CWA v. HHC, 29 OCB 43 (BCB 1982) [Decision No. B-43-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------x
In the Matter of the Improper Practice

-between-

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

DECISION NO. B-43-82
DOCKET NO. BCB-442-80

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Respondent.
----------x

DECISION AND ORDER

On August 7, 1980, the Communications Workers of America (hereinafter "CWA" or "the Union") filed an improper practice petition alleging that the New York City Health and Hospitals Corporation (hereinafter "HHC" or "the Corporation") violated Section 1173-4.2a(l) and (3) of the New York City Collective Bargaining Law (hereinafter "NYCCBL") when it "bumped" Mrs. Catherine Bridgeman from the position of provisional Principal Administrative Associate to the lower position of provisional Office Associate, allegedly in retaliation for union activity. On September 3, 1980, the Corporation filed an answer denying that it had committed an improper practice under the NYCCBL. CWA filed a reply on September 17, 1980. A hearing scheduled for October 30, 1980 was adjourned and rescheduled several times at the request of the Union. Ultimately, hearings were held on May 5, 1981 and on September 24, 1981.

At the close of the hearings, the representatives of the Union and Corporation entered into discussions concerning the possibility of voluntarily resolving this dispute. The parties agreed to let the Trial Examiner know the results of their efforts to effectuate a settlement. Written and oral communications between the parties continued until, by letter of April 5, 1982, the Trial Examiner demanded to know whether the dispute had been resolved or whether the Union desired to have a decision issue in this matter. By letter dated July 12, 1982, CWA informed the Trial Examiner that it would await a decision from the Board.

Amendment of Petition

In December of 1980, subsequent to the initial filing of the improper practice petition herein, Mrs. Bridgeman was bumped a second time - from the office Associate position which she held provisionally after the first humping - to her permanent civil service position of Office Aide. At the hearing on May 5, 1981, CWA sought orally to amend its petition to include the allegation that the second bumping was yet another incident of the HEC's discriminatory conduct toward Mrs. Bridgeman. Over the objection of counsel ior the Corporation, and in accordance with Sections 10.3 and 10.9 of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter 60CB Rules"), the Trial Examiner permitted oral amendment of the petition, on the condition that the Union demonstrate that the events complained of in the amendment arose out of the same cause of action as was pleaded in the

original petition. HHC's counsel was advised that he would be given additional time, if necessary, to respond to any new allegations (Tr. 5-7).[1]

Background

The following facts surrounding the Union's claim of improper practice are undisputed. on July 1, 1972, Mrs. Catherine Bridgeman received a permanent appointment to the position of Senior Clerk (predecessor to broadbanded title of office Aide) at Harlem Hospital Ambulatory Care Service (hereinafter "ACS"). On February 4, 1974, she was appointed provisionally as a Supervising Clerk (predecessor to broadbanded title of Office Associate), where she served until May 1, 1978 when she was appointed provisionally as an Administrative Assistant (predecessor to broadbanded title of Principal Administrative Associate - hereinafter "PAA).

As a representative of the CWA, Local 1180 bargaining committee for HHC, Mrs. Bridgeman attended collective bargaining sessions held on March 28 and May 19, 1980. She did not attend a bargaining session held on June 9, 1980, however, as she had received a memorandum dated June 5, 1980 from Dr. Gene-Ann Polk, the Director of ACS and Bridgeman's immediate supervisor, in which Dr. Polk stated:

> Your position as provisional Principle [sic] Administrative Associate and clinic responsibilities prevent your being active as an alternate with the Union during scheduled working hours. It is essential to the operation of your assigned clinics that you be present and available daily.
>
> No further approval will be given for Union activities. (Exhibit E to HHC's answer)

[1] References to the transcript of hearings in this case are indicated by "Tr." and the page number.

Upon learning of the above memorandum, Harlem Hospital's Assistant Personnel Director for Labor Relations informed ACS in a writing, dated June 17, 1980, of the Corporation's obligation to comply with standard agreements relative to release time for union representatives and directed ACS to permit Bridgeman to represent the local at all collective bargaining sessions (Exhibit F to HHC's answer). In the interim, a memorandum dated June 9, 1980 from Robert Pick, Director of Labor Relations for HHC, authorizing Bridgeman's release to attend a bargaining session on June 11, 1980, had been sent to the Personnel Director at Harlem Hospital. However, the memorandum did not arrive until the day of the scheduled meeting and Bridgeman did not learn of the June 11 meeting in time to attend.

