NYSNA v. City, HHC, 43 OCB 34 (BCB 1989) [Decision No. B-34-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DECISION NO. B-34-89

NEW YORK STATE NURSES ASSOCIATION,

DOCKET NO. BCB-1139-89

Petitioner,

-and-

NEW YORK CITY HEALTH and HOSPITALS CORPORATION,

Respondent.

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INTERIM DECISION AND ORDER

On February 14, 1989, the New York State Nurses Association ("the Union" or "the Petitioner"), filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("the HHC" or "the Respondent"), alleging that the HHC had impermissibly encouraged unit employees to leave their

employment with the Health and Hospitals Corporation in order to work for HHC Nurse Referrals, Inc. ("NRI"), a subsidiary, in violation of Sections 12-306a.(1) and (4) [formerly §§1173-4.2a.(1) and (4)], of the New York City Collective Bargaining Law ("NYCCBL").[1] The petition asks that the HHC be ordered to stop encouraging nurses to leave their HHC employment, and that the HHC be ordered to bargain collectively with the Union over the activities of NRI

The HHC, by its Labor Relations Counsel, did not answer, but, instead, submitted a verified motion to

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[1] NYCCBL §§12-306a.(1) and (4) provide as follows:

> **Improper practices; good faith bargaining.**
> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 1173-4.1 (now renumbered as section 12-306) of this chapter;
> * * *
> (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.

dismiss the petition together with an affirmation in support of the motion to dismiss on April 19, 1989, on the ground that the petition failed to state a prima facie claim of an improper practice under the NYCCBL.

The Union filed an affirmation in opposition to the Respondent's motion to dismiss on May 3, 1989.

BACKGROUND

The petition alleges that since on or about November 1, 1988, the HHC began to encourage its nurses to leave their employment with the Health and Hospitals Corporation in order to accept employment with NRI, a wholly-owned subsidiary corporation of the HHC. The petition contends that nurses who accepted the transfer of employment would no longer be represented by the New York State Nurses Association, although they would continue to be employed in HHC facilities. This

recruitment activity by the HHC, according to the petition, interfered with, restrained or coerced registered professional nurses in the exercise of their statutory employee and employee organization rights. The petition also alleges that the HHC refused to bargain collectively in good faith with the Union concerning the recruitment of HHC nurses by NRI

POSITIONS OF THE PARTIES

Respondent's Position

The Respondent contends that the petition fails to state a prima facie claim of an improper practice under the NYCCBL. The HHC refers to Rule 7.5 of the Law,[2] and

[2] Section 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining provides, in pertinent part, as follows:

> A petition filed pursuant to Rule ... 7.4 shall be verified and shall contain:
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> * * *
>
> c. A statement of the nature of the

asserts that the petition contains no relevant or material documents, nor does it contain any dates or facts, other than a general statement that the HHC engaged in an improper practice since a certain date.

According to the Respondent, this Board has held that the assertion of an improper practice, without factual allegations evidencing the violative activity, will not sustain the prerequisite burden of proof placed on the charging party. It refers to Board Decision No. B-33-80 in support of its contention that improper practice charges have been dismissed in instances where the charging party has failed to present factual evidence to substantiate its claim.

The Respondent acknowledges that the Petitioner need not present irrefutable evidence that the employer's action violated the NYCCBL. However, it goes on to cite several Board decisions involving

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> controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. ...

specificity and sufficiency[3] in order to bolster its position that, in this case, the Union failed to make allegations which contained specific and sufficient enough facts to state a prima facie claim, as required by statute and Board precedent.

The Respondent submits that the petition contains nothing more than "self-serving conclusory allegations that the HHC has engaged in an improper practice," and it requests that it be dismissed in its entirety.

Petitioner's Position

The Union replies that the Respondent's claim that the petition contains no relevant facts is baseless. The Union notes that, moreover, its counsel engaged in a telephone conversation with the Deputy Labor Relations Counsel of the HHC after the petition was filed, and "answered whatever questions she had concerning the petition."

