UPOA (for Simmons) v. City, DOP, 45 OCB 53 (BCB 1990) [Decision No. B-53-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------X

In the Matter of

UNITED PROBATION OFFICERS ASSOCIATION for MAMIE SIMMONS,

Petitioner,

-and-

CITY OF NEW YORK, DEPARTMENT OF PROBATION,

Respondent.

----------X

DECISION NO. B-53-90

DOCKET NO. BCB-1243-90

DECISION AND ORDER

On January 12, 1990, the United Probation Officers Association ("UPOA" or "the Union") filed an improper practice petition on behalf of its member, Mamie Simmons, against the City of New York ("the City") and the New York City Department of Probation ("the Department"). The City, by its Office of Municipal Labor Relations,[1] filed an answer on February 13, 1990. The Union filed a reply on February 28, 1990.

Background

Ms. Simmons, a Probation Officer ("PO") employed by the Department since October 1969, was on an established eligible list (List No. 132) for promotion to the Civil Service title of Supervising Probation Officer ("SPO"). At the time the instant petition was filed, Ms. Simmons had been a UPOA delegate for approximately one and one-half years. On November 30, 1989, Ms. Simmons appeared on behalf of the UPOA at a Labor-Management Committee meeting. In

[1] Pursuant to Executive Order No. 13, effective July 24, 1990, the Mayor restored the name of this office to the "Office of Labor Relations."

or about December 1989, Ms. Simmons allegedly received a letter from the Department's Chief of Personnel, dated July 12, 1989, which provides, in relevant part:

> [Y]ou are ineligible under the rules of the City Personnel Director for certification from the civil service list specified above for the following reasons:
>
> * * *
>
> 2. You were considered and not selected for appointment or promotion to three separate vacancies.
>
> * * *
>
> If you have been made ineligible for further certification under reason 2, such ineligibility is only for the above named agency. You can be recertified to that agency only upon that agency's request.

On January 12, 1990, UPOA filed an improper practice petition alleging that the Department violated Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL"):

> [B]y striking Mamie Simmons from the SPO list and improperly notifying her of that striking in retaliation for her union activities, particularly her vigorous advocacy of union interests at the Labor-Management Committee meeting held November 30, 1989.

As a remedy, the Union requests that Ms. Simmons be reinstated to the SPO list and appointed to a supervisory position with back pay and benefits to July 1989. UPOA also requests an order from the Board of Collective Bargaining ("Board") directing the Department to "cease and desist from retaliating against Mamie Simmons for her union activities."

Positions of the Parties

Union's Position

In support of its allegation of a violation of Section 12-306a of the NYCCBL, UPOA appended to its reply the affidavit of Ms. Simmons, wherein she alleges that "I am now and have been for some time a dedicated union activist." In this connection, Ms. Simmons contends that: (1) in the Fall of 1988, she played a significant role in the initiation and resolution of a grievance concerning the safety of POs working at night; (2) in September 1989, she enlisted the aid of the

UPOA President who, in turn, spoke to the Department's Deputy Commissioner to resolve a dispute concerning her pay check; and (3) at the November 30, 1989 Labor-Management Committee meeting, she "very vigorously advocated the union's interests on several issues." Therefore, Ms. Simmons states, "management is well aware of my position in the Union."

In further support of its position, the Union submits that in her most recent performance evaluation, Ms. Simmons was rated "Superior."

Based on the foregoing, UPOA contends it has alleged facts sufficient to demonstrate that the Department both knew of Ms. Simmons' union activities and retaliated against her by removing her name from the list of employees eligible for a promotion. The Union suggests that the Department back-dated the letter informing Ms. Simmons of her removal from the list to July 12, 1989, in order to avoid the appearance of anti-union animus.

City's Position

The City argues that the facts alleged by the Union in its improper practice petition fail to satisfy the test utilized by the Public Employment Relations Board ("PERB"),[2] and adopted by this Board in Decision No. B-51-87, to determine whether an employee was discriminated against in violation of the Taylor Law. This test, the City submits, requires "evidence that a charging party was involved in protected activities and 'that respondent has knowledge of and acted because of those activities' [emphasis supplied by respondent]."[3] The City contends that since the Department's decision not to promote Ms. Simmons and the consequent removal of her name from the eligibility list occurred in July 1989, and the only specific union activity which was alleged in the petition to be the reason for retaliation was her presence at the November 30, 1989 meeting, the Union has failed to allege facts which support the conclusion that the alleged retaliation was motivated by Ms. Simmons' involvement in protected activity.

---

[2] The City cites City of Salamanca, 18 PERB ¶3012 (1985).

[3] Id. at 3027.

The City also contends that the decision to promote or not promote an employee falls within the scope of its management rights under Section 12-307b of the NYCCBL, specifically the right to "determine the methods, means and personnel by which governmental operations are to be conducted ... [emphasis added]." Furthermore, the City argues, the Department was in compliance with Civil Service Law when it chose not to promote Ms. Simmons and when it notified her, by a letter dated July 12, 1989, that she was ineligible for further certification from List No. 132.

Discussion

At the outset, we note that UPOA does not explicitly claim that the Department's failure to promote Ms. Simmons in July 1989 was improperly motivated. Rather, the Union charges that the timing of a notice dated July 12, 1989, but allegedly sent in December 1989, informing Ms. Simmons of the removal of her name from the list of employees eligible for promotion to SPO, constitutes evidence of retaliation. In other words, the Union would have us find that the Department, by sending the challenged notice on the heels of her "vigorous advocacy of union interests at the Labor Management Committee meeting held November 30, 1989," intended to retaliate against Ms. Simmons on account of her participation in union affairs. Acts so motivated, the Union alleges, constitute a violation of Section 12-306a of the NYCCBL, and appropriate remedial action warrants her promotion to SPO, retroactive to July 1989.

