Carmichael v. HHC; North Central Bronx Hos., DC37, 47 OCB 48 (BCB 1991)
[Decision No. B-48-91(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	:	
LOREENE CARMICHAEL,	:	
Petitioner,	:	
-against-	:	DECISION NO. B-48-91
NORTH CENTRAL BRONX HOSPITAL, a Division of NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	:	DOCKET NO. BCB-1357-91
Respondent,	:	
-and-	:	
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,	:	
Respondent.	:	

INTERIM DECISION AND ORDER

On January 14, 1991, Loreene Carmichael ("petitioner"), filed, pro se, an improper practice petition against North Central Bronx Hospital ("NCB Hospital"), a division of the New York City Health and Hospitals Corporation ("HHC"). The petition alleged a violation of Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL").[1] On the same day, the petitioner

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

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

(continued...)

filed another improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union"), alleging a violation of Section 12-306b of the NYCCBL.[2] Both matters were docketed as BCB-1357-91.

On February 22, 1991, instead of an answer, respondent HHC filed a motion to dismiss on the ground that the petition fails to state a cause of action under the NYCCBL. On the same day, respondent DC 37 filed an answer to the petition.

The petitioner filed separate responses to the Union's answer and HHC's motion on March 21, 1991.[3]

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[1](...continued)
administration of any 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.

[2] Section 12-306b of the NYCCBL provides:

Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

[3] It should be noted that the petitioner's responses, which (continued...)

Background

Petitioner was appointed provisionally as an Office Associate on May 1, 1989, and assigned to the HIV Program at NCB Hospital. Although the events which form the basis of the instant petition allegedly occurred between July and September of 1990, the petitioner alleges that conditions at her work site were less than ideal from the onset of her employment. Specifically, petitioner recounts having to leave her work area, a small office packed with furniture and boxes, on several occasions so that HIV patients could be counselled and tested in her office. Petitioner alleges that counsellors "refused" to use the two conference rooms that had been designated for this purpose. Petitioner also complains that she was not trained on the typewriter she was required to use and, as a result, was unable to meet the expectations of her immediate supervisor, Nyda Morales, the HIV Program Director. In this regard, petitioner claims that Morales gave her deadlines which were unreasonable under the circumstances, and harassed and threatened her when she was unable to meet them. Petitioner states that when she complained to Union representatives in August 1989 about these conditions, she was informed that the HIV Program would be relocating, which it did approximately one year later.

According to petitioner, when she returned from a vacation on July 3, 1990, she discovered that the HIV Program office had moved, but that her new

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[3](...continued)
were entitled "Detail of Facts," were undated, unverified and did not indicate the requisite proof of service on the parties in interest. These defects, however, were cured by petitioner on June 20, 1991.

work area similarly was "inadequate." Petitioner maintains that because her office was also designated as a waiting area for two clinics (the HIV Program and the Special Care Unit), it was often noisy and so crowded that she had to step over patients' feet in order to perform any work away from her desk. Petitioner also claimed that the area was poorly ventilated. Finally, petitioner alleged that even though her assigned duties included typing, she did not have access to a typewriter in her work area.

On July 17, 1990, with the assistance of Jean Jones, a DC 37 Shop Steward, petitioner filed a Step I grievance seeking "better working conditions,"[4] citing a violation of Article XIV, Section 2 of the 1985-87 Citywide Agreement ("Agreement").[5] On July 31, 1990, Morales responded to the grievance in a writing entitled "Response to Grievance Report." In essence, Morales deemed petitioner's complaints unfounded.

Unsatisfied with this response, petitioner requested a meeting with representatives of DC 37 and NCB Hospital, which was held on August 8, 1990. Petitioner contends that she raised two issues at the meeting: poor working conditions and harassment by Morales. Petitioner submits that "nothing was resolved" at the meeting. Both the Union and HHC, however, submit that "certain changes" in petitioner's work site were effectuated in response to

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[4] Appended to the grievance form was a document dated July 5, 1990, entitled "Grievance Report." Therein, petitioner set forth the aforementioned complaints.

[5] Article XIV, Section 2 of the Agreement provides:

> a. Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.

the grievance.[6] The petitioner also contends that the Union representative advised her to take care of the "harassment issue" herself, by writing a memo to Morales' supervisor. Petitioner claims that she followed this advice but never received an official response.

On August 15, 1990, petitioner received a memorandum from Morales, dated August 13, 1990, regarding "Falsified Time Documentation." This memorandum provides:

> On August 1, 1990, you complained that you could not work due to the presence of a patient asleep in the waiting area. You were about to leave our designated work area when I asked you for a specific reason explaining why the patient's presence bothered you, you could not give me a detailed reply. You left for a period of 27 minutes. Later, you stated you were not taking a break because you had taken it earlier.
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> On August 3, 1990, you returned from lunch 15 minutes past the hour and a half granted to employees to enable them to cash their checks. No explanation was given by you.
>
> On August 9, 1990, you arrived to work at 9:10 a.m. yet signed in as having arrived at 0900, and on August 10, 1990, you arrived to work at 9:15 a.m. yet signed in as having arrived at 0905.
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> These sign-ins with inaccurate time are in violation of operating procedure No. 20-2.

The following day, petitioner received two more memoranda from Morales. A memorandum dated August 14, 1990, provides:

> On August 14, 1990, you arrived to work at 9:10 a.m. yet signed in as having arrived at 0905. As previously stated on memo dated August 13, sign-ins with inaccurate time are in violation of operating procedure No. 20-2.

