L.1969, Civil Service Painters, Mellor v. City, DOI, 47 OCB 43 (BCB 1991) [Decision No. B-43-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
-between-	DECISION NO. B-43-91
	DOCKET NO. BCB-1337-90
HELEN MELLOR and CIVIL SERVICE PAINTERS LOCAL 1969, I.B.P.A.T.,	
Petitioner,	
-and-	
CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF INVESTIGATION,	
Respondent.	

DECISION AND ORDER

On November 15, 1990, the Civil Service Painters Local 1969, I.B.P.A.T. ("the Union") filed a verified improper practice petition on behalf of its member, Helen Mellor ("Petitioner"), against the City of New York ("the City" or "the Respondent") and the New York City Department of Investigation ("DOI"). The petition alleges that the Department violated Sections 12-306a(2) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] by denying Petitioner's request for union

[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:

(continued...)

representation during an investigation conducted by DOI and by subsequently serving her with a subpoena "for the purpose of circumventing her demand that she be represented by her union representative." The City, by its Office of Labor Relations, filed a verified answer on December 10, 1990. The Union filed a verified reply on March 15, 1991.

Background

Petitioner has been employed by the Human Resources Administration ("HRA") in the competitive civil service title of Painter since September of 1988. On October 29, 1990, DOI arranged for Petitioner to be interviewed by an HRA Inspector General at 11:30 a.m. that day. Petitioner alleges that her co-

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[1](...continued)

(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 a public employee organization;

(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.

workers advised her that she was required to appear at an HRA Inspector General interrogation concerning matters related to her employment duties. Petitioner then called the HRA Inspector General Office ("OIG") and spoke with Kevin R. Smith, Deputy Counsel to the Inspector General, who confirmed that Petitioner was being directed to come to an interview. During this conversation, Petitioner stated that she wished to be represented at the interview and, as a result, the parties agreed to postpone it. The City alleges, and the Union denies, that Smith advised Petitioner that although she was not the subject of the investigation, she could be represented by legal counsel at the interview. On that same day, October 29, 1990, Smith advised Albert M. Carrozza, President of the Union, that Petitioner was not the subject of the DOI/OIG investigation and that it is standard procedure not to permit non-attorney counsel at these interviews. Smith also advised James Devor, the attorney for the Union, that the subject matter of the planned interview with Petitioner did not concern any contemplated disciplinary action against Petitioner.

On November 1, 1990 the interview was re-scheduled for November 5, 1990. On the latter date Petitioner arrived at the HRA Inspector General's Office accompanied by Carrozza in his capacity as Petitioner's union representative. In response, Smith cancelled the interview, advising Petitioner that the interview could not proceed with a non-attorney as Petitioner's

representative and that she was not the subject of the DOI/OIG investigation. According to the Union, both prior to and subsequent to the aborted November 5th interview, Devor informed Smith that preclusion of union representation at an Inspector General interview was unacceptable to the Union.

Petitioner advised Smith, on November 8, 1990, that the Union would not provide her with an attorney until it received written confirmation of the policy prohibiting the presence of a non-attorney representative at Inspector General interviews. On that same day, in a telephone conference between Petitioner, Devor, Carrozza, and Smith, an interview was scheduled for November 15, 1990. It was also agreed that Devor would represent Petitioner and that Petitioner would await service of a subpoena. Later that day, Petitioner was in fact served.

On November 15, 1990, Petitioner appeared for her interview accompanied by Carrozza and Devor. Petitioner was advised that Devor could represent her as her attorney at the interview, but that Carrozza could not be present. The interview then proceeded with Petitioner being represented by Devor only.

DOI is authorized to conduct any investigation which, in the opinion of the DOI Commissioner, is in the best interests of the City. DOI's jurisdiction extends to any agency, officer or employee of the City of New York, as well as to any person or entity doing business with the City. Chapter 34, Section 805 of the New York City Charter empowers DOI to compel the attendance

of witnesses and to examine witnesses under oath in public or private hearings.

