DeChabert v. HHC, Metropolitan Hospital Center, 47 OCB 17 (BCB 1991) [Decision No. B-17-91 (IP)]

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

DECISION NO. B-17-91
-between- DOCKET NO. BCB-1246-90

GEORGE DeCHABERT,
Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, METROPOLITAN HOSPITAL CENTER

Respondent.
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DECISION AND ORDER

On January 29, 1990, George DeChabert ("Petitioner") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation, Metropolitan Hospital Center ("respondent" or "HHC"), violated Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL")[1] by denying his request

[1] Section 12-306a of the NYCCBL provides as follows:
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 § 12-305 of this chapter;

(2) to dominate or interfere with the formation or administration of an public employee organization;

for union representation during an investigatory interview.

HHC filed a verified answer and motion to dismiss on July 6, 1990.[2] The Petitioner did not file a reply. In a letter dated August 23, 1990, the Trial Examiner assigned to the case wrote to Petitioner and informed him of his right to file a reply. Petitioner was given until September 4, 1990 to do so, but no reply was ever filed.

Background

Petitioner, a provisional housekeeper, was hired by

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(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.

[2] In prior cases, this Board has stated that when making a motion to dismiss, the moving party concedes the truth of the facts alleged in the petition. Decision Nos. B-9-91; B-7-89; B-38-87; B-36-87; B-7-86; and B-12-85. In the instant case, however, the document entitled "answer and motion to dismiss" filed by HHC contains a denial of most of the factual allegations asserted by Petitioner. Accordingly, due to the seeming inconsistency between the title and the content of the document submitted by HHC, we will deem it to be an answer, rather than a motion to dismiss.

Metropolitan Hospital Center on January 3, 1989. On September 14, 1989, he arrived at work at approximately 2:00 p.m. and went to the office of Ms. Janice Kurth, his supervisor, to sign his timesheet. The Petitioner alleges that Ms. Kurth confronted him with her suspicion that he was intoxicated, and ordered him to proceed to the emergency room for analysis. Petitioner submits that he requested the presence of his union representative and was told that his shop steward was not available. As a result, Petitioner contends, he refused to submit to testing and was terminated.

The Hospital offers a different account. According to HHC, Ms. Kurth asked Petitioner if he had been drinking. Petitioner admitted that he had been drinking and, therefore, Ms. Kurth ordered him to proceed to the emergency room for testing. He refused. At this point, HHC alleges, Ms. Kurth informed Petitioner that his actions constituted insubordination, and advised him that any further discussion should take place with his union representative present. According to HHC, Petitioner did not respond to Ms. Kurth's advice and never requested the presence of his Union representative. Instead, Petitioner proceeded to describe how the hospital was the cause of his problems. At this point, Ms. Kurth asked Ms. Casanova, another supervisor, to witness Petitioner's physical condition, his refusal to be tested, and the fact that he did not request the presence of a union representative.

Petitioner was placed off-duty for the remainder of the day.

The Hospital's Office of Labor Relations reviewed the circumstances and determined that the Petitioner should be terminated for three reasons: 1) Petitioner admitted to being intoxicated; 2) he was insubordinate in refusing to be medically evaluated; and finally, 3) his disciplinary record included a prior termination, on April 26, 1989, that was rescinded in order to give Petitioner one last chance. Pursuant to the terms of the stipulation rescinding his termination, however, Petitioner's probationary period was extended by three months.

Positions of the Parties

Petitioner's Position

The Petitioner states that as a union member, "it was only fair that I be able to consult and exercise as well as [utilize] my union rights for self protection." Specifically, he states that he "had the right to consult a union representative before going through with the wish of Ms. Janice Kurth's order for a sobriety test."

Respondent's Position

HHC contends that the improper practice petition must be

dismissed because Petitioner has failed to state a cause of action under the NYCCBL. In support of its position, HHC alleges that Petitioner has failed to demonstrate that Respondent committed any act in violation of §12-306a. Respondent submits that it has not interfered with, restrained or coerced Petitioner in the exercise of his statutory right to bargain collectively through certified public employee organizations, to organize, form, join, and assist public employee organizations; or to refrain from such activities. According to HHC, terminating an employee for insubordination does not constitute a violation of Section 12-306 of the NYCCBL.

