Seelig, 37 OCB 7 [Decision No. B-7-86 (IP)], aff'd, Seelig v. Anderson, No. 5063/86 (Sup. Ct. N.Y. Co.).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the
Improper Practice Proceeding

-between-

DECISION NO B-7-86
DOCKET NO. BCB-830-85

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

DEPARTMENT OF CORRECTION, CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

This proceeding was commenced on November 20, 1985, with the filing of a verified improper practice petition by Philip Seelig, as President of the Correction officers Benevolent Association (herein "petitioner" or "COBA") against the New York City Department of Correction (herein "respondent" or "City"). On December 30, 1985, the City answered by filing a verified motion to dismiss on the ground that the petition fails to state a cause of action upon which relief may be granted under the New York City Collective Bargaining Law (herein "NYCCBL"), together with an affirmation in support of its motion. The petitioner filed a response on January 13, 1986, in the form of an affirmation in opposition to the City's motion.

The Petition

The improper practice petition alleges that on or about September 26, 1985, the City granted vacation leave and tour changes to correction officers who are members of an anti-COBA organization in order that they might attend an anti-COBA rally. The petition further alleges that these changes resulted in the granting of overtime in violation of departmental procedures. By these actions, petitioner alleges that the City violated Section 1173-4.2 of the NYCCBL.[1]

The City's Position

It is the City's position that the facts alleged, even if true, do not make out a violation of Section 1173-4.2 of the

[1] Sec. 1173-4.2(a) states 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;

(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.

NYCCBL. The City emphasizes that subsection (3), supra, for bids discrimination against employees to encourage or discourage membership in, or activities on behalf of, any public employee organization. The City asserts that the granting of leave is based upon the employee's leave balance and departmental operational and staffing needs, rather than upon the employee's reason for requesting leave. The City argues that COBA, through the instant petition, is seeking to require that the City deny leave requests of employees who may be involved in rank and file union activities, contrary to the mandate of the NYCCBL.

The Petitioner's Position

COBA asserts that the facts alleged, if proven, constitute a cause of action. According to the petitioner, "It is clear that the Respondents' actions, in granting requests that were not in the best interests of the Department and which were contrary to staffing and operational needs of the Department, served to encourage and support the anti-union rally."

Discussion

It is well settled that on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true. Thus,

the only question to be decided by the Board here is whether, on its face, this petition states a cause of action under the NYCCBL. [2]

Even accepting COBA's limited factual allegations as true, we find that it has not established that the facts alleged would constitute an improper practice under the law. The petitioner's allegations are merely conclusory, and facts have not been alleged sufficient to make a prima facie showing that it is the purpose or policy of the City to assist COBA dissidents, or that the City is motivated by any anti-COBA animus. No facts are alleged which would indicate that the respondent was aware of either the alleged anti-COBA sentiments of the officers requesting leave or the purpose for which they requested it. Moreover, even assuming, arguendo, that the City was aware of their purpose, no facts are alleged which would indicate that the leave requests of COBA dissidents were treated differently from those of COBA supporters. In short, COBA has failed to allege facts which would indicate how any employee's statutory rights have been interfered with or restrained, how any employee has been discriminated against for the purpose of encouraging or discouraging membership or participation in COBA or any

[2] See, e.g., Decision No. B-39-85.

other employee organization, or how the administration of COBA or any other employee organization has been dominated or interfered with. Further, with respect to COBA's allegation that the granting of leave requests was contrary to staffing and operational needs of the Department, we note that Section 1173-4.3(b) of the NYCCBL specifically provides that the City has the right to, inter alia,

> determine the standards of services to be offered by its agencies; ... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; ...

In the absence of specific facts which support petitioner's conclusion, we find that decisions with respect to the granting of overtime, leave, and tour changes appear to fall within the realm reserved to the City by Section 1173-4.3(b).

Finally, we emphasize here that Section 1173-4.2 of the NYCCBL specifically prohibits the City from interfering with or restraining its employees in the exercise of their right to, inter alia, join or assist or to refrain from joining or assisting, employee organizations of their own choosing. The finding of a prima facie showing of a violation on the bare facts alleged herein would appear to require that the City engage in the very conduct which the statute proscribes, i.e.,

that the City consider, in passing upon leave requests, the employee's allegiance or opposition to a particular employee organization.

In sum, the record herein is devoid of any evidence that respondent undertook any action which was intended to or did, in fact, interfere with or diminish petitioner's or employees' rights under the NYCCBL. In the absence of a showing of a denial or violation of rights guaranteed by our law or any inhibition of protected activity, we cannot find that a violation of the NYCCBL has been stated against the Department of Correction.[3] For the reasons set forth above, the City's motion to dismiss is granted.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[3] Decision Nos. B-2-86, B-12-84, B-14-80.

ORDERED, that the motion to dismiss filed by the City in Docket No. BCB-830-85 be, and the same hereby is, granted.

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

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER