L.237, IBT, Baker v. DOI, Dep't of Juvenile Justice, Johnson, 43 OCB 61 (BCB 1989) [Decision No. B-61-89 (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-61-89

DOCKET NO. BCB-1188-89

DARREN BAKER and CITY EMPLOYEES UNION, LOCAL 237 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioners,

-and-

LACY C. JOHNSON, the NEW YORK CITY DEPARTMENT OF INVESTIGATION and the NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE,

Respondents.

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DECISION AND ORDER

On August 2, 1989, City Employees Union, Local 237, I.B.T., AFL-CIO ("the Union"), in behalf of Darren Baker ("the Petitioner"), filed a verified improper practice petition against the New York City Department of Investigation and the Department of Juvenile Justice, and against the Inspector General of the Department of Juvenile Justice ("the Respondents"). The petition alleges that the Respondents discriminated against both the Petitioner and the Union by causing disciplinary charges to be filed against the Petitioner, and by causing him to be suspended without pay and arrested, thereby committing an improper practice in violation of Section 2-306a.(3) of the New York City Collective Bargaining Law ("NYCCBL").[1] The Union asks the

[1] NYCCBL §12-306a.(3) provides 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:

Board to order the Respondents to cease such discrimination, and to rescind the charges and restore the Petitioner to his former position with full back pay.

The Respondents, appearing by the City of New York Office of Municipal Labor Relations ("the City") filed an answer to the improper practice petition on August 31, 1989. The Union filed a reply on September 15, 1989.

Background

The Petitioner has been employed as a Special Officer by the Department of Juvenile Justice ("DJJ") since at least June 23, 1986. In October of 1988, a meeting was held between the Petitioner, his Union Business Agent, and the Inspector General of the DJJ concerning a number of unauthorized telephone calls that allegedly were made by the Petitioner from his work location during working hours. As a result of that meeting, the Petitioner, in a written statement dated October 27, 1988, acknowledged his responsibility for the calls and agreed to make restitution in the amount of $1,601.26. The statement reads as follows:

> I, Darren Baker, after consulting with my union representative for Local 237, Joseph Sierra, and meeting with the DJJ IG, Lacy C. Johnson, do make the following statement.
>
> * I placed many phone calls from the second floor phone closet without the authority of the Department of Juvenile Justice to a variety of numbers . . . .
>
> * I agree that after examining phone bills supplied by the IG's office, the total for these calls is $1,601.26. Further, I understand that this amount represents the bills that have been returned to the Agency to date. Future bills to these same numbers are not part of this agreement, but I agree were made by me.
>
> * I agree to repay the Department of Juvenile Justice for these calls, through either monies allegedly owed to me through out of

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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;

> title work that I have performed, or through payroll deductions. I am signing this statement free from any promises or threats made by any parties to this matter after consulting with Mr. Sierra.

The statement was signed both by the Petitioner and by the Inspector General.

On or about February 22, 1989, the Petitioner was directed to appear before the Inspector General at the offices of the Department of Investigation. The parties agree that the Petitioner was not advised that he could be accompanied by a Union representative, nor was the Union notified of the ordered appearance. Although the purpose, contents and results of the meeting are in dispute, there is substantial agreement that the procurement of confidential information by the Petitioner was discussed.

Sometime thereafter, the Petitioner informed the Union Business Agent of the meeting, and, on or about March 8, 1989, the Business Agent protested the conduct of the Inspector General to the Department of Juvenile Justice officials.

On or about March 14, 1989, a settlement to resolve an outstanding out of title work grievance that had been filed by the Petitioner was reached. A stipulation of settlement was drafted and was executed by the Petitioner, his Union's Business Agent, and the DJJ Deputy Commissioner for Administration.

On April 3, 1989, the Petitioner was arrested at the Spofford Juvenile Detention Center on charges of grand larceny. By letter dated April 4, 1989, the Petitioner was notified that he was suspended without pay, retroactive to the previous day. The letter reads as follows:

> Pursuant to Section 75 of the Civil Service Law, you are hereby suspended without pay from your duties as a Special Officer. This suspension took effect at 5:00 pm on April 3, 1989.