Every executive agency of the City of New York has assigned to it an Inspector General. These Inspectors General are responsible for investigating allegations of criminality and corruption by City employees. Pursuant to Mayoral Executive Order Number 105, dated December 26, 1986, all Inspector General Offices were made a part of DOI and all Inspectors General became DOI employees working under the direction of the DOI Commissioner. Executive Order 105 further provided that each executive agency would assume responsibility, formerly borne by the Inspectors General, for the preparation and prosecution of all formal administrative proceedings. These include removal and other disciplinary proceedings for misconduct or incompetency, and each executive agency was mandated by the Executive Order to establish a system to administer such proceedings.

Positions of the Parties

Petitioner's Position

The Union argues that the Petitioner, in seeking union representation at the Inspector General interview, was engaged in activity which is protected under the NYCCBL. It alleges that, according to this Board's decision in B-48-88, a protected activity is one which is: a) related to the employment relationship, and b) engaged in on behalf of an employee

organization and not strictly personal. The Union contends that the Petitioner has met both these criteria. First, the Union maintains, DOI's authority to interrogate Petitioner and the power to enforce that right are based on her status as an employee and are therefore related to the employment relationship. Second, the activity was engaged in by the Petitioner jointly with the Union and was not strictly personal.

The Union contends that under the City of Salamanca[2] test, in order to establish a prima facie violation of Section 12-306a(3) of the NYCCBL, Petitioner must 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.

According to the Union, Petitioner has made this showing. There can be no question, argues the Union, that respondents had knowledge of Petitioner's union activity; in fact, the City openly admits that the November 5th interview was cancelled due to the appearance of Carrozza in his capacity as union representative. Additionally, the Union asserts, DOI acknowledges that it did not decide to serve Petitioner with a subpoena until after it was notified of the Union's position that an attorney would not be provided by the Union absent documentation of the City's refusal to permit union

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[2] 18 PERB ¶3012 (1985). The Board of Collective Bargaining adopted this test in B-51-87.

representation. Therefore, the Union argues that the Petitioner's union activity was the motivating factor in the City's decision to subpoena Petitioner.

The Union's next argument is one of policy. The Union contends that Section 12-302 of the NYCCBL declares it "to be the policy of the City to favor and encourage the right of municipal employees to organize and be represented." The Union argues that a public policy favoring union representation of public employees is further reflected in the 1978 Amendment of Subdivision 2 of Section 75 of the Civil Service Law wherein the Legislature expressly allowed representation of employees by non-attorney "representative[s] of a recognized or certified employee organization" at formal disciplinary proceedings conducted pursuant to that section.

In light of this public policy, the Union contends, the City has violated Section 12-306a(2) of the NYCCBL. The Union argues that by refusing to permit Petitioner to be represented by an officer of the Union, while allowing her to be represented by counsel retained by the Union, respondents have interfered with the administration of the Union in determining how it may best effectively and efficiently provide representation for its bargaining unit members.

The Union next addresses the City's claim that the Petitioner could not have reasonably believed that the investigatory interview might have resulted in disciplinary

action. The Union alleges that prior to the November 15th interview Devor advised Smith that if the Office of the Inspector General would assure Petitioner "use immunity" so that no statement made during the interview could be used in any future administrative disciplinary proceedings against her, then Petitioner's objection to the absence of union representation at such interrogation would be unwarranted. The Union further alleges that notwithstanding this acknowledgement, at no time was there any offer of such administrative "use immunity." The Union also notes that while Section 4(b) of Executive Order Number 16 authorizes Inspector Generals to confer such "use immunity" with respect to a subsequent criminal prosecution, no such authority exists with regard to subsequent administrative disciplinary proceedings.

The Union alleges that the subject matter of the November 15th interview was "wastefulness at Gracie Mansion." The Union argues that "given the sensitive political ramifications which were evident, Petitioner has a reasonable basis to believe that the interview was intended for the purpose of making scapegoats out of her and/or her co-workers." The Union further argues that a situation could arise in which an employee, who was not the subject of the investigation and was not involved in criminal activity, could disclose information on a collateral matter which conceivably could lead to disciplinary charges being brought. In fact, the Union alleges, the Union's counsel represented another

individual under precisely those circumstances.

