PBA v. NYPD, 43 OCB 7 (BCB 1989) [Decision No. B-7-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	:	
PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,	:	
Petitioner,	:	DECISION NO. B-7-89
-and-	:	DOCKET NO. BCB-1055-88
THE NEW YORK CITY POLICE DEPARTMENT,	:	
Respondent.	:	

INTERIM DECISION AND ORDER

On May 6, 1988, the Patrolmen's Benevolent Association of the City of New York, Inc. ("Union" or "PBA") filed a verified improper practice petition, together with the supporting affidavit of Police Officer William Genet, PBA Financial Secretary, Manhattan North, alleging that the New York City Police Department ("City") violated the New York City Collective Bargaining Law ("NYCCBL") by unlawfully interfering with protected activity.

After receiving several extensions of time with the consent of the PBA, the City, on December 29, 1988, through its Office of Municipal Labor Relations, did not answer but instead submitted a verified motion to dismiss the petition, and an affirmation in support thereof, on the ground that the petitioner has failed to state a claim upon which relief could be granted.

After receiving an extension of time in which to file answering papers to the City's motion, on February 14, 1989 the PBA submitted a verified affirmation in support of its improper practice petition.

The City requested and was granted an extension of time to reply to the Union's answering affidavit, which it submitted on March 17, 1989.[1]

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[1] We note that Section 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining provides only for the filing of moving papers and answering affidavits. However, inasmuch as the PBA has raised no objection to the City's

Background

The petitioner gives the following account of events which it claims form the basis of the improper practice charge:

On February 4, 1988, P.O. Genet, pursuant to his duty as an elected official of the PBA, was exclusively and singly engaged in conducting a union election for Precinct Delegate of the 34th Precinct in the station's muster room. The petitioner states that while the casting of ballots was still in progress and in the presence of approximately twenty eligible voters, Lieutenant Lawrence Mannion, 34th Precinct, asked P.O. Genet to have another person watch the ballot box so he could accompany the Lieutenant to his office. The petitioner asserts that in order to assure the integrity of the election, it was required that P.O. Genet keep the ballot box in his possession and sight at all times until the ballots were counted at the conclusion of voting at 4:30 p.m. that day. When P.O. Genet indicated that he was required to stay with the ballot box, Lt. Mannion allegedly raised his voice and said, "I want you in my office as soon as possible." Following P.O. Genet's inquiry as to the reason for his request, Lt. Mannion allegedly stated "in an even louder voice than before, 'Just come to my office!'" According to P.O. Genet,

> [s]urprised by the abruptness of the Lieutenant's demeanor and the harshness in his tone of voice, and cognizant of the legitimacy of my purpose and actions in the 34th Precinct station house, I asked Lieutenant Mannion whether he was requesting me to come to his office or ordering me to do so. In an unmistakably enraged manner, the Lieutenant, by now having continued on his way out the door of the muster room, yelled, "I'm ordering you into my office!"

The petitioner asserts that at all times relevant, there was no police emergency or apparent necessity for the election to be interrupted or suspended. The PBA claims that despite the alleged disruption, because P.O.

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request, and in view of our policy of eschewing an overly technical application of rules of pleading, we have considered all the papers submitted in reaching our determination. See Decision No. B-23-82.

Genet did not "abandon" the ballot box, the election was concluded that day. However, the Union argues, it should not be construed that harm was not suffered.

Positions of the Parties

City's Position

The City contends that the allegations set forth in the petition and accompanying affidavit are devoid of any facts sufficient to support its contention that the conduct complained of was improperly motivated to interfere with petitioner's protected rights.[2] Rather, the City argues, the petitioner relies solely upon "recitals of conjecture, speculation and surmise" when it states, for example, that the conduct complained of "can only have the effect of reducing the significance and demeaning the importance of Petitioner Association in the eyes of the [membership]."

The City also maintains that it has taken no action incompatible with Section 12-307b of the NYCCBL, which reserves to the City the managerial right, inter alia, to "direct its employees" and to "determine the methods, means and personnel by which government operations are to be conducted." The City asserts that Lt. Mannion's remarks constitute a simple direct order which is not, by any standard, "hyperbole of a substantive kind."[3]

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[2] The City cites Decision Nos. B-15-87; B-30-81.

[3] The City cites Town of Southhampton, 15 PERB ¶4555 (1982), where PERB dismissed an improper practice charge based, in part, on allegations that a Town Supervisor spoke of the PBA in a demeaning and derogatory fashion during a meeting of the Town Board. PERB held that:

> While the remarks attributed to the Supervisor may be highly critical of the PBA ... the PBA has neither pleaded that its organizational independence has been compromised nor is the hyperbole of a substantive kind which could evidence either domination or interference with its formulation or administration.

The City submits that since the Union has failed to state a prima facie claim of improper practice, the petition should be dismissed in its entirety.

Union's Position

The PBA asserts that the City has committed an improper practice within the meaning of Section 12-306a of the NYCCBL.[4]

The petitioner alleges that Lt. Mannion, as an agent of management:

> [I]nterfered with the regular business of the petitioner in an inappropriate manner, calculated to disrupt [the election], and to demean and disparage the image and usefulness of petitioner in the eyes of [its] membership.