On or about April 18, 1989, the Petitioner was served with a "Notice of Statement of Charges of misconduct" arising out of his unauthorized use of the telephone. The charges remained pending before the City's Office of Administrative Trials and Hearings throughout the time that the parties' pleadings were filed. Despite a demand for reinstatement made by the Petitioner's attorney in a letter to the Commissioner of the Department of

Juvenile Justice dated May 16, 1989, the Petitioner currently remains in suspended without pay status.

Positions of the Parties

Petitioner's Position

The Union contends that Petitioner signed the October 27 admission statement based upon his reliance on an alleged representation made by the Department of Juvenile Justice Inspector General that any criminal prosecution or disciplinary charges would be forborne.

According to the Union, the entire sequence of events leading up to the Petitioner's arrest and suspension relates back to the alleged anger of the Inspector General over the complaint made by the Union Business Agent to DJJ administrators regarding the Union's exclusion from the February 22 meeting at the offices of the Department of Investigation. In the Union's view, this

meeting violated a contractually-mandated due process right,[2] and the arrest and suspension of the Petitioner were the direct result of the Inspector General's anger over the Business Agent's subsequent complaint concerning the alleged contract violation. Therefore, the Union contends, the action taken against the Petitioner constituted retaliation for union activity, in violation of Section 12-306a.(3) of the NYCCBL. The Union alleges that its contention is supported by its version of the events that took place between February 22 and April 3, 1989:

According to the Union, during the February 22 meeting the Petitioner was threatened with immediate arrest on charges stemming from the unauthorized telephone calls unless he agreed to become a "confidential informant" for the Department of Investigation. He was not arrested at that time, however.

On or about March 31, 1989, the Union asserts, the Petitioner made restitution for the cost of the telephone calls by forgoing money due to him for out of title work and through salary deductions. The Union argues that, inasmuch as the Respondents took no steps to have the Petitioner arrested and suspended until after the Business Agent made the complaint, some three days after restitution allegedly had been made and five months after the Petitioner originally admitted to making the calls, improper motivation was clearly evident.

The Union further supports its allegation by describing the testimony of the Inspector General during an August 23, 1989 hearing before the Office of Administrative Trials and Hearings. According to the Union, the Inspector General admitted that he had been aware of the complaint made about him by the

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[2] Section 19 of Article IX of the City-Wide Agreement provides, in pertinent part, as follows:

> b. Whenever [a permanent employee] is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer, **and the employee shall be informed of this right**. [Emphasis added.]

Business Agent concerning the Petitioner, and he had also been aware that he was the subject of additional Union complaints made by other unit members working at the Spofford Juvenile Center. Moreover, during the hearing the Inspector General allegedly referred to the Business Agent as "abusive and vulgar," and he admitted that he hung up on the Union official during a telephone conversation concerning the Petitioner on March 28, 1989.

The Union dismisses the Respondent's claim that the Petitioner breached his alleged agreement to provide confidential information as a "flimsy pretext." It points out that the Inspector General refused to identify any of the sources of the complaints alleging that the Petitioner was "tipping off subjects of the D.J.J/D.O.I. investigations," and it contends that the Respondents have alleged no other facts to show that the Petitioner was the source of any alleged "tipping off" of persons under investigation.

The Union also denies the City's claim that the Petitioner received prior discipline as a result of his alleged earlier misuse of the agency's telephones, although it admits that, in a settlement of a previous dispute over this matter, the Petitioner agreed to forfeit two days of annual leave and he also agreed to make restitution for the earlier calls. The Union argues, however, that that settlement was reached without benefit of counsel or Union representation, and that, in any event, the calls were made during the same period of time that is currently at issue in the pending disciplinary case.

Finally, the Union claims that the disciplinary charges filed against the Petitioner were also partly motivated by the Respondents' desire to retaliate against him for his having filed a successful out of title work grievance. Citing Decision No.
B-58-87, the Union points out that such retaliation previously has been found to be a violation of the NYCCBL.