By memorandum dated June 25, 1980, Mrs. Bridgeman was informed that her services as a provisional PAA would be terminated due to the appointment of a permanent employee from a certified civil service list. Effective July 14, 1980, she was appointed provisionally to the title office Associate.

At the end of July or early in August of 1980, Bridgeman applied for a position in a special federally funded program called Network Outreach. Her application for an Office Associate position appears to have been rejected.[2]

[2] Bridgeman never received notice of the action taken on her application. A Corporation witness confirmed that applications for the program were only kept for a three-month period Mr. .212-13). Therefore, CWA's efforts at the time of the hearing, to obtain a copy of Bridgeman's application in order to ascertain what action had been taken were fruitless.

Effective December 15, 1980, Bridgeman was bumped again, this time to her permanent civil service title of office Aide, when a permanent employee was appointed from a certified list to the office Associate position.[3]

After the second bumping, Bridleman attempted to obtain a transfer out of ACS. However, she was prevented from accepting a position as a provisional Office Associate in the Patient Accounts division because ACS refused to release her without prior approval to fill the Office Aide position she then occupied.

Mrs. Bridgeman is an alternate shop steward for Local 1180 of CWA and, as noted above, was a member of Local 1180's bargaining committee*for HHC during the 1980 round of collective bargaining negotiations.

Positions of the Parties

CWA's Position

The Union contends that the two bumpings of Mrs. Bridgeman were motivated by HHC's hostility toward her on account of her union activity. It is alleged that the Corporation violated NYCCBL

[3] In its improper practice petition, CWA asserts that Bridgeman held permanent status in the Office Associate title. In its reply to the Corporation's answer, however, the Union effectively concedes that the complainant's status in the title Office Associate was at all time that of a provisional employee. This fact is also reflected in Bridgeman's Personnel History Card (Exhibit B to HHC's answer).

Sections 1173-4.2a(l) and 1173-4.2a(3)[4] when it took these actions.

In support of the above contention, CWA offered the complainant's testimony that the attitude of certain management personnel toward her changed when they became aware of her role in the union. Specifically, the Union points to the attitude of Ms. Norma Leach, Departmental Administrator for ACS who, it is alleged, upon learning of Bridgeman's appointment to union office, responded:

> Well, you will not have time to do union business. How did this, come about? (Tr. 23-4, 209)

CWA asserts that, even though Bridgeman always had an amicable relationship with her supervisor, who had also praised her work on many occasions, she was bumped before two co-workers, Dorothy Myers and John Watkins who, it is alleged, had less seniority than she. CWA also points to the fact that Bridgeman's application for a position in the Network Outreach Program was rejected while that of a co-worker was accepted. Finally, the Union claims that the complainant's efforts to obtain a transfer out of ACS were frustrated by her immediate supervisors, and that all of the above was done in retaliation for her active role in the Union.

---

[4] NYCCBL Section 1173-4.2a provides in relevant part:

> Improper public employer practices. It 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 1173-4.1 of this chapter;
>
> (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; ....

As a remedy, the Union seeks the reinstatement of Mrs. Bridgeman to her former PAA position and an order by the Board that HHC cease and desist its discriminatory activity.

HHC's Position

HHC asserts that the Union's petition should be dismissed as it fails to state a claim upon which relief may be granted.

As to the merit of the Union's allegations, the Corporation asserts that it had valid, non-discriminatory reasons for bumping Mrs. Bridgeman out of the two titles she held as a provisional employee, and that it treated Bridgeman no differently from other provisionals at Harlem Hospital who were Also bumped when a certified list of eligible PAAs was promulgated. HHC further maintains that it acted properly, in accordance with its Personnel Rules and Regulations (Section 5:5:1) and in conformity with the New York State Civil Service Law (Section 65(l)). In addition, HHC cites its managerial prerogative, pursuant to NYCCBL Section 1173-4.3b, to determine the standards of selection for employment and to determine the methods, means and personnel by which its operations are to be conducted.

