Engstrom v. HHC, Emergency Medical Serv., 43 OCB 36 (BCB 1989) [Decision No. B-36-89 (IP)]

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

GEORGE R. ENGSTROM,

Petitioner,

DECISION NO. B-36-89
DOCKET NO. BCB-1077-88

-and

NEW YORK CITY EMERGENCY MEDICAL SERVICE and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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INTERIM DECISION AND ORDER

On August 12, 1988, George Engstrom ("Petitioner") filed a verified improper practice petition in which he alleged that the New York City Emergency Medical Service ("EMS" or "Respondent") and the New York City Health and Hospitals Corporation ("HHC" or "Respondent") violated Sections 12-306a(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] by processing his applications for

[1] Section 12-306a of the NYCCBL states in pertinent part as follows:

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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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;
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> * * * *

reassignment to the Operations Secret Service Detail ("Operations Detail") and the Technical Services Unit ("Technical Unit") in a discriminatory manner. Respondents filed a motion to dismiss the petition on September 2, 1988, on the ground that Petitioner failed to state a cause of action for which relief maybe granted. Petitioner filed an affirmation in opposition to Respondents' motion on September 28, 1988.

BACKGROUND

Petitioner currently is employed by EMS as a paramedic in the Queensboro Command. He served as the President of Local 2507, the union which represents employees in the title Emergency Service Technicians and Paramedics, from May 1984 to June 1987. Prior to becoming President of Local 2507, Petitioner was a member of the Union's Executive Board.

In July 1987, Respondents posted an "official notice" on the bulletin board at Petitioner's work location announcing that EMS was accepting applications for positions in the operations Detail.[2] Petitioner submitted his application for reassignment to that unit in July 1987. Subsequently, in August 1987, Lieutenant Richard Garcia, Special Assistant to the EMS Coordinator for Technical Services, notified Petitioner that EMS was also accepting applications for positions in the Technical Unit. Petitioner submitted his application for reassignment to the Technical Unit in August 1987. Soon thereafter, Lieutenant

[2]The Operations Detail only accepts applications during a limited period of time once every two years.

Garcia informed Petitioner that his application was being reviewed by EMS; and that an appointment for an interview would be scheduled after EMS reviewed all of the applications that it had received.

Having received no word on the status of his applications for several months, on November 25, 1987, and again on February 1, 1988, Petitioner sent a letter by certified mail to Gary Calnek, Director of Human Resources for EMS, requesting a status report. He did not receive a response to either letter. Accordingly, on April 5, 1988, Petitioner's attorney sent a letter by certified mail to Mr. Calnek requesting a report on the status of Petitioner's applications. By letter dated April 13, 1988, William Leask, Director of Labor Relations for EMS, notified Petitioner's attorney that Petitioner's request to be assigned to the Operations Detail or the Technical Unit would not be honored because of the "needs of the service." Mr. Leask further stated that Petitioner was not entitled to "special treatment".

Thereafter, on August 12, 1988, Petitioner filed the instant improper practice petition, claiming violations of Sections 12 306a(1) and (3) of the NYCCBL. As a remedy, Petitioner requests that the Board:

(1) determine that Respondents' actions and/or its agents actions constitute an improper practice as defined in Sections 12-306a(1) and (3) of the NYCCBL;

(2) enjoin Respondents from continuing to harass Petitioner;

(3) direct Respondents to remedy the discriminatory acts complained of including but not limited to, treating Petitioner's applications to the Operations Detail and Technical Unit as it treated other similarly situated. employees, retroactive to the date Petitioner filed his applications; and

(4) grant such other and further relief as may be just and proper.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner submits that contrary to Respondents' assertion, he does not claim that he has a right to be assigned to the Operations Detail or to the Technical Unit. Instead, Petitioner maintains that the gravamen of his claim is that his applications for reassignment to those units were not processed in the same manner as the applications submitted by other similarly situated employees.

