a change in the reporting and time-keeping procedures to be followed when reporting to work assignments in the field (i.e., assignments outside the Central Office). The new procedure made no allowance for travel time to work locations outside the Central Office.

POSITIONS OF THE PARTIES

Petitioner's Position

The petitioner contends that the evidence shows that she was relieved of responsible duties; employees under her supervision were transferred out of the unit; new and onerous reporting procedures were implemented; requests for annual leave, previously routinely granted, were denied; and allowance for travel time when reporting directly to field assignments, was eliminated; all as part of a pattern of harassment and discrimination by the employer in retaliation for petitioner's filing and continuing prosecution of an out-of-title work grievance under the applicable collective bargaining agreement.

The petitioner argues that in determining the employer's true motivation, all of the surrounding circumstances must be carefully considered. Petitioner submits that the timing

of the alleged discriminatory acts, in relation to petitioner's filing of her grievance, is of particular significance. The acts complained of started to occur only after the filing of the grievance such incidents did not occur prior to that time. Petitioner asserts that the employer's explanation for the various challenged acts constitutes an attempt to "camouflage" its actions under the guise of the Civil Service Law and a "hopeless maze of bureaucratic departments and forms."

Respondents' Position

The respondents contend that the petitioner's claims are frivolous, and that each of the actions complained of by petitioner was a legitimate managerial action initiated exclusively for reasonable and proper purposes. The respondents argue that the challenged actions are nothing more than a series of unrelated managerial actions, void of any anti-union animus, which cannot form the basis of an improper practice.

The respondents witnesses testified as to the motivation and rationale for each of the acts complained of. The respondents submit that their testimony shows that they agreed with the validity of petitioner's out-of-title work grievance, and took steps to restore petitioner to an appropriate lower level of duties following their determination that she was, in fact, working out of title.

The respondents allege that the other actions taken were unrelated to the initiation or resolution of the grievance: (a) of two employees transferred out of petitioner's unit, one transferred voluntarily to super-vise employees working on a new project, and the other was transferred to another unit in which she was already spending the bulk of her working time; (b) the changes in record keeping and time keeping procedures were initiated for the purposes of compliance with agency policy and enhancement of the office's efficiency, and affected all employees under Herbert Simon's supervision, not just the petitioner; and (c) petitioner's request for annual leave to attend a professional conference was initially not approved because of the high level of the workload in the unit at the time when petitioner proposed to take a one-week's leave.

The respondents allege that petitioner's out-of-title work grievance is still pending at Step III of the grievance procedure. They assert that at the same time that petitioner is seeking monetary damages in the grievance forum for the performance of out-of-title work as the Director of Training, she is also requesting, as a remedy herein, restoration to those very same duties. The respondents contend that these contradictory claims constitute an abuse of the process which should not be permitted by this Board.

DISCUSSION

Upon our review of the record in this case, we find that one aspect of the petitioner's claim may be disposed of summarily. The petitioner contends that subsequent to the filing of her out-of-title work grievance, her responsibility has been reduced, she has been "demoted" to the in-house title of Trainer, she has been bypassed in the assignment of important work functions, she has not been invited to certain meetings, and she has not been permitted to participate in certain training programs. The petitioner claims that these are acts of harassment and discrimination in retaliation for filing her grievance.

We find that this part of petitioner's claim is wholly without merit. The record clearly demonstrates that these actions occurred following the respondents' own determination that petitioner was, in fact, performing out-of-title duties. The diminution in responsibility and the reduction in duties were not acts of harassment or discrimination; rather, they were acts taken to resolve the out-of-title work grievance and to comply with the prohibition of out-of-title work found in Civil Service Law §61(2). Moreover, petitioner has not been demoted, insofar as her civil service status and salary are concerned. Her permanent civil service title has been and continues to be Supervisor I, and neither

this title nor her salary have been affected by her reassignment to in-title duties as a Trainer. Thus, petitioner's challenge to these actions and her request for reinstatement to her former duties, at the same time that she continues to seek compensation through the grievance process for her earlier out-of-title assignment to those duties, is incomprehensible to us, and may not be maintained as the basis of an improper practice.

The petitioner also challenges several other actions by the respondents which she claims are part of a pattern of harassment directed against her. The respondents offer explanations for each of these actions. It is this Board's responsibility to determine whether these actions were motivated by discriminatory animus, or were legitimate exercises of managerial discretion.

The record shows that the transfers of two of the employees who worked in the unit supervised by petitioner were unrelated to the filing of the out-of-title work grievance, and were made for legitimate reasons. One, Francine Rose, was working on the introduction of an automated financial collection system, which required that she spend the greater part of her time in another unit - the Support Collection Unit ("SCU"). This arrangement created confusion, since Ms. Rose was subject to dual supervision: by petitioner, and by the head of SCU. In order to alleviate this confusion, Rose was transferred to the unit in which she was already spending the bulk of her time, the SCU.

The second transferred employee, Ed Hysysk, had prior experience in data processing, and was permitted to transfer voluntarily to a unit in which he supervised employees working on a new automated skills bank project. Both Hysysk's transfer, and that of Rose, appear to have been made for valid operational considerations and because of the expertise of the transferred employees in specialized areas. There is no evidence in the record to link the motivation for these transfers to the petitioner's grievance in any way.