HHC requests that the Union's petition be dismissed in its entirety.

Discussion

The Board is asked to decide whether the removal of Mrs. Catherine Bridgeman successively from two provisional appointments and reassignment to her permanent title was improperly

motivated so as to constitute an improper public employer practice under the NYCCBL. In order to prevail the Union must, as a minimum, demonstrate the following:

> (a) that the employer had knowledge of the employee's union activity;
>
> (b) that the employer or its agents harbored anti-union animus; and
>
> (c) that the acts complained of would not have occurred when they did but for the employee's union activity.[5]

Evidence that the Corporation had a sound business reason for taking the action that it did, coupled with a lack of evidence of bad faith or anti-union animus, however, will support a finding in HHC's favor.

The record shows that, in both instances, the bumping was done for valid operational reasons and in accordance with HHC Rules. Section 5:5:1 of the HHC Rules and Regulations provides:

> If there is no appropriate eligible list, from which to fill a vacancy in a position in the competitive class, the Appointing Officer may nominate a person to the Senior Vice President for non-competitive examination and if the Senior Vice President certifies the nominee as qualified on the basis of a non-competitive examination, he may be appointed provisionally to fill such vacancy until selection and appointment can be made after Competitive examination. (Emphasis added)
> (Cf. Civil Service Law §65(l))

The Union concedes that provisional employees have no tenure rights nor any rights with respect to order of bumping (Tr. 112). Nevertheless, Mrs. Bridgeman, one of a number of provisional PAAs in the ACS unit when a list of employees eligible for permanent

[5] See Board Decisions B-10-72; B-35-80.

appointment as PAAs was promulgated, was in fact bumped in order of seniority. Specifically, the Union attempted to demonstrate that Bridgeman received unfavorable treatment as compared with two other provisional PAAs, Myers and Watkins. The Personnel History Cards of Myers, Watkins and Bridgeman[6] reveal the following, however:

7/1/72	Myers and Bridgeman appointed as permanent Senior Clerks (predecessor to broadbanded Office Aide title). Watkins appointed as permanent Supervising Clerk (predecessor to broadbanded office Associate title).
2/7/74	Myers and Bridgeman appointed as provisional Supervising Clerks
5/1/78	Myers, Watkins and Bridgeman appointed as provisional Administrative Assistants (predecessor to broadbanded Principal Administrative Associate title).
7/14/80	Myers and Bridgeman appointed as provisional Office Associates (bumped from provisional PAA).
10/20/80	Myers appointed as provisional PAA.
11/10/80	Watkins appointed as permanent Office Associate (bumped from provisional PAA).

At least until who had equal tenure July 14, 1980, therefore, Bridgeman and Myers, in ACS, moved together while Watkins, who had been an Office Associate longer than either Myers or Bridgeman, was not bumped from the provisional PAA post until several months later. In addition, the uncontradicted testimony of the Associate Director of Personnel at Harlem

---

[6] HHC Exhibits A and B in evidence and Exhibit B to HHC's answer respectively. There is no evidence that either Myers or Watkins was or is actively involved in union activity.

Hospital reveals that bumping of

provisionals as a result of the promulgation of a new certified list began long before Bridgeman was bumped, and that at least twelve provisional PAAs had been bumped prior to Bridgeman, Myers and Watkins. The witness explained that:

> We have gotten down to the bottom of our provisionals. That is the reason we got to people like Mrs. Bridgeman, Ms. Myers and Mr. Watkins, who have been in the title for a number of years. (Tr. 168)

Although not reflected on Bridgeman's Personnel History Card in the exhibit submitted to the Board, the record reveals that Bridgeman was bumped from provisional Office Associate to permanent office Aide on December 15, 1980 (Tr. 49). We note that, by this date, Myers was already serving as a provisional PAA in the Network Outreach program (Tr. 164). Thus, it is apparent that Myers avoided a second bumping because she was no longer working in ACS and that Watkins was insulated from further bumping by virtue of his permanent status in the Office Associate title. No evidence was offered concerning any other employees who may have been serving as provisional Office Associates in ACS and who may have been retained while Bridgeman was bumped.

