Siegel v. Dep't of Housing & Preservation, et. al, 47 OCB 23 (BCB 1991) [Decision No. B-23-91 (IP)]

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

VERNELL ROBERTS SIEGEL,
Petitioner,

DECISION NO. B-23-91

-and-

DOCKET NO. BCB-1295-90

NEW YORK CITY DEPARTMENT OF HOUSING AND PRESERVATION, EARL G. EVANS and MICHAEL SLUTSKY,
Respondents.
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INTERIM ORDER AND DECISION

On June 20, 1990, Vernell Roberts Siegel ("petitioner") submitted a verified improper practice petition alleging that the respondents, Earl G. Evans, Michael Slutsky and the New York City Department of Housing and Preservation ("the Department"), violated §§ 12-306a (1) and (2) of the New York City Collective Bargaining Law ("NYCCBL").[1] As a remedy, petitioner requests

[1] Section 12-306 of the NYCCBL provides as follows:

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;

(2) to dominate or interfere with the formation or administration of any public employee organization....

(continued...)

that respondents "be punished for all improper practices committed if they are confirmed at any level by removing that HPD Agent from the position where the improper practice took place and ordering a monetary [penalty]."

With the agreement of petitioner, the New York City Office of Labor Relations ("OLR" or "the City"), representing respondents, was granted an extension of time in which to file an answer. The answer was filed on August 9, 1990. No reply was filed by the petitioner.

On October 5, 1990, the Trial Examiner assigned to the case requested from OLR a clarification of the City's position on one of the allegations made by petitioner. A clarification was received from OLR on October 19, 1990.

Background

Petitioner has been employed by the Department in the title Paralegal Aide Level I since October, 1979. Respondent Evans, the Executive Director of the Anti-Abandonment Programs, is petitioner's supervisor; respondent Slutsky is Labor Relations Agent for the Department.

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1 (... continued)
Section 12-305 of the NYCCBL provides, in relevant part:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self - organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing, and shall have the right to refrain from any or all of such activities....

The events upon which petitioner's improper practice claims are based began in 1987, when she required surgery. According to notes written by petitioner's doctors in March and April, 1988, she is unable to work in a smoke-filled environment, and it would be to her advantage to have an office with a window. In a memo to Evans on November 23, 1988, petitioner charged that Evans failed to provide her with a smoke-free office, and warned him that she planned to take legal action. In March, 1989, petitioner received a job evaluation from Evans covering the period from March, 1988, to April, 1989, with an overall performance rating of "very good".

Petitioner submitted a grievance at Step I of the grievance procedure, dated February 15, 1990. The grievance alleged that petitioner had been performing some duties of the Director of the program, and thus was working out of title; that the City statute prohibiting smoking in public work areas was being violated in the office; and that Evans was pressuring her to generate reports without adequate time to prepare them.

Evans completed an annual performance review of petitioner's work that was signed and dated by him on February 27, 1990. Petitioner received an overall "good" performance rating.

Petitioner's grievance was forwarded to Slutsky as a Step II grievance. In a decision dated May 7, 1990, Slutsky found that petitioner was performing the work of an Office Associate, and recommended that she be reassigned to duties commensurate with

the title Paralegal Aide Level I. In response to petitioner's other allegations, Slutsky referred the complaint about violations of the anti-smoking statute to the Department's Health and Safety Officer, and ruled that petitioner's responsibility to meet a deadline was a performance issue that could not be addressed by the grievance process.

Positions of the Parties

Petitioner's Position

Petitioner charges respondents with committing the following improper practices:

A. The above respondent's agent, Earl G. Evans interfered with Petitioner's rights to process an out of Title Grievance on February 22, 1990 as alleged in my February 23, 1990 memo and my Annual Evaluation. (See All Attached Documents).

B. Respondent Agent, Earl G. Evans continues to abuse his administrative powers by failing to provide me with proper office space pursuant to my doctor's request dating back to 1988. He has hired many employees straight off the street since my doctor's notes have been made available to him. This problem has had an adverse impact upon my health by causing me to require two surgeries within a two year period and also an adverse impact upon my health by causing me to lose unnecessary time from employment. My union Contract provided me with promises of a healthy work environment, not a smoke polluted and rat infested environment. In addition, Respondent's agent is in violation of my Seniority Right pursuant to the Title VII Law of the Federal Civil Rights Act Civil Practice, and the New York Civil Service Law also provides me with "Seniority Rights" in regards to benefits.

C. Respondent's Agent Earl Evans abused his administrative powers and violated my Rights to Privacy when he obtained my medical records without my written authorization. Further, I am of the opinion and belief that he published the medical information obtained.

D. After he obtained the medical information my salary checks were forwarded to the Controller's Office wherein Respondent's Agent alleged that he did not know my whereabouts. He willfully and knowingly forwarded my checks to the Controller's Office because I had left someone with written authorization to receive my salary checks and deposit them into my bank account. I am of the opinion and belief that this kind of behavior is "PRACTICAL IMPACT" (See Page 5 of your Annual Report, also my memo dated November 23, 1988).

E. Mr. Earl Evans is an H.P.D. agent representing the agency in the job title Executive Director of the anti-abandonment 7A programs. He practices disparity treatment within the 7A programs among other improper practices. Staff members or [member) that had a personal relationship with the prior director of the 7A program that was removed from his position for proper causes are treated in a manner quite different from other employees and myself. Promotions, merits are granted even when their work is seven months behind. That staff person does not have to work with certain staff members. There are other serious matters that should be investigated, and not [reduced) to writing at this time.

F. Michael Slutsky, Labor Relations Agent for H.P.D. discriminates in that he makes an evaluation as to job status and salary remuneration based on race or religious origin. For example, if a black person is performing a series of task[s] and a white person is performing the very same task, his evaluation of the white person (Jewish) status and salary would be higher than the "black" person.

Petitioner further alleges, in a memo and affidavit submitted with her petition, that she received a downgraded performance evaluation and was subjected to harassment and sabotage of her work because she filed an out-of-title grievance.

In a memo dated February 23, 1990, to Robin Weinstein, Acting Assistant Commissioner of the Department, petitioner alleged that "on February 22, 1990, my out of title grievance

submitted to your office... [Evans] did commence and promote physical threats to me, harassment... A union grievance is not a lawsuit as I was harassed about on [February 22] ....”

In her comments included in the performance evaluation, petitioner alleges, "Mr. Evans has a personal problem with me not my work because of his lack of ability to deal with my out of title grievance... If I had a problem with my work assignments before I filed the out of title grievance Mr. Evans would have sent me a memo or at least held conferences and provided me with the proper training....”

In an affidavit dated May 17, 1990, petitioner affirms that on April 26, 1990, Evans told her to complete 38 audits to be included in her May 1990 report. Petitioner affirms that her work on this assignment was sabotaged by the office staff because she had filed a grievance.

City's Position

The City argues that petitioner has failed to demonstrate an improper practice within the meaning of § 12-306a of the NYCCBL because her charges are conclusory allegations that do not establish a relationship between the acts complained of and interference with employee rights protected under the NYCCBL.

The City contends that petitioner's allegations of violations of Title VII of the Civil Rights Act and the New York Civil Service Law are not matters properly before this Board. It

cites Decision No. B-39-88, in which the Board held that:

> [o]ur authority does not extend to the administration of any statute other than the NYCCBL; the allegation that any statute other than the NYCCBL has been violated is, therefore, not a matter appropriate for inclusion in a petition addressed to this Board.

The City maintains that petitioner has failed to establish that the Department's smoking policy is the result of an improper practice under the NYCCBL. Rather, the City asserts, the Department exercised its managerial prerogative under §12-307b when it promulgated departmental guidelines regarding smoking.

The City requests that, "the improper practice petition be dismissed in its entirety, or that the Board issue an order providing such other and further relief as it shall deem appropriate."

Discussion

The instant petition includes a variety of allegations of acts by respondents which petitioner believes to be improper labor practices under the NYCCBL. We find that of the allegations made in the petition, one states a claim under the NYCCBL, one is time-barred, and the remainder are not within our jurisdiction.

Petitioner alleges in paragraph "D" of the petition that respondent Evans forwarded her salary checks to the Controller's Office without her authorization while she was on sick leave, and that "this kind of behavior is 'PRACTICAL IMPACT'" In

support of the allegations in paragraph "D", petitioner has submitted a document entitled "Check Pay Order", which was stamped as having been received by the Payroll Office on March 9, 1988. A handwritten note at the bottom of the order states, "Please provide check for next pay period by March 18, 1988." The memo dated November 23, 1988, from petitioner to respondent Evans, to which petitioner refers in paragraph "D", is titled "Smoke Pollution in Work Areas." There is no reference in the memo to the allegations made in paragraph "D" of the petition. Without evidence to the contrary, we must assume that the events upon which this claim are based took place in March, 1988.

Section 7.4 of the Revised Consolidated Rules of the office of Collective Bargaining provides that "[a] petition alleging that a public employer or its agents... has engaged in or is engaging in an improper practice in violation of Section [12-306] of the [NYCCBL] may be filed with the Board within four months thereof...." Claims of improper practices contained in the instant petition arising from events which occurred before February 20, 1990, may not be considered by the Board herein. For that reason, the claims alleged in paragraph "D" are time barred.

