Nelson v. Dep't of Sanitation, 47 OCB 36 (BCB 1991) [Decision No. B-36-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

GERALD NELSON,
Petitioner,

-and-

CITY OF NEW YORK DEPARTMENT OF SANITATION,
Respondent.

DECISION NO. B-36-91

DOCKET NO. BCB-1377-91

INTERIM DECISION AND ORDER

On March 1, 1991, Gerald Nelson, pro se, filed a verified improper practice petition against the City of New York and the New York City Department of Sanitation ("the Department"). The petition alleges that the Department committed an improper practice when it terminated his employment for having witnessed and reported an incident involving a co-worker and a supervisor.

The City of New York Office of Labor Relations, on behalf the Department, did not answer, but, instead, on March 12, 1991, moved to dismiss the petition on the ground that it failed to state a prima facie violation of the New York City Collective Bargaining Law ("NYCCBL"). On May 16, 1991, the Petitioner filed an answering affidavit opposing the motion.

Background

Petitioner Gerald Nelson had worked as a probationary Sanitation Enforcement Agent from November 12, 1989, until the

Department terminated his employment in early 1991. On August 1, 1990, he witnessed an incident that took place during roll call between a fellow agent and the zone coordinator for the area to which he was assigned. According to the Petitioner, the coordinator used abusive and vile language toward the agent. After that, the Petitioner volunteered a written statement to the Department recounting what he had seen and heard. Although undated, the statement appears to have been made in support of a letter written by the co-worker to the Department Commissioner entitled "Unprofessional Behavior," dated August 20, 1990. In the letter, the co-worker complains of obscenities allegedly used by the supervisor: "..... I approached the Lieutenant again and asked him why he spoke to me in an unprofessional manner. . . . I then informed him that he was never to speak to me in that manner again. I also reminded him that during the month of June, he read a Directive stating that neither supervisors or agents should use disrespectful or obscene language toward each other." Copies were sent to various superior officers in the Department and to "CWA-Local 1182," the co-worker's union. The Petitioner's statement in support of the co-worker's letter reads as follows:

> I Gerald Nelson did witness Lt. Bolstat at roll call curse at Agent Wise. And this is not the first time I've heard him use this type of language.

In early September of 1990, the Department transferred the zone coordinator to another work station, allegedly because of his involvement in this incident. On September 17, 1990, the Petitioner received an "unsatisfactory" annual evaluation covering the period "November 12, 1989 to November 11, 1990" (sic]. On October 16, 1990, he and his union representative signed a memorandum in which they agreed and consented to the extension of the Petitioner's probationary period of employment.

Between August 10, 1990 and December 13, 1990, the Petitioner received five official letters of warning and seven formal written complaints accusing him of committing various disciplinary infractions that included insubordination, lateness, incompetence, and other types of misconduct. These disciplinary measures were precursors to the termination of the Petitioner's employment with the Department.

By Notice of Determination to Claimant, dated February 28, 1991, the State Department of Labor notified the Petitioner that it had decided against his request for unemployment insurance payment. According to the notice, the Petitioner was found to have "lost your employment through misconduct in connection with your last employment." It specified that "you were discharged for not successfully completing the extended probation period. You absconded from [your] workplace on 12/11/91 for 25 minutes

and refused to sign [your] time card. You were warned for absences and insubordination."

Positions of the Parties

Petitioneres Position

According to the Petitioner, the Department terminated his employment as a direct result of his having witnessed the incident of "unprofessional behavior" committed by the zone coordinator on August 1, 1990. The Petitioner alleges that he started receiving official letters of warning shortly after he made his report, and he asserts that the procedure used to evaluate him was flawed. He notes that he had received satisfactory evaluations for the four previous quarterly marking periods, yet his overall annual evaluation suddenly became unsatisfactory immediately after reporting the conduct of the zone commander. He also questions how it is possible "to receive an unsatisfactory rating for days I have not yet worked," since the evaluation was issued on September 17, 1990, but covered the period November 1989 to November 1990. The Petitioner argues that to receive an unsatisfactory and partially prospective overall rating after receiving four satisfactory quarterly ratings during the year is "ludicrous and inconceivable."

In the Petitioner's view, the disciplinary write ups were pretextual, and the Department coerced him into agreeing to an

extension of his probationary period of employment. He alleges that none of the disciplinary complaints were investigated properly because he was never asked about the circumstances surrounding any of the charges, and they never received a final disposition.

