L.621, SEIU, et. al v. Dep't of Parks & Rec., et. al,45 OCB 16 (BCB 1990) [Decision No. B-16-90(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

LOCAL 621, S.E.I.U., AFL-CIO; VINCENT AUTORINO, PRESIDENT, and MICHAEL TURCHIANO,

Petitioners,

-and-

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION and ALEXANDER R. BRASH,

Respondents.
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DECISION NO. B-16-90

DOCKET NO. BCB-1240-90

INTERIM DECISION AND ORDER

On January 2, 1990, Local 621, S.E.I.U., AFL-CIO ("the Union"), on behalf of Vincent Autorino, Union President, and Michael Turchiano, a Union member, filed an improper practice petition against the New York City Department of Parks and Recreation and against the Department's Director of Management and Planning ("the Department" or "the Respondent"). The petition alleges that the Department levied an excessive penalty against Petitioner Turchiano in retaliation for his having more than one Union representative present at his disciplinary conference, in violation of Section 12-306a. of the New York City Collective Bargaining Law ("NYCCBL").[1] The Union asks that

[1] NYCCBL §§12-306a. 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:
> (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;

the charges and determination against the Petitioner be rescinded and that he be awarded "appropriate injunctive relief and monetary damages."

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 January 19, 1990. The Petitioners

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(2) to dominate or interfere with the formation or administration of any public employee organization;
(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;
(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.

filed a reply on January 29, 1990. The City filed a sur-reply on February 8, 1990.[2]

BACKGROUND

Petitioner Turchiano has been employed by the Department of Parks and Recreation for a number of years. On or sometime after November 20, 1988, he became a supervisor.

On or about July 14, 1989, the Department found that three employees under the Petitioner's supervision left their job site before their shift had ended without "clocking out." As a result, on or about November 16, 1989, the Department advised the Petitioner that he was being charged with "Failure to Properly Supervise . . . employees under your supervision." It scheduled an informal disciplinary conference for December 4, 1989.

On the morning of December 4, the Petitioner, his attorney, and the Union President and Vice President appeared for the

[2] The Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") do not provide for the filing of a sur-reply. It is the policy of this Board not to encourage the filing of subsequent pleadings. We will not consider such a submission unless special circumstances warrant consideration of the material in question.

The City asserts that it was not aware that the Petitioner had submitted a request for disciplinary arbitration until after the City had filed its answer to the instant improper practice charge. Under the circumstances of this case, filing a request for arbitration is a relevant and material fact. Therefore, we will allow the City's sur-reply to become a part of the record.

conference. The Conference Leader disqualified himself, however, and the proceeding was postponed for one day.

Later that afternoon, according to the Petitioner's attorney, he received a telephone call from the Parks Department Advocate's Office informing him that the Petitioner could be represented at the conference either by an attorney or by a union representative, but not by both. An Assistant Director of the Office of Municipal Labor Relations subsequently resolved the matter to the parties' satisfaction, upon the condition that only one of the Petitioner's representatives would serve as his spokesperson.

On December 5, 1989, the conference was conducted by Respondent Brash. The Petitioner was represented by an attorney. The Union President and Vice President attended and were "available for consultation."

Following the conference, the Petitioner was found guilty as charged and the Conference Leader recommended a period of probation for one year as the penalty. The Petitioner refused to accept the proposed penalty, and, on or about January 19, 1990, his attorney informed the Department that the Petitioner would avail himself of the grievance arbitration procedure provided for in the parties' collective bargaining agreement.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union contends that a one year probation period was unwarranted, and was assessed in retaliation for the Petitioner's attempt to have more than one representative present at his disciplinary conference.

According to an affidavit submitted by the Petitioner's attorney, during the December 5 meeting the Conference Leader asked the Petitioner why he felt it was necessary to be represented by "so many" union representatives. The Leader allegedly further stated that the presence of more than one representative was relevant to his inquiry because it "indicates something about [the Petitioner's] intent."

The attorney affirmed that he has represented Local 621 since 1978. He stated that during that time, he has attended many informal disciplinary conferences, and he has never encountered an objection over the presence of too many people. The attorney explained that it is customary for the Union President to attend the conferences, and in this case, the Vice President accompanied the President because he was newly-elected and would be handling future disciplinary cases.

In support of his contention that the penalty assessed against the Petitioner was unwarranted, the affidavit states that on July 14, 1989, the day of the incident leading to the charge, the Petitioner had been solely responsible for the supervision of more than thirty employees. This excessive supervisory responsibility allegedly occurred because a second supervisor was ill and had not worked that day. The affidavit further asserts that before the close of business, the Department discovered that three employees apparently took advantage of the other supervisor's absence and left work early. Their departure allegedly occurred before the Petitioner "had the opportunity to learn that these employees had left or to make any formal report."

The affidavit points out that the Petitioner never before had been served with disciplinary charges and that he had an "unblemished record" with the Department. It concludes that the "harsh" penalty imposed "can only be explained by the animus of the Parks Department and the [Conference Leader] resulting from Local 621's successful insistence that [the Petitioner] be represented by both a union official and by an attorney" at the conference.

Concerning the affirmative defenses raised by the City, the Union maintains the linkage between the Petitioner's penalty and the allegation that the punishment was motivated by the Union's insistence that it be allowed to have more than one representative present at the disciplinary conference, states a prima facie charge. According to the Union, any such action would constitute an improper practice. It contends that since a factual dispute exists as to whether there was unlawful motivation behind the Petitioner's punishment, a hearing is necessary to resolve the question.

The Union also denies the City's legitimate business reason defense. It asserts that the proposed penalty is "so far outside the norm" that it can be explained only by improper and unlawful animus.

Concerning the City's assertion of managerial prerogative, the Union claims that that defense is without merit. According to the Union, while the City may propose penalties, it may not penalize employees for exercising their right to be represented by an attorney and a union official.

Finally, the Union denies that it is seeking the same remedy in arbitration that it is seeking in the instant improper practice proceeding. It argues that, in arbitration, the Petitioner simply is contesting the charge and the recommended penalty, whereas the improper practice charge contests the City's alleged attempt to "chill the rights" of the Petitioner and other Union members to be adequately represented at disciplinary conferences.

Respondent's Position

The City denies that it attempted to discourage the Petitioner from having more than one representative attend his disciplinary conference. Although it acknowledges that the Parks Department would have preferred to have a single representative present, the City notes that the Department ultimately agreed to allow the Petitioner's attorney and two Union officers to attend. The City insists that the Conference Leader did not ask why the Petitioner felt it necessary to be accompanied by so many representatives, nor did he say that being represented by more than one person indicated anything about the Petitioner's intent.

In the City's view, the improper practice charge should be dismissed because the Union failed to state a prima facie case, under the City of Salamanca standard adopted by this Board.[3] The City notes that in several decisions, this Board has held that mere conclusory allegations are not sufficient to sustain a claimed improper practice.[4] According to the City, the Union's contention that the recommended penalty was designed as punishment for having more than one representative present at the disciplinary conference amounts to just such a conclusory allegation. To the contrary, the City maintains that the Department acted for a valid business reason, and it notes that the Union has not supplied any facts to disprove the legitimacy of its action.

The City further argues that the discipline recommended for the Petitioner would have occurred despite the number of representatives that the Union sought to have at the conference. According to the City, the penalty

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[3] The City refers to the standard employed by the PERB in City of Salamanca (18 PERB ¶3012 [1985]) and adopted by this Board in Decision No. B-51-87.

[4] The City cites Decision Nos. B-25-89; B-38-88; and B-26-86.

was solely the consequence of a failure to supervise employees properly. Moreover, the City asserts that the discipline was not severe. Most penalties recommended allegedly are more severe, the City contends, because they "include monetary fines and/or loss of annual leave time in addition to probation."

The City then points out that the Department did not exceed its authority under Section 12-307b. of the NYCCBL (the statutory

management rights clause).[5] Again citing a legitimate business reason, the City contends that placing the Petitioner on probation was within the City's management prerogative. Therefore, it maintains, the proposed penalty was not an improper practice.

Finally, the City argues that by challenging the recommended discipline through the contractual grievance arbitration procedure, the Union is seeking the same remedy in arbitration as it is seeking under an improper practice charge. Referring to Decision No. B-8-84, the City asserts that in order to avoid duplication of effort and the risk of inconsistent determinations, this Board has declined jurisdiction over

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[5] NYCCBL §12-307b. 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; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

improper practice proceedings involving the same parties who simultaneously were litigating similar issues in two different forums. It also asserts that this Board has deferred jurisdiction over improper practice charges where "it appears that arbitration will resolve both the improper practice charge and the contract interpretation issue."[6] Thus, the City concludes, because the Union is seeking the same relief for the same disciplinary action in both arbitration and in an improper practice proceeding, the improper practice charge should be deferred or dismissed.

DISCUSSION

At the outset, we note that personnel actions, including employee discipline, generally are matters within management's statutory prerogative to direct its employees and to take disciplinary action.[7] 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 that punishment was used as a pretext for interference with an employee's rights under the New York City Collective Bargaining Law.[8] We shall consider the Petitioners' allegations in this light.

From the facts presented in the instant case, we cannot find that the initial disciplinary charge brought by the Department against Petitioner Turchiano was the consequence of anything other than a legitimate business decision. We see no connection between the charge and union activity, for it appears that the Petitioner was accused of failing to supervise his subordinates adequately. Indeed, the Union does not deny that three subordinate employees under the Petitioner's supervision left work early

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[6] Quoting from Decision No. B-31-85.

[7] NYCCBL §12-307b. (the statutory management rights provision) supra note 5.

[8] Decision Nos. B-61-89; B-3-88; B-3-84; and B-25-81.

without authorization, nor does it accuse the Department of having harbored anti-union animus when it initiated disciplinary action against him. Instead, it contends that the Petitioner's span of control was unreasonable. Assuming arguendo that there are mitigating factors to be considered such as responsibility for an excessive number of subordinates, arbitration is the proper forum in which to contest this charge.

The improper practice charge focuses on the penalty which was proposed following the disciplinary conference, and not upon the initiation of the disciplinary charges. The Union asserts that the penalty recommended by the Conference Leader was excessive and that its formulation was motivated by anti-union animus, evidenced by his alleged statement that the presence of more than one representative "indicates something about intent." The City denies that the statement was made, and it responds that the penalty was not excessive. To the contrary, according to the City, the penalty was relatively lenient because it did not include the assessment of a fine or loss of annual leave time.

It thus appears that the issue of the excessiveness of the proposed penalty is an essential element of the Union's improper practice charge. However, this issue is also an element of the Union's claim of wrongful discipline which has been submitted to the parties' contractual grievance arbitration process. In addition, the issue of the Petitioner's guilt of the disciplinary charges constitutes a potential defense to the improper practice allegations as well as an element of the employer's proof in the disciplinary arbitration. Accordingly, we find that these matters should be evaluated initially in the arbitral forum. We believe that it would be premature, at this point, for us to order a hearing before a Trial Examiner, or even to decide whether such a hearing should be held, which would be likely to duplicate the evidence that will be adduced in the arbitration proceeding.

This does not end the matter, however, as far as the Union's improper practice charge is concerned. The Union alleges that the disciplinary penalty

assessed against the Petitioner was motivated by anti-union animus, and might constitute a violation of the NYCCBL. As we have said, the assertion of a statutory or contractual right does not automatically preclude the assertion of an improper practice, even when both claims arise out of the same circumstances and involve the same parties.[9] Thus, although both claims arose out of the same circumstances and both involve the same parties, the relief being sought in arbitral review is different from the relief available under the improper practice charge.

Nevertheless, in this case, a finding of excessive punishment is a necessary condition precedent to the determination that an improper practice has been committed. If the arbitrator finds that the recommended penalty was suitable, the basis of the charge seemingly would no longer exist. If, on the other hand, the arbitrator determines that the recommended penalty was excessive, a number of reasons, including anti-union animus, may account for it.

Therefore, we will retain jurisdiction, but we will delay taking further action until the arbitral review of this case is concluded. In so doing, we act in a way that is not inconsistent with our deferral and waiver policy. As the City points out, generally we have not exercised our improper practice jurisdiction when the same claim and issues are pending in another forum in order to avoid unnecessary duplication of effort and the risk of an inconsistent determination.[10]

Accordingly, we shall retain jurisdiction in this matter, but we shall hold in abeyance the Union's charge that disciplinary penalty assessed against the Petitioner has violated the New York City Collective Bargaining Law until such time as an arbitrator has issued an opinion and award upon which we may further determine whether an improper practice was committed by the

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[9] Decision Nos. B-54-88 and B-3-85.

[10] Decision Nos. B-9-85 and B-3-85.

Respondents.

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 Local 621, S.E.I.U., AFL-CIO, in behalf of Vincent Autorino, President, and Michael Turchiano in Docket No. BCB-1240-90 be, and the same hereby is, deferred until such time as an arbitrator reviews the underlying disciplinary matter and issues an opinion and award, upon which this Board may further determine whether an improper practice was committed by the New York City Department of Parks and Recreation.

DATED: New York, N.Y.
April 25, 1990

MALCOLM D. MACDONALD
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