L.1407, DC37 v. Dep't of Health, 47 OCB 1 (BCB 1991) [Decision No. B-1-91 (IP)]

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

-between-

DECISION NO. B-1-91

LOCAL 1407, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

DOCKET NO. BCB-1289-90

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF HEALTH,

Respondent.

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INTERIM DECISION AND ORDER

On June 6, 1990, Local 1407, District Council 37, AFSCME, AFL-CIO (the "Union"), on behalf of Mr. Alan Rosenblatt and Mr. Fitz Beaumont, filed an improper practice petition against the New York City Department of Health ("DOH"), alleging:

> Unlawful interference, restraint and coercion, as well as discriminatory treatment against union member-ship in violation of Section 12-306a (1) and (3) of the New York City Collective Bargaining Law ["NYCCBL"].[1]

DOH, by its Office of Labor Relations (the "City"), filed an answer to the petition on August 6, 1990. The Union filed a reply on August 31, 1990.

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[1] Section 12-306 of the NYCCBL provides, in pertinent part,

> 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 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;
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> * * *

Background

Petitioners Rosenblatt and Beaumont were hired by DOH as provisional Assistant Accountants on July 31, 1988 and September 25, 1988,[2] respectively. Both worked under the supervision of Mr. Jerry Brown, their immediate supervisor, and Mr. Mohammed Younis, Director of Internal Accounting. Shortly after Rosenblatt and Beaumont were hired, Brown allegedly began to assign them to duties which they claimed were outside the scope of the Assistant Accountant job description.[3] The duties complained of included "messenger" work, i.e., delivery and collection of checks and vouchers, and "porter" duties, i.e., picking up office supplies.

In August 1989, the Union filed separate Step I grievances on behalf of Rosenblatt and Beaumont, concerning the assignment of out-of-title work. The parties do not dispute that during a consolidated Step I hearing of both matters, Younis assured the grievants that, in the future, only work commensurate with their title would be assigned to them.[4]

Approximately two weeks after the Step I hearing, the Union alleges that Brown resumed the practice of assigning the duties previously complained of to both grievants. According to the Union, Rosenblatt allegedly refused to comply with Brown's request that he perform messenger work, without consequence. Beaumont, who did not refuse, instead chose to write a memorandum to Younis reminding him of the Step I grievance and asking that the practice of assigning him out-of-title work cease. This memorandum, dated October 20, 1989, read as follows:

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[2] Although a factual dispute exists as to the precise hire date of Beaumont, resolution of that issue is not germane to this Decision and Order.

[3] The job description for the Assistant Accountant title provides, in pertinent part:

General Statement of Duties and Responsibilities

Under close supervision, is trained in and performs beginning level professional work for the purpose of acquiring knowledge, skill and experience in the professional field of accounting for City departments or agencies; assists in making field investigations, and in auditing of business firms; performs related work.

[4] Neither party indicates the date of this hearing and, apparently, no formal decision was rendered.

> ...[Y]ou [continue] to show contempt, disrespect and disregard for our representatives and the union authorities!
>
> August 10, 1989, a grievance was submitted to the union and the union representative came as per your meeting, to wit you assured us that you would reply to my grievance.
>
> You were further told to [remove] all illegal documents that you placed [in] my official file and that you must give them to me to be destroyed.
>
> You were further told by [the union representa-tive] to [cease] and desist from [assigning] me [duties] not [commensurate] with my contract title.
>
> Instead of adhering to these request[s] you [continue] to [harass], intimi[d]ate, and humil[i]ate me ... [b]y having me [perform] out of title functions.
> I AM AGAIN REQUESTING A REPLY AND THAT YOU GIVE ME WORK AS PER MY CONTRACT TITLE.

According to the Union, later that day Beaumont personally confronted Younis to ask why he was being assigned to duties contrary to the Step I agreement. Younis allegedly responded, "there is nothing the Union can do to me." Beaumont also claims that Younis boasted about how the Union did nothing when two other employees brought complaints to it about him.

The Union alleges that Brown continued to assign messenger and porter duties to Beaumont until December 14, 1989, when he was removed from his regular work location, reassigned to the collating unit and assigned to duties which included collecting mail and matching and stapling invoices to purchase orders.

Beaumont was terminated from his provisional appointment on February 16, 1990. Rosenblatt was terminated on March 20, 1990. The Union submits that neither employee was given a reason for their summary dismissals nor had they been evaluated during their employment with DOH.[5]

The instant petition, filed on June 6, 1990, seeks an order from the Board of Collective Bargaining ("Board"), directing DOH: to cease and desist from retaliating against its employees on account of their union activity; to require that DOH post notices informing employees that it has been found guilty of unfair labor practices; and to reinstate Rosenblatt and Beaumont with back pay and benefits, plus interest.