HHC also contends that Petitioner has failed to establish any nexus between activities protected under the NYCCBL and the events of September 14, 1989, which resulted in his discharge. HHC submits that Petitioner's charges consist entirely of surmise, speculation and conjecture; they are totally unsupported by allegations of fact. Therefore, HHC argues, Petitioner's charges cannot provide a basis for finding an improper practice, and should be dismissed as a matter of law.

Discussion

We are presented, here, with two conflicting versions of the facts which gave rise to this dispute. Petitioner contends, in essence, that he had the right to consult with a union

representative before submitting to a sobriety test. This right, Petitioner alleges, was violated because he requested a union representative, was told that his shop steward was not available and, thereafter, was terminated for refusing to submit to a sobriety test.

In contrast, HHC contends that after Petitioner's supervisor asked him if he had been drinking, to which he responded affirmatively, she advised him to contact his union representative. Petitioner ignored this advice, according to HHC, and never requested that his union representative be present. Thereafter, Petitioner's supervisor ordered him to proceed to the emergency room for evaluation. Petitioner refused. HHC argues that Petitioner's refusal constituted insubordination, for which he was terminated. Termination of an employee for insubordination, HHC maintains, cannot be considered an improper practice.

We need not resolve this factual dispute, for we find that an issue of law, which is a matter of first impression for this Board, is dispositive of the Petitioner's claim herein.

In NLRB v. Weingarten,[3] the Supreme Court conferred upon private sector employees the right to aid of a union representative during an investigatory interview that the involved employee reasonably believes may result in disciplinary action. The Court based its decision on §7 of the NLRA which provides:

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[3] 420 US 251, 95 S.Ct. 959, 43 L.Ed.2d 171, 88 LRRM 2689 (1975).

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The right of union representation inheres, the court held, in §7's guarantee of the right of employees to act in concert for mutual aid and protection.

In granting this right, the Supreme Court set forth certain limitations:

> 1) The right to have representation at an investigatory interview arises only when the employee makes a request for such representation.
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> 2) The employee can request representation only if he reasonably believes that the interview will result in disciplinary action.
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> 3) The employee's right to have representation must not interfere with legitimate employer prerogatives such as the discontinuance of the interview if and when the employee requests a representative; the employer has no duty to bargain with a representative who is present at the interview.[4]

In addition, if no union representative is available for the interview and the employer wishes to continue the interview, it must be postponed until a representative is available.[5] However, nothing in Weingarten indicates that an employer must postpone an

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[4] Decision No. B-61-89, quoting Gentile, Developments Since Weingarten: A Brief Summary, New York State Bar Journal (May 1984).

[5] Heshizer and Downing, The Contracting Weingarten Doctrine: NLRB Policymaking in a Politicized Environment, Labor Law Journal (September, 1985) which cites as authority Consolidated Freightways, 264 NLRB 76 (1982).

interview because a particular union representative is not available, where another representative is available and could have been requested by the employee.[6]

When an employer is found to have violated an employee's Weingarten rights, the employee may be entitled to a make whole remedy. However, if the employer is able to demonstrate that the discharge was based on good cause established by facts independent of the interview, the discharge stands.[7]

This Board has never considered the question of whether employees covered by the NYCCBL are entitled to Weingarten rights. While the New York State Public Employment Relations Board ("PERB"), this Board's state counterpart, has not directly ruled on the applicability of the Weingarten doctrine under the Taylor Law, several decisions of PERB and the New York State courts have examined the topic. Those cases provide guidance as to whether Weingarten rights should be extended to New York City's public employees.

Section 202 of the Taylor Law, the counterpart to the NLRA's §7, provides:

> Public employees shall have the right to form, join and participate in, or refrain from forming, joining or participating in, an

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[6] Coca-Cola Bottling Co., 227 NLRB 1276, 94 LRRM 1200 (1977).

[7] Gentile, Developments Since Weingarten: A Brief Summary, New York State Bar Journal (May 1984); NLRB v. Consolidated Food, 694 F.2d 1070, 112 LRRM 2683 (6th Cir. 1982).

employee organization of their own choosing.

Conspicuously absent from this section, but present in §7 of the NLRA, is the phrase "...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...." It is this phrase which the Supreme Court relied upon in reaching its decision in Weingarten. This phrase is also absent from the NYCCBL.