Petitioner contends that Respondents processed his applications in a discriminatory manner because of his prior activities as a union official and President of Local 2507. In support of his contention, Petitioner notes that EMS has accepted applications for the Operations Detail and the Technical Unit from paramedics who applied for those positions at or about the same time as he submitted his applications. Upon receipt of their applications, EMS scheduled those employees for interviews and briefing sessions. The fact that he was as qualified as

those paramedics but was not granted an interview or briefing
session, Petitioner argues, evidences discriminatory treatment by

Respondents in violation of the NYCCBL.[3]

Petitioner further contends that Respondents continuously have treated him in a discriminatory manner. In support of his claim, Petitioner alleges the following:

1. Unlike other similarly situated employees, Petitioner is being harassed by HHC's collection agency division, the National Finance Service, which is demanding that he pay for emergency medical tr--atment received as a result of injuries sustained during his assigned duty hours. Petitioner submits that HHC continues this discriminatory treatment despite a letter from the New York City Law Department stating that his injuries and claim are accepted by Workers' Compensation and, thereft.fe, Petitioner is not responsible for payment. Petitioner asserts that calls to EMS's Human Resources Department and HHC for assistance in this matter "fell upon deaf ears" and were met with "indifference and callousness". Meanwhile, Petitioner notes, his wages continue to be garnished.

2. Unlike other similarly situated employees, Petitioner must insert his name on the "sign-in" sheet indicating his assigned command in order to receive his paycheck. Petitioner contends that this is contrary to EMS memorandums specifying his payroll assignment.

3. Unlike other similarly situated employees, Petitioner frequently must spend additional time correcting ambulance operational deficiencies because EMS and/or its agents assign him to the most run-down and mechanically unsound vehicles at the garage where

[3] In support of his assertion that he was as qualified as the other paramedics who applied for positions in the Operations Detail and the Technical Unit, Petitioner points out that he has received numerous certificates, Letters of Commendation and favorable performance evaluations from his supervisors.

he is stationed. [4]

Petitioner argues that the foregoing acts constitute a pattern of harassment in which officials and/or agents of Respondents sought to punish and harass him in retaliation for his past union activities. Inasmuch as such conduct constitutes an improper practice within the meaning of Sections 12-306a(1) and (3) of the NYCCBL, Petitioner submits that the Board should deny Respondents' motion to dismiss, and order them to file an answer to the improper practice petition.

Respondents' Position

Respondents assert that their motion to dismiss the improper practice petition should be granted because Petitioner has presented "only conclusory allegations, which are wholly unsupported by fact, that the basis for the non-reassignment was his formerly having held the position as President of Local 2507." Respondents allege that Petitioner "appears to make a claim that he has a right to reassignment merely because he

[4] In his affirmation in opposition to Respondents' motion to dismiss, Petitioner notes that on August 14, 1988, just two days after Respondents were served with the instant improper practice petition, his name appeared on the payroll sign-in sheet for the first time since January 1988. Additionally, he was assigned a mechanically sound ambulance at the garage. Thus, Petitioner concludes, he "had to wait almost a year and bring an improper practice petition before his name was entered into the payroll computer and his signature was not required to receive his paycheck while the other employees at (his) garage had to wait six to eight weeks from the time they were assigned a command before their names were entered into the computer."

applied for it." They argue, however, that "such claim is clearly and obviously without merit. The bare allegation that the reason for the denial of his request is his former position in the union is wholly insufficient to defeat (their] Motion to Dismiss."

Furthermore, Respondents contend that Petitioner has failed to establish a nexus between his failure to be reassigned to the Operations Detail and the Technical Unit and the fact that he previously held a position in the Union. Respondents do not dispute Petitioner's claim that other paramedics were appointed to the positions that he sought. They note, however, that it is probable that those employees, like Petitioner, are members of Local 2507; certainly they are represented by the Union. Therefore, Respondents maintain that contrary to Petitioner's claim, no evidence has been presented to show interference with, restraint or coercion of public employees in the exercise of their union rights in violation of the NYCCBL.

Although Petitioner claims that he is being treated in a discriminatory manner, Respondents maintain that "it is not clear that being forced to hand-write one's own name on a weekly sign-in sheet is sufficiently onerous to sustain a finding of discrimination against (them]." Moreover, Respondents argue, the documents submitted by Petitioner in support of his improper practice petition contradict his allegations of discrimination by showing the situation to be a "wholly rational, temporary

handling of a personnel deployment issue." According to Respondents, Petitioner's exhibits show that he was assigned temporarily to vacation relief at a location different from his usual assignment. Therefore, Respondents submit, it is not unreasonable that he may have been required to sign-in. In any event, they note that Petitioner has now been placed on the sign-in sheet in his permanent assignment at Station 46; and claim that any delay in placing his name on the computer-generated sheets was due to "ordinary and across the board administrative process." Since there is no relationship between these facts and Petitioner's former union activities, Respondents submit that Petitioner's claim of discrimination concerning the sign-in sheets is without merit, and must be dismissed.

