Johnson v. Dep't of Sanitation, 47 OCB 21 (BCB 1991) [Decision No. B-21-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

ADRIAN JOHNSON, DECISION NO. B-21-91

Petitioner, DOCKET NO. BCB-1331-90

-and-

NEW YORK CITY DEPARTMENT OF SANITATION,

Respondent.

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DECISION AND ORDER

On October 28, 1990, Mr. Adrian Johnson ("the petitioner") filed, pro se, a verified improper practice petition against the New York City Department of Sanitation ("the Department" or "the respondent"), alleging that ever since he became a shop steward the Department has continuously harassed and retaliated against him. In essence, the petition charges that several agents of the respondent have discriminated against petitioner, in violation of Section 12-306a of the NYCCBL.[1]

On November 30, 1990, the respondent, by its Office of Labor Relations ("the City"), filed a verified answer to the improper practice petition.

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[1] Section 12-306a of the NYCCBL provides, in relevant part:

> It shall be an improper practice for a public employer or its agents:
>
> (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.

On December 5, 1990, the petitioner served and filed an unverified reply (dated November 5, 1990) with the Office of Collective Bargaining ("OCB"). Attached to petitioner's cover letter were a multitude of handwritten statements which referred to one or more of the numbered paragraphs of the respondent's answer. Some of these statements were dated contemporaneously with the event referred to therein; others were dated well after the fact.

On December 27, 1990, the petitioner served and filed another unverified document (dated December 20, 1990), which was entitled "Amendment I." Petitioner characterizes this document as containing "additional grievances and answers to [the respondent's] answers," and it was accompanied by a cassette tape recording.

In an undated letter that was received on December 31, 1990, counsel for the City wrote to the Deputy Director and General Counsel of the OCB, objecting to the submission of the petitioner's pleading dated December 20, 1990. The City claimed that the pleading was unverified, illegible and untimely. The City also objected to the admission of the tape, claiming that the recording was "unintelligible."

In a letter dated March 13, 1991, the Trial Examiner assigned to this matter responded to the City's objections. The Trial Examiner found that the pleading dated December 20, 1990, which constituted an amendment to the petition, was neither untimely nor illegible. However, the Trial Examiner found that the petitioner's reply as well as the amendment were unverified and directed the petitioner to cure these defects.[2] The Trial Examiner also

[2] It is well settled that the Board of Collective Bargaining ("the Board") will not apply an overly technical (continued...)

sustained the City's objection to the admission of the tape recording, based upon a finding that the discernable information provided by the recording was cumulative and, more importantly, because the recording was not entirely audible.

On March 20, 1991, the petitioner filed an affidavit, which attested to the truth and accuracy of the allegations contained in his reply and in the amendment. On March 21, 1991, the City served and filed a verified answer to the amended petition.

Background

The petitioner, a provisional employee, was hired by the Department as an Attendant on September 21, 1987. He was regularly assigned to the Muldoon Avenue location of the Fresh Kills Landfill on Staten Island ("Landfill"). The Petitioner claims that since 1989, he has held the position of shop steward for Attendants working at that location.[3]

On January 17, 1990, the petitioner was found by a supervisor (Mr. A. Lobat) to be absent from his post of duty from 1:00 to 3:00 P.M. On January 18th, the petitioner was charged with violating several rules in connection with this infraction and was served with three warning letters. In a statement addressed "To Whom It May Concern" (dated May 30th),[4] the Petitioner

[2](...continued)
application of its rules absent a showing of prejudice.

[3] District Council 37, AFSCME, AFL-CIO, is the exclusive representative for purposes of collective bargaining of employees serving in the title Attendant.

[4] This is one of five statements of various kinds dated May (continued...)

explained that he had finished his assigned task at 11:30 A.M. that day and was waiting in the lunchroom for further instructions from his supervisor. Petitioner also claims that when he was given a new assignment at 3:00 P.M., Lobat allegedly harassed him and then threatened that the petitioner would be written up for disobeying orders.

On January 20th, 22nd, and 23rd, the petitioner filed three complaints with Mr. P. Nargi, Assistant Director of Truckfills, alleging that a supervisor (Mr. D. Hendrickson) assigned him to perform certain duty without the appropriate equipment. The petitioner claimed to be speaking on behalf of himself and the Attendants he represents when he stated: "I will not tolerate such harassment again."

In a letter dated January 24th, the petitioner wrote to Mr. J. Calandrillo, Council Representative, Blue Collar Division of District Council 37, to complain that another Attendant believed he was harassed by a supervisor (Lobat) in October 1989.