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[5] The Union also claims that DOH failed to give Beaumont compensation for all of the unused sick and vacation days due him on separation.

Positions of the Parties

Union's Position

The Union alleges that both Rosenblatt and Beaumont were terminated on account of their having brought and, in the case of Beaumont, pursued out-of-title work grievances. The Union also asserts that the employer's actions and words clearly demonstrate that the petitioners were terminated "in a purely retaliatory manner designed to discourage other union members from pursuing grievances or otherwise engaging in protected union activities."

Specifically, the Union points to the conversation between Younis and Beaumont, when the latter sought to discuss his grievance. The Union argues that Younis' response, i.e., "there is nothing the Union can do to me," clearly was intended to discourage Beaumont from seeking further Union assistance.

According to the Union, support for this conclusion is evidenced by Younis' blatant refusal to comply with the Step I Agreement. The Union further asserts that in retaliation for having pursued the matter, Brown continued to assign the complained of duties to Beaumont until he was reassigned to the collating unit to perform "menial tasks," which "physically isolated and ostracized him from all his coworkers." These acts, the Union argues, were not only designed to discourage Beaumont's pursuit of his out-of-title work grievance but also sent a message to other Union members that protected conduct would not be tolerated.

The Union also disputes the City's claim that both petitioners were terminated for cause. Inasmuch as Rosenblatt and Beaumont were never evaluated, the Union submits that the City will be unable to produce any "factual or written evidence whatsoever to indicate that [their] terminations were anything but retaliatory [emphasis in original]."

Finally, the Union rejects the City's management rights defense, claiming that the term is used "to cover a myriad of sins, and it is often used in cases where anti-union animus is the motivating factor." Moreover, the Union argues, because four new provisional Associate Accountants have been hired by DOH since February 16, 1989, the City cannot claim that Rosenblatt and Beaumont were terminated for lack of work.

City's Position

At the outset, the City generally denies all of the substantive allegations set forth in the petition and, instead, maintains that: 1) Rosenblatt and Beaumont were provisional employees; 2) DOH received numerous oral complaints from supervisors concerning their unsatisfactory productivity; 3) both were repeatedly counselled for unsatisfactory job performance; and 4) neither demonstrated any improvement during their employment. Therefore, the City argues, Rosenblatt and Beaumont were terminated for just cause and for reasons not proscribed by the NYCCBL.[6]

The City also argues that the Union's wholly conclusory allegations fail to satisfy the requirement of Rule 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules").[7] The City contends that in order to support the underlying theory of its case, a charging party must specify relevant documents, dates and facts which establish that union activity was the motivating factor resulting in the employer's decision.[8] Here, the City claims, the Union's allegations are based on nothing more than speculative and self-serving arguments which fail to demonstrate any causal connection between the legitimate exercise of managerial prerogative and the out-of-title work grievances filed by Rosenblatt and Beaumont.

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[6] The City cites Section 12-307b of the NYCCBL, which grants to management certain rights including the right, inter alia:

> ... to determine the standards of services to be offered by its agencies; direct its employees; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; and exercise complete control and discretion over its organization....

[7] Rule 7.5 of the OCB Rules provides, in pertinent part:

> **Petition-Contents.** A petition filed pursuant to Rule 7.2, 7.3 or 7.4 [Improper Practices] shall be verified and shall contain:
>
> * * *
>
> c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts...;
>
> d. Such additional matters as may be relevant and material.

[8] The City cites Decision No. B-51-87.

Discussion

As a preliminary matter, we find that personnel decisions concerning the assignment of work or the relief of employees from duty because of lack of work or for other legitimate reasons, generally are within management's statutory right to, inter alia, "direct its employees" and "maintain the efficiency of its operations."[9] As such, these management decisions are not normally reviewable in an improper practice forum.[10] However, it is well-established that acts properly within the scope of managerial prerogative may constitute improper practices if the charging party can establish that the challenged acts were motivated by reasons prohibited by the NYCCBL.[11]

In cases where the employer's motivation is at issue, the test which this Board has applied since our adoption, in Decision No. B-51-87, of the standard set forth by PERB in City of Salamanca, 18 PERB 3012 (1985),[12] provides that initially the petitioner must sufficiently show 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.

Once the petitioner has satisfied both elements of this test, then, if the respondent does not refute the petitioner's showing on one or both of these elements, the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[13]

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[9] Section 12-307b of the NYCCBL.

