CWA behalf of Stukes v. Comm. Robert, et. al, 31 OCB 27 (BCB 1983) [Decision No. B-27-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, on behalf of Gary Stukes,

Petitioner,

DECISION NO. B-27-83

DOCKET NO. BCB-629-82

-and-

COMMISSIONER ROBERT BLACK, BRONX BOROUGH OFFICE, NEW YORK CITY BOARD OF ELECTIONS,

Respondent.
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DECISION AND ORDER

On December 3, 1982, the Communications, Workers of America, AFL-CIO, on behalf of Gary Stukes ("petitioner" or "CWA"), filed with the office of Collective Bargaining an unverified improper practice petition charging Commissioner Robert Black, Bronx Borough Office, New York City Board of Election ("respondent") with "interfering and attempting to restrict CWA Local 1183' s proper defense of its member, Gary Stukes, in a disciplinary matter." The petition was refiled on February 4, 1983, properly verified and accompanied by proof of service as required by Sections 7.5 and 7.6 of the Consolidated Rules of the office of Collective Bargaining ("Rules"). The Board of Elections, by New York City's Office of Municipal Labor Relations ("OMLR") filed an answer on February 18, 1983. A reply

was submitted on March 11, 1983.

Positions of the Parties

CWA's Position

The facts as alleged by CWA are as follows. On September 29, 1982, Gary Stukes, a Voting machine Technician, Was called into the office of Deputy Chief Arlyne E. Siegel, Bronx Borough Office, Board of Elections, and advised that Commissioner Black wished to meet with him for the purpose of discussing and encouraging his resignation. Stukes was further advised that in the event that he refused to tender his resignation, he would be fired. On October 1, 1982, Stukes met with Commissioner Black. Despite the strong recommendation that he resign, Stukes indicated that he wanted a hearing with union representation. On October 6, 1982, Stukes received a letter from the Commissioner formally notifying him of the date of the disciplinary hearing. Two days later, Richard Wagner, President of Local 1183, CWA, called Commissioner Black. In response to his inquiries, he was advised that the impending discharge was a private matter between Stukes and the Commissioner. Wagner replied that once an employee is disciplined, he is entitled to union representation.

Respondent's Position

The version of the facts proffered by respondent in its answer is essentially the same. The suggested

interpretation is, however, different.

The October 1, 1982 meeting between Stukes, a Republican appointee, and Black, also a Republican appointee, was arranged so that the Commissioner could personally discuss with Stukes the nature as well as gravity of the charges against him, i.e. "non-performance, carelessness and incompetence." The suggestion to Stukes that he resign was made as a "courtesy" and stemmed from the awareness that a resignation would be less damaging than a discharge. It was not intended to interfere with the exercise by Stukes of his rights pursuant to Section 1173-4.1 of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] §1173-4.1 Rights of public employees and certified employee organizations. 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 of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (i) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining

Respondent further contends that the refusal to respond to Wagner's inquiries prior to the hearing likewise violated no provision of the NYCCBL, nor did it constitute a breach of any contractual obligation.

> The disciplinary procedure affords the Union adequate opportunity to know and respond to charges. At the least, the Union had the opportunity to speak and ascertain such information from Stukes.

The only facts alleged by petitioner, therefore, are (1) that Mr. Stukes was advised of the impending disciplinary charges against him as well as his option to resign, and (2) that Commissioner Black refused to discuss this matter with Local 1183's President prior to the hearing. Since, it is alleged, neither of these acts is per se coercive, there exists no basis for a finding of an improper practice.

Respondent's three remaining arguments and defenses are as follows. First, Section 1173-4.2(a)(1) and (3) protects the rights of employees, not their representatives. Second, the allegations contained in Paragraphs "2", "3" and "4" of the petition, relating as they do to incidents alleged to have occurred on September 29, 1982, and October 1, 1962, cannot form the basis for an improper practice finding as they are time-barred under Section 7.4 of the Rules. Third, respondent's alleged conduct, would not, in any event, warrant an improper practice finding since petitioner admits

that it had the opportunity to and did, in fact, participate in and represent Mr. Stukes at the disciplinary hearing. The effect upon any protected rights was, if any, de minimus.