Respondent's Position

The City's version of the events that took place after the Petitioner signed the settlement agreement in October of 1988 differs substantially from the facts alleged by the Union. According to the City, on or about January 3, 1989, the Commissioner of the Department of Investigation referred the evidence of the Petitioner's wrongdoing to the Bronx County District Attorney's office. As a result, on or about January 13, 1989, the Petitioner allegedly requested the opportunity to "mitigate" any criminal penalties that would result from the District Attorney's involvement in the case, and he offered to provide information "of a substantive nature" that would aid the City's investigation of criminal activity among employees at the Spofford Juvenile Detention Center. Due to the potential seriousness of the information, the Department of Juvenile Justice allegedly decided to delay disciplinary proceedings against the Petitioner in order to give him time to make good his offer.

According to the City, the Petitioner provided "sketchy" information about various Spofford employees allegedly involved in criminal or improper conduct during the February 22 meeting at the offices of the Department of Investigation. He then allegedly promised to gather more specific information about these activities and report back to Department of Investigation detectives on a regular schedule. The City contends, however, that the Petitioner did not keep the scheduled appointments and he failed to provide any of the information that he had agreed to supply.

On or about March 6, 1989, the DJJ Inspector General allegedly was informed that the Petitioner was not supplying DOI detectives with any information. Thereafter, on or about March 30, the Inspector General allegedly received complaints that the Petitioner was "tipping-off" the subjects who were supposed to be under investigation. The next day the Inspector General advised Department of Juvenile Justice officials that the Petitioner not only had breached his agreement to provide confidential information, but that he had compromised an ongoing confidential investigation

as well. Thus, according to the City, the Petitioner's suspension was delayed only due to his confidential investigation activities, and it eventually occurred after it became evident that he could not supply the promised information, and because he "sabotaged" the investigation.

The City argues that the Petitioner had confessed to "tampering" with DJJ telephone lines and to "theft of service," and it contends that he had never been promised that the issuance of criminal or disciplinary charges would be foreclosed in exchange for his October 27 agreement to make restitution. The City further points out that the Petitioner had been charged in a previous unrelated case involving unauthorized telephone calls, and that its disposition included both a disciplinary penalty and restitution.

The City's central argument is that the Union has failed to set forth facts to demonstrate a prima facie case of improper motivation as required by City of Salamanca,[3] and that there is no causal connection between protected conduct and the disciplinary action taken against the Petitioner. To the contrary, the City claims that the Respondents' action was motivated by legitimate business reasons, and that administration of discipline would have taken place independent of any improper motivation.

Discussion

Although we recognize that there are major discrepancies between the parties' accounts of the events that lead to the Petitioner's arrest and suspension, the record is sufficient to enable us to render a decision on the improper practice as charged.

At the outset, we note that the responsibility for enforcement of criminal law is held exclusively by the police and by the district attorney. Therefore, matters concerning arrest for alleged criminal misconduct are beyond our jurisdiction. We also note that personnel actions, including

[3] City of Salamanca, 18 PERB ¶3012 (1985).

employee discipline, generally are matters within management's statutory prerogative to direct its employees and to take disciplinary action.[4] As such, they are not normally reviewable in the improper practice forum. However, the administration of discipline may give rise to an improper practice finding if it can be shown to have been used as a pretext for interference with an employee's rights under the New York City Collective Bargaining Law.[5]

The mere assertion of discrimination or retaliation, however, is not sufficient to establish that disciplinary action constitutes an improper practice. Rather, we require that a petitioner, when making a claim involving alleged violations of Sections 12-306a.(3) of the NYCCBL, must show that protected union activity was the motivating factor behind the alleged discriminatory act.[6] In order to support such a retaliation for union activity charge, a complaint must set forth more than mere conclusory allegations based upon speculation and conjecture. It must, at a minimum, demonstrate the following:

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[4] NYCCBL §12-307b. (the statutory management rights provision) reads, in pertinent part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action....

[5] Decision Nos. B-3-88; B-3-84; and B-25-81.

[6] Decision No. B-51-87.

1. The employer's agent responsible for the alleged discriminatory action had knowledge 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 burden will shift to the employer to show that the same action would have taken place even in the absence of the protected conduct.[7]

At the same time, we point out that we are not unaware of the difficulties inherent in proving employer retaliatory motivation. Thus, just as we have allocated the burden of proof to the petitioner, if we find that a petitioner has demonstrated a sufficient causal connection between the management act complained of and union activity, we will permit an inference of improper motive to be raised by the petitioner.[8]

There appear to be four areas upon which the Union has focused its discrimination and retaliation charges: The February 22 meeting and its aftermath, which took place without the presence of a Union representative; retaliation as a result of the Union Business Agent's complaint that he was excluded from the meeting; retaliation for the Petitioner's having filed an out of title work grievance; and the Respondents' failure to conclude its Section 75 proceeding. We shall discuss each of these areas separately.

February 22 Meeting

We recognize that converting apprehended criminal offenders into confidential informants is a successful anti-corruption technique often used by law enforcement agencies as a means of rooting out criminal misconduct. Based upon the undisputed facts supplied by both parties in this case, we find

[7] Decision Nos. B-25-89, B-17-89; B-46-88; B-12-88 and B-51-87.

[8] Decision Nos. B-25-89 and B-7-89.

it plausible that the February 22 meeting involving the Department of Investigation was intended to afford the Petitioner the opportunity of becoming a confidential informant, if not to preserve his job, then at least to forestall or avoid criminal sanctions. In such case, it is understandable that the presence of an outsider at the meeting, including the Petitioner's union representative, would not have been welcome.

To the extent that the Petitioner was not advised that he had a contractual right to be accompanied by a union representative before the meeting, such an allegation, if proved, may constitute a violation of the parties' collective bargaining agreement. Alleged contractual violations may be subject to various forms of redress, but they may not be rectified by this Board in the exercise of its jurisdiction over improper practices. Section 205.5.(d) of the Taylor Law[9] precludes us from exercising jurisdiction over a claimed contractual violation that does not otherwise constitute an improper practice.[10] We must also consider, however, whether an independent statutory right may have been infringed upon as a result of the Petitioner's lack of representation at the meeting.

We have never ruled upon the applicability of the doctrine set forth in NLRB v. Weingarten, Inc.[11] under the NYCCBL. In Weingarten, the United States Supreme Court held that an employee's insistence upon union representation at an employer's investigatory interview is a protected, concerted activity when

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[9] Section 205.5.(d) of the Taylor Law, which is applicable to this agency, provides, in pertinent part, as follows:

> . . . the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exer- cise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[10] Decision Nos. B-45-88; B-35-88; B-55-87; B-37-87; B-29-87; and B-6-87.

[11] 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171, 88 LRRM 2689 (1975).

the employee reasonably believes that the interview might result in disciplinary action. The Court, quoting from an earlier Circuit Court decision, held that:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[12]

The Supreme Court was not willing to create an unlimited right to representation during an investigatory interview, however, and its decision adopted the same limitations as had earlier been shaped by the National Labor Relations Board:

> 1) The right to have representation at an investigatory interview arises only when the employee makes a request for such a repre- sentative.
>
> 2) The employee can request representation only if he reasonably feels that the inter- view will result in disciplinary action.
>
> 3) The employee's right to have represent- ation may not interfere with legitimate employer prerogatives such as the discon- tinuance of the interview if and when the employee requests a representative; the employer has no duty to bargain with a representative who is present at the interview.[13]

From the foregoing, we find that, even assuming the applicability of Weingarten rights, the Petitioner's rights could not have been violated because there is no allegation that the Respondents in any way affirmatively sought to deprive the Petitioner of requested representation. To the contrary, the parties indicate that the Petitioner never asked to be accompanied by his union representative before or during the February 22 meeting. Because the essential elements of the Weingarten test are not met by

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[12] NLRB v. Weingarten, supra, 88 LRRM at 2692.

[13] As analyzed in "Developments Since Weingarten: A Brief Summary," N.Y.S. Bar Journal, Vol. 56, No. 4, May 1984.

the allegations put forward by the Union herein, we will not engage in further examination of this aspect of the Petitioner's case with regard to the question of whether the Weingarten doctrine would be applicable under other circumstances. We conclude that the Petitioner voluntarily attended the February 22 meeting, made no request for union representation, and that, in those circumstances, if he had been entitled to Weingarten rights, they would not have been violated.

We also find it not unreasonable that the Inspector General was later unwilling to divulge the identity of the confidential sources who had informed him that the Petitioner was "tipping off" other employees under investigation. To have done so would not only have further jeopardized the investigation itself, but could have endangered the sources' personal safety as well.