[10] See e.g., Decision No. B-25-89.

[11] Decision Nos. B-50-90; B-16-90; B-61-89; B-7-89; B-3-88; B-3-84; B-43-82; B-25-81; B-4-79.

[12] In Decision No. B-51-87, we noted that "the Salamanca test is substantially the same as that set forth by the National Labor Relations Board in its 1980 NLRB v. Wright Line decision [251 NLRB 1083, 105 LRRM 1169, enforced 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981); cert. denied 455 US 989, 109 LRRM 2779 (1982)], and endorsed by the U.S. Supreme Court in NLRB v. Transportation Management Corp., [462 US 393, 113 LRRM 2857 (1983)]."

[13] See e.g., Decision No. B-67-90.

Applying this test to the instant proceeding, we note that the first element of the above test is not at issue. It is uncontroverted that Rosenblatt and Beaumont filed out-of-title work grievances in August 1989. There is also no dispute that Younis heard both matters during a consolidated Step I hearing held shortly thereafter.

Beyond this point, however, the sufficiency of the pleadings with respect to each petitioner diverge and, in the case of Rosenblatt, we find that the petition is devoid of any specific allegations which even arguably establish that the termination of his provisional appointment in March 1990 was related to protected activity. In other words, we do not find that the Union has satisfied its initial burden of proving a causal connection between the termination of Rosenblatt's employment and his having filed an out-of-title work grievance.

We have long held that an allegation of improper motive, even when accompanied by an exhaustive account of union activity, does not state a violation of the Section 12-306a of the NYCCBL where no causal connection has been demonstrated.[14] The mere fact that an employee filed a grievance does not provide a basis for a finding of improper practice. Nor will we find that the Union's burden of proving improper motive is advanced by the consolidation of two independent claims in a single petition where there exists no compelling reason to consider the charges as inextricably intertwined. In the absence of any showing that these claims are more than incidentally related, we will not draw an inference of discriminatory intent as to both petitioners from facts and evidence relating only to one.

In support of our decision to sever these claims, we note that no disciplinary action was taken in connection with Rosenblatt's alleged refusal to comply with Brown's request that he perform "messenger" work. Rosenblatt emerged seemingly unscathed from an act which arguably constitutes insubordination. In contrast, however, the Union alleges that after Beaumont threatened to pursue his grievance, the employer continued to assign him out-of-title work, and further retaliated by reassigning him to the collating unit to perform duties arguably even further removed from the Assistant Accountant job description. Thus, we cannot ignore the possibility that because Beaumont chose to seek relief by reasserting his grievance, rather than to simply refuse the assignments as did

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[14] Decision Nos. B-53-90; B-28-89; B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

Rosenblatt, that Beaumont's persistence was the causative factor for the differential treatment of which he complains.

Second, the only other point in the record at which the interests of Rosenblatt and Beaumont appear to merge is the Union's argument that the City's failure to produce written evidence of poor work performance creates a presumption that their terminations were retaliatory. We must reject this argument on its face. Except under limited circumstances not applicable to this proceeding, provisional employees have no expectation of tenure and rights attendant thereto and, thus, may be terminated at any time without charges proffered, a statement of reasons given or a hearing held.[15] Therefore, the City's mere failure to articulate a reason for the termination of a provisional employee, without more, does not constitute evidence sufficient to satisfy the Union's burden of proving improper motivation.

Where an exercise of management prerogative is challenged, a charging party must allege facts which demonstrate an arguable relationship between the act complained of and union activity.[16] The mere assertion of improper motivation will not satisfy this burden of proof.[17] In order to state a cause of action under Section 12-306a(1) and (3) of the NYCCBL, a petition must be supported by allegations of fact rather than recitals of conjecture, speculation and surmise.[18]

In the case of Rosenblatt, no such relationship has been demonstrated. Rather, it is apparent that the Union consolidated the claims of Rosenblatt and Beaumont in an attempt to create that nexus. In appropriate cases, we will consider circumstantial evidence as a factor in assessing the motivation of an employer's agent.[19] Here, however, the sufficiency of the charges with respect to Rosenblatt rests entirely on an inference to be drawn from facts alleged in

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[15] Decision Nos. B-39-89; B-17-89.

[16] Decision Nos. B-2-87; B-14-83; B-3-84; B-5-82; B-25-81; B-20-81.

[17] Decision Nos. B-61-89; B-46-88; B-39-85.

[18] Decision Nos. B-55-87; B-12-85; B-30-81; B-24-81; B-20-81.