On January 26th, the petitioner and two other Attendants were found by two supervisors (Mr. M. Biondo and Mr. L. Coco-zello) to be absent from their posts of duty from 9:15 to 10:15 A.M. All three Attendants were sent off duty without pay for the day. On January 27th, Biondo served the petitioner with a warning letter in connection with this incident. In a letter to union representative Calendrillo, dated January 26th, the Petitioner complained that because he and the others had been sent on duty in the rain and without appropriate equipment, they were justified in their refusal to work. In

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[4](...continued)
30th.

another statement concerning the incident, that was addressed "To Whom It May Concern" (dated May 30th), the petitioner also complained that the supervisors were "unprofessional" in that they ordered the three Attendants to walk over three quarters of a mile to sign-out rather than transport them back as they properly should have.

On January 31st, the petitioner filed another complaint with union representative Calendrillo, alleging that he and four other Attendants had been sent on duty that day without appropriate equipment.

On or about February 1st, the petitioner was found by a supervisor (Mr. V. Ambrosino) to be absent from his post of duty at 1:30 P.M. and when ordered to return to work, refused to walk to his post. On February 3rd, petitioner was served with a warning letter in connection with this incident, which recom-mended that petitioner be sent to the Department's Medical Clinic for an evaluation under Policy and Administrative Procedure No. 85-05 ("P.A.P. No. 85-05").[5] In a statement addressed "To Whom It May Concern" (dated May 30th), the Petitioner explained that the past practice always had been to wait for

[5] P.A.P. No. 85-05, as amended on June 12, 1987, is the Departments Substance Abuse Policy and Procedure. It establishes "rules governing the use of alcohol, illegal drugs, including marijuana, other controlled substances or unauthorized prescrip-tion drugs by Departmental employees and outlines procedures for referring troubled employees with substance abuse problems to the Employees Assistance Unit ["EAU"]." Referral to the EAU may be voluntary, supervisory, disciplinary or through the Department's Medical Clinic. Supervisory referrals are made to ensure that "employees are job fit at all times and are performing their duties satisfactorily. Employees who are not job fit must be referred to the Clinic for an exam to determine the cause(s) of this incapability." The policy applies to permanent, provisional and probationary employees.

transportation to the work site after lunch and, therefore, he was justified in disobeying Ambrosino's order.

On February 2nd, petitioner received a performance evaluation from his immediate supervisor (Lobat) covering the period January 1, 1990 to February 2, 1990. There is no dispute that the overall rating of unsatisfactory was the first such rating received by petitioner since his employment as an Attendant. In a covering memorandum from Assistant Director Nargi to Ms. S. Gargulio, Director of Personnel Services, it was noted that the petitioner had violated nine (9) rules during the period of time covered by the evaluation and that the infractions had been issued by five (5) different supervisors.

Also on February 2nd, the petitioner filed a list of twenty (20) complaints with union representative Calendrillo. For the most part, the complaints cited poor working conditions and alleged unprofessional behavior by supervisors at the Victory Boulevard and Muldoon Avenue work sites.

On February 7th, the petitioner was counseled by Assistant Director Nargi, concerning his performance evaluation. The unsatisfactory rating petitioner received was sustained.

On February 28th, the merits of all 20 complaints that were filed by the petitioner were addressed in a memorandum from Mr. J. Barsalona, Deputy Director of the Landfill, to Mr. W. Lonergan, Director of the Landfill. Essentially, Assistant Director Barselona's position was that none of petitoner's complaints constituted bona fide grievances.

The petitioner was absent due to illness from February 24th through March 9th. On March 12th, a supervisor (Lobat) served the petitioner with a warning notice for failure to provide medical documentation, pursuant to the

Department's Absence and Lateness Control policy. The record indicates that a grievance brought concerning this matter was resolved in the petitioner's favor.

On March 22nd, at approximately 8:30 A.M., the petitioner was ordered by two different supervisors (Lobat and Mr. P. Noia) to leave the Operations Trailer and to wait outside the office for his assignment. The petitioner allegedly refused to comply, stating that "it was his right to view the [operations] board." On March 23rd and 25th, the petitioner was served with warning letters, one from each supervisor, in connection with this incident.

On March 27th, the petitioner was scheduled to work at Plant #2 of the Landfill. He reported to duty without gloves or rain gear, which were in his locker at the Muldoon Avenue location. On that day, a supervisor at Plant #2 (Mr. H. Waikie) served the petitioner with a warning notice citing a refusal to work and sent him off duty without pay for the day. In a statement addressed "To Whom It May Concern" (dated May 30th), the petitioner maintains that Waikie was instructed by a supervisor at the Muldoon Avenue location (Mr. A. Desantis) to send petitioner off duty even though rain gear was available for him to borrow. Petitioner contends that at all times he was ready, willing and able to work.

On April 5th, the petitioner was ordered to report to a work site in Edgemere. When petitioner instead reported to the Muldoon Avenue location, he was sent home, marked absent without authorization at the Edgemere location and docked one day's pay. In a statement addressed "To Whom It May Concern" (dated May 30th), the petitioner maintains that he was unable to obtain travel directions to Edgemere and, on the advice of a union representative, reported

to work at his regular work site. This statement was edited at a later time and an undated note was appended to it, in which the petitioner also charged that a supervisor (Lobat) harassed him by not allowing petitioner to sign in for work at Muldoon Avenue. The record indicates that a grievance brought concerning this matter was denied.

On May 30th, the petitioner was assigned to the Victory Boulevard Truckfill ("Headquarters") for the purpose of reviewing the contents of his personnel file. The petitioner made this request because he was dissatisfied with the rating he received in his performance evaluation. The Department alleges that although the petitioner had an appointment with Assistant Director Nargi at 12:00 Noon that day, he arrived at the Deputy Director Barselona's office at 8:00 A.M., seeking to review his file at that time. Petitioner was told by Barselona to report to work and to return during his lunch hour or at the end of his shift. Petitioner allegedly used abusive language to indicate his displeasure with this response. Apparently, the petitioner was allowed to review his file at that time, received copies of selected material from it and then received his work assignment for the remainder of the day. The petitioner asked that he be allowed to prepare written responses to the material in his file on work time. This request was denied.[6]

Rather than report to his assigned work location, the petitioner allegedly loitered around Headquarters and made telephone calls until 10:30 A.M. When the petitioner was asked by a supervisor (Desantis) why he was not

[6] It is noted that many of the written statements that petitioner appended to his reply are dated May 30th.

performing his assigned duties, the petitioner allegedly used obscene and threatening language and threw a pointed litter stick in the direction of Deputy Director Barselona, who was in the vicinity. The petitioner was suspended immediately.

On June 5th, the petitioner was served with a "Notice and Statement of Charges" in connection with the May 30th incident. On June 8th, an Informal Conference was held before Mr. A. Fitton, Deputy Chief of the Department, concerning the following charge and specification:

> Rule 3.21 - EMPLOYEES SHALL NOT STRIKE, OR ATTEMPT TO STRIKE A SUPERIOR FELLOW EMPLOYEE OR MEMBER OF THE PUBLIC.

On that same date, the charges were upheld by Deputy Chief Fitton, who recommended that the following penalty be imposed:

> THAT MR. JOHNSON RETURN TO WORK ON 6/11/90. ALL TIME LOST FROM 5/30/90 TO 6/10/90 SERVES AS THE PENALTY. THIS IS A FINAL WARNING.

Also on that date, the petitioner signed the decision of Deputy Chief Fitton and, in the presence of union representative Calendrillo, accepted the penalty. However, in a statement dated November 1990, the petitioner denied that he either verbally abused or threw anything at Deputy Director Barselona on May 30th. Rather, the petitioner claims, both Barselona and Desantis "indiscriminately lied and made up all the allegations" in order to harass him and to cause the loss of his job.

On June 30th, the petitioner reported to work in shorts and sneakers. The petitioner was sent off duty by a supervisor (Biondo) because he did not have the required safety apparel with him. The petitioner allegedly claimed that it was too hot to wear pants and shoes that day. On July 2nd, the

petitioner was served with a warning notice for a violation of Departmental safety regulations and docked one day's pay.

On July 2nd, the petitioner allegedly was found by a supervisor (Hendrickson) to be loitering on his post of duty and when ordered to perform a specific task, allegedly refused to return to work. The petitioner was sent off duty at 11:30 A.M. and docked 4-1/2 hours pay. On July 12th, Hendrickson filed a Department Complaint Form (DS249A), which formally reported several infractions in connection with this incident (Index No. 61102). In a statement addressed to "To Whom It May Concern" (dated July 15th), the petitioner claims that he was falsely accused of refusing to work and harassed by the supervisor. A grievance brought concerning this matter was denied.[7]

On August 16th, petitioner allegedly called in absent due to illness. On August 17th, petitioner allegedly reported to work with a doctor's note for the previous day. Petitioner was sent off duty without pay on the order of Assistant Director Nargi, for failure to comply with rules regarding medical leave proce-dures. In a statement dated November 1990, the petitioner denies that he failed to follow procedures and contends that Nargi's order constitutes harassment.

On August 28th and again on September 15th, the petitioner claimed that at the end of his shift he was left in an unsafe area on the active bank of the Victory Boulevard Truckfill. On a grievance form dated October 8, 1990, the petitioner alleged that he was wrongfully denied overtime pay for travel

[7] It is noted that the petitioner submitted a tape recording of a grievance hearing held on September 19th, when this and other matters were addressed. However, for the reasons set forth, supra, at 3, the substance of the recording will not be considered as part of the official record of this matter.

time after the end of his shift. Petitioner also alleged that a supervisor (Desantis) failed to provide him safe transportation back to Headquarters for the purpose of harassing him. The grievance concerning this matter was denied.[8]

On September 27th, the petitioner was involved in a brawl with another Attendant. While being questioned at the scene, the petitioner allegedly approached Deputy Director Barselona "in a violent and threatening manner." The petitioner was suspended immediately by Barselona and both Attendants were escorted to the Department's Medical Clinic in accordance with P.A.P. 85-05.[9] In a letter addressed to Director of Personnel Services Gargulio (dated September 27th), the petitioner explained that it was the other Attendant who provoked the fight. In an undated note which was later appended to this letter, the petitioner also complained that after he returned from the P.A.P. test, Barselona allegedly threatened him, to wit: "Johnson, you are going to get yours."

On October 2nd, Deputy Director Barselona filed a Department Complaint Form which formally reported several infractions allegedly committed by the petitioner in connection with the incident on September 27th (Index No. 61161). Mr. G. Regan, Superintendant of the Landfill, Plant #2, who witnessed

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[8] See note 7, supra.

[9] See note 5, supra, at 6. P.A.P. No. 85-05 also provides:

> All employees involved in physical altercations will be tested. Whenever a physical altercation occurs between an employee and a supervisor, both parties will be required to submit to a medical evaluation which will include a substance use test. They will be escorted by a second supervisor. If an altercation occurs between two employees, the supervisor will escort them.

the altercation between petitioner and the other Attendant, also filed a formal complaint against the petitioner (Index No. 61162).

On October 29th, the petitioner filed the instant improper practice petition. Therein, the petitioner states, inter alia, that since becoming a Shop Steward:

> I have been grossly harassed and grossly discrimi-nated against. I have been abused verbally (cursed and sworn at) and have been accused of "CAUSING WAVES"! I have been intentionally provoked into, i.e.,
>
> > Loss of many days pay;
> > Extreme and constant conflict; and
> > Many wrongful and unwarranted accusations of not performing my duties (even though I do excellent work and gain no recognition for doing so -- only negative responses.)
> >
> > All of the above have contributed DIRECTLY to my ultimate and too severe disciplinary action of Suspension.[10]
> > [Emphasis in original.]

On December 20th, the petitioner amended the petition to include, inter alia, as evidence of the employer's improper motivation, a statement allegedly made by a supervisor (Desantis), to wit:

> Johnson, because you are a Shop Steward, you have to do more work than the others.

The petitioner also alleges that Department records have been falsified, which constitutes proof that "management makes up their own rules and regulations to suit themselves." Petitioner seeks reinstatement and to be made whole in every way.

Positions of the Parties

[10] It should be noted that subsequent to the filing of the instant petition, the petitioner has been terminated from his position as Attendent.

Petitioner's Position

The petitioner submits that the facts alleged demonstrate that supervisors at the Landfill have engaged in a systematic and continuous course of retaliatory conduct towards him on account of his union activity. The animus towards him, the petitioner contends, is a direct result of the numerous grievances he has brought and won on behalf of the men he represents.

As evidence of improper motive, the petitioner cites the following as examples of alleged harassment: the unwarranted suspension and loss of a day's pay on September 27th; manage-ment's refusal to pay him overtime on September 15th and August 28th; management's failure to let him work on August 17th; and management's false accusation on July 2nd, resulting in the loss of 4-1/2 hours of pay.

In further support of his claim, the petitioner contends that the shop steward who preceded him at the Landfill was discharged. Thus, petitioner queries:

> MUST I RESIGN MY SHOP STEWARD STATUS IN ORDER TO ONCE AGAIN BE ABLE TO HAVE MY RIGHT TO WORK WITHOUT RETALIATION AND DISCRIMINATION?? [Emphasis in original.]

Respondent's Position

The respondent submits that the facts speak for themselves. Rather than support the petitioner's claim of retaliation, the respondent contends that the facts demonstrate that each of the acts complained of were part of progressive discipline, clearly motivated by the petitioner's numerous violations of work rules and the Department's code of conduct.

The respondent contends that the petitioner's allegations are conclusory, that the petition is devoid of any evidence that the disciplinary

measures taken were motivated by anti-union animus, or that there was any acrimony because of his activities as a shop steward.