The Petitioner concludes that the underlying factors primarily responsible for his termination were the statement that he made against the zone coordinator, and his association with a fellow enforcement agent. He maintains that the Department discriminated against him by changing the "normal probation policies to discourage his union membership," in violation of Section 12-306a.(3) of the NYCCBL.[1]

Respondent's Position

According to the City,. a petitioner in an improper practice proceeding alleging a violation of §12-3O6a.(3) of the NYCCBL must show that the City was aware of the employee's union

[1] NYCCBL §12-306a.(3) reads as follows:

> **Improper public employer practices**. 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;

activity, that it had animus toward that activity, and that the activity motivated the employer to act against the employee.

In this case, the City argues, the Petitioner essentially contends that the Department discharged him because he had reported one of his supervisors for using foul language during roll call. Thus, the City asserts, the petition contains no facts that can be construed as a claim that the Petitioner participated in union activity, and that because of that activity, action was taken against him. To the contrary, the city insists, even if the Petitioner could prove every one of his allegations, that still would not establish that the City violated the NYCCBL. Upon this basis, the City asks that the petition be dismissed.

Discussion

The City has referred to the test that we generally apply in an improper practice proceeding in which a violation of Section 12-306a.(3) of the NYCCBL is claimed. The test provides that when an employer is accused of having violated a provision of Section 12-306a. of the NYCCBL, the petitioner has the initial burden of showing 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.

If that can be done, the employer must present uncontroverted testimony and evidence that attacks directly and refutes the evidence put forward by the Union, or it must put forward evidence, unrefuted by the Union, that it had other legitimate and permissive motives which would have caused it to take the action complained of even in the absence of the protected activity.[2]

Implicit in this employer improper practice test is the assumption that if anti-union activity is present, it is of a sort that is protected by the NYCCBL. This is a threshold issue in the instant case, because the City's motion to dismiss questions the scope and reach of protected activity in public sector employment under the NYCCBL and the Taylor Law.

At the time of the incident with the supervisor, both the Petitioner and his co-worker held the title of Sanitation Enforcement Agent. Sanitation Enforcement Agents are covered by a collective bargaining agreement entered into between the City of New York, and Local 1181 and Local 1182 of the Communication Workers of America, AFL-CIO. Article VI of the Agreement contains the parties Grievance Procedure. The term "grievance" is defined as, inter alia", "a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer." Step I of the

[2] Decision Nos. B-4-91 and B-50-90.

procedure permits the employee and/or the Union to "present the grievance in the form of a memorandum to the person designated for such purpose by the agency head..."

When deciding a notion to dismiss a petition that alleges violation of the NYCCBL, we deem the moving party to concede the truth of the facts alleged by the petitioner. More than that, we will accord the petition every favorable inference, and we will construe it to allege whatever may be implied from its statements by reasonable and fair intendment.[3] Thus, we will deem the letter written by the Petitioner's co-worker to the Commissioner, with a copy to his union, as being the equivalent of a Step I grievance alleging that a supervisor's conduct violated a written policy or order of the Department, and that the Petitioner's ' written statement was intended to support the Step I grievance filing. The allegations that management retaliated by lodging a series of false disciplinary allegations against the Petitioner, and that these unproved allegations led to his discharge, must be deemed conceded by the City. In addition, for the purpose of deciding this motion, we will draw no negative inference from evidence that some infractions may have been reported before the Petitioner made his written statement concerning the supervisor.

[3] Decision No. B-9-91; B-6-91; B-51-90; B-32-90; B-26-90; and B-34-89.

Similarly, we will disregard the finding made by the Department of Labor that the Petitioner committed misconduct.

Under these favorable inferences and assumptions, we deem the co-worker to have been engaged in protected activity for having filed a grievance;[4] and we deem the Petitioner to have been engaged in protected activity for having filed a written statement supporting the grievance.[5] Thus, we find that the Petitioner has stated a claim of an improper employer practice within the meaning of Section 12-306a.(3) of the NYCCBL sufficient to withstand the City's motion to dismiss. We shall order the City to serve and file an answer within ten days of receipt of this determination.

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 notion of the City of New York to dismiss the improper practice petition docketed as BCB-1377-91 be, and the same hereby is, denied; and it is further

[4] See, e.g Local 32, IAFF v. City of Utica, 21 PERB ¶3066 (1988); and SUNY v. Marsh, 12 PERB ¶3009 (1979).

[5] Sag Harbor Union Free School Dist. v. Helsby, 8 PERB ¶3137, aff'd 9 PERB ¶7023 (Third Dep't., 1976).

ORDERED, that the city of New York shall serve and file an answer to the improper practice petition docketed as BCB-1377-91 within ten (10) days of receipt of this Interim Decision and order.

DATED: New York, New York
July 30, 1991

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER

JEROME E. JOSEPH
MEMBER