UPB (behalf of Werfel) v. City, DOP, 45 OCB 71 (BCB 1990) [Decision No. B-71-90 (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 ON BEHALF OF JOEL WERFEL,
Petitioners,

-and-

CITY OF NEW YORK, DEPARTMENT OF PROBATION,
Respondents.
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DECISION NO. B-71-90

DOCKET NO. BCB-1280-90

DECISION AND ORDER

On May 9, 1990, the United Probation Officers Association ("the Union" or "the UPOA"), on behalf of Joel Werfel, a Supervising Probation Officer, filed an improper practice petition against the New York City Department of Probation ("the Department"). The petition alleges that the Department, in violation of §12-306a. of the New York City Collective Bargaining Law

("NYCCBL"),[1] gave Petitioner Werfel an untimely and an anomalous job evaluation in retaliation for his having filed both an Article 78 petition and an appeal with the Civil Service Commission challenging an earlier denial of promotional opportunity. The petition asks that Petitioner Werfel be awarded the merit pay increase that he allegedly would have received if his evaluation had been done properly, and that the Department cease and desist from retaliating against him for his union activities.

The Department, appearing by the City of New York Office of Municipal Labor Relations ("the City"), filed an answer to the improper practice petition on June 1, 1990. The Union filed a reply on June 25, 1990.

On July 2, 1990, a Trial Examiner designated by the Office of Collective Bargaining asked the parties to provide additional information concerning Petitioner Werfel's Article 78 petition. The parties duly responded to the request.

BACKGROUND

Petitioner Joel Werfel was appointed to the position of Probation Officer with the Department in 1979, and he was promoted to Supervising

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[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 re-numbered as 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 discourag-ing membership in, or participation in the activities of, any public employee organiza-tion;
> (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.

Probation Officer in 1981. In 1986, Petitioner Werfel passed the promotional examination for the civil service title of Administrative Probation Officer ("APO"). He was ranked twenty-sixth out of sixty on the list published by the Department of Personnel. By letter dated June 19, 1989, the Probation Department's Chief of Personnel informed the Petitioner that he was no longer eligible for the APO list because he had been "considered and not selected for appointment or promotion to three separate vacancies."

By letter dated August 1, 1989, the Petitioner appealed the issue of whether his name had been properly removed from the eligible list to the Civil Service Commission, claiming that the list had been handled improperly. The City moved to dismiss the appeal, contending that the Commission lacked subject matter jurisdiction. On or about October 20, 1989, the Commission denied the City's motion. Instead, it remanded the matter to the Department of Personnel "for compilation of a complete record which includes documentary evidence of the actions taken pertaining to appellant."[2]

On December 12, 1989, the Petitioner instituted an Article 78 proceeding in state Supreme Court, New York County, seeking to have the Department's ineligibility determination overturned. On February 15, 1990, Supreme Court Justice Helen E. Freedman issued a decision requiring that the Petitioner be reinstated to the June, 1987 list of eligibles for the Administrative Probation Officer position, and that he be considered for the next available position.[3]

On April 10, 1990, Petitioner Werfel's supervisor gave a copy of a job performance evaluation covering the period January 1988 to May 1989 to him for signature. He refused to sign the evaluation, alleging that it was not

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[2] Notice of City Civil Service Commission Action; Item No. C89-984.

[3] Werfel v. New York City Department of Probation, New York City Department of Personnel, and New York City Civil Service Commission, Index No. 22557/89 (cited hereinafter as Werfel decision).

legitimate, in part because it was "at least two years overdue," and, in part because the overall rating was "contrary the [Bureau Chief's] repeated promises" for a superior rating.

POSITIONS OF THE PARTIES

Petitioners' Position

The Union contends that the untimely and underrated job performance evaluation that Petitioner Werfel's supervisor gave to him was in retaliation for his having engaged in protected union activities. The Union asserts that, had he been given a superior rating, which allegedly he deserved, the Petitioner would have been entitled to a seven percent merit pay increase.