The respondent denies that the previous shop steward was discharged. In fact, the respondent offers:

> Labor Relations at the [Landfill] are good and labor-management meetings are held on a regular basis.

As further evidence of this, the respondent maintains that all grievances raised by petitioner were resolved prior to Step III of the grievance procedure.

Finally, the respondent submits that the mere fact that the petitioner is a shop steward does not confer upon him immunity from otherwise appropriate and proper disciplinary procedures; nor in any way diminish management's right to take such action.[11]

DISCUSSION

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), 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
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> 2. the employee's union activity was a motivating factor in the employer's decision.

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[11] In support of its position, the respondent cites Section 12-307b of the NYCCBL (Management Rights) and Decision Nos. B-51-87; B-35-80.

If the respondent does not refute the petitioner's showing on one or both of these elements, then the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[12]

Applying these principles to the instant matter, we note that there is no dispute that respondent was aware of the petitioner's shop steward status. However, after an exhaustive review of the petitioner's allegations, we do not find that the record before us establishes the requisite causal connection between the petitioner's alleged advocacy on behalf of Attendants at the Landfill and the alleged discriminatory treatment he complains of. Rather, what clearly emerges from these facts is an attempt by the petitioner to shield himself from the consequences of his actions by virtue of his shop steward status.

The most revealing conclusion that can be drawn from our review of the chronology of events is the petitioner's pattern of filing complaints and grievances, allegedly on behalf of other Attendants as well as himself, after having been disciplined or in anticipation of discipline. Support for this conclusion can be drawn from the apparent lack of union activity prior to the first incident of disciplinary action and the multitude of complaints submitted by petitioner immediately after several subsequent incidents of discipline.

Furthermore, and just as revealing, are petitioner's accusations of intentional harassment by supervisors on account of his alleged union activity, leveled only after it became apparent to petitioner that his job was in jeopardy. In this connection, it should be noted that petitioner's

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[12] See Decision No. B-4-91 and the cases cited therein.

statements written contemporaneously with the events they alluded to contained admissions of his own wrongdoing which, he claimed, were justified by the circumstances. In contrast, petitioner's statements written after the fact but pertaining to the same acts previously admitted, contained denials of any wrongdoing and charges of subterfuge by supervisors.

We find also that the facts support the respondent's position that "labor relations at the Landfill are good." The record reveals that petitioner's many grievances were addressed in a timely manner and that petitioner had the benefit of union representation at all times significant. We do not credit petitioner's unsubstantiated claim that the previous shop steward for Attendants at the Landfill was discharged. Even assuming, arguendo, that this is true, petitioner did not attempt to demonstrate that the prior shop steward's discharge was motivated by anti-union animus.

Finally, it is well settled that an allegation of improper motivation, even when accompanied by an exhaustive account of union activity, does not state a violation of Section 12-306a of the NYCCBL unless a causal connection has been demonstrated.[13] Based on the above account of events, we find that the evidence clearly supports the respondent's claim of progressive discipline rather than the petitioner's claim of systematic harassment. The respondent has documented and, in several instances, the petitioner has admitted (even though later retracted) that petitioner's work performance was less than satisfactory. Moreover, the petitioner presents not a scintilla of evidence that the disciplinary actions taken were disparate. We will not draw an

[13] See Decision No. B-1-91 and the cases cited therein.

inference of anti-union animus simply because a shop steward has been disciplined.[14]

We have long held that a finding of improper motivation cannot be based on recitals of conjecture, speculation or surmise.[15] In the instant matter, the documentation petitioner submits as evidence of improper motivation lacks any probative value to the extent that petitioner's written statements reflect afterthought, are self-serving and are wholly uncorroborated. Evidence such as this lacks any indicia of reliability upon which to base an inference favorable to the petitioner's position. Consequently, the record before us does not support a finding of a causal connection between the actions petitioner complains of and his union activity.

Accordingly, the petitioner has not met the initial burden of proving that the respondent acted with improper motivation; nor has petitioner sufficiently shown the existence of disputed issues of fact concerning the employer's motivation, so as to warrant the holding of an evidentiary hearing in this matter. Thus, the instant improper practice petition shall be dismissed in its entirety.

ORDER

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[14] See Decision Nos. B-28-89. See also, Decision No. B-8-91 (where we did not impute anti-union animus on a supervisor simply because he initiated an investigation into the potential wrong-doing of a union official.)

[15] See Decision No. B-53-90 and the cases cited therein.

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 submitted by Adrian Johnson be, and the same hereby is, dismissed.

DATED: New York, New York
April 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GEORGE B. DANIELS
MEMBER

ELSIE A. CRUM
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