COBA, Seelig (Pres. of COBA) v. DOC, et. al, 37 OCB 48 (BCB 1986) [Decision No. B-48-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice

-between-

PHILIP SEELIG, AS PRESIDENT OF THE CORRECTION OFFICER'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF CORRECTION; MARTIN LEVY, WARDEN BRONX HOUSE OF DETENTION; JANIS WHITE, ASSISTANT COMMISSIONER OF THE DEPARTMENT OF CORRECTION; DEPUTY WARDEN BRONX HOUSE OF DETENTION; WILLIAM F. LEWIS DIRECTOR OF LABOR RELATIONS, JACQUELINE McMICKENS COMMISSIONER OF THE DEPARTMENT OF CORRECTION,

Respondents.

DECISION NO. B-48-86

DOCKET NO. BCB-882-86

DECISION AND ORDER

On July 1, 1986, Philip Seelig, as President of the Correction Officers Benevolent Association ("COBA" or the "Association"), filed an improper practice petition in which it is alleged that on March 12, 1986, officials at the New York City Department of Correction (collectively referred to as the "employer" or "Respondent") (1) prohibited the distribution of, and destroyed, union literature; (2) deprived Association members of the opportunity to speak with their President; and (3) denied Union access to the facility for the

purpose of conducting a safety inspection. On October 3, 1986, respondent, by its office of Municipal Labor Relations ("OMLR") submitted its answer. No reply was filed.

Positions of the Parties

Association's Position

Petitioner claims that following reports of water contamination at the Bronx House of Detention ("BHD"), he visited the facility on March 12, 1986, for the purpose of examining the water tanks. Upon his arrival, it is alleged, Mr. Seelig was ordered not to speak to members of his Union, and roll call was removed from the entrance to BHD to deprive COBA members of the opportunity to communicate with Mr. Seelig. In the statements of the nature of the controversy, Petitioner claims that:

> Warden Martin Levy wrongfully barred Petitioner from distributing union literature. ADW [Assistant Deputy Warden] White wrongfully took union literature and ripped said literature up in front of union members. Bill Lewis directed Petitioner to refrain from distributing union literature.

For a remedy, Petitioner requests that the Board, upon a finding that Respondent's actions constitute an improper practice as defined in Section 1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL"):

(1) issue a cease and desist order; and (2) grant such other relief as it may deem just and proper.

Respondent's Position

Respondent alleges that on March 12, 1986, the Environmental Protection Agency conducted a water main test which temporarily caused a discoloration of the water supply at BHD. A sample taken by an inmate was brought to Deputy Warden White (Deputy Warden Levy, contrary to the Union's assertion, was not present), whereupon an investigation was commenced through the offices of Deputy Commissioner Keilin. That day, at approximately 1:45 p.m., Association President Seelig arrived at BHD, requesting access to the entire facility for the purposes of obtaining a water sample for testing, and addressing the membership. The request was denied by Deputy Warden White. Mr. William Lewis, in reiterating this position, nevertheless advised Mr. Seelig that he would be provided an area in which to meet with the facility's Union delegate. Mr. Seelig indicated that this would not be necessary.

The Respondent asks that it be noted that one week prior to this occurrence, the Association had been granted permission to hold a meeting at BHD, which it did on

March 7, 1986, for the purpose of discussing the alleged contamination of the water supply at BHD. Although it was under no contractual obligation to do so, the employer allowed the meeting upon the assurance that no disruption would occur. The result of the meeting, it is claimed, "was a food boycott and media campaign by the Union which derogated the Department." Respondent further asks the Board to note that on March 7, 1986, a report was received from the Allentown Testing Laboratory indicating that the water supply at BHD was well within OSHA standards.

Respondent does not deny that certain material found in Deputy Warden White's desk was destroyed but maintains that the material was "nowhere identified as Union literature," and that at no time did President Seelig request permission to distribute union literature.

For its first affirmative defense to the improper practice charge, Respondent maintains that an employer need not grant a request for access "if an employee organization can responsibly represent its members without having access to the employer's facilities." Respondent cites to Holyoke Water Power Co., 118 LRRM 1179 (1985) where in the NLRB states that where access

to an employer's property has been denied, a balancing test would be applied such that

> [w]here it is found that responsible representation can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end ...

On the other hand,

> [w]here it is found that a union can effectively represent employees through alternate means other than by entering on the employer's premises, the employer's property rights will predominate and the union may properly be denied access.[1]

Similarly, it is argued, the New York State Public Employment Relations Board ("PERB") requires that a request for access to conduct an inspection be supported by a "proper showing of need."[2] Respondent maintains that alternate means were available to the Association and that it failed to demonstrate that the requisite need existed.

Respondent notes that on May 25, 1984, a citywide policy was adopted, pursuant to which "a union representative who wishes access to City premises for a safety inspection in an area not open to the public,

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[1] 118 LRRM at 1180.