According to the Union, on April 19, 1989, Petitioner Werfel's supervisor "reaffirmed her promise of a superior evaluation." She then allegedly repeated the promise "on numerous occasions up to an including October 3, 1989." However, when the Petitioner received his evaluation, it did not contain the superior rating that he expected. The rating not only was poorer, but allegedly it was unusually late as well. The Union claims that every other performance evaluation in the supervisor's branch had been filed by March of 1989, and that "virtually all other [Supervising Probation Officers] received superior evaluations as a means of receiving a 7% increase intended for all." The Union also notes that both the Petitioner's prior and subsequent evaluations were rated superior.

The Union supports its charge by noting that the Petitioner filed a successful lawsuit, commenced "in conjunction with the Union's consent and support . . . to remedy an improper denial of promotion to a member of the UPOA." The Union also points out that its attorneys sent letters to the Department complaining of the Petitioner's unfair treatment. Therefore, in the Union's view, these legal steps taken by the Petitioner clearly constitute protected activity because he acted "against the Department [and was] supported by the Union in his complaint and suit against the defendant." The Union also argues that its involvement was "part of the certified employee

organization's role in representing its members."

The Union theorizes that the Petitioner's supervisor denied him the superior rating because she had been named as a defendant in the Article 78 proceeding and in the appeal to the Civil Service Commission. It also theorizes that the evaluation was a means "to undercut [the Petitioner's] claim before the court," because the Petitioner "foreseeably" could use a superior evaluation to support his claim that the Department improperly dropped him from the APO promotional list.

Contradicting one of the City's defenses, the Union maintains that the supervisor abused any managerial discretion that she may have had. It points out that, in addition to intrinsic untimeliness, the supervisor dated the evaluation on November 30, 1989, yet allegedly she delayed showing it to the Petitioner until late January, 1990. The Union concludes that the delay and the rating of satisfactory rather than superior as promised "establishes a sufficient causal connection" between the actions pending against the Department and the Petitioner's denial of a merit pay increase.

Respondents' Position

The City argues that the petition should be dismissed because the assignment of job performance ratings lie within the Department's statutory

managerial authority authorized by Section 12-307b. of the NYCCBL.[4] According to the City, the Department properly exercised its discretion when it gave the Petitioner a satisfactory job performance rating instead of a superior rating.

The City also contends that the Petitioners based their allegations solely upon opinions, inferences and conjecture. Relying upon Decision No. B-2-87, the City asserts that allegations of improper motivation must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise.

Finally, the City maintains that Section 12-305 of the NYCCBL clearly delineates the rights accorded public employees, and the section in no way contemplates the inclusion of the filing of litigation. Therefore, the City concludes, since filing a law suit is not within the scope of employee rights granted by §12-305, it is not an activity protected by Section 12-306a. of the Collective Bargaining Law.

DISCUSSION

The basis of this improper practice charge is retaliation allegedly stemming from Petitioner Werfel's involvement in litigation and a Civil Service Commission appeal "supported by the Union" and "commenced in conjunction with the Union's consent and support." We find, however, that the

[4] 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 stan-dards 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; main-tain the efficiency of governmental opera-tions; determine the methods, means and per-sonnel by which government 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 per-forming its work.

Article 78 petition and the Civil Service Commission appeal were of limited application, and both focused upon Petitioner Werfel personally and individually.

Several factors underlie this conclusion: We note that Joel Werfel is the only named petitioner in the Article 78 petition; neither the United Probation Officers Association nor other "similarly situated" Supervising Probation Officers are parties. Indeed, there is no indication that other Probation Officers supported Petitioner Werfel in, or were even aware of, his legal proceeding. Other indicia that the Article 78 proceeding was of a personal nature include the facts that Petitioner Werfel sought "an order reinstating him to the promotional list and a direction that he be appointed to that position with back pay";[5] that the petition refers to counsel for Petitioner in the singular ("Attorneys for Petitioner"), and that the UPOA was not included on the petition's distribution list.

Similarly, personal benefit is evidently the prime purpose of Petitioner Werfel's appeal to the Civil Service Commission. The appeal was made "on behalf of Joel Werfel," and the Notice of Action report issued by the Commission on October 20, 1989, clearly indicates that the Petitioner's individual interest is the essential subject matter presented for its consideration:

> Mr. Werfel claims that he is entitled to two more considerations. He argues that he should not have been charged with consider-ations when another individual was considered and appointed as the result of settlement of litigation and when surgery and an inability to meet the physical demands of the position required him to decline consideration for appointment to a position at the Community Contact Unit.

