DC37 v. City, Dep't of Health, et. al, 35 OCB 3 (BCB 1985)
[Decision No. B-3-85 (IP)]

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

DISTRICT COUNCIL 37, AFSCME,

DECISION NO. B-3-85
DOCKET NOS. BCB-692-84,
BCB-710-84

Petitioner,

-and-

THE CITY OF NEW YORK; THE DEPARTMENT OF HEALTH; ELLIOT GROSS, CHIEF MEDICAL EXAMINER; and THE OFFICE OF CHIEF MEDICAL EXAMINER,

Respondents.
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SECOND INTERIM DECISION AND ORDER

In January 24, 1984, District Council 37, AFSCME, AFL-CIO ("DC 37" or "the Union") filed an improper practice petition against the City of New York ("the City"), the Department of Health ("the Department"), Elliot Gross in his capacity as Chief Medical Examiner, and the Office of Chief Medical Examiner ("OCME"), jointly referred to as "respondents", in the case docketed as BCB-692-84. In it, DC 37 alleged that the Chief Medical Examiner and other management representatives repeatedly violated the New York City Collective Bargaining Law ("NYCCBL") by their alleged "discriminatory and harassing treatment" of DC 37 Chapter Chairperson Shirley Latimer, by terminating four probationary employees who supported the Union and Latimer, by setting time limits on prearranged labor-management

meetings, and by threatening the President of Local 375 with arrest if he continued a safety inspection he was in the process of making.

After joinder of issue, on May 2, 1984, the Board issued Interim Decision No. B-7-84, in which it was found that all but two of the numerous acts cited by the Union occurred beyond the statutory four-month period in which an improper practice charge may be filed so that they were time-barred and could be considered only in the context of background information. The two allegations found to have been pleaded in a timely manner relate to an allegedly discriminatory requirement that Latimer document her leave time and a supposedly unlawful attempt to exclude Latimer from a labor-management meeting. A hearing was ordered to resolve the issues of fact that had been created by these two allegations.

On June 12, 1984, DC 37 filed another improper practice petition in the case docketed as BCB-710-84. In it, the Union primarily claims that on March 23, 1984, respondents committed a new improper practice by terminating Latimer's employment, allegedly on account of her Union activities.

Upon withdrawal of a motion in opposition to consolidation, on August 15, 1984, the two above captioned

matters were consolidated and noticed for hearing.

Prior to the commencement of the hearing, on October 26, 1984, respondents, by their representative, the Office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss and defer, and a memorandum of law, following the issuance of a decision by the Civil Service Commission dated October 5, 1984. The Union filed an affirmation and accompanying memorandum of law in opposition on November 14, 1984. The issues raised by these pleadings underlie the instant Interim Decision.

Background

In November, 1983, Chapter Chairperson Latimer was served with disciplinary charges by OCME alleging incompetence, insubordination and violation of time and leave rules. Latimer chose to challenge these charges under Section 75 of the Civil Service Law ("CSL") instead of pursuing the matter through the contractual grievance-arbitration procedure. Accordingly, hearings were held before Office of Administrative Trials and Hearings ("OATH") Administrative Law Judge ("ALJ") Renee A. White in December, 1983.

On March 8, 1984, ALJ White issued a Report and Recommendation in which she found Latimer guilty of all

but one charge and recommended a two-month suspension as an appropriate penalty.

On March 23, 1984, the Chief Medical Examiner rejected the ALJ's recommendation and instead terminated Latimer's employment.

Latimer appealed the termination to the Civil Service Commission ("CSC"). On August 2, 1984, a hearing was held before the Commission pursuant to CSL Section 76. Based upon its review of the OATH record, the Commission affirmed the Chief Medical Examiner's termination of Latimer's employment on October 5, 1984.

Positions of the Parties

The City's Position

The City argues that the improper practice petitions filed herein raise facts identical to those already litigated before the OATH ALJ and considered by the CSC at the appeal level. OMLR states that relitigation at OCB of improper practice issues already decided would serve no purpose, especially when the Commission's finding "was not palpably wrong under a fair interpretation of the NYCCBL." The City contends that deferral by OCB to the Commission's decision is warranted and would avoid duplicative litigation.

OMLR urges that at the OATH hearing, Latimer testified "at length of her functions as a Chapter Chairperson" and that the CSC found "no supportive evidence in the record" before the ALJ to substantiate a claim of retaliation for union activity.

The City further alleges that: (a) the OATH and CSC procedures were fair and regular; (b) OATH administrative law judges and CSC Commissioners are, respectively, expert in fact-finding and in reviewing disciplinary charges; (c) the issues in the improper practice petitions are factually parallel to those litigated before OATH and appealed to the CSC; and (d) the OATH and CSC rulings are neither "palpably wrong" nor are they repugnant to the purposes and policies of the NYCCBL. Thus, asserts OMLR, deferral is appropriate; not to defer would be to condone forum shopping, would prejudice respondents by allowing duplicative litigation, and would engender delay and uncertainty in the finality of remedies.

