Echevarria v. HHC, Woodhull Hospital, 43 OCB 28 (BCB 1989) [Decision No. B-28-89 (IP)]

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

RAFAEL ECHEVARRIA,

Petitioner, DECISION NO. B-28-89

-and- DOCKET NO. BCB-1102-88

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, WOODHULL HOSPITAL,
Respondent.
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DECISION AND ORDER

Petitioner Rafael Echevarria filed a verified improper practice petition on October 24, 1988, in which he charged the respondent New York City Health and Hospitals Corporation ("HHC") with committing improper labor practices in connection with his union activity. On November 29, 1988, respondent submitted a verified motion to dismiss the petition for failure to state a cause of action under the New York City Collective Bargaining Law ("NYCCBL"). Petitioner's verified answering papers to the notion were served and filed on January 10, 1989. HHC submitted a "reply affirmation" on January 30, 1989.[1]

[1]It should be noted that both parties requested and received extensions of time to either submit or to perfect their pleadings in this matter. It is further noted that while Section 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") does not provide for a reply to answering papers to a motion, HHC's request to file a reply was granted in view of the scope of petitioner's answer, described infra.

Background

Petitioner has been employed at the Woodhull Medical and Mental Health Center ("Woodhull"), a division of HHC, in the title of Special Officer, Hospital Police, since March 22, 1982. Petitioner states that in early 1986 he was elected by the Special Officers at Woodhull to serve as a Shop Steward. Special Officers are in a group of titles whose certified exclusive representative is the City Employees Union Local 237, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 237").

The petition alleges that the respondent,

> by its officers, agents and representatives, has discriminated against [him] because of his membership and activities on behalf of Local 237.[2]

Respondent, in a motion to dismiss, argues that petitioner has failed to comply with Section 7.5 of the OCB Rules. HHC asserts that petitioner alleges no dates, facts or relevant

[2] Although petitioner does not cite specific subsection(s) of the statute which he deems to have been violated, the petition alleges discriminatory treatment because of "his membership and activities on behalf of Local 237." If proven, such activity would constitute a violation of Section 12-306a(3) of the NYCCBL, which provides:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> > (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;

material evidencing any violative activity which would enable it to formulate a meaningful response. HHC contends that because petitioner's allegations are entirely vague and conclusory, the petition fails to state a cause of action and should be dismissed.[3]

Petitioner's answer to HHC's notion consisted of a covering letter dated December 30, 1988, accompanied by well over 100 pages of supporting documentation. In the covering letter, petitioner maintains that he has been discriminated against by his superior officers continually since 1986, when he began peaking out on behalf of his constituents as their Shop Steward. Petitioner asserts that evidence of the discriminatory treatment he has suffered is manifested, inter alia, by efforts to have him terminated for medical reasons, the imposition of harassing assignments, verbal and physical threats made by supervisory personnel, wrongful discipline, a discriminatory performance evaluation, disparate application of rules governing overtime assignments, and the employer's failure to respond to grievances to petitioner's satisfaction. The attachments consist of various documents apparently related to these complaints. A brief synopsis of this material follows:

1) July 8, 1986 - Allegedly verbally abused, physically threatened and provoked to respond in kind by a superior officer, Captain Alfred Esposito. Petitioner contends that the supervisor's intent was to demean the effectiveness of Local 237 because it occurred while he was acting on behalf of a member as

[3] HHC cites Decision Nos. B-20-81; B-35-80; B-33-80.

his Shop Steward.[4]

2) July 28, 1986 - Initiation of the Medical Evaluation Board procedure to determine petitioner's medical fitness. This followed the employer's receipt of a doctor's note recommending he not be assigned overtime for at least 4 weeks due to a cardiac condition. There is also evidence indicating that the employer's action followed the submission of a group grievance concerning the assignment of excessive amounts of mandatory overtime. Presumably, petitioner submits this documentation in an attempt to demonstrate improper motive.

3) April 2, 1987 - ordered to submit a written statement explaining his absence from post. Petitioner contends this order is an example of retaliatory harassment.

4) May 12, 1987 - Superior officer allegedly deviated from established procedure in order to entrap petitioner for refusal to work mandatory overtime. Petitioner maintains that the supervisor's intent was retaliatory and only because of actions he took in anticipation of a "set-up" did he avoid being served with disciplinary charges.

