Esposito v. L.237, CEU, et. al, 41 OCB 3 (BCB 1988) [Decision No. B-3-88 (IP)]

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

ALFRED ESPOSITO,

Petitioner, DECISION NO. B-3-88

-and-

DOCKET NO. BCB-964-87

WOODHULL MEDICAL AND MENTAL HEALTH CENTER and LOCAL 237, TEAMSTERS, C.E.U.,

Respondents.
- x

DECISION AND ORDER

Petitioner Alfred Esposito filed a verified improper practice petition on June 2, 1987, in which he charged both Woodhull Medical and Mental Health Center (hereinafter "Woodhull") and Local 237, Teamsters C.E.U.[1] (herein after "Local 237" or "the Union") with committing improper labor practices in violation of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). Local 237 submitted a verified answer on June 23, 1987, and Woodhull submitted a verified answer and motion to dismiss on June 29, 1987. The petitioner did not submit a reply to the respondents' pleadings.

[1] The respondent Union's correct name is City Employees Union, Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

Background

The petitioner is an employee of respondent Woodhull, which is a division of the New York City Health and Hospitals Corporation (hereinafter "HHC"). Petitioner serves in the civil service title of Hospital Security Officer and has the institutional title of Captain, Hospital Police. Petitioner's titles are in a collective bargaining unit for which respondent Local 237 is the certified exclusive representative.[2]

The petitioner states that be has been active in trying to organize another organization, "P.O.B.A.", to become the bargaining representative of the security officers of HHC. In January, 1987, certain agents of Local 237 complained to Woodhull management that the petitioner was attempting to organize on behalf of P.O.B.A. during company time, in violation of HHC policy. Following a meeting between Local 237 representatives and HHC central office management concerning, inter alia, the complaints about the petitioner's alleged activities, the matter was investigated by Woodhull's labor relations staff, resulting in the filing of disciplinary charges against petitioner on February 11, 1987. At the same time,

[2] Board of Certification Decision No.67-78.

disciplinary charges also were filed against another Woodhull employee, Senior Special Officer (Sergeant) Ralph Coppin. The charges against each provided:

> "That during December 1986 and January 1987 during your tour of duty, you engaged in union organizing in violation of HHC Policy."

An informal disciplinary conference (Step 1A) was convened in petitioner's case on February 25, 1987. The petitioner was afforded the right to confront and cross-examine witnesses, to offer evidence, and to provide a defense to the charges against him. The petitioner declined Local 237's offer to represent him in connection with the charges. The informal disciplinary conference (Step 1A) in Sgt. Coppin's case, although scheduled for the same day as the petitioner's, was adjourned at Sgt. Coppin's request and was concluded on April 9, 1987.

On April 23, 1987, the Labor Relations Officer who conducted the conferences in both cases issued a separate Report and Recommendation in each case. He found that the petitioner was guilty of the charged offense, and recommended a penalty of suspension for five days without pay. He advised the petitioner of his right to elect to:

> "a) accept the informal conference recommendation; or
>
> b) proceed with an appeal pursuant to the Contractual Grievance Procedure; or

c) exercise your right for a hearing in accordance with Rule 7:5 of the Health & Hospitals Corporation's Personnel Rules & Regulations."

Woodhull concedes that the Report and Recommendation in petitioner's case was not issued within five days of the conference, as required by the collective bargaining agreement. It alleges that since the facts and issues in petitioner's case were similar to those to be heard in Sgt. Coppin's case, the hearing officer deemed it appropriate to delay issuing petitioner's decision until Sgt. Coppin's case was concluded.

In the absence of petitioner's acceptance of the recommended penalty, no penalty will be imposed until after a determination is rendered following a formal bearing pursuant to Rule 7.5 of HHC's Personnel Rules and Regulations. Consequently, petitioner has not served any part of the recommended penalty.

The Woodhull policy which petitioner and Sgt. Coppin are alleged to have violated provides, in pertinent part, as follows:

"B. Organizational Activity by Corporation Employees

No employee may discuss union organization or solicit membership from other employees if they are on working time or in a patient care area. Employees may discuss a union

campaign and solicit membership during non-working time and in non-patient care areas, but not if the activity disrupts patient care or the normal operations of the hospital."