The Union's Position

The Union argues that deferral is inappropriate in the instant matter, claiming firstly that the ALJ at the OATH hearing refused to allow counsel for Latimer to present evidence relating to issues of union animus rather, the ALJ

limited the factual issues at the hearing to the charges filed by the Department against Latimer. District Council 37 submits that the hearing before the Civil Service Commission consisted only of legal argument; no new evidence was presented. Thus, concludes the Union, the Commission's findings that there was "no supporting evidence in the record" to support the claim that the disciplinary charges were instituted in retaliation for union activity is to be expected. The Union additionally urges that since the OATH proceeding pertained only to charges against Latimer, at no time was there any consideration of petitioner's allegations that respondents have enga(-jed in an overall pattern and practice of discrimination so as to discourage membership and participation in District Council 37 and to interfere with individuals' rights granted under the NYCCBL.

Discussion

The instant matter, in which we are called upon to defer to a ruling made by the Civil Service Commission, presents a case of first impression for this Board. It is not, however, the first time that we have considered issues of deferral. Uurthermore, the New York State Ilublic Employment Relations Board ("PERB") has dealt with a similar matter, and it has been our policy to accord significant weiqht to decisions of PERB in matters analoqous to cases before us.

In City of Albany and Council 66, AFSCME,[1] the charging party alleged that the City of Albany and the Commis-sioner of the Department of Public Works violated the Taylor Law by first disciplining and then discharging employee George Strokes on account of his protected activities on behalf of Council 66. Strokes had been given a disciplinary hearing pursuant to CSL Section 75; a recommendation of discharge issued and was followed. Nevertheless, a PERB Hearing Officer found that the employee's discharge was motivated by considerations proscribed by the Taylor Law.

Reinstatement with back pay, a cease and desist order and the posting of a notice was deemed an appropriate remedy. PERB confirmed the Hearing Officer's decision and order, finding that the Hearing Officer correctly "inquired into whether the substantially motivating cause of the discharge was the City's, or its agent's, animus towards Council 66".[2]

On appeal,[3] the City of Albany contended that, inter alia, PERB lacked jurisdiction to review a proceeding conducted pursuant to CSL Section 75. The Appellate Division disagreed. The Court stated:

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[1]9 PERB ¶4512 (1976).

[2]9 PERB ¶3055 (1976).

[3]City of Albany, et al. v. Public Employment Relations Board, 395 N.Y.S. 2d 502 (1977), aff'd, 404 N.Y.S. 2d 343 (N.Y. 1978).

> Initially, we would point out that PERB plainly had jurisdiction to consider the legality of the dismissal in question. Since Strokes was fired in proceedings conducted pursuant to section 75 of the Civil Service Law, an article 78 proceeding would admittedly be the proper method for challenging the decision that his performance at work warranted his dismissal (Civil Service Law, §76). However, the City overlooks the fact that the PERB inquiry centered upon an entirely different issue, i.e., whether his dismissal was motivated by (the Commissioner's) anti-union animus and, therefore, constituted an improper employer practice in contravention of paragraphs (a) and (c) of subdivision 1 of section 209-a of the Civil Service Law. In this sphere PERB is vested with the exclusive nondelegable jurisdiction to prevent such practices (Civil Service Law, §205, subd. 5, par. [d]), and it is irrelevant to its determination whether or not cause for the employer's action in terminating Strokes actually existed...
>
> Moreover, such being the case, there can likewise be no doubt that PERB's action under consideration here will be unaffected by the disposition of the article 78 proceeding initiated by the intervenors-respondents to challenge the validity of the proceedings conducted pursuant to section 75 of the Civil Service Law, since the section 75 proceedings relate to the fact of misconduct, whereas PERB is concerned only with the employer's motivation in terminatinq Strokes.

Adopting the reasons articulated in City of Albany, we do not believe that the instant situation constitutes a matter in which deferral is appropriate. our review of the transcripts of the OATH hearing and the Civil Service Commission

appeal indicates that while some mention of Latimer's Union affiliation and activity was made, neither body explored the possibility that the actions taken against Latimer were moti-vated by anti-union animus and might constitute a violation of the NYCCBL. In this connection, we note the following objection made by counsel for respondents at the OATH hearing following questions concerning the Department's awareness of the identity of Union representatives:

> There has been no foundation laid for it and no discussion in the direct examination of any relationship between Ms. Latimer and the Union or between any other employees in the Union. I feel it has nothing to do with the charges that she is being brought up on and it is without the scope of the charges. (Transcript, p. 100)-(emphasis added).

We also cite the following statements made by the ALJ at the OATH hearing when an attempt was made to introduce evidence of discrimination agains t T atimer on account of union activity:

> If she (Latimer) believes for some reason she was not being treated fairly, it does not go as to whether or not she was to perform the duties of her job. Do you understand and agree with that?
>
> Because of the fact that her duties don't change no matter what the atmosphere is, I think her testimony is relevant to a grievance procedure and not to this procedure. (Transcript, p. 220.)

For the reasons set forth above, we shall deny respondents' motion to dismiss and defer and shall order that the hearing scheduled to take place in the above-captioned matters qo forward.

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 respondents' motion to dismiss and defer be, and the same hereby is, denied; and it is further

ORDERED that a notice be issued rescheduling the above-captioned matters for hearing.

DATED: New York, N.Y.
February 19, 1985

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER