

L.1180, CWA v. Dep't of Finance, 43 OCB 17 (BCB 1989) [Decision No. B-17-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - X

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1180,

DECISION NO. B-17-89

DOCKET NO. BCB-947-87

Petitioners,

-and-

NEW YORK CITY DEPARTMENT OF FINANCE

Respondents.

- - - - - X

DECISION AND ORDER

On April 9, 1987, the Communications Workers of America, Local 1180 ("CWA" or "the Union") filed an improper practice petition on behalf of its member, Martin Kovzelove, charging that the New York City Department of Finance ("the Department" or "the City") had committed an improper practice in violation of Sections 1173-4.2a(1) and 1173-4.2a(3)¹ of the New York City Collective Bargaining Law ("NYCCBL"). The Department, through its representative, the Office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss on May 11, 1987. The Union submitted an answering affidavit on June 22, 1987. A reply was submitted by OMLR on July 31, 1987.

In a letter filed on August 10, 1987, OMLR requested that it be permitted to withdraw its motion to dismiss and that it be given an opportunity to submit an answer to the petition. These requests were granted by the Trial Examiner

¹Recodified as §12-306a(1) and §12-306a(3) of the NYCCBL.

in a letter dated August 11, 1987. Thereafter, an answer on behalf of the Department was filed by OMLR on August 21, 1987. The Union did not submit a reply.

Hearings were held before a Trial Examiner designated by the Office of Collective Bargaining on October 16 and December 2, 1987. After several extensions of time requested by OMLR, with the consent of the Union, the parties submitted post-hearing briefs in February, 1988.

Background

Martin Kovzelove was hired by the Department in May of 1986 as a provisional Computer Associate (Technical Support). Kovzelove had learned of the position through a newspaper advertisement placed by the Department. Kovzelove claimed that the work he was assigned by the Department was not of the type described in the advertisement. His prior experience in private industry was in technical support positions and he believed that he had been hired to perform such work for the Department. Kovzelove experienced difficulty with a number of work assignments because, according to him, they were basically clerical and not technical in nature and were not, therefore, compatible with his experience.

Kovzelove alleges that he spoke to several supervisors and management representatives, seeking reassignment to technical duties of the type described in the advertisement. In this regard, he alleges that during the summer of 1986,

he told his supervisor that his job duties were "lower" than the skills for which he was hired, and he asked for more responsible work. Nevertheless, although several changes in his assignment were made by management, Kovzelove continued to be dissatisfied. Additionally, management was concerned over Kovzelove's apparent inability to perform assigned tasks in a satisfactory manner. In October, 1986, the then Acting Director of Data Center operations, Rudy Wilson, met with Kovzelove and two of his supervisors, Annette Nelson and Julia McCaw, to discuss Kovzelove's work performance. Wilson said that they should meet again in 45 days to review Kovzelove's performance. However, before 45 days passed, Wilson was succeeded as Director by Robert Belajonas.

In November, 1986, Kovzelove contacted CWA shop steward Al Crowley and requested representation concerning his performance of what he considered to be out-of-title work. On November 18, 1986, Crowley, alternate shop steward Elaine McNeil, and Kovzelove met with the newly-appointed Director of Data Center Operations, Robert Belajonas. The parties dispute several aspects of what occurred at this meeting. The Union contends that Crowley informed Belajonas that he was there to represent Kovzelove in connection with the latter's out-of-title work claim, and that that matter was the sole topic of discussion. However, Belajonas asserts that the Union representatives further informed him that Kovzelove's employment was scheduled to be terminated on

December 2, and asked what he was "... going to do about it." The Union denies that any termination was scheduled or that there was any discussion of Kovzelove being discharged.

Both parties agree that there was, at some point, a discussion of the Department's news paper advertisement, but they offer differing versions of the content of that discussion. The Union witnesses all testified that Belajonas stated that the advertisement was "ambiguous" and should not have been run because the Department did not have a "line" with duties like those described in the advertisement, and might not have such a "line" even in the next year due to budgetary reasons. Belajonas, on the other hand, testified that the advertisement was "colorfully", "overzealously" written, but that when analyzed "line for line", it was consistent with Kovzelove's assigned duties.

Both parties agree that the November 18 meeting was concluded when Belajonas asked for more time to look into the matter because he only recently had assumed the duties of his position. The Union alleges that after the meeting was over, shop steward McNeil filled out a Step 1 out-of-title work grievance which was given to Julia McCaw, Kovzelove's immediate supervisor. Also following the meeting, Belajonas asked another of Kovzelove's supervisors, Annette Nelson, to prepare a report outlining assignments Kovzelove had been given.

A second meeting on the out-of-title work grievance took place sometime subsequent to the filing of a Step 2 grievance on December 2, 1986. At this meeting, Crowley asked McCaw and Belajonas why they had not responded to the Step 1 grievance. Crowley alleges that both answered that they didn't know that they had to submit a response. Commenting upon their answers, Crowley said:

"Someone writes up a grievance and you don't know what you were supposed to do ...? What kind of supervisor or manager are you?"

The Union contends that at this point in the meeting, Belajonas changed the subject "abruptly" and announced that Kovzelove was being terminated. In contrast, Belajonas recalled meeting with Kovzelove and the Union representatives about this time, but his recollection was that the purpose of the meeting was to inform Kovzelove of efforts Belajonas had made to find another position which would better utilize his skills. Belajonas testified further that he asked the Union to help Kovzelove look for other employment and that the Union declined, stating that it was not their responsibility to find employment for people. Belajonas stated that he detected a "mismatch" between what Kovzelove perceived as the job and what the job actually involved. Belajonas said that inasmuch as the holidays were approaching, he decided not to terminate Kovzelove before Christmas.

On December 22, 1986, Kovzelove and CWA grievance

representative Paul Donnelly met with Myles Driscoll, the Department's Director of Labor Relations, concerning the Step 2 out-of-title work grievance. The parties agree that Driscoll said that he would call Belajonas to see whether there was other work available which Kovzelove would be better able or "more inclined" to perform. Driscoll later contacted Donnelly and informed him that Belajonas believed that the type of work Kovzelove wanted to do was available on the night shift.

However, Kovzelove testified that when he told Belajonas that he would accept the offer to work on the night shift, Belajonas told him that there was not going to be a night shift for him or anyone else. Kovzelove further asserted that Belajonas said to him,

"If this grievance continues, you're only fucking yourself and the Union would be fucking you."

Kovzelove called Donnelly to inform him of what had happened. Donnelly called Driscoll, who testified that he was surprised to learn that the offer of night shift work did not exist. Driscoll suggested that they all meet with Belajonas to try to work out the matter.

Meanwhile, during the first week in January, 1987, Belajonas requested Annette Nelson to prepare an updated report on Kovzelove's job performance. He stated that he wanted to know whether or not Kovzelove's performance had improved.

On January 16, 1987, Driscoll, Belajonas, Donnelly, and Kovzelove met, as had been suggested by Driscoll, to discuss Kovzelove's work assignment and the possibility of his reassignment to a night shift. At this meeting, Belajonas stated for the first time that he was proposing to put the entire unit on a 12-hour shift. Donnelly became angry over what he perceived to be a unilateral change in hours of employment, in violation of the applicable contract, and the meeting broke up without there being any resolution of Kovzelove's situation.²

Annette Nelson submitted a memorandum to Belajonas, dated January 28, 1987, in which she reviewed Kovzelove's performance, found it to be inadequate, and recommended that his employment be terminated. That same date, Belajonas informed Kovzelove that he would be terminated, but that he could stay on payroll until February 13, 1987 in order to have an opportunity to look for another job. In fact, Kovzelove's employment was terminated as of February 13. An intra-agency memorandum implementing this action stated that Kovzelove,

"... is being dismissed due to unsatisfactory work performance as evaluated by his supervisors."

²At the request of the Union, a subsequent meeting was held on February 23, 1987 in the office of the First Deputy Director of OMLR, as a result of which the Department was instructed to negotiate with the Union over the proposed institution of 12-hour shifts. Neither the offer to assign Kovzelove to a night shift nor his out-of-title grievance were considered at this meeting.

Positions of the Parties

Union Position

The Union contends that Belajonas' decision to discharge Kovzelove was a reaction to shop steward Crowley's challenge to the manner in which he was handling Kovzelove's out-of-title work grievance. It argues that Belajonas raised the issue of Kovzelove's termination only after Crowley accused him of being a poor manager for failing to respond to the Step 1 grievance and at a time when neither of Kovzelove's supervisors (Nelson and McCaw) had recommended that he be discharged.

The Union further alleges that Belajonas' offer, made to Driscoll, to reassign Kovzelove to the night shift, and his repudiation of the offer when Kovzelove attempted to accept it, served to undermine the grievance procedure. Moreover, the Union contends, not only did Belajonas tell Kovzelove that he would not be assigned to the night shift where, allegedly, more appropriate work was available, but he told him, in plain language, that if he continued to pursue his grievance, the Union would hurt him and he would be hurting himself. The Union submits that implicit in Belajonas' statement is a threat that if Kovzelove pursued the grievance, Belajonas also would hurt him.

Finally, the Union notes that while not the basis for the improper practice charge herein, Belajonas' proposal unilaterally to reschedule an entire unit of employees to a

12-hour shift, in violation of the collective bargaining agreement and without negotiating with the Union, provides additional evidence of his "... unremitting dislike of and disregard for Union rights."

The Union asserts that Belajonas knew of Kovzelove's union activity, discriminated against him because of his use of the grievance procedure, and discharged him in violation of the NYCCBL. The Union requests that the Board direct the Department to restore Kovzelove to the payroll with back pay and order the Department to give him the chance to perform the technical work which he had been promised.

City Position

The City contends that the record establishes that, regardless of Kovzelove's filing of an out-of-title work grievance, the sole factor in Belajonas' decision to terminate his employment was his unsatisfactory work performance. The City asserts that the unrefuted testimony of Kovzelove's supervisors, Annette Nelson and Julia McCaw, demonstrates that Kovzelove absolutely could not perform the duties assigned to him. Both testified that his work performance was unsatisfactory throughout the period of his employment in the Department. Kovzelove, himself, failed to testify that he adequately performed his duties. The City submits that the only conclusion which reasonably can be drawn from the record is that Kovzelove lost his job because

of his poor performance.

Furthermore, the City contends that the record is devoid of evidence that the filing of the out-of-title claim was a motivating factor in Belajonas' decision to discharge Kovzelove. To the contrary, the City argues, the record shows that Belajonas acted with compassion to postpone Kovzelove's termination and to try to find another position in which he could function more effectively. The City alleges that the Union refused to assist in locating another position and, in fact, was impeding the resolution of Kovzelove's problems.

The City points out that Kovzelove knew, at least from the time of his meeting with Acting Director Wilson in October, 1986, that management was dissatisfied with his work and that his performance was being monitored. Kovzelove also knew from this meeting that his supervisors were scheduled to meet again with Wilson in 45 days to review his job performance. The City submits that when Kovzelove filed an out-of-title grievance on November 18, 1986, he did so in an effort to retain his job by alleging that he was performing out-of-title work and that this was the reason why his performance was so poor. The City observes, in this regard, that all of the employees who tried, in vain, to train Kovzelove to perform work in their respective areas held titles which were the same as or lower than Kovzelove's. The City asserts that Kovzelove must have

known that it was likely that his services would be terminated well before the time that he filed his grievance.

Finally, the City alleges that the sole reason the Union filed the improper practice charge herein was because Kovzelove, as a provisional employee, had no other forum for obtaining review of his discharge. The City submits that since the Union has failed to show that the filing of the grievance was a motivating factor in Kovzelove's discharge and since the Department has established that the only motivating factor was Kovzelove's poor work performance, the improper practice petition should be dismissed.

Discussion

The petition alleges that the Department's action in terminating the employment of Martin Kovzelove was violative of Sections 1173-4.2a(1) and 1173-4.2a(3) of the NYCCBL³. In cases in which such a violation is alleged, we have applied the test adopted by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985), which, we have noted, is substantially the same as that set forth by the National Labor Relations Board ("NLRB") in its 1980 Wright Line decision⁴ and endorsed by the United States Supreme Court in National Labor Relations Board v.

³Recodified as §12-306a(1) and §12-306a(3).

⁴Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169, enforced, 662 F. 2d 899, 108 LRRM 2513 (1st Cir. 1981), cert., denied, 455 U.S. 989, 109 LRRM 2779 (1982).

Transportation Management Corporation.⁵ This test provides that in such cases, the petitioner has the burden of showing that:

1. the employer's agent responsible for the alleged discriminatory 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

If the petitioner succeeds in establishing the above, the burden will shift to the employer to show that the same action would have been taken even in the absence of the protected conduct. Stated another way, if the petitioner satisfies both parts of this test, it will have made a

"...prima facie case of improper motivation, [and] the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons."⁶

In the present case the management representative, Belajonas, clearly was aware that Kovzelove had filed and was pursuing an out-of-title work grievance, with the assistance of the Union. Belajonas participated in several meetings at which the grievance was discussed, and he was chastised by the Union shop steward, Crowley, for not

⁵103 S. Ct. 2469, 113 LRRM 2857 (1983). This test first was adopted by us in Decision No. B-51-87 and has been employed consistently since then. See, e.g., Decision Nos. B-8-89; B-7-89; B-1-89; B-46-88; B-12-88.

⁶City of Salamanca, 18 PERB ¶3012 at 3027 (1985); Decision No. B-7-89.

issuing a response to the grievance after its initial submission. Therefore, there can be no doubt that the first element of the above test has been satisfied.

Proof of the second element of the test is more difficult to adduce. Examination of whether an employee's union activity was a motivating factor in an employer's decision to act requires that we try to ascertain the employer's state of mind when the challenged decision was made. In the absence of an outright admission of improper motive, proof of this element necessarily must be circumstantial. Based upon our review of the record herein, we are convinced that the Union has met its burden of showing that Kovzelove's pursuit of his out-of-title grievance, and the Union's support thereof, were motivating factors in Belajonas' decision to terminate Kovzelove's employment.

The record shows that Belajonas was both defensive and evasive in dealing with the Union in connection with Kovzelove's grievance. His claim that the purpose of the November 18, 1986 meeting was to discuss Kovzelove's scheduled termination is contrary to the testimony of the other persons present at that meeting and is unsupported by any documentation which would tend to show that any such action was scheduled or even contemplated. Further, we credit the testimony of the Union witnesses that in the midst of a discussion of the out-of-title grievance on

December 2, 1986, Belajonas abruptly changed the subject after being criticized by Crowley, and announced that Kovzelove was being terminated. We find this to be illustrative of his apparent unwillingness to deal with the Union concerning this matter. At a later step of the grievance procedure, Belajonas informed Driscoll, the Department's Director of Labor Relations, that the type of work Kovzelove desired to do was available on the night shift, but almost immediately thereafter, he informed Kovzelove that the night shift work did not exist. Even Driscoll testified that he was surprised at Belajonas' change of position.

Kovzelove testified that after telling him that he would not be assigned to the night shift, Belajonas said to him,

"If this grievance continues, you're only fucking yourself and the Union would be fucking you."

In his own testimony, which occurred after Kovzelove's, Belajonas did not deny the truth or accuracy of the above statement attributed to him.

A subsequent meeting to discuss the grievance, on January 16, 1987, was disrupted when Belajonas again changed the subject and raised the new issue of a proposed unilateral institution of 12-hour shifts for unit employees. The Union walked out of this meeting, and the out-of-title grievance never was resolved. Kovzelove was informed by

Belajonas on January 28, 1987 that his employment would be terminated, effective February 13, 1987.

In light of all these circumstances, we find that the Union has made a prima facie showing that Kovzelove's union activity was a motivating factor in Belajonas' decision to discharge him. The unrefuted fact that Belajonas made the statement quoted above is especially supportive of the Union's contention. Accordingly, we find that the Union has satisfied its burden under the City of Salamanca test and that the burden of persuasion has shifted to the Department to establish that its action in terminating Kovzelove was motivated by legitimate business reasons and would have been taken even in the absence of the protected union activity.

The testimony and documentary evidence shows that Kovzelove's immediate supervisors, as well as those of his coworkers assigned to train him, were dissatisfied with his work performance from the time he was hired in May, 1986. Annette Nelson and Julia McCaw testified credibly that Kovzelove's work was submitted late, contained errors and omissions, required many corrections, and often had to be re-done. They stated that he required very close supervision and that they did not have the staff to monitor his work constantly as was necessary. They said that he was not able to work independently. They also testified to complaints they had received from an outside organization, Chemical Bank, concerning Kozvelove's mishandling of data it

submitted to him as part of his job.

Nelson and McCaw testified that they discussed these problems with Kovzelove, with Michael Friedlander, the Director of the Department's Management Information Systems, with the Data Center's Acting Director, Rudy Wilson, and his successor, Robert Belajonas. As a result of these discussions, Kovzelove's work assignment was changed several times. According to Nelson and McCaw, none of the changes was successful in alleviating the problems with Kovzelove's work.

It was not disputed that in October, 1986, Kovzelove, Nelson, and McCaw met with Acting Director Wilson to discuss these matters. At the conclusion of their meeting, Wilson said that they should meet again in 45 days to review Kovzelove's performance. However, before 45 days passed, Wilson was succeeded by Belajonas.