In Dutchess Community College v. Rosen,[8] the Petitioner, a teacher, alleged in an improper practice case that her hours were cut back after she voiced complaints to the administration on behalf of a group of teachers. PERB held that "omission of language comparable to the second part of §7 evidences an intention not to afford protection to the concerted activities of employees that fall short of an attempt to form, join, participate in or refrain from forming, joining or participating in an employee organization." The Court of Appeals affirmed this decision in 1988.[9]

In City of New York Department of Investigation v. SSEU, Local 371,[10] the Petitioner, relying primarily on Weingarten, charged that the City violated Civil Service Law §209-a.1(a) - (c) by refusing to permit a union representative to be present during the course of

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[8] 17 PERB ¶3093 (1984).

[9] Rosen v. PERB, 72 N.Y.2d 42, 526 N.E.2d 25 (1988).

[10] 9 PERB ¶3047 (1976).

an interview. PERB, in dismissing the charges, held that the cited statutory provisions made it an improper practice for an employer to interfere with the organizational or representational rights of public employees. Therefore, a necessary element of the charge, anti-union animus, was found not to be present in that case. On the Weingarten issue PERB stated:

> "We also find it unnecessary to determine whether the Weingarten doctrine applies under the Taylor Law, and we disassociate ourselves from the expression of opinion by the hearing officer that the Weingarten doctrine is applicable."

PERB's decision was affirmed by the Appellate Division, First Department in Sperling v. Helsby.[11] The court stated that:

> "Weingarten is not controlling for it is concerned with the plight of a private sector employee who is compelled to appear at such an interview. Here not only does the applicable law, Civil Service Law §209-a.3, specifically recognize the existence of fundamental distinctions between private and public employment but in addition Civil Service Law §75 affords public employees more protection throughout the process of investigation and disciplinary proceedings than the private processes noted in Weingarten."

Based in part on the Rosen decision, in New York City Transit Authority v. Amalgamated Transit Union[12] a PERB Hearing Officer held that there is no Weingarten right of union representation under the Taylor Law for public sector employees during an

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[11] 60 A.D.2d 821, 400 N.Y.S.2d 821 (1977).

[12] 19 PERB ¶4618 (1986).

investigatory interview.[13] The Hearing Officer stated that "As the private sector Weingarten right to representation at an investigatory interview flows from §7 of the NLRA and because the [Taylor Law] has no similar provision, it is not a protection accorded by the [Taylor Law] to public employees."[14]

Taken together, the First Department's decision in Sperling and the Hearing Officer's decision in New York City Transit Authority, indicate that PERB and the New York State courts do not recognize the existence of Weingarten rights for public sector employees under the statute as it now stands. Inasmuch as the First Department has found that §209-a.3 of the Taylor Law negates the existence of Weingarten rights, and because §209-a, in its entirety, is applicable to employees covered by the NYCCBL,[15] this Board is constrained to follow Sperling and find that no independent statutory right exists that would require union representation at an employer's investigatory interview.

Having found that New York City employees do not enjoy Weingarten rights, it follows that even accepting Petitioner's version of the facts in this case, his allegations fail to state a claim under Section 12-306a of the NYCCBL. Therefore, we will

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[13] The Hearing Officer's decision was not appealed to PERB and therefore was final and dispositive.

[14] Id. at 4791.

[15] See Taylor Law, §212.1.

dismiss the improper practice petition.

We note that a contractual right to union representation at certain disciplinary interviews is contained in Article IX, Section 19 of the City-Wide Agreement.[16] Without expressing any view as to its applicability to the facts of this case, we point out that such provision, negotiated by the City and the unions, can provide protection and redress for public employees who do not enjoy the benefits of statutory Weingarten rights.

ORDER

Pursuant to the powers vested in the Board of Collective

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[16] Article IX, Section 19 of the City-Wide Agreement states the following"

> When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:
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> b. Whenever such an employee is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer, and the employee shall be informed of this right. Upon the request of the employee and at the discretion of the Inspector General, the Inspector General may agree to the employee being accompanied by a lawyer and a Union representative. Such permission shall not be unreasonbly denied. If a statement is taken, the employee shall be entitled to a copy.

Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition of George DeChabert be, and the same hereby is, dismissed.

DATED: New York, New York
March 21, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
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