CWA v. HRA, 31 OCB 6 (BCB 1983) [Decision No. B-6-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING

BOARD OF COLLECTIVE BARGAINING

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In the Matter of

COMMUNICATIONS WORKERS OF AMERICA, DECISION NO. B-6-83

Petitioner, DOCKET NO. BCB-617-82

-and-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondent.

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DECISION AND ORDER

A verified improper practice petition was filed by the Communications Workers of America (hereinafter "CWA" or "the Union") on October 4, 1982, and amended on October 71 1982, in which it was charged that the New York City Human Resources Administration (hereinafter "HRA" or "the City") committed an improper practice in violation of Section 117-4.2 (a) (3) (sic) of the New York City Collective Bargaining Law (hereinafter "NYCCBL") on September 24, 1982, by ceasing to pay suspended employee Thomas Romney his salary. This action was allegedly taken in retaliation for the Union's insistence that a Step II hearing be held concerning Romney's salary during his initial suspension Period in accordance with the provisions of the grievance procedure under the collective bargaining agreement entered into between the parties. As relief in the improper practice matter, CWA seeks to have Romney returned to the

payroll and salary paid retroactive to September 10, 1982.[1]

HRA, by its representative, the office of Municipal Labor Relations (hereinafter "OMLR"), filed an answer on October 22, 1982, in which it moved to have the instant petition dismissed for failure to state a claim. CWA filed a reply on November 12, 1982. On January 25, 1983, OMLR submitted previously unavailable material related to proceedings conducted by the Office of Administrative Trials and Hearings (hereinafter "OATH"), in accordance with the provisions of Section 72 of the Civil Service Law (hereinafter "Section 72"). By letter dated January 31, 1983, CWA stated that it will submit written comments to the Commissioner of HRA with regard to the OATH proceedings before he renders a final decision in the Section 72 matter.

Background

By memorandum dated December 18, 1981, HRA notified Principal Administrative Associate Romney that his employment with that agency was suspended. Three days later, Romney received a telegram which stated:

> You are suspended without pay as a Principal Administrative Associate, Level 1, effective December 21, 1981 at 9:00 A.M.

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[1] The payment received on September 24, 1982 covered the time period through September 10, 1982.

A letter dated December 31, 1981, from HRA Assistant Commissioner Gary Calnek to Romney reiterated the information in the telegram and added that Romney had been suspended "pending the appropriate service of charges as required by law and the disposition of the disciplinary proceeding incident thereto."

However, on February 25, 1982, HRA Commissioner James Krauskopf wrote to Romney informing him that he was "hereby placed on an involuntary leave of absence." Krauskopf directed Romney to report for a medical examination to determine mental fitness pursuant to Section 72.[2] Commissioner Krauskopf further stated:

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[2] Section 72 of the Civil Service Law states in pertinent part:

> 1. When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit.

> (E)ffective on the date of this emergency involuntary leave, and during that period, you will only be entitled to draw upon all of your accumulated, unused sick leave, vacation, overtime and other time allowance standing to your credit.

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Pursuant to Section 72, subsection 1, Romney underwent a medical examination before a psychiatrist on March 26, 1982. However, prior to the issuance of a report, the examining physician passed away. Romney therefore underwent a second medical examination on June 3, 1982, at which time he was found mentally unfit to perform the duties of his position. Review was held before an OATH Administrative Law Judge on September 22, 1982, October 1, 1982, and October 2, 1982. While these proceedings were taking place, the parties discussed CWA's request for a contractual Step II grievance hearing (filed on June 30, 1982) over the alleged failure to

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3. An employee who is certified as not mentally fit to perform the duties of his position and who is placed on leave of absence pursuant to subdivision one of this section ... may appeal from such determination to the state or municipal civil service commission having jurisdiction over his position. Such commission may conduct such inquiry as it deems necessary or desirable, and shall provide for a medical examination of such employee, which shall be conducted by a medical officer designated by the commission who shall not be the same medical officer who examined the appellant under subdivision one or two in connection with

> the determination under appeal. If the commission finds that the determination appealed from is arbitrary or unreasonable, it-shall direct the reinstatement of such employee.
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> 4. If an employee placed on leave pursuant to this, section is not reinstated within one year after the date of commencement of such leave, his employment status may be terminated ...

pay Romney his salary for a period of approximately four weeks following his initial suspension in December, 1981.[3] The parties also discussed the fact that as of late September 1982, Romney was still being paid by HRA.

On September 24, 1982, Romney was allegedly told that he would no longer be receiving any payment from HRA. No explanation was given. On September 29, 1982, Romney received a letter from HRA to be used in connection with an unemployment insurance claim. The letter stated that during the period from December 18, 1981 to June 4, 1982, Romney had been receiving salary; from June 4, 1982 to August 25, 1982,[4] payments consisted of unused leave and credit balances; and from August 25, 1982 to September 10, 1982,
Romney had again received salary.

On December 20, 1982, the OATH Administrative Law Judge issued his Report and Recommendations. He found Romney mentally unfit to perform the duties of a Principal Administrative Associate and recommended that Romney "be placed on

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[3] The four week time period is not specifically delineated by the Union in its pleadings in the instant matter. However, the Board takes administrative notice of CWA's Request for Arbitration in Case No. A-1625-82 in which the Union seeks "(r)estoration of more than 30 days' pay, from December 21, 1981 January 22, 1982" for Romney.

[4] In its answer, OMLR states that Romney's leave balances were actually depleted on August 20, 1982, rather than on August 25, 1982.

a leave of absence pursuant to Section 72 of the Civil Service Law."

Positions of the Parties

CWA's Polition

CWA argues that salary payments to Romney were stopped "in retaliation for the Union's pressure" to schedule a contractual Step II grievance hearing on Romney's behalf. The Union notes that HRA, contrary to the written statements made in December, 1981, never filed disciplinary charges against Romney. Rather, in February, 1982, Romney was placed on an involuntary leave of absence because of alleged mental unfitness.

In both its petition and in its reply, CWA states that while the Section 72 matter (which was initiated by the February, 1982 suspension) was pending, Romney continued to receive his salary and did so "(d)ue to inordinate Agency administrative foul-ups, compounded by the death and a serious illness of the City's examining psychiatrists." In its reply, CWA, for the first time, additionally contends

that between April and June, 1982, Section 72 Coordinator Serena Gaynor told a CWA grievance representative that because of all the confusion surrounding the caser Romney was being paid administratively and that his leave balances were not being touched.

CWA urges that the termination of payments amounted to discriminatory conduct prompted by its insistence on enforcing contractual rights. The Union contends that until the actual termination of payments, there was never any indication from HRA that administrative salary payments to Romney would cease. In fact, CWA points to statements made at the September 22, 1982 OATH hearing to the Administrative Law Judge to the effect that Romney was still being paid, which statement, claims CWA, caused the judge to grant a one week continuance rather than hold hearings on consecutive days.

The City's Position

OMLR seeks dismissal of the instant petition, arguing that CWA's allegations of retaliatory action are unsupported by the facts and that the City's actions are devoid of any discriminatory intent.

OMLR contends that Romney was not removed from pay status until June 4, 1982, the day after his examination by a City physician. After that time, Romney continued to be paid by drawing upon accumulated sick leave, annual leave and other time allowance credits. These leave balances were depleted as of August 20, 1982. Payments thereafter were made by administrative error.

OMLR states, upon information and belief, that conversations between HRA officials and CWA representatives did take place in September, 1982 regarding the scheduling of a Step II hearing. The City contends that as a result of these discussions, HRA discovered its overpayment to Romney for the period from August 21, 1982 to September 10, 1982. Payments for any period of time after September 10, 1982 then stopped.

OMLR maintains that it paid and ceased paying Romney in accordance with the provisions of Section 72. It points out that recoupment proceedings for the overpayment have not been commenced.

Discussion

Under Section 1173-4.2(a)(3) of the NYCCBL, it is an improper practice for a public employer:

> to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

Thus, in order for a petitioner to make a prima facie showing that this section of the NYCCBL has been violated, the fact must be alleged which, if proven, would indicate that the City, motivated by anti-union animus, took discriminatory action against an employee in order to encourage or discourage membership in, or participation in the activities of, a union. CWA has failed to meet this burden in the instant matter.

Essentially, it is the Union's contention that because of the proximity in time of two events - the discussion of Union demands for a Step II grievance hearing on Romney's initial suspension and the cessation of salary payments to Romney - there is a cause and effect relationship between them. The intrinsic weakness of this post hoc Propter hoc reasoning is underscored by the fact that not only was Romney's salary paid for most of the suspension period, in compliance with the mandates of Section 72 and with the paraphrase of those mandates set forth in Commissioner Krauskopf's letter to Romney of February 25, 1982, but it was paid in excess of those mandates. CWA rightly points out that this case involves "inordinate Agency administrative foul-ups", conceding that these were "compounded by a death and a serious

illness of the City's examining psychiatrists". These circumstances worked to Romney's advantage. In the words of Section 72 Coordinator Gaynor, "because of all the confusion [Romney's] leave balances were not ... touched". This continued throughout the Spring and until June 3, 1982 when Romney's examination for alleged mental unfitness took place. Thereafter, Romney was paid based upon accrued sick leave, annual leave, overtime and other accrued leave entitlement. These payments properly continued through August 20, 1982 when the last of the leave accruals had been exhausted. Even at that point, however, bureaucratic confusion continued to operate to Romney's advantage for salary payments continued, in error through September 10, 1982. It appears to be true that the error was discovered as a result of inquiries regarding the Step II hearing of Romney's grievance of his suspension. It is equally true, however, that is the full extent of the connection between the pursuit of Romney's grievance and the cessation of salary payments. Thus, the Payments were stopped when the processing of the Step II grievance request brought to light the fact that Romney's entitlement to payment was at an end and that he had no right under Section 72 to the payments he had received between August 20, 1982 and September 10, 1982. The City's act was

not a retaliation against Romney for pursuing his rights under the NYCCBL but the termination of an erroneous and unlawful circumstance. The Union has not indicated how it believes the City could legally and properly have continued payments of salary to Romney once it became known, albeit belatedly, that he was no longer entitled to such payments. Nor do we perceive any basis for such action by the City. Having established that the City not only acted in accordance with the law in terminating payments to Romney when it did but that it had no basis for doing otherwise, we conclude that its action did not constitute an improper practice within the meaning of Section 1173-4.2a of the NYCCBL.

In short, the facts alleged by the Union prove little more than that the City acted to correct a financial error. CWA has failed to show that the City's actions were either motivated by anti-union animus or discriminated against Romney in the exercise of those rights specifically guaranteed by the NYCCBL. This Board has consistently held that allegations of improper motivation and conduct must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise.[5]

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[5] Decision Nos. B-30-81, B-2-82, B-16-82.

Based upon the foregoing, we find that no violation of the NYCCBL has been stated and we shall dismiss the petition.

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 improper practice petition filed in the instant case be, and the same hereby is, dismissed.

DATED: New York, N.Y.
February 28, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

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EDWARD F. GRAY
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CAROLYN GENTILE
MEMBER

PATRICK F.X. MULHEARN
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