L.1183, CWA v. Board of Elections, 41 OCB 2 (BCB 1988) [Decision No. B-2-88 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the
Improper Practice Proceeding

-between-

COMMUNICATIONS WORKERS OF AMERICA, ON BEHALF OF ITS LOCAL 1183,

Petitioner,

DECISION NO. B-2-88

DOCKET NO. BCB-963-87

-and-

NEW YORK CITY BOARD OF ELECTIONS,

Respondent.
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DECISION AND ORDER

On May 29, 1987, the Communications Workers of America ("CWA" or "petitioner") filed, on behalf of its Local 1183, a verified improper practice petition alleging that, at a staff meeting on January 29, 1987, Ms. Kay Amer, Chief Clerk of the Bronx Borough Office of the Board of Elections ("respondent") made certain remarks which interfered with the exercise of protected employee rights, in violation of section 12-306 (formerly section 1173-4.2) of the New York

City Collective Bargaining Law ("NYCCBL").[1] Respondent, appearing by the New York City Office of Municipal Labor Relations ("OMLR"), filed a verified answer to the petition on July 28, 1987. Petitioner did not submit a reply. On November 23, 1987, a hearing was held before a Trial Examiner designated by the Office of Collective Bargaining. Post-hearing briefs were submitted on December 18, 1987.

Background

On the afternoon of January 29, 1987, Kay Amer, Chief Clerk of the Bronx Borough Office of the Board of Elections, called a meeting of the approximately forty employees in that

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[1] Section 12-306 (formerly section 1173-4.2) of the NYCCBL provides, in relevant part:

> a. Improper public employer practices. It shall be an improper practice for a public employer orits 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.

office at which she made statements that, petitioner alleges, were meant to discourage employees from taking complaints about working conditions to the union. The meeting at which the allegedly coercive statements were made was one of several meetings in the office on that day.

In the morning of January 29th, Ms. Amer had addressed her employees concerning the introduction of computer terminals that was to take place in February. The second meeting that day was a scheduled union meeting at which Local 1183 President C. Richard Wagner appeared for the purpose of receiving members' complaints about working conditions. Of particular concern was a lack of heat in the Bronx borough office. After this meeting, Ms. Amer's administrative assistant, who is a member of the Local and who was present at the union meeting, reported to Ms. Amer that one of the union delegates had complained that the employees were being "slave-driven." In response to this report, Amer called another staff meeting because she "felt it was incumbent upon [her] as a chief clerk to find out what was happening" (Tr. 51)[2] and whether

[2] References to the official transcript of the hearing in this matter will be indicated by the letters "Tr." followed by the relevant page number(s).

this remark reflected a consensus among the employees. It was at this meeting that Ms. Amer made the statements which, petitioner asserts, violated employee rights under the NYCCBL.

CWA presented the testimony of three witnesses in support of its petition. Ms. Helen Cutler, a clerk to the Board of Elections, stated that, at the meeting in question on January 29,1987, some of the employees registered complaints about working conditions to which Ms. Amer responded that, if the employees "were not satisfied with conditions at the Board of Elections in the Bronx, there is the door, it works both ways" (Tr. 12). Ms. Cutler also stated that Ms. Amer said, "the union cannot do more than she has done" (Tr. 15).

Petitioner's second witness was Ms. Nilda Rodriguez, a clerk to the Board and a Local 1183 delegate. It was Ms. Rodriguez' statement at the earlier union meeting, i.e., that employees were being slave-driven, which led to the meeting under scrutiny here. According to Rodriguez, the offending statements by Ms. Amer were that:

> we're wasting our time complaining to the union. There was nothing the union can do for us and whoever didn't like it, there was the door [pointing] (Tr. 26).

Ms. Rodriguez did not recall any specific statement that the union could not do more than Amer had done (Tr. 29).

The Union's final witness was Local President Wagner. Mr. Wagner testified that he arrived at the Bronx Board of Elections a little before lunchtime on January 29, 1987. The purpose of the visit was to discuss a serious problem with heat and other matters in the office that had been brought to his attention by union delegate Rodriguez. A union meeting took place during the lunch hour. After the meeting broke up, Wagner went to speak with employees who were not at the union meeting because they had to cover the front desk and switchboard areas. About an hour later, Wagner was ready to leave the building, but wanted to speak to Chief Clerk Amer first about some of the matters that had been discussed at the union meeting. Wagner was told that Amer was having a staff meeting on the fourth floor. Wagner testified:

> so I went down on the elevator and I came into the room behind her,... I didn't want to interfere with what she was doing so I just stood behind her and waited, and that's when ... she said that the people shouldn't go to the union, that there was nothing the union could do for them, and that if they didn't like what was going on at the board, that they could go,... there was the door, they could leave (Tr. 36-7).

On cross-examination, Wagner modified his testimony, stating:

> On reflection I really think that she said don't go to your union, they can't do anything for you .... I don't think I heard the word shouldn't ... (Tr. 39).

Respondent's case consists of the testimony of Kay Amer, the Chief Clerk. With respect to statements made at the staff meeting on the afternoon of January 29, 1987, Amer testified that she told her employees that since she had become Chief Clerk, major improvements had been made at the Board of Elections. As examples, Amer cited the painting of the office and washing of windows, the installation of blinds, carpeting, furniture, plants, pictures, new toilets and sinks, and obtaining free parking spaces for ten employees (Tr. 55). Amer stated that she regretted being unable to do more, for example, to improve the lighting. She admitted saying to the assembled employees:

> I can't make a Cadillac out of a Ford. ... I can't paint a pretty picture in the board .... And if you don't like it, there is the door ... (Tr. 57).

However, Amer denied that she ever told employees not to go to the union. To the contrary, she testified, she has encouraged people to go to the union. Amer noted that when she learned, in the morning of January 29, 1987, that Local

President Wagner was coming to the office that day, she specifically suggested that employees speak with him about their questions and concerns (Tr. 45, 67).

Although Ms. Amer admitted that she used words to the effect that "if you don't like it, there is the door" (Tr. 57, 59), she asserted that these words were taken out of context by the union.

> Yes, I said ... that as far as the cleanliness of the building, as far as the heat, and the landlord and the ... cleaning service, isn't it more feasible for them to come to me if we don't have heat, if ... say, the bathrooms aren't kept as clean as we'd like them to be, isn't it more realistic and feasible to come to me as a chief clerk? I have the phone numbers, I have a rapport with these people that I can get on the line and say, you know,...the building should be maintained better. And I have done that (Tr. 58).
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> * * *
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> I basically said that if you don't like it here, there is the door. As far as making more improvements in the office, I doubt very much if the union could help you (Tr. 59).

On cross-examination, Amer commented that working conditions at the general (Manhattan) Office of the Board of Elections, which is Local President Wagner's home base, are

terrible - worse than conditions at the Bronx borough office. And, in response to a question from petitioner's representative, she acknowledged that this fact "gives one [the] perception""that if Wagner couldn't do anything there, he couldn't do anything to improve conditions in the Bronx (Tr. 72-4).

Positions of the Parties

Petitioner's Position

Petitioner does not dispute the sincerity of Ms. Amer's statement that the union could do nothing to improve working conditions at the Bronx borough office. To entertain such a belief, it acknowledges, is not a violation of the NYCCBL. Rather, CWA alleges, Ms. Amer's words-"don't go to your union, there is nothing they can do and if you don't like it there is the door" (petitioner's brief, p. 2), and her attitude - she was "upset," "angry", "in a vexed state" (id.), discouraged employees from seeking union assistance. This intimidating conduct, it is argued, does violate the NYCCBL.

Petitioner also alleges that Amer's behavior violated the collective bargaining agreement between the parties which, at Article XV provides, inter alia, that

an employee shall not induce any mass resignations during the term of the agreement. It is alleged that, by inviting employees who were dissatisfied to leave, Ms. Amer incited mass resignations (Tr. 41).

Petitioner notes that "[m]ost of Ms. Amer's testimony paints a picture of a caring administrator" (petitioner's brief,.p. 1). However, CWA argues that, in fact, Amer was not interested in her employees but "had her own concerns." Petitioner reasons, "[i]t does not follow that a caring administrator would listen to employees' concerns and conclude that if they do not like it they could leave" (id., p. 2).

As a remedy for the alleged improper practice, petitioner requests that Ms. Amer be directed to post a statement declaring that the union is the proper agent to resolve employee grievances and that Ms. Amer will not interfere with the right of employees to seek assistance from their union.