[19] Decision Nos. B-67-90; B-24-90; B-17-89; B-8-89.

connection with Beaumont. Inasmuch as the Union has failed to allege facts specific to Rosenblatt which support the inference urged, we cannot conclude that the charges with respect to him constitute a cognizable claim of improper practice.[20] Therefore, must dismiss that aspect of the instant petition.

On the other hand, we find that the Union has raised a substantial issue concerning whether Beaumont's efforts to pursue his grievance were met with acts arguably intended to discourage this activity. The Union's showing is advanced by the claim that when confronted by Beaumont on October 20, 1989, Younis "flaunted his anti-union animus," when he said "there is nothing the Union can do to me." Rather than attempt to rebut the allegation or to offer an explanation for the remark, the City generally denies all of the substantive allegations of the petition. While the City has raised an issue of fact with respect to Beaumont's account of this conversation, the resolution of which is a necessary precedent to our consideration of the Union's allegations of improper motive, the mere denial of Beaumont's version of the facts is not sufficient to negate the allegation.[21] If Younis did utter the remark attributed to him, given the context in which the offending statement was made and the juxtaposition with other remarks allegedly made in that context (i.e., that the Union did nothing when two other employees had complained), the import of such a statement is open to an interpretation supportive of the Union's claim that Younis intended to discourage Beaumont from seeking further Union assistance.

Furthermore, while we will not infer animus simply because an employee complains of an unpleasant assignment, we find that the facts in dispute are suggestive of a continuing course of retaliatory conduct. The Union has demonstrated a sufficient relationship between Beaumont's complaint in August 1989 concerning out-of-title work; his pursuit of the grievance and the questions raised by Younis' remarks on October 20, 1989; the continued assignment of alleged "messenger" and "porter" duties to him alone; and the arguably punitive reassignment to the collating unit in December 1989; to sharpen the perception of punishment on account of his having filed and pursued the out-of-title work grievance.

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[20] Decision No. B-2-86.

[21] Decision No. B-48-88.

However, based on facts still in issue, we are unable to determine whether the employer did intend to interfere, coerce, restrain and discriminate against Beaumont on account of his protected activity or that it had some other reason, not violative of the NYCCBL, for its actions. Where, as here, the Union has alleged facts sufficient to support an inference of improper motive, the City must submit evidence sufficient to rebut the Union's showing or establish that its actions were motivated by reasons not prohibited by the NYCCBL.[22] It is well-settled that an employer is not shielded from a review of its actions simply by asserting a management rights defense.[23] Here, the City neither attempted to refute the elements of Beaumont's improper practice claim, nor did it offer probative evidence in support of the alleged exercise of managerial prerogative.

Therefore, we direct that a hearing be held for the purpose of creating a record upon which we may determine whether the City or its agent(s) violated Section 12-306a(1) and (3) of the NYCCBL, as alleged by the Union on behalf of Fitz Beaumont. However, we dismiss that aspect of the Union's petition which alleges an improper practice on behalf of Alan Rosenblatt.

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[22] Decision Nos. B-67-90; B-24-90; B-4-90; B-3-90; B-61-89; B-36-89; B-25-89; B-8-89; B-7-89; B-1-89; B-46-88; B-12-88; B-3-88; B-58-87.

[23] Decision Nos. B-50-90; B-16-90; B-61-89; B-3-88; B-3-84; B-25-81.

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 the Union be, and the same hereby is, dismissed to the extent it alleges an improper practice with respect to Alan Rosenblatt; and it is further

ORDERED, that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which this Board may determine whether there has been a violation of Section 12-306a(1) and (3) of the New York City Collective Bargaining Law, as alleged by the Union on behalf of Fitz Beaumont.

DATED: New York, New York
January 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER

First, there is no dispute that at the Step I hearing, Younis gave the grievants "assurances ... that in the future, [they] would only be assigned to work commensurate to their title." This does not necessarily imply that the work complained of was, in fact, out-of-title for the Assistant Accountant job description.[24] However, without the

[24] In this connection, we note that the title at issue is an entry level position.

benefit of written decision stating the employer's disposition of his grievance, Beaumont reasonably believed that his contractual rights were being violated when Brown resumed the practice of assigning these duties to him.

Furthermore, since a substantial issue has been raised concerning the employer's motive for its actions prior to Beaumont's termination, we cannot, at this juncture, ignore the possibility that his termination also may have been tainted. Because a substantial question concerning the employer's motive has been raised, we also must examine the City's claim that it terminated Beaumont's employment for just cause, based on "numerous oral complaints from supervisors." Ordinarily, we are not concerned with the quantum of evidence supporting the termination of a provisional appointee.[25] However,

[25] See Discussion, supra, at 11-12.