5) June 15, 1987 - ordered to submit a written statement detailing the substance of his intervention as a Shop Steward on behalf of a member. Petitioner refused to comply with an order that he thought was unreasonable and intended to harass him. The evidence indicates that petitioner was charged with insubordination stemming from this refusal. A disciplinary hearing was held

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[4] In Alfred Esposito v. Woodhull Medical and Mental Health Center and Local 237, Teamsters, CEU, Decision No. B-3-88, Captain Esposito charged Woodhull and Local 237 with committing improper practices in connection with his union activity. Captain Esposito, even though a member of a bargaining unit represented by Local 237, was also an official of a competing union and was attempting to persuade the' security officers at Woodhull to change their certified bargaining representation from Local 237 to this other union, POBA. In that matter, Captain Esposito was brought up on disciplinary charges for engaging in union activity during his tour of duty in violation of HHC policy and suspended for five days. The aspect of the petition charging Local 237 with an improper practice was based, in part, on the allegation that Local 237 Shop Steward Rafael Echevarria 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." We found that even if Special officer Echevarria had made the alleged statement, "we [did] not believe his actions were improper or had any adverse effect on petitioner's rights under the NYCCBL."

to review both this charge and an unrelated charge regarding petitioner's refusal to work mandatory overtime. The hearing officer sustained both charges of insubordinate conduct, resulting in petitioner's receipt of a five-day suspension.

6) July 10, 1987 - Issuance of an adverse performance evaluation. Petitioner appealed on two grounds, alleging that his evaluation was based on "pending" disciplinary charges as well as in retaliation for his union activity. The evidence indicates that, upon review by Woodhull's Labor Relations Officer, the evaluation was rescinded and reissued without any mention of the cited pending charges which, by that time, had been dismissed.

7) October 22, 1987 - ordered to submit an incident report concerning the vandalism of petitioner's own locker. Petitioner contends that he had followed hospital procedure in reporting the incident-and that this assignment was intended solely to provoke his refusal to comply, which he claims would have resulted in disciplinary action.

8) October 22, 1987 - Ordered to submit a written statement regarding an incident in which he had intervened on behalf of a member in his capacity as Shop Steward. Petitioner complained, in his statement, that he shouldn't have to explain how he becomes involved in matters he handles as a Shop Steward.

9) May 24, 1988 - Allegedly physically assaulted by Captain Esposito because he disapproved of petitioner's handling of an inquiry made by family members of an emergency room patient. Petitioner filed a formal complaint against Captain Esposito, alleging that the physical assault was really in retaliation for petitioner's advocacy of Local 237 and the role petitioner Played when the Captain was earlier disciplined for engaging in union activity while on duty.[5] The documents submitted indicate that HHC brought charges of misconduct against both petitioner and the Captain arising from the altercation. The charges against petitioner were dismissed on August 19, 1988. However, the disposition of the employer's charges against Captain Esposito is unknown. Petitioner claims that because the Captain is still "at large," the employer has been unresponsive to his grievances.

10) October 6, 1988 - Suspended for five working days. The documentation submitted indicates that this penalty was imposed for alleged misconduct stemming from charges dated April 19, 1988 (no further details supplied). Petitioner submitted a letter indicating that he is appealing the employer's decision.

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[5] See note 4 at 4, supra.

In its reply, respondent moves for dismissal on the additional ground that petitioner fails to state a cause of action for which relief may be granted. Quoting from Mr. Echevarria's December 30th cover letter, respondent points to petitioner's claim that he is being "unnecessarily harassed for no reason (emphasis by respondent)." HHC contends that

> [s]uch a statement clearly indicates that Petitioner, himself, believes the actions taken against him by Respondent were not based upon anti-union animus.

In addition, respondent argues that because petitioner has not demonstrated a nexus between his union activity and the employer's actions, he fails to state a prima facie claim of improper practice. [6]

DISCUSSION

We consider at the outset respondent's arguments relating to the legal sufficiency of the instant petition. The HHC contends, inter alia, that the petition is defective because it lacks the specificity required by Section 7.5 of our Rules.[7] The

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[6] Respondent cites Decision No. B-15-83.