Respondent's Position

Respondent contends that Ms. Amer's comments at the staff meeting in the afternoon of January 29, 1987 have been taken out of context for purposes of the improper practice petition herein. The City maintains that the

statements complained of do not criticize or demean the union and were not intended to prevent employees from exercising their rights under the NYCCBL. According to respondent, the sole purpose of the meeting was to respond to a remark that employees were being "slave-driven" and to ascertain what concerns the employees had. The City asserts further that the testimony of petitioner's witnesses as to the content of Ms. Amer's statements is "replete with contradictions" and should be disregarded in favor of Ms. Amer's own consistent testimony as to what she said at the January 29 meeting and the meaning of those statements.

Respondent argues that Ms. Amer is deeply concerned about the welfare of her employees, has continually sought to improve working conditions at the Board of Elections, and that she has tried to involve the union in that process. Far from harboring anti-union animus, respondent contends, Amer has a warn, relationship with Local President Wagner and has encouraged employees to participate in union activity.[3] The City concludes

[3] As examples, the City cites (a) the testimony of Nilda Rodriguez, clerk and union delegate, that when she arrived late on January 29, 1987, she was directed by Ms. Amer to hurry down to the union meeting that was already in progress (Tr. 23-4); (b) the unrefuted testimony of Kay Amer that she has never attempted to prevent Mr. Wagner from holding union meetings in the office (Tr. 47); and (c) Ms. Amer's unrefuted testimony that she instructed her employees to jot down any questions they might have for Mr. Wagner so that they could discuss them at the union meeting (Tr. 45, 67).

that petitioner has failed to make the necessary showing of improper motivation on the part of the Chief Clerk.

Respondent further alleges that petitioner has failed to establish that Amer's statements restrained or coerced employees in the exercise of rights granted under the statute. Although petitioner charged that Amer in-cited mass resignations by suggesting that if employees did not like the conditions at the Bronx office they could leave, in fact, no employee resigned as a result of Amer's statements. Moreover, the City arques, the statements complained of in the petition were merely an expression of the opinion of the Chief Clerk as to what she could do and what the union could do to improve working conditions.

Based upon the above, respondent concludes that the record evidence is insufficient to support a finding of improper practice and the petition therefore should be dismissed.

Discussion

Although there are discrepancies in the testimony concerning the actual words or phrases used by Chief Clerk Amer in the statements which form the basis for the improper practice charge in this matter, the differences are not significant. It is undisputed that, at a meeting at the Bronx borough office of the Board of Elections on January 29, 1987, Ms. Amer used words to the effect that (1) the union could not do more than she had done (to improve working conditions), and (2) if the employees did not like it, they could leave - there's the door. CWA alleges that these remarks violated its members' rights under the NYCCBL because they were designed to discourage employees from seeking the assistance of the union.

Although the petition does not specify which subsections of the statute are deemed to be violated NYCCBL Section 12-306a, formerly Section 1173-4.2a, is quoted at note 1 supra), the facts alleged in the petition, on their face, do not relate to employer domination or interference with the administration of the union,

discrimination on account of union activity or a refusal to bargain collectively. Therefore, we shall consider only whether the allegations of the petition state a violation of Section 12-306a(l) (formerly Section 1173- 4.2a(l)), which makes it an improper practice for a public employer "to interfere with, restrain or coerce public employees in the exercise of their rights granted in [Section 12-305 (formerly Section 1173-4.1)] of this chapter."[4]

In Elmont Union Free School District,[5] an administrative law judge of the State Public Employment Relations Board ("PERB") found that the school district interfered with protected rights of school principals,

[4] Section 12-305 (formerly Section 1173-4.1) of the NYCCBL provides, in relevant part:

> Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[5] 19 PERB ¶14558 (ALJ 1986).

when the superintendent of schools reproved principals for their statements at a school board meeting criticizing the performance of two central office administrators. The ALJ found that the principals who attended the board meeting were there as members of the union or of the bargaining unit and that the issues addressed related to terms and conditions of employment. From this, he concluded that their conduct was protected by the Taylor Law. The judge went on to find that, while the superintendent had a right to express his opinion as to the principals' conduct, it was unlawful to do so in circumstances which were coercive.[6] Although there was no evidence of anti-union animus, the ALJ concluded that the superintendent's conduct violated Section 209-a.l(a) of the Law.

As contrasted with the situation in Elmont, in the present case, we find that the Chief Clerk's statements regarding the ability of the union to improve working conditions in the office amount to no more than an expression of her opinion as to the relative abilities

[6] The superintendent had excused all persons not involved in the expression of criticism from the room, leaving the principals and the two administrators and, to this "captive audience," stated that "speaking against the Central Office Administrators was a terrible thing." 19 PERB at p. 4622.

of herself, who has direct access to the landlord, cleaning service, etc. and of the union which has no such access or responsibility, to remedy the many environmental problems which existed at the Board. While petitioner's members, attending a staff meeting at which they were invited to air their concerns about working conditions, were engaged in protected activity, neither the context in which the offending statements were made, nor their juxtaposition, with other remarks made in that context rendered the statements coercive.[7]

It appears that Amer, who had been Chief Clerk for only seven or eight months at the time of the incidents complained of, had made extraordinary efforts to upgrade the physical plant at the Bronx borough office and, in fact, had succeeded in improving some of the conditions there. Her statements must be considered in the context of these extraordinary efforts[8] and her apparent

[7] In Butler Shoes New York Inc., 111 LRRM 1225 (1982), the NLRB held that the employer did not violate the LMRA by a series of speeches made to its employees since the statements were nothing more than an expression of opinion on the relative merits of unionization and its rejection. See cases cited therein at p. 1226.

[8] We note that there is no allegation that Amer acted unilaterally with respect to matters that the City was obligated to negotiate with the union, nor is there any allegation that a demand to negotiate was made by the union.

frustration at being unable to do more (e.g., "I can't make a Cadillac out of a Ford") (Tr. 57). From the record testimony emerges a picture of a conscientious and frustrated manager whose statements that the union could do no more than she had done, and if the employees did not like it they could leave, properly should be viewed as a defensive, if impolitic response to persistent employee dissatisfaction with conditions at the Board of Elections. Petitioner alleges that Amer was "angry", "upset" and "in a vexed state" when she uttered the of fending statements. Rather than supporting petitioner's claim of improper practice, however, in our view, these allegations provide a credible alternative explanation for the tone of Amer's remarks. Amer undoubtedly was "angry" and "upset". However, only an unreasonably literal interpretation would support the conclusion that she intended to incite mass resignations, as CWA suggests. While Amer's choice of words and the tenor of her speech in addressing her employees may have been inappropriate, even rude, her statements did not disparage or denigrate the union and, we conclude, do not support a finding of anti-union animus.[9]

[9] Cf. Town of Hempstead, 18 PERB ¶4642 at p. 4838 (1985) (obscenities and lack of concern for union official's feelings do not demonstrate animus).

Furthermore, petitioner has failed to allege any facts which would establish that Amer's statements actually interfered with, restrained or coerced employees in the exercise of their right to seek assistance from the union. It appears that employees at the Bronx borough office have regular access to their union for the purpose of discussing working conditions; for example, Local President Wagner indicated that he regularly goes to that office for lunchtime meetings with his members (Tr. 33). Moreover, Wagner testified that it is his "habit" on such occasions to go to the fifth floor to say hello to the Chief Clerk and her deputy before the union meeting (id.). Thus, it is evident that Ms. Amer is aware of the regular contact between her employees and their union, has done nothing to prevent it and, in fact, maintains a cordial relationship with the local president. Additionally, Amer testified without contradiction that on the very day of the meeting in question, she (a) advised Nilda Rodriguez to hurry down to the union meeting that was in progress when Rodriguez arrived late, and (b) suggested, during the morning meeting dealing with the impending computerization project, that employees jot down their concerns so that they might speak to Wagner about them at the union

meeting scheduled later in the day. If anything, it should be noted, this conduct encourages employees to seek the assistance of their union.

We also note that petitioner called two of Ms. Amer's staff members as its witnesses, one of whom is also a union delegate, but neither of them gave any indication that they would be apprehensive about contacting the union in the future. Nor does it otherwise appear that Amer's remarks were accompanied by threats of reprisal. Additionally, respondent established that, in fact, there were no resignations as a result of Amer's statements at the January 29th meeting.

Based upon all of the evidence, including the lack of animus or hostility in the relationship between the principals in this matter; the non-coercive circumstances in which the offending remarks were made; and the union's failure to offer any facts which would tend to support its allegation of interference, restraint and coercion, it appears to us that an innocent interpretation is consistent with the words used by Ms. Amer, while a threat is found only by a strained interpretation. Accordingly, we find that the petition fails to state a claim of improper practice and it shall be dismissed in its entirety.

0 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 by the Communications Workers of America on behalf of its Local 1183 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
January 28, 1988

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