Addressing the City's argument regarding a potential conflict of interest faced by a union representative, the Union notes first that it has not demanded that a union representative be present at every interview; rather it is only when the employee wants such representation that the Union demands the right to appear. The Union contends that in the majority of instances where union representation is sought by a bargaining unit member, it is the Inspector General, and not the employee, who is concerned with secrecy. According to the Union, the bargaining unit member is free to consent to the representative's disclosure of such information whether or not that representative is an attorney. Under such circumstances, the Union argues, an Inspector General does not have a right to confidentiality since no such obligation is owed to anyone who is not the client. The Union contends that while there may be occasions where representation by an attorney may be more appropriate, that is a decision that should be made by the Union, not DOI.

The Union's final argument deals with the City's reliance on PERB's decision in City of New York Department of Investigation v. SSEU, Local 371[3]. The Union argues that this reliance is misplaced in light of the fact that Section 19, Article IX of the City-Wide Agreement, adopted subsequent to that decision, grants a right to union representation at certain disciplinary

[3] 9 PERB ¶3047 (1976).

interviews and at Inspector General interviews. While the Union acknowledges that Petitioner is not covered by this agreement,[4] it argues that Section 19 clearly demonstrates the City's longstanding acquiescence to a policy of encouraging union representation during investigatory interviews conducted by Inspectors General. Accordingly, the Union asserts, the Board should hold that the Weingarten doctrine must be applied to all employees governed by the NYCCBL.

Respondent's Position

The City contends that neither the Taylor Law nor the NYCCBL provide a statutory right to union representation during investigatory interviews conducted by DOI. The City notes that in NLRB v. Weingarten,[5] 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 held that this right of union representation inheres in the guarantee, found in §7 of the National Labor Relations Act

[4] Petitioner is not covered by the City-Wide agreement because she is employed in a title governed by Section 220 of the Labor Law.

[5] 420 US 251, 95 S.Ct. 959, 43 L.Ed.2d 171, 88 LRRM 2689 (1975).

("NLRA"),[6] of the right of employees to act in concert for mutual aid and protection. The City points out that the phrase, "...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection," found in §7 of the NLRA is absent from the Taylor Law and the NYCCBL.

The City further argues that PERB held, in Dutchess Community College v. Rosen,[7] 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." Furthermore, the City argues, in New York City Transit Authority v. Amalgamated Transit Union,[8] a PERB Hearing Officer held that there is no Weingarten right of union representation under the Taylor Law for public sector employees during an investigatory interview.

The City maintains the even assuming, arguendo, that employees covered by the NYCCBL did enjoy Weingarten rights, the petition would still have to be dismissed. The City notes that

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[6] §7 of the NLRA provides:
> 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.

[7] 17 PERB ¶3093 (1984).

[8] 19 PERB ¶4618 (1986).

the Weingarten court held that an employee can request representation only if he reasonably believes that the interview will result in disciplinary action. According to the City, Petitioner could not have "reasonably" believed that the investigatory interview might have resulted in disciplinary action for two reasons. First, Petitioner, her attorney, and the Union, were each informed that Petitioner was not the subject of DOI/OIG's investigation and that she would not be subject to disciplinary charges. Second, DOI and its Inspector General Offices handle only investigations of criminality by City employees; not disciplinary matters. According to the City, the practical effect of the Executive Order 105 has been that DOI and its Inspector General offices have focused their efforts upon investigations of criminality by City employees, while purely disciplinary matters are now handled by individual executive agencies.

The City argues that Petitioner also has no contractual right to union representation during investigatory interviews conducted by DOI. There is no enforceable agreement between the City and the Union other than the New York City Comptroller's Determination regarding salary and benefits for Petitioner's title. Since the most recent collective bargaining agreement between the parties expired on July 31, 1971 without either party having filed a bargaining notice, the City maintains, there is no preservation of the status quo. Regardless, the City argues, the

most recent collective bargaining agreement is silent on the issue of union representation at DOI investigatory interviews. Petitioner had failed to cite a rule or regulation of the City which grants employees the right to be represented by their union during an investigatory interview. The City points out that Mayoral Executive Order Number 16, which sets forth the rights and duties of New York City employees as they apply to DOI/OIG investigations, makes no mention of an employee right to have a union representative present during an investigatory interview. Additionally, the City notes that Executive Order Number 83, which sets forth certain general rights and duties of the City and its employees, also does not mention DOI/OIG investigatory interviews or a right to union representation.