[7] OCB Rules §7.5 provides that a petition alleging that an employer or its agents has engaged in an improper practice, shall be verified and contain:

a. The name and address of the petitioner;
b. The name and address of the other party (respondent);
c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
d. Such additional matters as may be relevant and material (emphasis added).

petitioner, in an attempt to cure this alleged defect, submitted answering papers describing the aforementioned events which, he contends, demonstrate a continuing course of employer conduct that allegedly violates his rights under the NYCCBL.

As pointed out by the respondent, Section 7.5 provides that an improper practice petition must contain "relevant and material documents, dates and facts." A petition which fails to comply with this standard deprives the other party of a clear statement of the charges to be met and materially hampers the preparation of a defense. However, it is our long-established policy that the OCB Rules shall be liberally construed, particularly where the other party is not prejudiced by a defect in pleading.[8]

In this regard, we note that petitioner is appearing pro se and, further, that respondent was afforded the opportunity to and did submit a reply to petitioner's answering papers. Inasmuch as the allegations of the petition, as supplemented by petitioner's answer to the notion, set forth the material elements of his claim with sufficient clarity to afford the respondent notice of the transactions or occurrences complained of, we find the petition to be in substantial compliance with our rules and deem

[8] Decision No. B-38-88; B-21-87; B-44-86; B-8-77; B-9-76; B-5-74. See also, OCB Rules, Section 15.1.

it sufficient under the circumstances.[9]

With respect to HHC's allegation that the petition fails to state facts which establish that the employer's actions against petitioner were based on his union activity, it is well settled that on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true. Therefore, the question raised by a motion to dismiss is whether, taking the facts as alleged by the petitioner, the petition states a prima facie claim of improper practice.[10]

When it is alleged that an employer has discriminated against an employee because of his union activity, we have adopted the standard set forth in City of Salamanca, 18 PERB §3012 (1985).[11] In such cases, in order to establish a claim of improper practice arising from allegations of discrimination, the petitioner must show 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 satisfies both parts of this test, it will have made a "prima facie case of improper motivation, [and] the

[9] Cf. Decision No. B-2-82.

[10] Decision Nos. B-7-89; B-38-87; B-36-87; B-7-86; B-12-85; B-20-83; B-17-83; B-25-81.

[11] Decision Nos. B-17-89; B-8-89; B-46-88; B-12-88; B-51-87.

burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons."[12]

Respondent contends that the petitioner has not met the initial burden of demonstrating a nexus between the employer's conduct and his union activity. Petitioner, on the other hand, contends that the record is replete with evidence of disparate treatment directly related to or in retribution for his activity as a Shop Steward.

After a careful and deliberate review of petitioner's allegations, we find, as a preliminary matter, that all of the acts complained of, with the exception of the imposition of a five-day suspension in October 1988, about which the petitioner provides no details, involve alleged incidents which occurred more than four months prior to the filing of the instant petition.

Pursuant to Section 7.4 of our rules:

> a petition alleging that a public employer or its agents has engaged or is engaging in an improper practice ... may be filed with the Board within four (4) months thereof....

Accordingly, allegations concerning these earlier events are time-barred and will be considered only in the context of background information rather than as specific violations of the NYCCBL.[13]

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[12] 18 PERB §3012 at 3027.

[13] See Decision Nos. B-25-84; B-7-84; B-27-83; B-2-82; B-20-81.

All of the acts constituting this background and which petitioner attributes to the employer as evidence of discriminatory treatment are either based on pure speculation, attributable to a third party or extremely remote. They, therefore, do not constitute such probative evidence based on "relevant and material documents, dates and facts" as to meet applicable standards of sufficiency. Consequently, we cannot infer from these allegations that petitioner's suspension in October 1988 was an extension of an ongoing course of employer conduct inspired by anti-union animus.

With respect to petitioner's allegations of improperly motivated medical removal proceedings (7/28/86), retaliatory harassment (4/2/87), disparate application of the rules for purposes of entrapment (5/12/87), improperly motivated adverse performance evaluation (7/10/87), and orders issued with the intent to provoke insubordinate conduct (10/22/87), we find these contentions wholly conclusory and, therefore, without merit. The petitioner has not alleged any facts which, if proven, would support his contention that these specific acts emanated from management's desire to punish him for his union activity. Petitioner's reliance upon the mere fact that he is a Shop Steward to establish the inference of improper motive is otherwise insufficient. We have long held that allegations of improper motivation must be based upon statements of probative facts rather than recitals of conjecture, speculation and

surmise.[14] In Decision No. B-2-87, we stated that "the mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity ..., does not state a violation where no causal connection has been demonstrated."[15]