[3] Decision Nos. B-12-85; B-30-81; B-23-81; B-20-81; B-13-81; and B-35-80.

According to the Union, the petition clearly states that the basis of the improper practice charge is that the HHC is using its wholly owned subsidiary, NRI, to erode the Union's representational rights. The Union explains that the HHC is doing this by encouraging its registered professional nurse employees, who are currently represented by the New York State Nurses Association, to leave their HHC employment in order to become independent contractors of NRI, where they would no longer be represented by the Nurses Association.

In the Union's opinion, its claim has presented a clear and concise description of the basis of the petition. It contends that the legal issue that this Board must determine is "whether
a public employer, whose employees are represented in an OCB-certified bargaining unit, can use a subsidiary as a vehicle to defeat representation rights by encouraging the 'employees' to leave their employ and work for the subsidiary as 'independent contractors'," and it maintains that sufficient facts have been alleged in order for the Board to make its

determination on this question.

The Union further asserts that the cases cited by the HHC have no bearing on this matter, because the petition clearly describes and defines the legal issue presented to the Board.

DISCUSSION

It is well-settled that, when making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by the Petitioner.[4] More than that, the petition is entitled to every favorable inference, and it will be deemed to allege whatever may be implied from its statements by reasonable and fair intendment.[5] In the instant proceeding, the HHC's motion to dismiss is based upon the premise that the petition is devoid of any facts

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

[5] See Westhill Exports, Ltd. v. Pope, 12 N.Y.2d 491, 496, 240 N.Y.S.2d 961, 964 (1963). See also, Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121, 127 (1st Sep't 1964).

which could lend support to the Union's assertion that the conduct of the HHC makes out a prima facie improper practice under the NYCCBL.

In considering HHC's motion to dismiss, we must deem HHC to admit the petition's allegations that it has engaged in activity intended to encourage or to cause unit members to sever their employment with the HHC in order to become independent contractors with NRI; that NRI is a wholly owned subsidiary corporation of the HHC; that those persons who resign from HHC and become independent contractors with NRI no longer would be represented by the Petitioner-Union; and that, despite their new employment relationship, these persons would continue to be employed in HHC facilities.

In this case, we are satisfied that sufficient material facts have been presented, and, although incomplete, the petition as a whole manifests a cause of action cognizable under the NYCCBL, and sufficiently puts the HHC on notice of the charges to be met in order to enable it to formulate a meaningful response.

We find, therefore, that the Petitioner has stated a prima facie claim of improper practice within the meaning of §12-306a. of the NYCCBL, sufficient to withstand the Respondent's motion to dismiss, and we order the HHC to serve and file an answer within ten days of receipt of this determination.

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 HHC's motion to dismiss the improper practice petition be, and the same hereby is, denied; and it is further

ORDERED, that the HHC shall serve and file an answer to the petition within ten days of receipt of a copy of this Interim Decision and Order.

DATED: New York, N.Y.

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Dear Mr. Silber and Ms. Grossman:

This office wishes to take the highly unusual step of calling to your attention Board of Collective Bargaining Decision No. B-43-80, because it did not appear in the BCB Cumulative Digest of Decisions when the looseleaf edition was distributed, although it has been included in the June 1989 update. Decision No. B-43-80 may have some bearing on the improper practice charges raised in BCB-1139-89, and we invite you to comments on it in your pleadings, if you deem it appropriate.

By way of background, on December 17, 1980, an Intermediate Report of Trial Examiner Joseph R. Crowley was issued in a case docketed as BCB-330-79. Under a provision of former Rule 12.6 of the Rules of the Office of Collective Bargaining then in effect, when no exceptions to an intermediate report were filed by any party within ten days, the report automatically became a final decision of the Board. In the case of BCB-330-79, no exceptions were filed within the prescribed time

limit, and, on January 8, 1981, the intermediate report became a Board decision by operation of law.

I trust that the foregoing information will be of service to you.

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