Completion of the election notwithstanding, the PBA maintains that the petition states a cause of action upon which relief can be granted inasmuch as the conduct complained of is "clearly of a nature harassing a legitimate function of union activity."

In response to the City's motion to dismiss, the Union contends that "[r]espondent has misunderstood the substance of [p]etitioner's complaint in

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[4] Although the petitioner does not specify which subsection(s) of the statute it claims to have been violated, the facts asserted in the petition relate to alleged violations of Section 12-306a(1) & (2) 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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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> * * *

this proceeding." The PBA explains that Lt. Mannion's order is the specific and particularized fact which states the cause of action herein; and that the order, standing alone, constitutes the gravamen of the complaint upon which relief should be granted. The Union contends that a superior officer "unequivocally interfered" with the conduct of a union election, an act which in and of itself constitutes a violation of the NYCCBL.

Therefore, the PBA urges that the motion be denied in its entirety and the City be directed to file an answer to the improper practice petition, which seeks an order by the Board of Collective Bargaining ("Board") directing the City to:

> [I]nstruct and insure that superior officers within the Respondent Department do not interfere and disrupt the regular on-duty operations of Petitioner Association, and to vacate and annul any instruction, rule, regulation or direction to superior officers, either written or oral, which interferes with the regular conduct of business by the Board of Directors, Officers and Delegates of the Petitioner Association.

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]

When it is alleged that an employer committed an improper employer 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 of the employee's union activity.

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

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

> 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 burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons."[7] This burden-shifting approach is substantially equivalent to that employed by the NLRB in cases turning on employer motivation.[8] 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 at 1175.

In the instant proceeding, the City's 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. However, a motion to dismiss concedes the truth of the allegations of the pleading to which it is addressed. Therefore, we must accept petitioner's assertions that the sole reason for P.O. Genet's presence in the 34th Precinct on February 4, 1988, was to conduct a union election and that Lt. Mannion was aware of the nature of this activity. The petitioner also alleges that Lt. Mannion ordered P.O. Genet to his office with the knowledge that his reiterated directive would interfere with the conduct of the election. Based on the foregoing, we find that the petition demonstrates a sufficient causal connection between the management act complained of and union activity to permit the inference of improper motive, shifting the burden to the City to show that it would have taken the same action in the absence of protected conduct.

In County of Nassau, 17 PERB ¶3119 (1984), PERB reached the merits of an

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[7] 18 PERB ¶3012 at 3027.

[8] Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169; enforced 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981); cert. denied 455 U.S. 989, 109 LRRM 2779 (1982).

improper practice charge alleging, inter alia, interference both with an employee's protected rights and with a union's internal affairs, in violation of Section 209-a.1 of the Taylor Law.[9] The union alleged that the employer seized a grievance form that the grievant was photocopying which complained about the County's conduct. The County acknowledged that it had confiscated the form but denied that it did so for the purpose of depriving the grievant of rights protected by the Taylor Law. Rather, the employer explained, it took the form to use as evidence of insubordination in a disciplinary proceeding which ensued. In its ruling in that case, PERB dismissed the improper practice charge, holding that the employer's account for its actions adequately demonstrate that the employer was not motivated by an intention to interfere with the grievant's Taylor Law rights. However, PERB also stated:

> [A] public employer's seizure of grievance forms might, if unexplained, be sufficient to establish improper motivation ...(emphasis added).

Similarly, we find that the Union's unrebutted account of management's conduct constitutes a prima facie showing of improper motivation. The unanswered petition alleges facts which demonstrate that Lt. Mannion knowingly and repeatedly issued a directive in his capacity as P.O. Genet's superior in a manner which arguably interfered both with the protected rights of public employees and with the administration of union business. This conduct, if unexplained, would amount to a violation of Section 12-306a of the NYCCBL.

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[9] The relevant subsections of Sections 209-a.1 of the Taylor Law provide:

> **Improper employer practices**. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employees organization for the purpose of depriving them of such rights;....

Recognizing that the alleged adverse effect of the conduct at issue may be viewed as "comparatively slight," we are guided by the standard applied by the U.S. Supreme Court in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). In that case, the U.S. Supreme Court declared:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him (emphasis in original).

Accordingly, in order to prevail, the City must now show that there existed some legitimate motivation for Lt. Mannion's assertion of his managerial authority under the attendant circumstances. We have long held that "acts properly within the scope of management's statutory prerogatives may constitute improper practices, if taken for [prohibited] purposes."[10]

Therefore, we find that petitioner has stated a prima facie claim of improper practice within the meaning of Section 12-306a of the NYCCBL sufficient to withstand the respondent's motion to dismiss and order the City 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 City's motion to dismiss the petition be, and the same hereby is, denied; and it is further

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[10] Decision No. B-3-84. See also, Decision Nos. B-43-82; B-26-81; B-4-79.

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

DATED: March 30, 1989
New York, N.Y.

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER