DC37 & Henrietta Lindsay v. HRA, et. al, 43 OCB 8 (BCB 1989)
[Decision No. B-8-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and HENRIETTA LINDSAY,

Petitioners,

-and-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, DEPARTMENT OF SOCIAL SERVICES, LENORA CENTENO and FRANCES BETTIS,

Respondents.

DECISION NO. B-8-89

DOCKET NO. BCB-1057-88

DECISION AND ORDER

On May 18, 1988, District Council 37, AFSCME, AFL-CIO ("the Union") filed an improper practice petition on behalf of itself and Henrietta Lindsay ("petitioner") against the New York City Human Resources Administration, Lenora Centeno and Frances Bettis ("HRA" or "the City"). The City, by its office of Municipal Labor Relations, filed an answer on June 14, 1988. The Union filed a reply on June 24, 1988.

A hearing was held before a Trial Examiner designated by the Office of Collective Bargaining on January 24, 1989, at which time the parties were afforded a full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. A transcript of the proceeding was taken. The parties did not submit post-hearing briefs.

Background

Ms. Lindsay, an Eligibility Specialist, Level III, has been employed by the Department of Social Services ("DSS") of the HRA since 1972. In that capacity, petitioner's duties include conducting face-to-face interviews with clients to determine their eligibility for assistance, computing and authorizing payments, determining employability, referring case problems to the appropriate agency and responding to telephone inquiries for a caseload of approximately 160 clients. Petitioner Lindsay works within a group of five employees and has been supervised by Respondent Lenora Centeno, a Principal Administrative Associate, Level I, for approximately three years. Each employee in the group works individually. However, on a rotating basis, Ms. Centeno preassigns each group member as the daily "E" Worker, whose function is to be available in the event of an unplanned absence within the group. In such cases, the E Worker services all scheduled appointments for the absent employee and handles all unscheduled clients with emergencies who walk into the center that day. Much testimony was offered by both parties as to the scope of an E Worker's duties, it having been the subject of several grievances handled by the petitioner on behalf of herself and co-workers in her role as a shop steward.

For the past eleven years, Ms. Lindsay has been a shop steward of Local 1549. Petitioner states that her primary function in that position is to enforce the contract on location. Other Union positions also held by the petitioner include that of Union Delegate and Vice Chairperson for the DSS. In her capacity

as Vice Chair, Ms. Lindsay actively serves on the HRA'S Quality of Worklife Committee, as well as on several subcommittees, including the Forms Reduction Committee, the Health Subcommittee, and the Labor Caucus. Three of these committees meet at preset times for a half-day during regular working hours at least once a month. The petitioner maintains that these obligations do not interfere with her assigned work inasmuch as she does not schedule any client interviews which conflict with the meetings. Ms. Lindsay also states that she has never been denied excused time to attend to these matters.

On March 23, 1987, Ms. Lindsay received a performance evaluation covering the period of March 1, 1986 through February 28, 1987 ("1986"), which rated her overall performance as Satisfactory.[1] Of the seven individual task ratings she received, Ms. Lindsay was rated Superior in Task Nos. 2, 10 and 17 and Satisfactory in the remaining four.

On February 29, 1988, Ms. Lindsay received a performance evaluation covering the period March 1, 1987 through February 28, 1988 ("1987"), which again rated her overall performance as Satisfactory. However, in contrast to the 1986 evaluation, of the seven of the individual task ratings, Ms. Lindsay received Satisfactory ratings in each category. The Union alleges that Ms. Lindsay's actual work performance in each of the downgraded tasks, as described by the employer, did not substantively

[1] In its petition, the Union originally alleged that Ms. Lindsay's overall performance for 1986 was rated as Superior. However, in its reply, the Union acknowledged that the 1986 overall rating was, in fact, Satisfactory.

change,[2] and that the lesser ratings in these categories were motivated by anti-union animus. Ms. Lindsay testified:

> I felt it was a payback from my supervisor ... because on different occasions we have had confrontations in regard to the E Worker procedure.

