O'Neill v. Woodhull Hospital, Soriano, et. al, 45 OCB 47 (BCB 1990) [Decision No. B-47-90 (ES)]

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

DECISION NO. B-47-90(ES)

-between-

DOCKET NO. BCB-1297-90

LANCE O'NEILL,

Petitioner,

-and-

WOODHULL HOSPITAL, HECTOR SORIANO,
HOWARD PRIPPAS AND CARLOS LORAN,
Respondent.
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**DETERMINATION OF EXECUTIVE SECRETARY**

On June 26, 1990, Lance O'Neill ("petitioner") filed a verified improper practice petition against Woodhull Hospital alleging:

> Contract violation of Rule 5:2:7 Appointment and Promotion.[1] Title changed to respiratory Therapist on July 1, 1983 but salary never upgraded. I got a 100% on

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[1] Rule 5:2:7, entitled Appointments and Promotions, states:

> Time served in a title on a provisional or temporary basis, for a continuous period equal to the probationary period immediately preceding permanent appointment shall be construed in the case of promotion to have been the probationary period for such a title. This shall apply however, only when there has been no break in service in the promotional title. If the period of temporary or provisional service has been for any less than the required probationary period, it shall not constitute even partial fulfillment of the probationary period.
>
> For purposes of determining whether the requirement for probationary service has been satisfied, only the time spent in full pay status shall be counted as the time worked. The only exception to this shall be the provisions of the military law where applicable.

> Civil Service Examination, List Number 5, [then] fingerprinted and sworn in, and management demoted me to housekeeping for 18 months even though [Personnel] Review Board ordered me back on January 2, 1990.

As a remedy, petitioner seeks an immediate return to his position as a Respiratory Therapist, with the same tour of duty, days off and vacation as he worked previously; salary upgrade retroactive to July 1, 1983 and promotion to Assistant Technical Director.

According to the decision and order of the New York City Health and Hospitals Corporation ("HHC") Personnel Review Board, dated December 28, 1989, which was attached to the improper practice petition, petitioner has been a member of HHC in the title provisional Respiratory Therapist since July 1, 1983. Effective January 24, 1989, petitioner began a one year probationary term in the civil service title of Certified Respiratory Therapist. On February 27, 1989, HHC terminated petitioner, without a hearing, from his probationary position and reassigned him as a Housekeeping Aide, his permanent noncompetitive position.

The Personnel Review Board noted that petitioner's alleged misconduct occurred on December 26, 1988 and January 12, 1989, while he was a provisional employee and before HHC appointed him to his probationary position. Therefore, it determined that Rule 5:2:7 was operative since petitioner served in his provisional title for the period of July 1, 1983 to January 4, 1989, when he became a probationary employee and, moreover, the positions appear similar with regard to title and duties.

Based upon its interpretation of Rule 5:2:7, the Personnel Review Board determined that petitioner's termination as a probationary employee, without a hearing, was unlawful. Even if Rule 5:2:7 did not extend protection to the petitioner, the Personnel Review Board held that it was inherently unfair to terminate petitioner, without a hearing, for misconduct committed as a provisional employee and then use the alleged misconduct as a factor in terminating him as a probationary employee. Therefore, the Personnel Review Board directed the following:

> 1. Petitioner be considered a certified employee who has completed his term of probation based upon Rule 5:2:7,

> unless it can be demonstrated that both positions are different.
>
> 2. Petitioner be reinstated to his certified title and HHC's disciplinary action be in accordance with Rule 7:5.
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> 3. Petitioner receive a disciplinary hearing in accordance with Rule 7:5 for the misconduct which allegedly occurred on December 26, 1988 and January 22, 1989.
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> 4. In the event petitioner is found guilty after a hearing a lawful penalty be assessed.
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> 5. If petitioner is found guilty he shall have the right to have HHC's decision reviewed by the Personnel Review Board after filing a Notice of Appeal in accordance with its rules.

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("the OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that the claim asserted therein must be dismissed because petitioner has not alleged facts sufficient as a matter of law to constitute an improper practice within the meaning of Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL").[2] The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees set forth therein, i.e., the right to bargain collectively through certified public

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2 Section 12-306a of the NYCCBL states as follows:

> 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;
> (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.

employee organizations; the right to organize, form, join, and assist public employee organizations; and the right to refrain from such activities. Absent any allegations that the respondents' actions were intended to, or did in fact, affect any of the rights that are protected by the NYCCBL, the petition cannot be entertained by the Board of Collective Bargaining.

Furthermore, to the extent petitioner alleges a "contract violation of Rule 5:2:7 Appointment and Promotion," I note that such an allegation may not be considered in the improper practice forum. Claimed violations of the collective bargaining agreement are expressly beyond the jurisdiction of the Board of Collective Bargaining pursuant to Section 205.5(d) of the Taylor Law.[3]

Accordingly, I find that no improper public employer practice has been stated. Therefore, the petition is dismissed pursuant to Section 7.4 of the OCB Rules. Such dismissal is, of course, without prejudice to any rights petitioner may have in any other forum.

Dated: New York, New York
August 17, 1990

Loren Krause Luzmore
Executive Secretary
Board of Collective Bargaining

[3] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides that:

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