With regard to Petitioner's charge that he is being harassed by HHC's collection agency concerning an outstanding balance for emergency room treatment, Respondents assert that to the extent the bill may have been improper, there is no evidence that Petitioner ever tried to correct it through the normal channels (e.g., letters or phone calls). In any event, they contend that Petitioner has failed to demonstrate any nexus between the allegedly improper bill and the fact that he was the President of Local 2507 until June 1987.

Respondents claim that Petitioner's conclusory

allegations that actions taken by a division or facility of HHC which are unsatisfactory to him constitute an improper practice are wholly

insufficient to support a claim pursuant to Sections 12-306a(1) and (3) of the NYCCBL. Respondents contend that "there has been absolutely no showing by Petitioner that he has been discriminated against for the purpose of discouraging membership in, or participation in the activities of any public employee organization." Moreover, they argue that Petitioner has not presented any evidence to show that HHC interfered with, restrained or coerced him in the exercise of any rights granted in Section 12-305, which includes the right to self-organization, the right to join or assist public employee organizations and the right to bargain collectively.

Therefore, for all of the reasons stated above, Respondents request that the Board issue an order dismissing the improper practice petition without the need for any further proceedings; and for such other relief as the Board deems just and proper.

DISCUSSION

It is well-settled that on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true. The only question to be decided is whether, on its face, the petition states a prima facie cause of action under the NYCCBL. [5]

In cases where it is alleged that an employer committed an improper practice within the meaning of Section 12-306a of the NYCCBL, we have adopted the test set forth in City of Salamanca, 18 PERB ¶3012 (1985).[6] In such cases, in order to establish improper motivation, the petitioner must show that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge

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

[6] See Decision Nos. B-46-88; B-12-88; B-51-87.

> of the employee's union activity.
>
> 2. the employee's union activity was a motivating factor in the employer's decision.

If both parts of this test are satisfied, the Petitioner will have established a prima facie case of improper motivation, thus shifting the burden of persuasion to the respondent to establish that its actions were motivated by legitimate business reasons.[7]

In the instant proceeding, Respondents' motion to dismiss is based on the premise that the petition is devoid of any facts which support the conclusion that the conduct complained of was improperly motivated. In support of their position, Respondents assert that the employees who were appointed to the Operations Detail and the Technical Unit were either members of, or represented by, Local 2507. Therefore, they claim, the decision not to reassign Petitioner to either one

[7] We note that this burden-shifting approach is substantially equivalent to that employed by the National Labor Relations Board (NLRB) in cases turning on employer motivation. In Wright Line, the NLRB held

> We shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. 105 LRRM 1169, 1175.

of those units could not have been based upon his prior union activities.

A motion to dismiss concedes the truth of the allegations of the pleading to which it is addressed. Thus, for purposes of deciding Respondents' motion, we must accept Petitioner's assertion that while other similarly situated applicants for positions in the Operations Detail and the Technical Unit were granted interviews and briefing sessions, he, a for-ma union activist, was not. We must also accept Petitioner's assertion that Respondents' retaliation against him because of his past union activities was not limited to disparate treatment of his applications to the Operations Detail and the Technical Unit; but also included harassment of Petitioner at his work site by requiring him to follow procedures that were not imposed on similarly situated employees. Based on the foregoing, we find that Petitioner has stated a prima facie claim of improper practice within the meaning of Sections 12-306a(1) and (3) of the NYCCBL sufficient to withstand Respondents' motion to dismiss.

We note that while Respondent is correct in its position, as stated in the April 13, 1988 letter of Mr. Leask, Labor Relations Director, that Petitioner was not entitled to special treatment,

application of the principles enunciated in Salamanca, Wright Line and the above cited decisions of this Board suggest that contrary to Respondents claim, the issue presented by the pleadings before us is not whether Petitioner was entitled to or did receive special treatment. Rather, the issue presented in the instant matter is whether Petitioner received the usual treatment afforded other applicants. In a sense it is Petitioner's claim that he did receive special treatment; but that its special quality resulted in treatment that was discriminatory and disparate to that ordinarily given to other applicants.

Accordingly, we order Respondents 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 Respondents' motion to dismiss the petition be, and the same hereby is, denied; and it is further

ORDERED, that Respondents shall serve and file an answer to

the petition within ten days of receipt of a copy of this Interim Decision and Order.

DATED: June 29, 1989
New York, N.Y.

MALCOLM D. MacDONALD
CHAIRMAN

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MEMBER

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MEMBER

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