L.1180, CWA v. NYPD, 37 OCB 28 (BCB 1986) [Decision No. B-28-86 (IP)]

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

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180,

DECISION NO. B-28-86

Petitioner,

DOCKET NO. BCB-804-85

-and-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.
----------X

DECISION AND ORDER

Petitioner Communications Workers of America, Local 1180, (herein "CWA" or "the Union") filed a verified improper practice petition on August 12, 1985, in which it alleged that respondent New York City Police Department (herein "Police Department or "City") committed an improper practice in violation of Section 1173-4.2 (1) and (3) of the New York City Collective Bargaining Law (herein "NYCCBL") with respect to Tillman Gives, a civilian employee of the Police Department. on October 8, 1985, the City filed a verified answer. On December 30, 1985, the Union filed a verified reply. On May 6, 1986, the City filed a surreply.[1]

The improper practice petition alleges that on or about

[1] Both parties requested and received a number of extensions of time for filing answering and reply papers.

April 18, 1985, Gives' appeal of his November 1984 evaluation was denied, as was his request for transfer back to the 911 Section of the Communications Division. The petition alleges that these actions were taken because of Gives' activities is shop steward and other activities on behalf of the Union.

Background

Gives has been employed in his current title, Principal Administrative Associate, Level I (PAA-I) since April 1982.[2] His departmental title is Assistant Platoon Commander. Between April 1982 and November 15, 1983, Gives received three evaluations in which his overall performance was rated as "Meets Standards."

On October 3, 1983, Local 1180 filed an out-of-title grievance on behalf of Gives and four other Assistant Platoon Commanders in the 911 Section of the Communications Division, alleging that they were doing PAA-III work. On January 26, 1984, a Step III hearing was held at which Gives, by this time shop steward, acted as spokesperson for unit members. As a result of this meeting, the grievance was withdrawn on February 16, 1984.

Gives regularly worked the midnight - 8:00 a.m. tour

[2] The PAAs are members of a collective bargaining unit represented by the petitioner.

the 911 Section. In October 1984 Gives requested and was denied a change of tour in order to attend, as a member of the Local 1180 bargaining committee, a contract negotiation session on October 19, 1984. (It is not alleged that the bargaining session was scheduled to be held during Gives' tour of duty). Although the improper practice states that the Union "took great exception" to the denial of tour change, there is no evidence that a grievance was filed concerning this matter, nor does the petition state what other action the Union took in this regard.

On or about November 15, 1984, Gives was given his fourth evaluation, for the period November 15, 1983 to November 15, 1984. In this evaluation Gives' performance is rated "Well Below Standards," and both of the evaluating supervisors recommend that Gives be transferred to a less demanding position.

At an unspecified time in the fall of 1984, Gives went out on sick report due to the effects of injuries suffered in an automobile accident in June 1984. On December 28, 1984, while still on sick report, Gives requested that he be reassigned from the midnight - 8:00 a.m. tour to the day tour when he was able to return to active duty, citing "the strain of working steady midnights" and his premature return to work after the accident.

On approximately January 22, 1985 City and Union representatives met to resolve the issue of the appropriate assign-

ment levels of the PAA-Is in the 911 Section. Gives, although still apparently out on sick report, was again principal spokesperson for the PAA-Is.

Also on January 22, Gives' commanding officer in the 911 Section, Captain Mangan, addressed a memorandum to the Director of the Communications Division, requesting that Gives and another PAA be transferred from the 911 Section because of their substandard performance. Captain Mangan noted, in addition to specific criticisms of Gives' performance, that Gives had been on sick report for 80½ days during the evaluation period, primarily due to the effects of the June 1984 accident. Considering Gives' request for transfer to day tours, the Mangan memorandum concluded that reassigning Gives to the day tour within the 911 Section would not "eliminate the stress and strain" of working in the 911 operation, and that such a reassignment within the command would create a supervisory imbalance requiring additional overtime. Consequently, Mangan requested that Gives be transferred to a day tour outside the 911 Section.

On or about February 27, Gives was transferred from the 911 Section to the Telephone Control Section of the Communications Division.

On an unspecified date, Gives appealed his evaluation and requested that he be returned to his "previous duties as an Assistant Platoon Commander under the supervision of a different Platoon Commander." On or about April 18, 1985, Gives' overall evaluation rating was changed from "Well Below Standards" to the next higher category, "Below Standards." His request for transfer back to the 911 Section was denied.

On August 16, 1985, three PAA-Is in the 911 Section were upgraded to PAA-II.[3] On August 30, 1985, the Union requested that the Step III hearing be reconvened in the out-of-title grievance previously withdrawn on February 16, 1984.

Positions of the Parties

The Union's Position

The Union admits that the City had no legal or contractual obligation to change Gives' tour in October 1984 but contends that the denial of such a change was a deviation from its normal Practice and thus discriminated against Gives. The petition does not, however, allege the denial of tour change as an improper practice, presumably because October 1984 is well

[3] Two of the upgraded PAAs had been included in the 1983 out-of-title grievance.

beyond the four-month statute of limitations provided for in OCB Rule 7.4.

The Union asserts that Gives' evaluation was not, for a variety of reasons, justified by his performance. The Union also contends that Gives did not request a transfer out of the 911 Section, nor did he request a less stressful assignment: he merely requested a change out of the steady midnight to 8:00 a.m. tour.

The position of the Union is that because Gives served for a time as shop steward (the exact dates of his stewardship are not given), he was perceived as the leader of the Assistant Platoon Commanders (PAAs) in the 911 Section. The Union also asserts that the City was aware that the resolution of the out-of-title grievance might result in higher salary and retroactive pay for Gives. The implication is that if Gives had not been transferred from the 911 Section, he would have been upgraded to PAA-II in August 1985. Thus, according to the Union, Gives' poor November 1984 evaluation and subsequent transfer from the 911 Section:

> can be construed as retribution for filing the out-of-title grievance [in October 1983], his Local's fighting for his right to be a bargaining committee member on City time [in October 1984], and for his promoting involvement in Local 1180 among all other PAAs in the Police Department.

The City's Position

With respect to Gives' and transfer, and the denial of his appeal thereof, the City takes the position that the improper practice petition fails to allege sufficient facts to constitute an improper practice under the NYCCBL. The City contends that, under Section 1173-4.3(b) of the NYCCBL, it has the right to determine standards of service and to direct its employees and that the transfer of an employee based on his performance evaluation is within its statutory management rights.[4] The City further argues that Gives' evaluation was justified by his performance. Finally, the City asserts that in making the decision to transfer Gives, his supervisors considered not only his performance but also his own request for a day tour due to the "strain of working steady midnights."

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[4] This section states that the City has the right, inter alia

> to determine the standards of services to be offered by its agencies...direct its employees; ... 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; ...

and that these decisions are not within the scope of collective bargaining.

With respect to the denial of tour change in October 1984, the City takes the position that release for the purpose of participating in union activities is governed by Mayor's Executive Orders No. 75 (March 22, 1983) and No. 38 (May 16, 1957, amended February 7, 1967). The City asserts that, while employees may be excused from their regular tour of duty, without loss of pay, to the extent that it conflicts with the union activities in which the employee is participating, there is no general practice or policy of changing the employee's tour of duty to the time when the union activity is scheduled and then excusing the employee without loss of pay.

Discussion

The petition alleges violations by the City of NYCCBL Section 1173-4.2(a)(1) and (3). These provisions make it an improper practice for a public employer:

> (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;

The Union charges that the Police Department committed an improper practice under the NYCCBL by denying Gives' appeal of his evaluation and transfer in retaliation for Gives acting

as spokesman for the PAA-Is at out-of-title grievance meetings held in January 1984 and January 1985, for his "promoting involvement in Local 1180 among all other PAAs in the Police Department," and because CWA fought for Gives' right to attend bargaining sessions on City time in October 1984.

We conclude that the petitioner has failed to establish a prima facie improper practice case, since it has alleged no facts which support the underlying theory of the case, i.e., that the denial of Gives' evaluation appeal and transfer request, and, by inference, the underlying evaluation and transfer, were motivated by his participation in the above activities.

Initially, we note that while Gives acted as spokesman at a January 1984 grievance meeting, the grievance was withdrawn in February 1984, and the parties continued to work toward a resolution. No facts are alleged which would indicate that the denial of tour change in October 1984 was in any way related to Gives' participation in the grievance withdrawn approximately eight months before. No facts are alleged which indicate what action if any, the Union took in its fight "for Gives' right to attend bargaining sessions on City time." Thus the denial of tour change provides no evidence of animus to support the instant charge. Moreover, as the petition herein was filed approximately ten months after the denial of tour change in October 1984, consideration of the allegation that

this act discriminated against Gives is barred by OCB Rule 7.4.[5]

No facts are alleged which demonstrate how Gives promoted involvement in Local 1180 "among all other PAAs in the Police Department." No facts or statements are alleged which support a conclusion that any of Gives' superiors was motivated, in any way, by animus against Gives for his alleged activities. The mere fact that Gives acted for an unspecified time as shop steward and as spokesperson for the PAAs involved in the out-of-title grievance is not, without more, sufficient to support a conclusion that the Police Department harbored animus against Gives.

In short, petitioner has failed to show any causal link between Gives' activities on behalf of the CWA and the denial of his appeal. Moreover, the record is devoid of any probative evidence showing that the underlying evaluation and transfer were in retaliation for any such actions.

On the other hand, we find that in the light of Gives' own request for a day tour, and his use of the word "strain"' in his request therefor, Gives' transfer can be construed as an attempt to accommodate his request rather than as an act of retribution. We note as well that? under Section 1173-4.3(b), the City has the management right to determine staffing levels, and to conclude, as it did, that to retain Gives within the

[5] Although the parties take different positions as to what the practice is with respect to granting tour changes to attend negotiations, for the above reasons we find this difference immaterial in the instant case.

911 Section on the day tour would create a supervisory imbalance. Moreover, another PAA was given a rating of "Well Below Standards" and a transfer out of the 911 Section at the same time as Gives, which also mitigates against a finding of disparate treatment. And finally, Gives' appeal of his evaluation was not denied in toto, inasmuch as the overall rating was raised to the next higher category, "Below Standards."

In sum, the petitioner fails to demonstrate how the actions of the Police Department representatives were based upon motives prohibited by Section 1173-4.2, how they interfered with the right to organize and to bargain collectively (or to refrain from doing so) granted by Section 1173-4.1, or how they discriminated against Gives. Allegations of such improper motivation must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise. Such recitals cannot provide the basis for a finding of improper practice. See Decision No. B-18-86 (insufficient facts to support prima facie finding that City appointed petitioner to a position for which it knew she was unqualified, withheld benefits, transferred and warned her because she had filed grievances); Decision No. B-12-85 (no facts alleged to support petitioner' charges that the presence of certain supervisors in the unit interfered with and dominated the administration of the union); Decision No. B-25-81 (failure to

show that the disciplinary action was connected to petitioner's union candidacy); Decision No. B-35-80 (insufficient facts to support a finding that petitioner was suspended for his union election activities).

Accordingly, we find that no violation of the NYCCBL has been stated, and we shall dismiss the petition herein.

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 filed herein by the Communications Workers of America, Local 1180 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 29, 1986

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