In a recent decision[6] on whether participation in a legal proceeding

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[5] Werfel decision, p.1, emphasis added.

[6] Lamar McNabb and Local 1757, District Council 37 v. City of New York, Decision No. B-48-88.

initiated by a union constitutes protected activity under Section 12-305 of the NYCCBL, we adopted a two-pronged test based upon two related decisions of the New York State Public Employment Relations Board ("PERB").[7] In order for participation in litigation to qualify as protected activity:

> 1. it must be related to the employment relationship; and
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> 2. it must have been undertaken on behalf of the employee organization and not be strictly personal.

In the McNabb case, we decided that the legal activity in question, also an Article 78 proceeding, satisfied both prongs of the test. We found that it was sufficiently related to the employment relationship to satisfy the first element because the litigation was undertaken to increase promotional opportunities and to fill vacant positions with permanent competitive appointees. We then found that the second element was satisfied because the petitioners did not gain the benefits of the litigation on a strictly personal basis. We based this finding upon the facts that the litigation had been filed in the names of the president of the local and interested unit members "on behalf of themselves and all others similarly situated"; that the union's attorneys represented all the petitioners in the action; and that the union bore all the litigation expenses. We concluded that "notwithstanding the fact that [the petitioners] clearly had a personal interest in the outcome of the litigation, the proceeding itself was a union-initiated action and participation therein of union members was participation in the activities of an employee organization, which is protected under the NYCCBL."

Applying this standard to the case now before us, we find that, although the first element is satisfied, the second element is not. A fair reading of Petitioner Werfel's state Supreme Court pleadings and the Civil Service

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[7] Deer Park Board of Education, 10 PERB ¶4594 (1977), aff'd, 11 PERB ¶3042 (1978); and City of Saratoga Springs, 18 PERB ¶3009 (1985).

Commission report shows that both proceedings were intended to secure a job promotion and wage increase. These goals clearly relate to the Petitioner's job in the Department of Probation.

However, the Petitioners have not met the second element of the test, requiring both that the litigation be undertaken on behalf of the employee organization and that the litigant not be a strictly personal beneficiary. In addition to the indications listed at the beginning of this section, we note that Justice Freedman characterized the Article 78 petition as a personal action: "Petitioner Joel Werfel challenges respondents' determination that he is no longer eligible for certification from the civil service list for promotion to Administrative Probation Officer. He seeks an order reinstating him to the promotional list and a direction that he be appointed to that position with back pay."[8] We note further that Justice Freedman based her decision upon the issue of "whether [petitioner] was properly certified and considered on three separate occasions pursuant to [a rule of the City Personnel Director]."[9] Thus, the record lacks any evidence to establish that the Article 78 proceeding was undertaken on behalf of anyone other than Petitioner Werfel himself.

Similarly, the Civil Service Commission narrowly framed the appeal that it was considering: "Joel Werfel appeals to us to resolve the issue of whether his name had been improperly removed from the eligible list for the position of Administrative Probation Officer, Exam. No. 1513."[10]

In view of the above, we conclude that the Article 78 petition and the Civil Service Commission appeal were intended to benefit Joel Werfel personally. Thus, neither qualifies as protected activity under Section 12-

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[8] Werfel decision, p.1, emphasis added.

[9] Id., p.5.

[10] Notice of Commission Action; Item No. C89-984, emphasis added.

305 of the New York City Collective Bargaining Law.[11] We find, therefore, that no violation of law has been stated and we shall dismiss the petition herein 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 for Joel Werfel against the

[11] Cf. Rosen v. PERB (72 N.Y.2d 42, 530 N.Y.S.2d 534 [1988]), where the New York Court of Appeals agreed with PERB that Section 202 of the Taylor Law does not afford protection to concerted activities of employees which fall short of attempts to form, join or participate in, or refrain from forming, joining or participating in an employee organization.

City of New York Department of Probation in Docket No.

BCB-1280-90 be, and the same hereby is, dismissed.

Dated: New York, New York
October 17, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
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