Chambers v. Landmarks Preservation Comm., 47 OCB 41 (BCB 1991) [Decision No. B-41-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding between	:	
WILLIAM CHAMBERS,	:	
Petitioner,	:	DECISION NO. B-41-91
-and-	:	DOCKET NO. BCB-1364-91
NEW YORK CITY LANDMARKS PRESERVATION COMMISSION,	:	
Respondent.	:	

DECISION AND ORDER

On January 29, 1991, Mr. William Chambers ("petitioner") filed, pro se, a verified improper practice petition against the New York City Landmarks Preservation Commission ("respondent"). Petitioner alleges that he was discharged in retaliation for having filed an out-of-title grievance, in violation of Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] Although petitioner does not identify the subdivision of Section 12-306 of the NYCCBL which he claims to have been violated, the petition alleges discriminatory treatment motivated by petitioner's participation in grievance activity. If proven, such employer conduct could constitute a violation of Section 12-306a(3) of the NYCCBL, which provides:

> **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;
> * * *

On February 14, 1991, the New York City Office of Labor Relations ("the City"), on behalf of the respondent, filed a verified answer to the petition.

On May 3, 1991, the Trial Examiner assigned to handle this matter advised petitioner of his right to submit a verified reply, in order to "address any additional facts or new matter alleged in the respondent's answer." On May 10, 1991, the Office of Collective Bargaining ("OCB") received a letter from petitioner that was neither verified nor indicative that respondent was served with a copy.[2] On May 29, 1991, petitioner was informed by the Trial Examiner that because his letter did not satisfy the requirements of the Revised Consolidated Rules of the OCB ("the OCB Rules"),[3] it will not be considered by the Board of Collective Bargaining ("Board"). Petitioner was given until June 14, 1991, to submit a responsive pleading that complies with the criteria set forth in the OCB Rules. The petitioner failed to submit a reply.

Background

Petitioner was employed by the respondent in the position of Stockhandler. Although the record does not reflect petitioner's date of hire, there is no dispute that he was a provisional employee with less than two years of service. According to petitioner, he telephoned his union

[2] Essentially, the petitioner complained in his letter that the employer failed to give him a "reason" for his termination.

[3] See Section 7.9 of the OCB Rules, entitled: "Reply-Contents; Service and Filing."

representative[4] on November 30, 1990, to complain that he had been assigned to out-of-title duties.[5] On December 7, 1990, petitioner received a letter from respondent, which read as follows:

> This is to inform you that your employment as a Stockhandler with the NYC Landmarks Preservation Commission is terminated as of Friday, December 7, 1990, close of business.

Positions of the Parties

Petitioner's Position

Petitioner alleges that respondent terminated his employment on account of his complaint to the union about out-of-title work. This conclusion, petitioner maintains, is inescapable since no reason or explanation was given for his termination; nor does his performance evaluation reflect that his work performance was lacking.[6] Most telling, petitioner argues, is the fact that he was discharged within one week of having spoken to the union representative. Petitioner states:

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[4] A copy of the petition was sent to Mr. Barry Feinstein, President, Local 237, City Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The union was not made a party to this proceeding, however.

[5] Appended to the petition was a copy of New York City Department of Personnel Policy and Procedure No. 510-85, which provides, in part, that "[a]gencies should take all steps necessary to make certain that their employees are working at tasks consistent with their current civil service titles...."

[6] Appended to the petition was a copy of an evaluation form dated June 29, 1990, for the rating period of October 1, 1989 through March 1, 1990. The evaluation reflects that petitioner received an overall rating of "Very Good."

> Upon [the union representative] returning my call he spoke to my supervisor. Within the next following week I was terminated....

Respondent's Position

The City submits that petitioner has failed to state a prima facie claim of improper practice inasmuch as the elements necessary to a finding of improper motivation have not been established. Citing the test set forth by the Public Employee Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985), the City asserts that petitioner has failed to demonstrate that respondent had knowledge of petitioner's union activity; or that union activity was a motivating factor in respondent's decision to terminate his employment.

In support of its argument, the City states that respondent only became aware that petitioner was party to an out-of-title dispute when the grievance was filed on December 11, 1990. The City denies that a union representative ever spoke to petitioner's supervisor, either on the phone or in person, prior to petitioner's termination on December 7, 1990.

The City claims that because no nexus between petitioner's alleged union activity and respondent's decision to terminate his employment has been shown, petitioner has failed to prove that respondent's decision was improperly motivated. Furthermore, the City asserts, an inference of improper motive may not be drawn from the fact that no reason or explanation was given for petitioner's discharge. In this connection, the City notes that petitioner, a provisional employee with less than two years of service, "was terminated

pursuant to the rules, regulations and policies of the New York City Department of Personnel."

Discussion

In essence, it is petitioner's contention that because of the proximity in time of two events - his conversation with a union representative on or about November 30, 1990 and the notice of his termination dated December 7, 1990 - there is a cause and effect relationship between them sufficient to establish that respondent's act was improperly motivated. The evidence petitioner offers in support of this conclusion is an assumption that the union representative who returned his call on or about November 30, 1990, spoke to petitioner's supervisor concerning his out-of-title grievance before December 7, 1990.

The City unequivocally denies that any conversation between petitioner's union representative and his supervisor took place in advance of respondent's decision to terminate his employment.[7]
In any event, the City argues, establishment of this fact alone does not provide a sufficient basis for a finding of improper practice.

It is well settled that when a violation of Section 12-306a of the NYCCBL has been alleged, initially a 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

[7] It should be noted that petitioner did not avail himself of two opportunities to attempt to rebut the facts alleged in the City's answer to the petition.

2) the employee's union activity was a motivating factor in the employer's decision.[8]

In order to satisfy this burden, the petitioner must set forth specific allegations of fact that demonstrate at least an arguable basis for an improper practice claim.[9] The petitioner's case will not be advanced by unsubstantiated and controverted hearsay statements.[10] Allegations of improper motivation must be based on statements of probative facts, rather than recitals of conjecture, speculation and surmise.[11] If a petitioner fails to establish either element, the burden will not shift to the employer to demonstrate that its actions were motivated by a reason not prohibited under the NYCCBL.[12]

Applying these principles to the instant matter, we find that petitioner's allegations are of insufficient probative value to support a claim of improper motivation. At the outset, we find that petitioner merely assumes that respondent was aware of his pending grievance before the decision to terminate his employment was made. Notwithstanding the wholly conclusory and speculative nature of petitioner's assumption, even if petitioner could prove respondent had prior knowledge of the grievance, that fact alone would not provide the necessary causal link between petitioner's protected activity and the actions of the respondent. The mere fact that an employee has filed a

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[8] Decision Nos. B-1-91; B-67-90; B-61-89; B-51-87.

[9] Decision No. B-38-88.

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

[11] Decision Nos. B-24-90; B-28-89; B-2-87; B-28-86; B-18-86; B-12-85; B-25-81; B-35-80.

[12] Decision Nos. B-68-90; B-53-90; B-28-89; B-59-88.

grievance, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive.[13]

In Decision No. B-1-91, a factually similar case, an improper practice petition was filed on behalf of two complainants. Both were provisional employees with less than two years of service; both had filed out-of-title grievances; and both were terminated without any explanation or reason given. The charge as to one complainant was dismissed for the union's failure to satisfy its initial burden of proving a causal connection between the termination of his employment and his having filed a grievance. We reached a different result, however, with respect to the other complainant's allegations. In the latter case, the charge was sustained and a hearing ordered because additional facts and circumstances were alleged that permitted an inference of improper motivation. Furthermore, we found that the City did not even attempt to refute the elements of the claim.

Here, petitioner's total reliance on the proximity in time of two events, even if uncontroverted, fails to constitute evidence sufficient to support an inference that his discharge was retaliatory.[14] In the absence of any evidence other than this conclusory allegation, which demonstrates a nexus between the act complained of and protected activity, a finding that respondent acted with improper motivation would be purely speculative.

Finally, the mere fact that respondent offered no explanation for its decision to terminate petitioner is not evidence probative of the employer's motivation in the instant circumstances. It is well settled that provisional

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[13] Decision No. B-1-91.

[14] See Decision Nos. B-53-90; B-38-88.

employees with less than two years of service have no expectation of tenure and rights attendant thereto and, thus, may be terminated without charges proffered, a statement of reasons given or a hearing held.[15] Thus, petitioner cannot rely on the respondent's failure to give him a reason for his termination to raise an issue of anti-union animus.

Accordingly, we shall dismiss the improper practice petition in its entirety.

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 filed by William Chambers be, and the same hereby is, dismissed.

DATED: New York, New York
September 11, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

[15] Decision Nos. B-1-91; B-39-89; B-17-89.