The record in this case is replete with testimony concerning and documentation of the high regard with which Mrs. Bridgeman was viewed by her supervisor, Dr. Polk and by her co-workers, and of her unique contribution to the smooth functioning of the clinics in ACS. Also documented are efforts made by Bridgeman's superiors to prevent her being bumped. That the bumping of provisionals was disturbing to ACS is reflected in a January 2, 1981 memorandum from Dr. Polk to Harlem Hospital's

Director of Personnel in which she expresses concern at the "frequent changes in status of employees as a result of the 'Bumping Process' which has occurred over the past few months" (HHC Exhibit C in evidence).

From the above, it is evident to this Board that, far from being improper, the bumping of Mrs. Bridgeman was carried out in accordance with HHC's Rules and Regulations regarding provisional appointments and also in accordance with principles of seniority, compliance with which is not mandated by Civil Service Law, HHC Rules, or by Any applicable collective bargaining agreement. It appears that the Corporation had a sound business reason for its actions with respect to the complainant and, in fact, bumped Bridgeman only when no alternative course was available.

Nevertheless, the Union asserts that other acts by the Corporation's agents belie its anti-union animus and discriminatory motive with respect to the complainant. To these allegations we now turn.

The Union offered the testimony of Mrs. Bridgeman that, when she was appointed to her union office, she presented a certificate to Norma Leach, ACS Departmental Administrator, who told her that she would not have time for union business. In an attempt to neutralize the adverse effect on the Corporation's case of such testimony, counsel for HHC elicited Bridgeman's acknowledgment that her responsibilities as a provisional PAA kept her very busy during working hours (Tr. 95). HHC, it appears, would have us construe Leach's remark not as evidence of anti-union animus but

as a simple statement of fact. Vie decline to draw such a conclusion. However, this incident is but one of many factors which will determine the outcome of this case.

CWA also points to the June 5, 1980 memorandum from Dr. Polk to Mrs. Bridgeman, advising the complainant that her clinic responsibilities would prevent any further participation in union activities during working hours. HHC contends, however, that the Polk memorandum reflects and was motivated by the fact, conceded by Bridgeman on cross-examination (Tr. 78), that ACS was short-staffed. HHC also offers evidence that, upon learning of the Polk memorandum, the Corporation communicated to Dr. Polk the necessity of complying with collective bargaining agreements authorizing release time for union representatives (Exhibit F to HHC's answer). This was-done by way of a memorandum, dated June 17, 1980,.from Harlem Hospital's Assistant Personnel Director for Labor Relations, which states as follows:

> Kindly be advised that, Ms. Catherine Bridgeman was elected as a Shop Steward of Local 1180 to represent that local at all Collective Bargaining sessions.
>
> Therefore, it is imperative that we comply with standard agreements relative to release time for such union representatives.
>
> This memorandum is submitted for your information and guidance.

It could not be clearer that the Corporation did everything that could reasonably be expected swiftly and unequivocally to correct an error by one of its managerial employees with respect to the right of elected union officials to participate, at designated times, in union activity.

HHC points out that, subsequent to the Polk memorandum, and

before the Corporation's corrective action, authorization for Bridgeman's release to attend a bargaining session on June 11, 1980 was sent by HHC's Director of Labor Relations to Harlem Hospital's Personnel Director (Exhibit G to HHC's answer).[7]

With respect to Bridgeman's application for a position in the Network Outreach Program and the fact that Myers was accepted for a position in that center while Bridgeman was not, HHC offered as a possible explanation testimony that Myers had applied for a position as provisional PAA while Bridgeman applied for an Office Associate position. As stated above, the Outreach Program is a special federally funded program and, although Harlem Hospital's personnel office sorted applications for the program, submitting Bridgeman's along with a group of applications for Office Associate positions, all hiring decisions were made by the Center's own director. Neither HHC's witness nor CWA appeared to have any knowledge as to positions that were open at the time of Bridgeman's application nor as to how decisions on applications for the program were made (Tr. 160-66).