The Union submits, as further evidence of discriminatory intent, a copy of the original, although unofficial, third page of her 1987 evaluation. on that page, in a section of the form reserved for "Comments and Examples to Justify Overall Rating",

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[2] The descriptive comments for Task Nos. 2, 10 and 17 in 1986, as compared to 1987, are as follows:

	1986 (rated Superior)	1987 (rated Satisfactory)
Task 2	Mrs. Lindsay goes out of her way to insure that clients are issued correct payments and clients submit proper documentation under procedural guidelines for financial assistance, medicaid and food stamps.	Ms. Lindsay's calculations in marginal area are clear, accurate and comprehensive. She adheres strictly to agency guidelines.
Task 10	Mrs. Lindsay exhibits extensive diligence in reviewing and documenting pertinent data. She goes out of her way to insure the correct employability coding and status of her clients. Her work in this is above average.	Ms. Lindsay puts forth a diligent effort to insure that correct employability status is given to her clients. Appropriate documentation is obtained and accurately recorded.
Task 17	Check validations are clear, accurate and comprehensive. In many cases she excels beyond dept. requirements to to determine if check authorizations are given under procedural guidelines.	Ms. Lindsay's work performance is satisfactory according to dept. standards. Check validation is documented thoroughly, accurately, and properly completed.

it is undisputed that the employer originally stated:

> Ms. Lindsay maintains a satisfactory work performance overall rating. She is a diligent and conscientious worker <u>when she is at work, however. Ms. Lindsay is the union representative and must attend various meetings; when she is absent it creates a hardship on the unit</u> (emphasis added).[3]

Ms. Centeno testified that after she prepared the evaluation but before it was presented to Ms. Lindsay, she was directed by her supervisor, the Office Manager,[4] to mention that Ms. Lindsay was often absent from the unit because of her union activity. Ms. Centeno explained that the Office Manager wanted to include the comment because, when combined with petitioner.'s annual leave, sick leave and holidays, petitioner's absences from the unit added up to 69-70 days. Ms. Centeno then stated:

> I am not saying Ms. Lindsay has a time and leave problem. I am saying the absences, when the employee is not there to maintain those 160 cases, [has] an impact on the unit.

Petitioner testified that when she objected to the reference to her status as a shop steward in her evaluation, and brought it to the attention of the Director of the department, the comment was changed, to wit:

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[3] The City objected to the admission of Petitioner's Exhibit #1, a five-page document entitled <u>Non-Managerial Employee Performance Evaluation</u> for Henrietta Lindsay, covering the period of March 1, 1987 through February 28, 1988, on the ground that it is not a true copy of the 1987 evaluation <u>as it exists</u> in the personnel file of Ms. Lindsay. The Union contends that this exhibit is a true copy of all the documents that were given to Ms. Lindsay. The Trial Examiner overruled the City's objection and admitted the exhibit inasmuch as there was no dispute that the petitioner did, in fact, receive the documents at issue.

[4] We note that neither party to this proceeding could recall the name of the Office Manager and that she is no longer employed by the HRA.

> Ms. Lindsay maintains a satisfactory work performance overall rating. She is a diligent and conscientious worker when she is at work, however, Ms. Lindsay's frequent absences is a hardship on her clients and her co-workers and impacts on the function of the group (emphasis added).

Still dissatisfied with the reference to "absences" in the comment and maintaining that the entire evaluation was not based on merit but rather on animosity directed toward her activity as a shop steward, Ms. Lindsay appealed the 1987 evaluation to the HRA's Office of Personnel Services Evaluation Review Board ("ERB"). In her appeal, petitioner contests her overall rating as well as the aforementioned individual task ratings, contending the should be changed from Satisfactory to Superior. The ERB has yet to render a decision.

On May 18, 1988, the Union filed the instant petition alleging that the City committed an improper practice in violation of Section 12-306a(3) of the New York City Collective Bargaining Law ("NYCCBL").[5] As a remedy, the Union seeks an order from the Board directing the City to (1) rescind the evaluation rating of Satisfactory and replace it with a Superior rating, (2) cease and desist from issuing discriminatory evaluations, and (3) if the Union prevails, append the findings

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[5] Section 12-306a(3) of the NYCCBL provides:

It shall be an improper practice for a public employer or its agents:

> (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.

of the Board to the 1987 evaluation. At the hearing, counsel for the Union also requested that should the Board find in favor of petitioner and order the City to re-evaluate Ms. Lindsay for the time period in question, that the Board retain jurisdiction over the matter to assure adherence to the Board's order.

Positions of the Parties

Union's Position

The Union maintains:

> [G]iven the similarity of [the City's] remarks regarding Ms. Lindsay's job performance on task numbers 2, 10 and 17 ..., the decreased rating in those same tasks between 1986 and 1987 ... and the reference to Ms. Lindsay's union activities on the 1987 evaluation ..., the only conclusion to be reached is that [the City's] purpose in making such references is to discourage her membership or participation in the activities of any public employee organization.

The Union submits that when compared, the commentaries for Task Nos. 2, 10 and 17 between 1986 and 1987 are not appreciably different, yet the ratings in these categories were downgraded from Superior to Satisfactory. The Union asserts that the motivation for the drop in these ratings was anti-union animus, pointing to an "indication in the evaluation instrument itself that Union activities were taken into account ."

The Union also contends that the City's remarks regarding Ms. Lindsay's frequent absences creates the impression that but for these absences, her "overall performance rating would change or improve.”

Finally, the Union asserts that absent any "coercive or discriminatory motive, [the City] need not have made any mention

or reference to [Ms. Lindsay's] union activities" and intended it to have a chilling effect on petitioner's continued participation in protected conduct.

City's Position

The City asserts that the Union has failed to allege facts sufficient to demonstrate that the City's actions were based on an intent to unlawfully discriminate against petitioner for the purpose of discouraging union membership or participation in union activity.[6]

The City maintains that the Union has not demonstrated that union activity was the cause of the Satisfactory ratings petitioner received for Task Nos. 2, 10 and 17 in 1987. Rather, to support its position that petitioner's absences due to union activity were not a motivating factor, Ms. Centeno testified that although attendance is one of the factors upon which a performance evaluation is based, it "does not come into play when you are dealing with Outstanding and superior ratings.... My understanding of Superior is when you extend yourself beyond the limits of [the job]." When asked for the particular reason why Ms. Lindsay went from a Superior to a Satisfactory rating in the three Tasks at issue, Ms. Centeno testified that "she was more cooperative" in 1986 and would more readily agree to take on work beyond her case load in emergencies. When outstanding or Superior ratings are being considered, Centeno stated, "work

[6] The City cites Decision No. B-51-87.

attitude does come into play." As further evidence that the Task ratings Ms. Lindsay received in 1987 were not based on her activities as a union representative, the City submits "there are no references to her union activity in any of the comments corresponding to these categories."

Finally, the City maintains that the Union has "failed to make a prima facie showing of any discrimination" inasmuch as the petitioner's overall rating did not change from 1986 to 1987. The City argues that insofar as the Supervisor's factual, statement had no adverse impact on petitioner's evaluation, the inclusion of the comment does not rise to the level of an improper practice.

Discussion

Where a violation of Section 12-306a(3) has been alleged, we have adopted the test set forth by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985).[7] Thus, in cases involving a claim of discrimination, the petitioner is required to prove that (1) the employer's agent responsible for the challenged 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 has made a prima facie case of improper motivation, then the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business

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[7] Decision Nos. B-3-88; B-58-87; B-51-87.

reasons.

Applying this test to the instant matter, it is uncontroverted that the employer was well aware of Ms. Lindsay's union activity and, in fact, approved excused time for the absences it engendered. We also note that the City, by its own admission, intended to send a message to petitioner that her absences create a hardship on the unit. Therefore, the focus of our inquiry shall be whether the Union has demonstrated that the City discriminated against the petitioner for motives prohibited by the NYCCBL.

With regard to the actual downgrade Ms. Lindsay received in Task Nos. 2, 10 and 17, we find the testimony of Ms. Centeno credible as to the criteria she applied as a basis for justifying Superior and Outstanding ratings in performance evaluations.[8] Taking note of the fact that Ms. Centeno evaluated Ms. Lindsay before it was reviewed by her Supervisor (who then directed that the evaluation include a comment regarding absences), we are sufficiently convinced that Ms. Centeno's judgments as to the individual task ratings were based on lawful considerations and support the City's contention that the same action would have taken place absent the protected activity. Furthermore, we do not agree with the Union's assertion that the employer's commentaries for each of the individual task ratings were not substantially different from year to year. Based on Centeno's

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[8] We make no judgment on the merits of the standards Ms. Centeno applied and limit this finding solely to the question of motivation.

testimony that, in her opinion, a Superior rating is warranted when an employee extends herself beyond the limits of the job, we note that such an observation was made in the 1986 comments to justify the Superior ratings petitioner received. We again note that the comments to justify the Satisfactory ratings petitioner received in 1987 were devoid of any indication that Ms. Lindsay extended herself in this way. We find, therefore, that the evidence supports the City's contention that Ms. Centeno applied her judgment in a consistent, non-discriminatory manner over the two years in question.

We now turn to the Union's claim that petitioner's overall rating would have been Superior had she not been subjected to unlawful discrimination. Based on the record we find this allegation to be unsubstantiated. First, we note that Ms. Lindsay's overall rating did not change from 1986 to 1987, despite the challenged reference to her absences in 1987. Second, the City has sustained its burden of proving that the individual task ratings petitioner received in 1987 were lawfully motivated. Third, beyond this bare allegation, the Union offers no probative facts to support its contention that petitioner's overall work performance would have been Superior in 1987 but for anti-union animus. Therefore, inasmuch as the Union has failed to make a *prima facie* showing that anti-union animus was the basis for the overall rating petitioner received, we decline to disturb the City's assessment of Ms. Lindsay's work performance for the time period in question.

Finally, we address the Union's claim that the City's

decision to comment on petitioner's absences was clearly intended to discourage future participation in these activities in violation of Section 12-306a(3) of the NYCCBL. The City denies the contention and asserts that the remark is merely a factual statement.

There is no dispute that petitioner is excused from duty several times a month to attend various labor-management committee meetings. From the testimony emerges a picture that the petitioner's Supervisor is clearly frustrated with the disruption these absences cause and the adverse impact they have on the functioning of the group. There is uncontroverted testimony to the effect that petitioner is frequently close to missing important deadlines and often has to recruit help from co-workers or work beyond regular hours to meet them. In this regard, Ms. Centeno testified that group members also complain that they must take on the responsibility of answering Ms. Lindsay's phone when she is not there. Clearly, the record establishes that although petitioner primarily works independently, her absences place a strain on the efficient operation of the unit.

Based on the record, we find it reasonable to conclude that the Supervisor's manifest desire that Ms. Lindsay spend less time attending union meetings and more time performing assigned work is a true measure of why she raised the matter during a performance review. Clearly, but for these absences, the challenged statement on both versions of the 1987 performance evaluation would not have been contemplated. Therefore, we find

that the necessary causal link between petitioner's union activity and the employer's action with respect to the challenged statement included on her evaluation has been demonstrated.

The City's attempt to rebut the charge of improper motivation, by asserting that the supervisor's comment was simply a factual statement, does not negate the element of intent under these circumstances.[9] In this regard, we find significant Ms. Centeno's testimony that she was directed by her superior to comment on Ms. Lindsay's union activity in the 1987 evaluation because it was "part of her absenteeism." Nevertheless, at the same point in the record, Centeno testified that Ms. Lindsay does not have a time and leave problem. In view of this, we find that the revised comment on the 1987 evaluation is merely an attempt to mask an underlying motive - which is to impress upon petitioner that her absences due to union activity are a factor in the evaluation process.

Furthermore, insofar as the City's modified version of the comment states that petitioner is frequently absent, a negative inference is unavoidable. Generally, the purpose of performance evaluations is to provide guidance i.e., to inform employees of what is expected of them and whether their performance is satisfactory. Therefore, it is reasonable to construe a Supervisor's observation as to the frequency of petitioner's

[9] In Decision No. B-43-82, we declined to draw the conclusion that a statement of fact can not be construed as evidence of anti-union animus. Instead, we reasoned that it was just one of many factors which will be determinative of the outcome.

absences in this context and in this manner as tantamount to an admonition. Consequently, a real potential exists that such employer conduct could have a chilling effect on petitioner's continued participation in union activity.

Section 12-306a(3) expressly prohibits employer action which discourages participation in the activities of any public employee organization. In the instant matter, direct evidence demonstrates that the City was aware of petitioner's considerable involvement in union activity and that this activity was the cause for the challenged employer action. The weight of circumstantial evidence permits the inference that the City's action was motivated by its desire to discourage petitioner from maintaining this level of activity. The City has not demonstrated a legitimate business reason to justify the remark and, thus, has failed to prove that its conduct was not attended by an improper motive. Accordingly, we find that the reference to petitioner's absences in her 1987 performance evaluation constitutes an improper practice within the meaning of Section 12-306a of the NYCCBL.

Therefore, we hereby direct the City to cease and desist from violating the NYCCBL in the manner described herein, and to remove the following phrase from Ms. Lindsay's 1987 evaluation:

> ... when she is at work, however, Ms. Lindsay's frequent absences is a hardship on her clients and her co-workers and impacts on the function of the group.

However, having found that the City has satisfied its burden to prove that the actual 1987 ratings petitioner received were legitimately motivated, we dismiss that aspect of the instant

petition and order no further relief.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by New York City Collective Bargaining Law, it is hereby

ORDERED, that the City cease and desist from violating the NYCCBL in the manner described herein; and it is further

ORDERED, that the violative language be removed from petitioner's 1987 performance evaluation.

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

MALCOLM D. MacDONALD
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