What also emerges from the record is clear evidence of personal animosity between the petitioner and Captain Esposito, arising from their conflicting loyalties to two competing unions.[16] Such antipathy between a superior and a subordinate, in and of itself, does not constitute a violation of the NYCCBL.[17] Furthermore, application of the legal doctrine of respondeat superior is not warranted under the circumstances. In drawing an analogy between the allegations herein and cases involving the unlawful conduct of supervisors in union election settings, we are guided by the findings of the National Labor Relations Board ("NLRB"), which has held that such conduct will not be imputed to the employer when the supervisors are members of the same bargaining unit and there is no evidence to indicate that the employer encouraged, authorized, or ratified such

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[14] Decision Nos. B-55-87; B-2-87; B-2-82; B-30-81; B-20-81.

[15] See also, Decision Nos. B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

[16] See note 4 at 4, supra.

[17] Decision No. B-30-81.

conduct.[18]

In the instant matter, the record demonstrates that the employer maintained a neutral posture in what is best characterized as an inter-union dispute between petitioner, an officer of Local 237, and Captain Esposito, an officer of POBA, both of whom are members of the bargaining unit for which Local 237 is the certified representative. Apparently, the employer interjected itself only after violations of HHC policy were committed.[19] Furthermore, petitioner's complaint that management ignored his grievances concerning Captain Esposito's conduct is belied by the fact that HHC brought disciplinary charges against the Captain. Because the evidence does not support a conclusion that the acts attributable to this supervisor are chargeable to the respondent, petitioner's reliance upon these particular incidents (7/8/86 and 5/24/88) as evidence of anti-union animus is without merit.

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[18] In A.T.&K. Enterprises v. National Maritime Union, 264 NLRB 1278, III LRRM 1371 (1982) the NLRB held that the employer did not violate the LMRA by reason of the involvement of supervisors in an attempt to decertify the incumbent union. The NLRB found that despite the presence of "statutory" supervisors in the unit, their conduct would not be imputed to the employer since: (1) the supervisors were members of the incumbent's bargaining unit; (2) the employer did not encourage, authorize or ratify the supervisors' conduct and was apparently unaware of such conduct; and (3) the employer did not act in a manner that could have led employees reasonably to believe that the supervisors were acting on behalf of management. See also, Quinn Company v. Local 3. Operating Engineers, 273 NLRB 795, 118 LRRM 1239 (1984).

[19] In Decision B-3-88, we also dismissed the improper practice charges Captain Esposito levied against Woodhull.

Finally, we examine the two complaints which, initially appear to flow from petitioner's union activity. In June 1987 and again in October of that year, petitioner was ordered to write statements detailing the substance of his intervention as a Shop Steward in matters involving other members who were facing disciplinary charges. On the first occasion petitioner was suspended for insubordination arising, in part, out of his refusal to comply. On the latter occasion he complied with the order, presumably to avoid discipline.

As previously stated, we cannot consider these specific allegations as independent bases for an improper practice claim inasmuch as they are statutorily time-barred. In the event a petition had been timely brought, there might have been a sufficient causal connection between the management acts complained of and union activity to permit the drawing of an inference of improper motive. However, under the instant circumstances, we find these events too far removed from the only timely specific allegation before us to form the basis of a prima facie improper practice claim.

Petitioner also fails to state any basis for challenging the suspension he received in October 1988 other than that he does not agree with the employer's decision. This allegation, standing alone, clearly does not warrant an inference of improper motivation sufficient to shift the burden of proof to the respondent. Rather, a reasonable inference to be drawn from

petitioner's failure to state any probative facts relative to this suspension, in view of the extensive amount of material he submitted in support of the earlier allegations, is that he cannot demonstrate a causal connection between this complaint and union activity.

Therefore, because we cannot conclude that petitioner has stated a legally cognizable claim of improper practice within the meaning of Section 12-306a of the NYCCBL, we must grant the respondent's notion to dismiss.

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 respondent's motion to dismiss the petition be, and the same hereby is, granted; and it is further

ORDERED, that the improper practice petition of Rafael Echevarria be, and the same hereby is, dismissed.

DATED: May 23, 1989
New York, N.Y.

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