The timekeeping changes challenged by petitioner required that she and the Trainers in the unit commence using time clocks, rather than weekly time sheets. The evidence demonstrates that this change was implemented by Herbert Simon in response to a memorandum he received from Gary Calnek, Assistant Commissioner, Office of Personnel Services, dated February 22, 1980. Calnek's memorandum, which was addressed to Office Managers and Timekeepers in all branches of the Human Resources Administration, mandated that all employees (except those in certain designated titles) earning \$22,500 or less, must use time clocks to record their daily attendance. The record also shows that petitioner's supervisor, Simon, requested a waiver of the time clock requirement on behalf of petitioner and others, but that the request was denied. Accordingly, Simon testified that this timekeeping change was implemented for all staff under his supervision, not just the petitioner.

The testimony also reflects that in December, 1980, in response to a directive from the Office of Personnel Services, Simon instituted an additional timekeeping change for all employees under his direct supervision which, in some cases, had the effect of eliminating extra travel time previously granted to Central Office staff reporting to assignments in the field. While there is some dispute in the record as to whether all employees in other units were subject to this change, it is clear that the change was of general application and was implemented in the Training Unit in which petitioner worked. There is no evidence that this change was directed toward petitioner or was motivated by any anti-union animus.

Petitioner's challenge to the temporary disapproval of a request for one-week's annual leave to attend a professional conference is similarly without basis. The testimony shows that the request was submitted only a short time before the date the leave was to commence, and that it was disapproved by Simon because he felt he could not spare petitioner, in view of the unit's workload, since there was not enough time left prior to commencement of her leave within which to obtain coverage for her assignments. In any event, the request for leave was subsequently granted by Simon, upon the advice of the agency's labor relations office, on the grounds that his disapproval was not timely communicated to petitioner. while this incident does show that Simon

may have felt some annoyance toward petitioner, we are unable to find evidence of discriminatory intent nor of any connection with the previously filed grievance.

We have considered the other allegations of harassment submitted by petitioner, and find them similarly to be without merit. These remaining incidents, which we consider to be of relatively minor significance (e.g., rearrangement of office space, delay in approval of a request for sick leave, change in forms used for reporting) were all explained and justified by the respondents' witnesses to the satisfaction of this Board. There is not a trace of proof in the record to support a conclusion that these incidents were intended to harass or discriminate against petitioner. In fact, in one case (the rearrangement of office space), it appears that the action taken was intended to improve working conditions for petitioner and the others in the unit. We fail to find that any of these actions constitute improper practices.

For the reasons stated above, we find that the petition is without merit and should be dismissed.

We wish to address one further issue, raised by the respondents at the hearing in this matter. The respondents objected strenuously to the petitioner's motion, made in the course of the hearing, to amend the petition to include additional incidents, occurring subsequent to the date of filing of the petition, which were claimed to have arisen

out of the same cause of action, i.e., were claimed to be further acts of harassment in retaliation for petitioner's filing of an out-of-title work grievance. The respondents argued that neither the NYCCBL nor the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules") authorize such amendment of a petition. The respondents contended that the date of filing of an improper practice petition is a cut-off date which precludes consideration of subsequently occurring events. In response, the petitioner's attorney indicated that the petitioner was prepared, if necessary, to file a new improper practice petition, but that administrative economy would be served and the parties' time saved if all related events could be considered in one proceeding.

The Trial Examiner overruled the respondents' objection and permitted the amendment of the petition and the presentation of evidence relating thereto, on condition that the respondents be given an adequate opportunity to prepare a defense to the new charges. The Trial Examiner stated that the respondents would be granted an adjournment of the hearing, at their request, if they required additional time to prepare their response to the new allegations. The Trial Examiner further stated that this ruling was based upon his conclusion that the concept of administrative economy:

"... would indicate that it would make no sense to require the petitioner to come back with a new improper practice petition alleging additional facts arising out of what appears to be the same cause of action...."

It was noted by the Trial Examiner that §10.9 of the OCB Rules permits the introduction of proof at variance with the allegations of a pleading, provided that the variance is not so substantial as to be misleading. It was found by the Trial Examiner that the respondents were on notice of the nature of the petition's claims of harassment and discrimination, so that the presentation of evidence of additional incidents of harassment did not render the petition misleading.

We affirm the Trial Examiner's ruling. In a case such as this one, no purpose would have been served by requiring the petitioner to file a new improper practice petition after each incident of claimed harassment. Such a procedure would only have burdened the parties, the Trial Examiner, and this Board with unnecessary paperwork, and undoubtedly would have delayed the adjudicatory process. All of the acts of alleged harassment are claimed to have constituted improper practices because they were engaged in retaliation for the petitioner's filing of a grievance. It is thus apparent that all of these allegations arise out of the same cause of action, and they were properly considered

in one proceeding. The respondents' due process rights were adequately protected by the Trial Examiner's offer to adjourn the hearing to give the respondents an opportunity to prepare a defense to the new allegations raised for the first time at the hearing.

We observe that §204.1(d) of the Rules of Procedure of the New York State Public Employment Relations Board (hereinafter "PERB") expressly authorizes a hearing officer to permit a charging party to amend an improper practice charge before, during, or after the conclusion of a hearing "... upon such terms as may be deemed just and consistent with due process." We hold that the power to permit such an amendment of an improper practice petition is inherently within the scope of the powers and duties of a Trial Examiner, as set forth in §10.3 of the OCB Rules. The allowance of such an amendment is also consistent with the express allowance of variances between pleadings and proof, pursuant to §10.9 of the OCB Rules. The overriding concern in permitting an amendment or variance is the preservation of due process. We find due process to have been satisfied in the present case.

O R D E R

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 petition of Janice Cerra be, and
the same hereby is, dismissed.

DATED: New York, N.Y.
November 6, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

FRANKLIN J. HAVELICK
MEMBER

EDWARD J. CLEARY
MEMBER

MARK J. CHERNOFF
MEMBER