Finally, we address Bridgeman's unsuccessful attempt, after the second incident of bumping, to obtain a transfer out of ACS

[7] That this authorization was not received at ACS in time for Bridgeman to be informed of it, and that she did not attend the meeting does not, in our view, indicate discriminatory motive or ill will toward Mrs. Bridgeman or the Union. We note that the primary responsibility for keeping its bargaining committee members apprized of scheduled bargaining sessions must rest with the local, so that the individual representative can be sure that she has obtained any formal authorization from the employer which may be required for her release.

and HHC's response that a freeze on the filling of vacant positions made it impossible for ACS to replace Bridgeman and therefore to allow her to transfer. CWA's Exhibit 9 in evidence is a memorandum from Ms. Leach of ACS to Dr. Summers, Acting Executive Director of Harlem Hospital, requesting approval to fill Bridgeman's Office Aide position in order that Bridgeman might be released to accept a transfer to Patient Accounts. A handwritten response on the face of the memorandum emphatically denies the request because of the "freeze" at Harlem Hospital. We take administrative notice of the practice by which the City of New York and the Health and Hospitals Corporation routinely deny requests for transfer when they know they will be unable to fill a position vacated by a transferee. Further, allegations that other employees were able to obtain transfers, while Bridgeman was not, are entirely unsubstantiated (Tr. 85-6).

The replacement of provisionally appointed employees by persons certified, as a result of civil service examination, for permanent appointment to positions occupied by provisional appointees is mandated by Section 65 of the New York State Civil Service Law and by Section 5:5 of the Rules and Regulations of the New York City Health and Hospitals Corporation. The manner, including the order, in which provisional appointments are to be terminated is not prescribed by the statute or by HHC's Rules. in the absence of any statute, regulation, or contract provision

I

on the subject, such decisions are clearly within management's prerogative under NYCCBL Section 1173-4.3b.[8] This is not to say that an act taken within the scope of management's rights may not, at the same time, constitute an improper practice under NYCCBL Section 1173-4.2a. In order to violate the NYCCBL's prohibition against anti-union discrimination, however, it must be shown that there was a discriminatory intent on the part of the employer.[9]

We cannot conclude, on the record in this case, that any of the above-described incidents was motivated by a discriminatory intent sufficient to invalidate the otherwise legitimate exercise of managerial discretion. of the three essential elements of its case, CWA has failed to establish at least one, namely, that the

---

[8] Section 1173-4.3b provides in relevant part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work....

[9] See Board Decisions B-10-72; B-4-79; B-35-80; B-25-81; B-27-81; B-5-82. See also, New York City Transit Authority, 15 PERB ¶4537 (H.O. 1982) at p. 4578 (employer retains right to change schedules so as to alter number of employees on duty at any given time absent any improper motivation).

acts complained of would not have occurred when they did but for the employee's union activity. As we stated above, HHC has amply demonstrated that the bumping of Mrs. Bridgeman occurred only when there was no alternative.

We note that, at the close of the Union's case in chief, HHC moved to dismiss the petition for failure to state a prima facie case of improper practice with respect to either of the two incidents of bumping. Since a ruling on such a motion is dispositive of the case and is therefore for determination only by the Board, the Trial Examiner advised counsel for HHC that he had the option of requesting an adjournment of the hearing in order to obtain a ruling from the Board, or that the hearing could proceed with his motion noted on the record. In the interest of avoiding further delay,. HHC elected the latter course and the motion was duly noted (Tr. 121-22). Since we now find, based upon the entire record, that CWA failed to establish a violation of NYCCBL Section 1173-4.2a(l) or (3), we shall dismiss the improper practice petition without ruling on the Corporation's motion.

Finally, we affirm the Trial Examiner's ruling, to which HHC took exception (Tr. 6), granting the notion made by CWA after the commencement of the hearing, to amend its improper practice petition to include the second incident of bumping. In our view, no purpose would have been served by requiring the Union to file a new petition and to go through separate and additional hearings on the

precise issues which were already before the Board. Further, the Corporation's due process rights were adequately protected by the Trial Examiner's offer to afford HHC additional time to prepare a defense to any new allegations raised for the first time at the hearing.[10]

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 Union's improper practice petition be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 29, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

PATRICK F.X. MULHEARN
MEMBER

JOHN D. FEERICK
MEMBER

[10] For a fuller discussion of the rationale for such a ruling, see Board Decision B-27-81 at pp. 12-15.