The City contends that under the City of Salamanca test, Petitioner will be unable to establish the first prong of this test; since she has no statutory or contractual right to union representation during a DOI investigatory interview, she was not engaged in protected union activity. The City maintains that even assuming, arguendo, that there was such a right, there has been no assertion that the issuance of the subpoena was motivated by anti-union animus. In fact, the City argues, the admission of Devor into the investigatory interview completely dispels any assertion that the City was motivated by anti-union animus. In support of this conclusion the City cites a PERB decision, City

of New York Department of Investigation v. SSEU, Local 371.[9] The City asserts that the facts in Department of Investigation are indistinguishable from the instant case and that PERB found that "the admission of the charging party's attorney into the interview dispels any possible suspicion of [anti-union] animus." Additionally, the City contends, the issuance of the subpoena was motivated by a desire to interview Petitioner without further delay, not by anti-union animus.

The City's final argument rests in public policy. The City maintains that public policy dictates that DOI be permitted to conduct its investigations while maintaining the confidentiality and secrecy required in matters concerning public corruption. To permit union delegates to be present at each investigatory interview would compromise DOI's ability to conduct investigations into criminal activity, which is DOI's primary mission. The City explains that when an employee provides information to DOI, he or she may be put in a position of conflict with his co-workers. The responsibility of a union representative, the City argues, runs to all of the Union's constituents. Therefore, a union representative could face a conflict in the situation in which the interests of the questioned employee are at odds with his co-workers. According to the City, reprisals against employees who provide information leading to criminal charges against their co-workers are a

[9] 9 PERB ¶3047 (1976).

legitimate concern. The City argues that an attorney who finds himself in this situation, on the other hand, is bound by the Code of Professional Conduct which prohibits an attorney from disclosing the confidences of a client or from simultaneously representing two clients whose interests conflict unless each client knowingly and intelligently waives his or her right to independent representation. Additionally, the City notes, any conversations between the attorney and the individual to be questioned would be subject to the attorney-client privilege and could not be repeated by the attorney to the individual's co-workers. Thus, the City maintains that DOI's insistence that an attorney, and only an attorney, be permitted to accompany a City employee during questioning protects both DOI's legitimate concerns and the rights of the individual questioned.

Furthermore, the City contends that Executive Order Number 16, which empowers the DOI commissioner to require an employee of the City to answer questions concerning any matter related to the performance of his official duties and to penalize an employee who refuses to answer such questions, expresses a public policy determination that it is so important that DOI be provided with unfettered access to information from employees that failure to answer questions posed by DOI is cause for termination.

DISCUSSION

The Union alleges in its improper practice petition that the City has violated Sections 12-306a(2) and (3) of the NYCCBL. The Union contends that applying the City of Salamanca test, Section 12-306a(3) was violated when the City served Petitioner with a subpoena. The violation of 12-306a(2) allegedly occurred when DOI denied Petitioner's request for union representation during an investigatory interview, while permitting representation by the Union's attorney. The Union alleges that by telling the Union that an attorney may represent the Petitioner, but a union representative may not, the City has interfered with the administration of the Union within the meaning of §12-306a(2) of the NYCCBL. According to the Union, deciding what type of representation shall be provided to a member is an administrative decision for the Union to make; not a decision for DOI to make. Finally, on policy grounds, the Union argues that Weingarten rights should be extended to cover all employees covered by the NYCCBL.

First, it should be noted that the reply in the instant case was filed approximately six days prior to this Board's issuance of Decision No. B-17-91. In that decision we held that employees covered by the NYCCBL are not entitled to Weingarten rights. Therefore we will not address the parties' arguments concerning the applicability of Weingarten rights under the NYCCBL.

The Union 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.(3) 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
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> 2. the employee's union activity was a motivating factor in the employer's decision.