Positions of the Parties

Petitioner's Position

The petitioner asserts that he has been harassed by Woodhull and Local 237 for engaging in protected union activity. He alleges that this harassment has taken the form of the reporting of complaints against petitioner by Local 237 and the filing of disciplinary charges by Woodhull. Additionally, petitioner alleges that a Union shop steward was overheard telling two Special Officers who were to be called as witnesses by management at the disciplinary conference that they must testify or lose their jobs. The petitioner states that this evidence "suggests" that the witnesses were coerced into testifying against the petitioner.

Furthermore, petitioner submits that Woodhull's actions were violative of BBC procedures because be was not given a counseling and/or warning session prior to disciplinary action being taken. He also complains that he did not receive the findings of the Step 1A bearing officer within the time limits prescribed by HHC procedures.

Finally, petitioner alleges that be has been harassed by being passed over for promotion to the position of Associate Director of Security. He notes that although be is a Captain in Woodhull's security force, be was not even interviewed for the aforementioned position.

As a remedy for the alleged improper practices committed by Woodhull and Local 237, petitioner requests that a new disciplinary bearing be ordered, and that he be paid any damages he may have sustained as a result of the recommended penalty of a five day suspension.

Woodhull's Position

Woodhull alleges that while the petitioner implies that be is an active member of P.O.B.A., be has not alleged any facts showing that P.O.B.A. authorized or even was aware of his actions. Moreover, Woodhull notes that at the disciplinary conference, the petitioner claimed that he was not engaged in the organizing of P.O.B.A. or of soliciting members for that organization at the times in question. Therefore, Woodhull submits that it could not have interfered with, restrained or coerced the petitioner in connection with his participation in any protected activity.

Furthermore, Woodhull asserts that petitioner has failed to demonstrate any nexus between the acts

complained of and any protected union-related activity. He has failed to state facts which would establish that Woodhull or HHC harbored anti-union animus or favored one union over another. Woodhull argues that were conclusory allegations of improper motive are insufficient to state a prima facie case of improper practice.

Woodhull points out that the disciplinary charges of which the petitioner complains only have been considered at an informal disciplinary conference (Step 1A) and can be reviewed at a formal hearing pursuant to HHC Rule 7.5 or through a grievance under the collective bargaining agreement. Woodhull contends that these procedures provide an adequate appeals mechanism to protect the petitioner's rights.

Concerning petitioner's claim that he should have been given a counseling and/or warning session prior to the preferring of charges, Woodbull alleges that HHC's Operating Procedure 20-10 grants management the discretion to bypass counseling and/or warnings where it considers the conduct in question to be of a more serious nature. in any event, submits Woodhull, any alleged violation of HHC’s Operating Procedures is a matter which should be addressed either in a Rule 7.5 disciplinary bearing or through a grievance under the collective

bargaining agreement. Such an alleged violation would not constitute an improper practice.

For the above reason, Woodhull requests that the petition be dismissed as a matter of law without any further proceedings.

Local 237's Position

Local 237 alleges that it was obligated to inform Woodhull of complaints made by its members against petitioner concerning his alleged violation of hospital policy regarding union organizing on company time. Local 237 contends that its actions in relaying such complaints cannot constitute an improper practice.

Local 237 also denies that it had any responsibility for or control over Woodhull's actions regarding the disciplinary conference held, the penalty to be imposed, any promotional decisions to be made. Local 237 notes that it lacks the power to remove any employee of Woodhull from his or her job.

Local 237 further denies that it presented witnesses against petitioner at any hearing. The witnesses appearing at the Step 1A disciplinary conference were called by Woodhull management, not Local 237.

Local 237 alleges that at the Step 1A disciplinary conference held on February 25, 1987, it offered to

represent the petitioner and he declined said offer. After that date, petitioner did not request that Local 237 take any actions or file any grievances on his behalf. Therefore, Local 237 asserts that as a consequence of the petitioner's refusal to permit the Union to represent him, the Union was discharged and owed no further duty to the petitioner.

For these reasons, Local 237 submits that the petition fails to state a cause of action against the Union and should be dismissed.

Discussion

A. Charges Against Woodhull

The petitioner's improper practice charges against Woodhull concern the filing of disciplinary charges against him, the delay in issuing the bearing officer's Report and Recommendation following the informal disciplinary conference, and the fact that he was passed over for a promotion. The petitioner argues that Woodhull's actions in these areas were intended to harass and discriminate against him for engaging in protected activity, i.e., his activity in trying to organize a different labor organization (P.O.B.A.) to become the bargaining representative of Woodhull's security officers. Such harassment

and discrimination, if proven, would constitute violations of Section 12-306a(l) and (3)[3] of the NYCCBL.

Where violations of Section 12-306a(l) and (3) have been alleged, this Board has applied the test set forth by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985). Thus, in cases involving a claim of improperly motivated management action, the petitioner is required to make a prima facie showing that (1) the employer's agent responsible for the challenged action had knowledge of the employee's union activity, and (2) the employee's union activity was a motivating factor in the employer's decision. Once the petitioner has carried this burden, then the burden of persuasion shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct.[4]

Applying this test to the instant matter, we conclude that petitioner has failed to state a prima facie case of improper practice against Woodhull. While it appears that Woodhull was aware of petitioner's activity on behalf of P.O.B.A.,[5] there is no evidence that his organizational activity, to the extent it may have been protected under

[3] Formerly numbered as §1173-4.2a(l) and (3).

[4] Decision Nos. B-58-87; B-51-87.

[5] The hearing officer at the Step 1A disciplinary conference took notice in his Report and Recommendation that petitioner is a Vice President of P.O.B.A.

the NYCCBL, vas a motivating factor in the employer's decision to file disciplinary charges. Not all union organizational activity is protected under the law. It is well established that an employer may adopt and enforce a no-solicitation rule which is limited to working time and places of work, without committing an improper practice.[6] The rule promulgated by Woodhull, the alleged violation of which formed the predicate for the disciplinary charges filed against petitioner, is so limited.[7] It expressly recognizes that employees may discuss a union campaign and solicit membership, but only during non-working time and in non-patient care areas.

We find that union organizational activity in alleged violation of Woodhull's no-solicitation rule is not protected conduct under the NYCCBL. There is no allegation that this rule has been applied in a discriminatory manner, or that it was adopted for the purpose of discriminating against petitioner. To the contrary, the record shows that this rule was promulgated on April 23, 1984, several years before the commencement of P.O.B.A.'s organizing

[6] See, City of Albany v. Albany Professional Permanent-Firefighters Ass'n, 3 PERB ¶4507 (1970), aff'd 3 PERB ¶3096 (1970).

[7] The pertinent text of Woodhull's no-solicitation policy is set forth on pages 4-5 supra.

campaign. Despite the petition's conclusory allegation that the disciplinary charges were intended as harassment by Woodhull, the petition fails to allege facts tending to show that the filing of the charges was motivated by anything other than Woodhull's intention to deal with an alleged violation of its lawful rules.

We note, in this regard, that petitioner's denial that he violated the no-solicitation rule is a matter which can be addressed either in a formal disciplinary hearing pursuant to Rule 7.5 of HHC's Personnel Rules and Regulations, or through the contractual grievance procedure, which may culminate in arbitration. In the absence of proof of improper motivation, the merits of the disciplinary charges are not before this Board for determination.

Petitioner further complains that the filing of charges without first conducting a counseling and/or warning session, and the delay in rendering the Report and Recommendation following the disciplinary conference, were violative of BBC procedures. We find that the assertion that these alleged violations were intended as harassment for petitioner's union activity is equally conclusory and without factual evidence of such motivation. Woodhull's explanation that, under its procedures, it has the discretion to by-pass counseling and/or warning if it considers

an offense to be serious, is not implausible. Its concession that it exceeded the time limit for rendering the Report and Recommendation is coupled with its explanation that it wanted to hold the determination in petitioner's case until the similar case of Sgt. Coppin was concluded, a not-unreasonable desire under the circumstances.

However, the questions of whether Woodbull's actions were violative of HHC procedures, whether there was justification for any such violations, and, if not, what the remedy should be, are matters properly addressed through the grievance and arbitration procedures of the parties' collective bargaining agreement. Alleged violations of written agency policy are grievable under the agreement. Pursuant to the limitation contained in Section 205.5(d) of the Taylor Law,[8] which is applicable to this Board pursuant to Section 212 of that law, we are without jurisdiction to consider claims of contract violation which do not otherwise independently constitute improper practices. No such independent basis is established by the record herein. Accordingly, we find that the petitioner's claims of violation of HHC procedures do not constitute improper practices.

[8]Civil Service Law, Article 14.

Finally, petitioner asserts that Woodhull's failure to promote him to the position of Associate Director of Security constitutes another instance of harassment and discrimination. We take administrative notice that this position is not part of the Special Officer occupational group,[9] which includes the petitioner's title of Hospital Security Officer, and is not in a direct line of promotion therefrom. This position is classified by HHC as a managerial title,[10] and need not be filled by an individual promoted from within the Special Officer occupational group. Based upon these facts, we are unable to conclude that petitioner had any entitlement to or even any reasonable expectation of obtaining that position. In light of Woodhull management's considerable discretion in filling the position of Associate Director of Security, and the bare, conclusory allegation of improper motivation in passing over petitioner for that position, we bold that the petitioner has failed to make a prima facie showing of improper practice.

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[9] This group of titles, all of which are contained within the bargaining unit for which Local 237 is the certified representative, consists of:

Special Officer
Senior Special Officer
Supervising Special Officer
Hospital Security Officer

[10] The Board of Certification, which has sole authority to declare a title managerial for collective bargaining purposes, has not been requested to rule on the status of this position.

B. Charges Against Local 237

The petitioner's charges against Local 237 concern the Union's actions in complaining to Woodhull and HHC management about the petitioner's activities, and the conduct of a Local 237 shop steward, Echeverria, in allegedly telling two Special Officers who were to be called as witnesses by management at the disciplinary conference that they must testify or lose their jobs.

Local 237's complaints to management involved accusations that the petitioner was engaged in union organizing during company time. While the petitioner denies the validity of these accusations, be does not allege any facts tending to show that the Union bad any improper motivation in making the complaints. In our view, if Local 237 believed, rightly or wrongly, that petitioner was violating Woodhull's legitimate no-solicitation rule, then it had a right to bring the alleged violation to the attention of management. There is no evidence that the Union was motivated by any consideration other than its observation that the petitioner appeared to be doing what it could not.

Moreover, Local 237's complaints had no effect on the petitioner's exercise of protected rights. It was Woodhull's management which decided, after an independent investigation, to bring charges against petitioner. Management's exercise of its independent judgment thus

insulated Local 237 from any disciplinary action taken against petitioner. Local 237 was without power to bring disciplinary charges or impose any penalty. These clearly are matters of management prerogative for which Local 237 cannot be held responsible.

With regard to the Local 237 shop steward's statement to prospective witnesses, we observe that the shop steward's alleged remarks appear to be an accurate statement of the law. The courts have held that a public employee may be compelled to answer job-related questions, provided be or she is not required to waive immunity from use of the answers in a subsequent criminal proceeding.[11] An employee who refuses to answer such questions is subject to disciplinary action, including termination of employment. Therefore, the shop steward's statement to two employees called by management to testify at a disciplinary conference concerning incidents which allegedly occurred during their tours of duty, to the effect that they "... must testify or lose their jobs," was perhaps overboard but was not substantially incorrect. Additionally, we find it significant that while the petitioner alleges that the witnesses were told that they "must testify", he does not allege that the shop steward or anyone else told the witnesses what the content of their testimony sbould be. Under these

[11] Uniformed Sanitation Men v. Commissioner of Sanitation, 426 F. 2d 619 (2d Cir. 1970), cert. denied 406 U.S. 961; Shales v. Leach, 119 A.D. 2d 990, 500 N.Y.S. 2d 890 (4th Dept. 1986).

circumstances, assuming arguendo that the shop steward made the statement alleged by petitioner (a fact which the Union denies), we do not believe his actions were improper or had any adverse affect on the petitioner's rights under the NYCCBL.

We further observe that Local 237 offered to represent the petitioner in defending against the disciplinary charges filed by Woodhull. The petitioner declined the Union's offer. The petitioner does not suggest that the Union breached its duty to fair representation in this matter.

For all of the above reasons, we bold that the petition fails to state a prima facie claim of improper practice against Local 237.

ORDER

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 of Alfred Esposito be, and the same hereby is, dismissed.

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

MALCOLM D. MacDONALD
CHAIRMAN

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MEMBER

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MEMBER

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CAROLYN GENTILE
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