Once Belajonas became the Director of the unit, he, too, became concerned about Kovzelove's work performance. At the November 18, 1986 grievance meeting, Belajonas said that he needed time to look into the matter because he had just assumed the duties of his position. Immediately, he requested Nelson to prepare a report outlining the assignments Kovzelove had been given. Her report (City Exhibit 1) set forth in detail the problems which had been experienced in each of Kovzelove's assignments. She also annexed to her report a memorandum which she had received

from another unit employee, Barbara Yelverton, who had been assigned to train and work with Kovzelove on a particular assignment. Yelverton's memorandum describes how Kovzelove "... has managed to create a disaster" in the work of that assignment.

In the first week of January, 1987, Belajonas asked Nelson to prepare an updated report on Kovzelove's job performance. He said that he wanted to know whether or not his performance had improved. She submitted a memorandum, dated January 28, 1987, in which she reviewed, in cursory fashion, Kovzelove's assignments, described the problems with his work, and recommended that his employment be terminated. In her testimony, Nelson stated that Kovzelove was not performing his duties, was "... holding up the department," that his work required constant monitoring, and that,

"If you have to sit and babysit [him],
then it's no good."

Immediately after receipt of Nelson's January 28 memorandum, Belajonas informed Kovzelove that he would be terminated. Belajonas told him that he was delaying the effective date of the termination until February 13, 1987, in order to give him an opportunity to look for another job. The intra-agency memorandum which implemented Kovzelove's termination (and which, incidentally, was written by an administrative representative of the Department and not by Belajonas) states that Kovzelove,

"... is being dismissed due to unsatisfactory work performance as evaluated by his supervisors."

Based upon our review of the record herein, we find that the Department had a sound basis for believing that Kovzelove's performance was unsatisfactory, that efforts to place him in assignments which he would be better able to perform were unavailing, and that his continued employment would be detrimental to the interests of the Department. The testimony, in this regard, of Kovzelove's supervisors, Nelson and McCaw, was credible and convincing. We find it significant that Kovzelove, in his testimony, did not dispute the content of Nelson's and Yelverton's memoranda, and did not allege or present any evidence to show that he performed his job in a satisfactory manner.

We also note that the Department's dissatisfaction with Kovzelove's performance was manifested prior to the date that he submitted his out-of-title work grievance. Kovzelove was called to meet with his supervisors and Acting Director Wilson about his job performance at least a month prior to the filing of the grievance. He was on notice that his performance would be reviewed 45 days after that meeting. When viewed in this context, the Department's concern over his performance cannot be considered to be a retaliatory response to the submission of the grievance.

We conclude that Kovzelove's work performance was not acceptable and that the Department would have terminated his employment upon the basis of the facts presented herein even without regard to his union activity.⁷ We find that while the Union has made prima facie showing that Kovzelove's union activity was a motivating factor in the decision to discharge him, the Department has overcome that showing by establishing to our satisfaction that the decision to discharge Kovzelove was motivated by legitimate business reasons and would have been made even in the absence of protected union activity.

This case involves what has been characterized as a dual or mixed motive discharge our approach to this problem is consistent with that required in such cases by the City of Salamanca and Wright Line test. The federal courts, reviewing the NLRB's application of the Wright Line test, have recognized that,

"[e]ven if it is established, however, that 'a desire to frustrate union activity' is a motivating factor in the discharge, the employer can still avoid being held by the board to be in violation of the act by proving by a preponderance of the evidence 'that the discharge would have occurred in any event and for valid reasons....'"⁸

⁷We note that as a provisional employee, Kovzelove was an employee at will and could be discharged without charges and a hearing and without the necessity of proving his incompetence or misconduct.

⁸Lithographers Local I v. National Labor Relations Board,
F.2d, 115 LRRM 3161, 3162 (2d Cir. 1984).

In the present case, to the extent that improper motivation affected Belajonas' judgment with respect to Kovzelove, Belajonas' actions are not to be condoned. However, since the Department has met its burden of proving what is, in effect, an affirmative defense - that Kovzelove would have been discharged in any event and for a valid business reason - the improper practice petition must be dismissed.

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 submitted by the Communications Workers of America be, and the same hereby is, dismissed.

DATED: New York, N.Y.
April 27, 1989,

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

JEROME E. JOSEPH
MEMBER

FREDERICK P. SCHAFFER
MEMBER