If that is done, the employer must present uncontroverted testimony and evidence that refutes the evidence put forward by the Union, or it must put forward evidence, unrefuted by the Union, that it had other legitimate and permissible motives which would have caused it to take the action complained of even in the absence of the protected activity.[10]

Implicit in this employer improper practice test is the assumption that if union activity is present, it is of a type that is protected by the NYCCBL.[11] The Union argues that, according to this Board's decision in B-48-88, a protected activity is one which is: a) related to the employment relationship, and b) engaged in on behalf of an employee organization and not strictly personal. The Union contends that both of these criteria have been met.

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[10] Decision Nos. B-36-91, B-4-91 and B-50-90.

[11] Decision No. B-36-91.

The test found in B-48-88 was applied in order to determine whether participation in litigation qualified as protected activity. It was applied again in our decision in B-71-90, also to determine whether participation in litigation constituted protected activity. This test is not applicable in the instant case since we have already determined in B-17-91 that requesting union representation during an investigatory interview that may lead to discipline is not protected activity. Since we find that the complained of activity is not protected, it is unnecessary to apply the City of Salamanca test.[12]

In any event, even if employees covered by the NYCCBL did enjoy Weingarten rights, PERB's decision in City of New York Department of Investigation v. SSEU, Local 371[13] would be controlling. In that case, 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 a DOI investigatory interview. PERB, in dismissing the petition, 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. PERB stated that a necessary element of that cause of action was anti-union animus, which was found not to be

[12] We note that in allowing attorney representation at DOI investigations, the City appears to have acted in a non-discriminatory manner.

[13] 9 PERB ¶3047 (1976).

present in that case. In fact, PERB noted, "the admission of charging party's attorney into the interview dispels any possible suspicion of such animus."

Section 12-306a(2) of the NYCCBL makes it an improper practice for a public employer to interfere with the administration of any public employee organization. Administration can be defined as "[m]anagement or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like."[14] A union's right to administer is not an independent right in and of itself. Rather, a union has the right to administer entitlements which are statutorily or contractually granted. For example, an employer may not interfere with a union's contractual right to administer grievances by refusing to permit union representation at a grievance proceeding;[15] an employer may not interfere with a union's statutory right to bargain collectively by unilaterally paying employees wages in excess of those provided in the parties' agreement.[16] In contrast, if the parties' collective bargaining agreement does not require union representation at a pre-hearing meeting, the employer's denial of such representation does not constitute interference with the administration of the

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[14] Black's Law Dictionary 41 (5th ed. 1979).

[15] Town of Chili, 18 PERB ¶4696 (1985).

[16] Buffalo Police Benevolent Association, inc., 23 PERB ¶4558 (1990), CSEA,inc., 23 PERB ¶4534 (1990).

union.[17]

In the instant case, the right that the Union wishes to administer is the right to have a union representative appear at a DOI investigation. However, this right has been neither contractually granted to the Union nor, as we decided in B-17-91, statutorily granted.[18] Therefore, the Union has no right to administer this entitlement. Having no such right, the Union cannot be heard to claim that DOI interfered with the administration of the Union within the meaning of 12-306a(2). The fact that the employer has chosen to allow attorney representation at DOI investigations is of no consequence; while possibly required as a matter of due process of law, it does not constitute a grant of a right under either the NYCCBL or a collective bargaining agreement.

In conclusion, we find that DOI has not violated Sections 12-306a(2) and (3) of the NYCCBL. Since the complained of activity is not protected under the NYCCBL, no violation of §12-306a(3) can be found. As to §12-306a(2), since union representation during an investigatory interview is not a right statutorily or contractually granted to the Union, the Union has

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[17] Decision No. B-27-83.

[18] It should be noted that the Weingarten right is an individual right, not a union right. See Prudential Insurance Co. v. NLRB, 108 LRRM 2689 (5th Cir. 1980). It follows that if individual public employees lack this right, then their union cannot assert an independent right on its part to administer this non-benefit.

no standing to claim that DOI has interfered with the administration of this right. Therefore, we will dismiss the improper practice petition.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

ORDERED, that the improper practice petition of Helen Mellor and Civil Service Painters Local 1969, I.B.P.A.T. be, an the same hereby is dismissed.

DATED: New York, New York
September 12,1991

MALCOLMD.MacDONALD
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