All but one of the remaining improper practice charges fall outside the jurisdiction of this Board. The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of

public employees set forth therein, i.e., the right to bargain collectively through certified public employee organizations; the right to organize, form, join and assist public employee organizations; and the right to refrain from such activities. Claims of discrimination and disparate treatment based on personal relationship, race, or religion, such as those petitioner makes against Evans and Slutsky in paragraphs "E" and "F", are not related to rights protected under the NYCCBL and thus may not be addressed by this Board.[2]

Petitioner claims in paragraph "C" of the petition that respondent Evans violated her right to privacy by obtaining her medical records without authorization and making public the information contained therein. She has submitted no evidence to support this claim. Even if petitioner had produced such evidence, however, she has not stated a claim under the NYCCBL.[3] Such an act does not constitute an improper practice in the absence of a showing that the employer intended to, or did, affect any of petitioner's rights protected by the NYCCBL.[4]

Petitioner alleges in paragraph "B" that Evans did not provide her with a smoke-free office, and that "[her] Union contract provided [her] with promises of a healthy work environment, not a smoke polluted and rat infested environment."

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[2] Decision Nos. B-39-88; B-8-86; B-1-83.

[3] Decision No. B-2-82.

[4] See footnote 1, supra.

If this statement alleges a violation of the applicable collective bargaining agreement, we note that such an allegation may not be considered in the improper practice forum, pursuant to § 205.5(d) of the Taylor Law.[5] An alleged contract violation that does not otherwise state a claim of improper practice may be raised only through the parties' contractual grievance and arbitration process.[6] Moreover, as the City correctly asserts, allegations of violations of Title VII of the Federal Civil Rights Act and the New York Civil Service Law are also not within our jurisdiction.[7]

Finally, we turn to petitioner's assertion that Evans and the Department committed improper labor practices in retaliation for her having filed a grievance. In her petition and accompanying documentation, petitioner alleges that her performance evaluation was downgraded, she was pressured to perform an assignment without being given enough time to complete it, she was physically threatened, and her work was sabotaged by

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[5] Section 205.5(d) of the Taylor Law, which applies to the City of New York pursuant to § 212 of that law, provides in relevant part:

> the board shall not have the authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[6] Decision Nos. B-55-87; B-37-87; B-17-86.

[7] Decision Nos. B-39-88; B-2-82.

the office staff, because she had filed a grievance.

The mere assertion of retaliation is not enough to prove an improper practice.[8] Petitioner must satisfy the test set forth by PERB in City of Salamanca[9] and adopted by this Board in Decision No. B-51-87.

The Salamanca test requires petitioner to make a sufficient showing that:

1. the employer's agent responsible for the challenged 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 respondent does not refute the petitioner's showing on one or both of these elements, it must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[10] As we held in Decision No. B-67-90:

> [I)f the employer attacks directly and refutes the petitioner's showing on the elements of the above test, the Board will find that the petition fails to prove improper motivation. If the employer fails to rebut the Union's showing that the employee's conduct was a "substantial" or "motivating" factor in the employer's decision, the employer could avoid being held in violation of the NYCCBL by putting forward evidence, unrefuted by the petitioner, proving that its actions would have occurred even in the absence of the protected activity. However, if the employer fails to rebut the Union's showing of improper motivation and also fails to persuade this Board that other legitimate reasons exist for the challenged action, then the

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[8] Decision No. B-61-89.

[9] 18 PERB 3012 (1985).

[10] Decision No. B-67-90; see also, Decision Nos. B-24-90; B-36-89; B-1-89; B-46-88; B-58-87.

employer will be found in violation of the NYCCBL.

We recognize that it is difficult to prove that an employee's activity was a motivating factor in the employer's decision to act; it requires that the Board ascertain the employer's state of mind. In the absence of an outright admission of improper motive, proof of this element must be circumstantial.[11] If petitioner demonstrates a sufficient casual connection between the act complained of and the protected activity, improper motive may be inferred.[12] Such offers of proof will be considered in light of all the relevant circumstances.[13]

In the instant matter, petitioner has submitted documentation claiming to show that her performance evaluation of February, 1990, was downgraded compared to her evaluation in the same unit before filing the grievance. In support of her position, petitioner claims that Evans informed her by memo dated December 13, 1988, that she had been named Management Assistance Section (MAS) Coordinator for all 7A Administrator Audits. The memo outlined the tasks that petitioner was to perform. A letter from Evans dated October 4, 1989 recommended that petitioner be considered for promotion, and stated:

> Ms. Siegel since being transferred to the Management Assistance Section has been an asset to this Unit. Her

[11] Decision Nos. B-24-90; B-17-89.

[12] Decision No. B-61-89.

[13] Decision No. B-24-90.

> last overall rating was a very good. She is a punctual employee. Further she has taken on and requested additional responsibilities and she has efficiently handled a multitude of tasks in addition to her paralegal tasks in this section. I feel that the Section loss will be a gain to any HPD division that is fortunate enough to gain her services....

S. Ice Foster, the Director of the 7A Central Auditing Unit,

stated in a memo dated February 8, 1990:

> [Mrs. Siegel] has taken over the complete responsibilities of the 7A Auditing Program... Mr. Evans... and myself are of the opinion that Mrs. Siegel is very capable of taking over the auditing responsibilities... Mrs. Siegel performs the auditing tasks in a very good plus manner... She is very punctual with her meetings, very detailed in obtaining necessary information to complete the audits and she has an excellent work relationship with both the 7As and the Auditors....

Petitioner has submitted a copy of a memo that she wrote to Acting Assistant Commissioner Robin Weinstein on February 23, 1990. In it, she states:

> Please be advised that on Thursday afternoon on or about 4:00 P.M., February 22, 1990, my out of title grievance submitted to your office and your conference with [respondent] did commence and promote physical threats to me, harassment...
>
> A union grievance is not a law suit as I was harassed about on the prior mentioned date.
>
> However, the union grievance is an accepted negotiated policy between the employer and the union to discuss issues outside of court....

In an affidavit dated May 17, 1990, petitioner describes incidents which she believes were motivated by retaliation against her union grievance. Petitioner affirms that on April 26, 1990, she was instructed by respondent Evans to complete 38 audit reports within the next ten days. The affidavit relates

that when she checked the progress of her work with the Department's typist, petitioner discovered that some of her completed work on this assignment had been marked in red. She affirms that when respondent Evans subsequently called her into his office to correct her work on this assignment, the copy of her work in his possession differed from the original which she had given to the typist. The affidavit continues:

> I asked to see those changes, but was told I could not see them by [the typist], and come Monday May 7, 1990, and she does not know what I am talking about.
>
> [The office manager] assigned that typing and she does not know anything about this matter, she just can't recall those memos...
>
> Mr. Evans' conferences and investigation failed to produce the documents, but I know I saw them....
>
> It is amazing and I am shocked to learn while I have a grievance in progress or pending a matter of this nature would surface.

Based on the informal evaluations contained in management's recent memoranda, and the timing of the events in question, we find that petitioner has arguably established a causal relationship between the filing of her grievance and the subsequent downgrade of her performance evaluation and other incidents which petitioner believes to have been retaliatory. In accordance with the Salamanca test, the Department either must refute petitioner's showing of such a causal relationship or produce evidence that its action would have occurred even in the

absence of the protected activity.[14] Because respondent's answer did not address the issue of retaliation, the Trial Examiner afforded the Department an opportunity to clarify its position on this issue. In its reply dated October 19, 1990, the Department's attorney stated:

> I spoke with petitioner's supervisor who was responsible for evaluating petitioner's work performance. He informed me that he had completed the review in question prior to the time that he was notified that petitioner filed her grievance. It was therefore impossible for the supervisor to retaliate against her when he had no knowledge of the grievance. The review was based entirely on the petitioner's work performance and not on any improper grounds.

Petitioner has alleged sufficient facts to state a cause of action under the NYCCBL on the issue of retaliation. Without more factual evidence, however, we cannot conclude that petitioner has proven improper motivation. The City has raised questions of fact with respect to the reasons for the downgrade in petitioner's performance evaluation. The City asserts that Evans had completed the performance review before the grievance was filed and that the review was based entirely on petitioner's performance. These assertions alone do not negate petitioner's allegations, nor are they sufficient to prove the lack of a causal relationship between the downgraded evaluation and the filing of the grievance. They do, however, raise material, factual issues which must be resolved before we can decide this matter. Accordingly, to establish a record upon which we may

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

make a final determination, we order that a hearing be held before a Trial Examiner to resolve the questions of fact raised by the city and to determine whether other allegedly retaliatory acts complained of in the petition and accompanying documents were committed by respondents and were improperly motivated. Claims based upon events which occurred before February 20, 1990, and upon matters not within our jurisdiction, are dismissed.

ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED that the issue of whether improperly motivated acts were committed by respondents Earl G. Evans and the New York City Department of Housing and Preservation in response to a grievance filed by petitioner is to be referred to a Trial Examiner designated by the Office of Collective Bargaining for the purpose of conducting a hearing to establish a record upon which this Board may make a final determination; and it is further

ORDERED that the remaining improper practice charges against respondents Earl G. Evans and the New York City Department of Housing and Preservation be, and the same hereby are, dismissed; and it is further

ORDERED that the improper practice charges against respondent Michael Slutsky be, and the same hereby are, dismissed.

DATED: New York, New York
April 24, 1991

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

George Benjamin Daniel
MEMBER

Elsie A. Crum
MEMBER