Discussion

Section 1173-4.2 of the New York City Collective Bargaining Law provides that it shall be an improper practice for an employer

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights in section 1173-4.1 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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 with certified or designated representatives of its public employees.

The petition herein charges that respondent interfered with, and attempted to restrict, CWA Local 1183's proper defense of its member, Gary Stukes, in a disciplinary matter.

As one of its defenses to this action, respondent asserts the statute of limitations as a basis for precluding consideration of certain portions of the improper practice petition. Respondent maintains that except for those

allegations pertaining to the October 8, 1982 telephone conversation between Stukes and Black, all other events referred to in the petition took place more than four months prior to February 4, 1983, the date on which the improper practice petition was refiled and are thus time-barred. In light of this defense and the fact that CWA concedes the untimeliness of the allegations pertaining to the earlier events, this Board will not consider those occurrences as independent bases for a finding of an improper practice. We have, however, taken these events into consideration as background, and having examined all the facts by which petitioner seeks to substantiate its charge, nevertheless find the allegations herein to be scant and inconclusive.

The meeting which took place on October 1, 1982, appears to fall within the limits prescribed by the parties for themselves in their 1980-82 collective bargaining agreement.

> Section 9 - Disciplinary Procedure
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> The Board of Elections may discuss complaints or disciplinary problems with an employee when such discussions are deemed necessary.
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> (a) After service upon an employee of written charges of incompetency or misconduct, a hearing with the employee shall be held with respect to such charges by two Commissioners, who shall represent the borough in which the employee works. The employee shall be served with written charges at least ten (10) days prior to

> the hearing. The employee may be represented, at his/her option, at such hearing by a representative of the union. The employee and/or the Union shall have the right to examine any witness(es) and to present a defense to the charges. [Emphasis added]

* * *

Subdivision (a) does not require that an employee representative be present at a pre-hearing meeting, and Stukes, knowing the subject matter to be discussed at the October 1,1982 meeting in advance, never requested union assistance for that occasion.

The parties do not disagree that a finding of an improper practice must therefore be made, if at all, solely on the basis of the reasonable interpretation as well as proper weight to be given the October 8, 1982 telephone conversation between Commissioner Black and Mr. Wagner.

In its reply, CWA expressly admits the allegations contained in Paragraph "20" of respondent's answer, to wit:

> ... the NYCCBL does not require Respondent to repeat to the Petitioner Union every word or statement spoken to an employee. The disciplinary procedure affords to the Union adequate opportunity to know and respond to charges. At the least, the Union had the opportunity to speak and ascertain such information from Mr. Stukes.

CWA maintains that Wagner did not expect Commissioner Black to discuss the merits of the case with him, but merely wished

to be advised of the hearing date. It is this Board's view that in light of the fact that (1) the date of the hearing was easily ascertainable from Stukes; (2) the right of Black to meet with Stukes privately, as he did, on October 1, 1982 was undisputed; (3) there were no allegations that any vital and otherwise unascertainable information was denied Wagner; and (4) a union representative did represent Stukes at the disciplinary hearing, the facts of this case, at least to the extent pleaded by CWA, cannot support an improper practice finding.

We make this determination in recognition of the further fact that the conversation was an isolated occurrence, and that the remarks attributable to the Commissioner were made to a union president and were not shown to have had either the purpose or effect of interfering with the exercise of any protected rights.[2]

For all the foregoing reason, we find that there exists no basis for a finding of an improper practice.

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[2] Pease Company v. NLRB, 109 LRRM 2092, 666 F. 2d 1044 (6th Cir. 1981). The United States Court of Appeals for the Sixth Circuit considered the remarks of an operation manager to a union president and found that the NLRB had erred in finding an improper practice. The remark, that in a few months the manager would not have to hear any grievances, was found to have been not only ambiguous but also an isolated remark made to the union president and its chief negotiator.

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 improper practice petition of the Communications Workers of America, AFL-CIO be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 30, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
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JOHN D. FEERICK
MEMBER