From these facts, we cannot infer that the Respondents' failure to inform the Petitioner of his right to be accompanied by a Union representative prior to the February 22 meeting was motivated by anti-union animus, or that it was retaliatory or discriminatory within the meaning of the NYCCBL. To the extent that the Petitioner's ultimate arrest and suspension were the consequences of his lack of cooperation and production in his role as a confidential informant, it is possible that those results may be challenged in other forums, but they do not constitute an improper practice under the New York City Collective Bargaining Law.

Retaliation for the Union Business Agent's Complaint

We find no basis to conclude that the Petitioner's arrest and suspension stemmed from the protest lodged by the Union Business Agent with the Department of Juvenile Justice Deputy Commissioner for Administration.

According to the Union, the Petitioner first informed the Business Agent about the occurrence of the February 22 meeting on or about March 8. "Thereafter," the Business Agent made his complaint. Although neither party specifies the exact date that the complaint was transmitted, we logically

assume that it occurred between March 8 and March 14, the day that the same parties met and signed their stipulated settlement resolving the Petitioner's out of title work grievance.

The Petitioner's arrest and suspension, however, did not take place until a month later. Although this delay, in and of itself, is not dispositive of an alleged linkage between the two events, there were other intervening factors which strongly weigh against our making such a connection.

We have found that the purpose of the February 22 meeting was to explore the possibility of the Petitioner's service as a confidential informant, and we are satisfied that, in the Respondents' minds, the Petitioner did not deliver the information as promised. We are also satisfied that the Respondents believed that the Petitioner had disclosed confidential information to the same people that he was supposed to be gathering information on, and that the disclosures may have compromised the entire investigation.

We need not deliberate over the accuracy of either of these conclusions. The fact that the Respondents believed them to be accurate is enough to render untenable any inference of a retaliatory motive that might otherwise be considered. In light of these factors, we are satisfied that the Respondents' actions were reasonably based upon what was, in their minds, an appropriate and legitimate business decision.

Retaliation for the Petitioner's Having Filed a Grievance

We are not persuaded that the Petitioner was arrested and disciplined for having filed an out of title work grievance.

According to the Union, the grievance was filed in January of 1988, more than one year before most of the events complained of took place. Beyond surmise, the Union offers no support for its conclusion that the Petitioner's arrest and suspension were related to the grievance, and, as we stated at the outset of our discussion, a retaliation charge must be based upon more than

speculation and conjecture. Based upon all of the evidence that has been presented to us, we are satisfied that the Petitioner would have been arrested and suspended regardless of whether he had filed an out of title work grievance.

Failure to Conclude the Section 75 Proceeding

It is not for us to decide whether a pre-hearing suspension that exceeds thirty days may be improper, absent a demonstrated motive of employer retaliation for protected activity. In light of the discussion above, such improper motive has not been found to exist in this case. If the Section 75 proceeding remains unresolved, the Petitioner or his Union may seek relief in other forums,[14] but the alleged delay does not constitute an improper practice under the NYCCBL.

Based upon all of the evidence, we are satisfied that the Petitioner's suspension was the consequence of a legitimate business decision, which would have occurred regardless of whether the Union Business Agent had attended the February 22 meeting, or whether the Business Agent subsequently complained about his lack of notification about it. In this same regard, we find that the Petitioner made no request and was not denied any right that he might have had to be accompanied by a Union representative at the meeting. We also find no evidence to support the assertion that the Petitioner was suspended in retaliation for his having filed a grievance, nor do we find any motive that could be considered an improper practice under the NYCCBL concerning the delayed conclusion of the Petitioner's Section 75 proceeding. Accordingly, we reject the allegation that the Petitioner's arrest and suspension were in violation of §12-306a.(3) of the NYCCBL and we shall dismiss the petition

[14] We recognize that Civil Service Law § 75.3 provides that suspension of an employee without pay pending the hearing and determination of disciplinary charges shall not exceed thirty days, but we have no jurisdiction to consider claimed violations of that Law.

herein in its entirety.

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 Darren Baker and City Employees Union, Local 237 of the International Brotherhood of Teamsters, AFL-CIO, in Docket No. BCB-1188-89 be, and the same hereby is, dismissed.

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

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Frederick P. Schaffer
MEMBER