The City generally denies the allegations of the petition and points out that a decision to promote or not promote an employee, so long as made in accordance with Civil Service Law, falls within its statutory managerial prerogative.

Although the Union does not specify which subsection(s) of the statute it claims to have been violated, its allegations, if proven, would constitute violations of Section 12-306a(1) and (3) of the NYCCBL, which provide that it shall be an improper practice for a public employer:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (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;
>
> * * *

Where a violation of Section 12-306a(1) and (3) of the NYCCBL is alleged, we have, since Decision No. B-51-87,[4] adopted the test set forth by PERB in City of Salamanca,[5] which places the burden on the union to prove that: 1) the employer's agent responsible for the alleged discriminatory 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 charging party proves a prima facie case of improper motivation," PERB held, "the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons."[6]

Essentially, it is the Union's contention that because of the proximity in time of two events - Ms. Simmons' appearance on behalf of the UPOA on November 30, 1989 and her receipt of a letter dated July 12, 1989 in December 1989 - there is a cause and effect relationship between them sufficient to establish improper motive. The intrinsic weakness in this argument is underscored by the fact that, pursuant to the rules of the City Personnel Director,[7] the removal of

---

[4] See also, Decision Nos. B-4-90, B-25-89; B-8-89; B-7-89; B-1-89; B-46-88; B-12-88.

[5] 18 PERB ¶3012 (1985).

[6] Id., at 3027.

[7] We take administrative notice of the rules of the City Personnel Director, under which the City asserts authority for removal of Ms. Simmons' name from List No. 132. Therein, Rule IV, Section VII, entitled "Certification of Eligible Lists and Selection Therefrom," at 4.7.4., provides that:

(continued...)

Ms. Simmons' name from List No. 132 was a consequence of her having been considered and not selected for promotion for the third time in July 1989. Therefore, it is clear to us that the gravamen of the Union's complaint is an alleged failure of the Department to promote Ms. Simmons at that time.

In this connection, the Union submits that Ms. Simmons had been a UPOA delegate for approximately one year by the time she was considered for promotion to SPO in July 1989. However, the Union has failed to allege facts sufficient to prove that the Department was aware of her union involvement until November 30, 1989. In reaching this conclusion, we do not discredit Ms. Simmons' account of her union activity prior to July 1989. However, we will not, without more, impute this knowledge to the employer solely on the basis of an unanswered affidavit submitted with the Union's reply.[8]

In any event, we have repeatedly found that even an exhaustive recitation of union activity will not suffice to establish the necessary causal connection between the management act complained of and protected conduct.[9] A charging party need do more than simply prove that the City was aware of the interaction between a petitioner and his/her union. A union must also demonstrate that the employee's union activity was a motivating factor when the challenged decision was made.[10]

---

[7](...continued)
No name shall be certified more than three times to the same agency head for the same or similar position unless at such officer's request....

[8] The Revised Consolidated Rules of the Office of Collective Bargaining do not provide for the filing of pleadings subsequent to a reply and it is the policy of this Board to discourage such pleadings.

[9] Decision Nos. B-28-89; B-2-87; B-26-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

[10] E.g., Decision No. B-17-89.

The only evidence offered by the Union to demonstrate that the City harbored anti-union animus is a conclusory assertion that although dated July 12, 1989, the letter notifying Ms. Simmons of her removal from List No. 132 was intentionally back-dated and mailed to her shortly after the November 30th meeting. We recognize that, by submitting such evidence, UPOA seeks to establish a motive for retaliation by the Department. However, even assuming, arguendo, that the July 12, 1989 notice of removal was back-dated as UPOA alleges, the Union has neither alleged nor attempted to demonstrate that the process by which the Department failed to select Ms. Simmons for promotion in July 1989 was tainted by anti-union animus.

In the absence of an arguable claim that the alleged retaliatory removal of Ms. Simmons' name from the list was, for example, a discriminatory act or that the Department had no other legal basis for its actions, we cannot conclude that an improper practice has been committed. The facts belie the Union's argument that removal of Ms. Simmons' name from List No. 132 was in any way related to her union activity at the November 30th meeting and its allegations prove little more than that the notice dated July 12, 1989, was not timely received. Furthermore, the proximity in time between two events is not, without more, sufficient to support a conclusion that the Department harbored anti-union animus against Ms. Simmons.[11]

We have consistently held that allegations of improper motivation and conduct must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise.[12] The mere allegation of improper motive does not state a violation where the Union has failed to demonstrate a nexus between the underlying management act complained of (the denial of a promotion to Ms. Simmons in July 1989) and union activity (which became manifest in November 1989).

---

[11] See e.g., Decision Nos. B-24-90; B-38-88; B-6-83.

[12] Decision Nos. B-28-86; B-18-86; B-12-85; B-6-83; B-16-82; B-2-82; B-30-81; B-25-81; B-35-80.

Based on the obvious inconsistency in UPOA's attempt to establish improper motive through the timing of two unrelated events and its failure to allege facts to support the implicit claim that Ms. Simmons was improperly denied a promotion in July 1989, we conclude that UPOA has failed to establish a prima facie improper practice against the City. Accordingly, we dismiss the improper practice petition in its entirety.

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 filed by the United Probation Officers Association be, and the same hereby is, dismissed.

DATED: New York, New York
September 17, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD SILVER
MEMBER