[2] City of Albany, 6 PERB 3012 (1973).

shall give notice to the Agency Safety Coordinator." Respondent maintains that

> ... assuming that Seelig's stated reason for having access to the facility was legitimate, and that he did in fact wish to make a safety inspection, he may have been granted such access had he followed the proper procedure.

Respondent further notes that Petitioner had access to the February 20, 1986 test results performed on the facility's water supply, and, "if the Union did not agree with the results of any such tests they could seek redress via the State's OSHA laws."

For its second affirmative defense, Respondent asserts its management right to, among other things, maintain the efficiency of its operations. Respondent argues that the potential for disruption to the officers responsible for supervising and controlling the inmate population was "so great as to amount to a certainty." Its refusal to grant access to the facility under these circumstances was, therefore, a proper exercise of its management prorogative.

For its third affirmative defense, Respondent argues that Article XXV of the parties' collective bargaining agreement prohibits the distribution of written material by the union if the material contains "any derogatory

or inflammatory statements concerning the Department.” Respondent claims that the dissemination of material wherein it is stated that there is a cancer-causing condition of which the Department is aware, had the potential for, inciting both employees and inmates alike. Furthermore, it is claimed, any written material sought to be distributed by the Union must be printed on union stationery. Respondent maintains that “[t]he printed material were not in compliance with contractual requirements and, therefore, the Department, was within its rights in preventing this distribution.”

Based on the foregoing defenses, Respondent asks that the improper practice petition be dismissed.

Discussion

Section 1173-4.2 of the New York City Collective Bargaining Law (“NYCCBL”) provides that 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;
>
> (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 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.

It is clear that in interpreting the NYCCBL, it is the Board's function, wherever necessary, to strike a balance between the competing. interests served by the law and achieve an accommodation between the various employee rights and Section 1173-4.3b, which provides that

> [i]t 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.

It is with this consideration in mind that we examine the employer's defenses to the charges contained in the Association's improper practice petition.

The employer maintains, and we agree, that "an employer may restrict access to its premises ... when such restriction will not prevent a ... certified employee organization from reasonably representing its constituents,"[3] and that an employer's refusal of access is not improper if the necessity for such access is not established.[4] Respondent maintains that it was on the basis of the events which occurred on March 7, 1986, i.e. a food boycott and media campaign, that it determined the inadvisability of allowing another meeting to be held on March 12, 1986, a judgment which does not appear to be arbitrary or discriminatory. The employer insists that not only was there an "absolute failure to demonstrate need, on the part of the union, but alternative means were available through which the union could effectively represent its employees."

In response to the charge that it destroyed union literature, Respondent maintains, and the Union does not appear to disagree, that: (1) the material in question had no marks identifying it as Union literature; (2) the material contained inflammatory statements concerning the Department; and (3) the Association's President

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[3] PERB §4521 (1972) at 4589.

[4] PERB §3012 (1973).

never requested permission to distribute the material.

Respondent also maintains that Petitioner's March 12, 1986 demand for immediate access to the facility for purposes of conducting a safety inspection disregards a city-wide policy adopted on May 25, 1984 wherein it is stated that

> ... a union representative who wishes access to City premises for safety inspection in areas not open to the public, shall give notice to the Agency Safety Coordinator. Such access shall then be permitted to take place, unless at the time requested the safe and efficient operation of the Agency would be disrupted. In such case, the Agency Labor Relations office should be notified and the inspection should be scheduled at the earliest time possible.

Rule 7.9 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") provides that, in proceedings before the Board of Collective Bargaining (
"Board"), the petitioner may serve and file a reply to the respondent"s answer which

> shall contain admissions and denials of any additional facts or new matter alleged in the answer.

Rule 7.9 also provides that:

> Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply

Since the Association has not filed a reply, the application of Rule 7.9 requires that we accept as true Respondent's uncontested assertions. Accordingly, we must find that there exists no basis for a finding of an improper employer practice on the assumption that:

> (1) Petitioner's request for inspection was not showing of need;
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> (2) An earlier meeting, held on March 7, 1986, created a disturbance;
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> (3) Petitioner failed to give the Agency Safety Coordinator notice as required by city-wide policy dated May 25, 1984;
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> (4) The material destroyed by Deputy Warden White was not printed on Union stationery and nowhere identified as union literature; and
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> (5) The printed material was inflammatory within the meaning of Article XXV of the parties' collective bargaining agreement which prohibits the distribution of any written material by the union which contains "any derogatory or inflammatory statements concerning... the Department..."

Based on all the foregoing considerations, it is the Board's view that Petitioner has failed to demonstrate the commission of an improper practice within the meaning of Section 1173-4.2 of the NYCCBL.

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 filed herein by the correction officer's Benevolent Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 25, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER