

UPOA (for Kelly) v. City, DOP, 45 OCB 32 (BCB 1990) [Decision No. B-32-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

UNITED PROBATION OFFICERS
ASSOCIATION, for LARRY KELLY,

DECISION NO. B-32-90

DOCKET NO. BCB-1222-89

Petitioner,

-and-

CITY OF NEW YORK,
DEPARTMENT OF PROBATION,

Respondent.

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INTERIM DECISION AND ORDER

On November 8, 1989, the United Probation Officers Association ("the Union" or "the Petitioner") filed a verified improper practice petition against the New York City Department of Probation ("the Department") contesting the involuntary termination of a Probation Officer, allegedly in retaliation for his union activities. The petition asks that the Board rescind the officer's discharge and order the Department to cease and desist from such retaliation.

The City of New York Office of Municipal Labor Relations ("the City"), on behalf of the Department, did not answer, but, instead, submitted a verified motion to dismiss the petition together with an affirmation in support of the motion to dismiss, on December 4, 1989, on the ground that the petition failed to state a prima facie claim of an improper practice under the New York City Collective Bargaining Law ("NYCCBL").

The Union filed an affirmation in opposition to the Respondent's motion to dismiss, together with a supporting affidavit, on December 18, 1989.

BACKGROUND

Probation Officer Larry Kelly was hired to work as a provisional Probation Officer in October of 1986. In November of 1988, Officer Kelly's

name was taken off a civil service list, and he became a permanent Probation Officer, subject to a one-year probationary period. He was assigned to work in Manhattan Adult Supervision at the Department's 100 Centre Street location. On or about October 23, 1989, within the period of his probationary employment, the Department discharged Officer Kelly.

POSITIONS OF THE PARTIES

City's Position

The City contends that the petition fails to state a prima facie claim of an improper practice under the NYCCBL. In moving for accelerated judgment as permitted by Rule 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), the City asserts that the petition fails to allege facts which could form the basis of an improper public employer practice petition, other than a conclusory allegation that Officer Kelly was terminated for union activities. According to the City, this Board has held that the assertion of an improper practice, without factual allegations evidencing the violative activity, will not sustain the charging party's burden of proof. The City refers to Board Decision No. B-15-87 to support its contention that a petitioner fails to state a prima facie claim of improper practice, under NYCCBL §12-306a.(1), where it fails to allege any facts to support its conclusions that the employer's action was based on motives prohibited by §12-306a. of NYCCBL.

The City notes that this Board had adopted a test that it will apply in cases where anti-union animus has been alleged. Thus, when a union alleges that a public employee was terminated because of union activity, it must show both that the employer knew of the employee's union activity and that the employer's termination decision was motivated by that union activity.¹

The City acknowledges that, for the purposes of a motion to dismiss, a

¹ The City refers to the City of Salamanca test, adopted by this Board in Decision No. B-51-87. See also Decision Nos. B-61-89; B-28-89; B-17-89; and B-3-88.

petitioner's allegations are taken as true. It contends, however, that the Union has failed to present any evidence to substantiate Officer Kelly's alleged union activity. It also contends that there is no allegation that the Department knew of any such union activity, or that the alleged union activity was a motivating factor in Officer Kelly's termination.

Petitioner's Position

The Union contends that, although its petition does not state "ultimate facts," it meets all requirements of modern "notice pleading." According to the Union, its pleading satisfies OCB Rule 7.5, which requires only that a petition contain "[a] statement of the nature of the controversy." It supports its position by noting that the Executive Secretary's letter of November 16, 1989, found that the Union's petition was not "on its face, so untimely or insufficient as to warrant summary dismissal," and directed the City to answer.

Furthermore, the Union argues that the City's claim that it had no knowledge of Officer Kelly's union activity is false. Referring to his affidavit, the Union contends that Officer Kelly was very active in the United Probation Officers Association, serving as a Union delegate and as a member of both the labor-management committee and the city-wide grievance committee. As Union representative, he also initiated a discrimination charge against Assistant Commissioner Bertram Zipkin.

The Union also contends that the City knew of Kelly's union activities because of the regular contact that he maintained with Department officials in his capacity as Union representative. On one occasion, in 1987 when Officer Kelly was interceding on behalf of another employee, Commissioner Zipkin allegedly "became incensed and shouted names at [him]."

The Union concludes that there can be no reason, other than retaliation for union activity, that could account for Officer Kelly's discharge. All of his evaluations allegedly were "superior" and his last evaluation allegedly

was "outstanding," the highest rating possible.

DISCUSSION

When making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by the petitioner.² In addition, the petition is entitled to every favorable inference and will be taken to allege whatever may be implied from its statements by reasonable and fair intendment.³ In the instant proceeding, the City's motion to dismiss is based upon the premise that the petition is devoid of any facts which could lend support to the Union's assertion that the conduct of the Department constitutes a prima facie improper practice under the NYCCBL.

In considering the City's motion to dismiss, we must deem the City to admit the petition's allegations that the Department terminated Officer Kelly's employment in retaliation for his union activities. Thus, although unproven, we are satisfied that sufficient material facts have been presented for the petition to manifest a cause of action cognizable under the NYCCBL, and sufficiently puts the City on notice of the charge to be met in order to enable it to formulate a meaningful response.

We find, therefore, that the Petitioner has stated a prima facie claim of improper practice within the meaning of §12-306a. of the NYCCBL, sufficient to withstand the City's motion to dismiss, and we order the City to serve and file an answer within ten days of receipt of this determination.

² Decisions Nos. B-34-89; B-7-89; B-38-87; B-36-87; B-7-86; B-12-85; B-20-83; B-17-83; B-25-81.

³ Decision No. B-34-89; See, also, Westhill Exports, Ltd., v. Pope, 12 N.Y.2d 491, 496; 240 N.Y.S.2d 961, 964 (1963); Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121, 127 (1st Dept., 1964).

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 improper practice petition be, and the same hereby is, denied; and it is further

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: New York, N.Y.
June 27, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

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MEMBER

CAROLYN GENTILE
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