The other memorandum, which was dated August 15, 1990, provides:

> On [August 6 and August 7, 1990], you took two (2) days without pay due to your father's death. When I questioned you as to the date of

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[6] I.e., in an effort to minimize the flow of people through petitioner's work location, Morales agreed to post a sign at the entrance of the Special Care Unit, and to direct the staff of that clinic to use the appropriate exit when leaving their area.

> your father's death, your reply was payroll and personnel are aware of this. On August 14, 1990 you stated that as soon as the death certificate arrived you would provide documentation.
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> You are entitled to a maximum of four (4) days with pay for a death in the immediate family. The four (4) days **should** directly follow the death. For any person who is not an immediate family member, absence [may] be charged against annual leave or taken without pay [emphasis in original].

On August 17, 1990, petitioner received a Notice to Report for Counselling Session/Warning Notice ("Notice") from Morales, which provides:

> You are directed to report to Nyda Morales - Senior Health Care Program Planner, North Central Bronx Hospital, Rm. 4M-08, August 23, 1990 - 10:00 AM, for a counselling session [concerning]:
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> 1) Absences
> 2) Lateness
> 3) Patient Complaints
> 4) Staff Complaints
>
> Your Union representative may be present with you.

On August 17, 1990, petitioner responded, in writing, to each of the above memoranda and Notice. Therein, petitioner categorically denies the sign-in infractions and claims to have been unjustly accused of falsifying her father's death. Petitioner also contends that she was never absent before July 1990, and that her absences during that month were due to "harassment, unnecessary stress and anxiety." As for the patient and staff complaints, petitioner submits that her evaluations clearly state that she is courteous and responsive to the public, patients, and medical staff.

Two days prior to the counselling session, on August 21, 1990, petitioner alleges that Morales gave her an important typing assignment and instructed that she use a typewriter located in a small storage room in the Special Care Unit. Petitioner claims that she experienced a severe allergic reaction to something that had been sprayed into the room while she was typing

and immediately sought medical attention at the Employee's Health Service ("EHS").

According to petitioner, the EHS doctor had been alerted in advance by Morales and, as a result, approached her with disbelief and in an "unprofessional manner."[7] Petitioner claims that her husband, who came to pick her up, was told by the EHS doctor that petitioner should "take some time off from work" and that she would need clearance from a psychiatrist before returning to duty.

Petitioner contends that she sought medical attention from her private physician and, in compliance with the EHS doctor's directive, saw an independent psychiatrist on September 5, 1990. In the meantime, petitioner alleges that the employer refused to process a worker's compensation claim for her and then, while on sick leave, sent her a letter dated September 19, 1991, which provides, in pertinent part:

> This letter is to advise you that your services as a provisional Office Associate are being terminated effective the close of business Friday, September 21, 1990.

Petitioner claims that she sought the Union's help and was told that she was not entitled to "any kind of arbitration hearing" because she was a provisional with less than two years of service. DC 37 contends that despite petitioner's provisional status, it arranged a meeting for November 5, 1990, with NCB's Director of Labor Relations, to discuss petitioner's "employment

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[7] Petitioner gave a detailed account of what allegedly transpired at the EHS. Among other thing, petitioner claims that the doctor asked her inappropriate questions, threatened to have her restrained by security, and insisted that she see a psychiatrist in the hospital's emergency room. Petitioner states that she finally agreed to see a staff psychiatrist only after being threatened that she could not otherwise leave the hospital.

difficulties." DC 37 maintains that petitioner failed to appear for this meeting and did not call to explain her absence or to reschedule it. Petitioner contends that she was never informed of the meeting.

The instant improper practice charges against NCB Hospital and DC 37 were filed on January 14, 1991.

Positions of the Parties

Petitioner's Position

Petitioner claims that even though she had complained about poor working conditions since the beginning of her employment in May 1989, it wasn't until she took formal action, by filing a grievance on July 17, 1990, that respondent NCB Hospital began a course of retaliatory action, which ended in the unjust termination of her employment on September 21, 1990. In support of this conclusion, petitioner alleges that the warning notices she received were based on total fabrications, which an examination of her time sheets, evaluations and other documentation will reveal.

Petitioner also claims that respondent DC 37 failed in its responsibility to: 1) follow-up on her working conditions grievance; and 2) to challenge her retaliatory discharge. In essence, petitioner claims that the representation provided by the Union was inadequate and "unfair."

HHC's Position

Respondent HHC moves for an order dismissing the petition against it on the ground that it fails to state an improper practice under the NYCCBL. HHC claims that petitioner "has failed to provide any nexus between any alleged act by respondent [NCB Hospital] and any of the four bases for an improper practice."

In any event, HHC asserts, it is clear that petitioner's claims of harassment on account of protected activity are belated. In reaching this conclusion, HHC points out that the underlying working conditions grievance which petitioner now claims was filed because she was "harassed by the department," in the first instance concerned "various activities of patients in the waiting room near her work area." Furthermore, HHC contends, the record demonstrates that NCB Hospital attempted to address petitioner's complaints and took steps to resolve them.

DC 37's Position

Respondent DC 37 submits that at no time did it fail or refuse to process petitioner's working conditions grievance. Rather, the Union argues, the record reveals that it did assist petitioner in the presentation of her working conditions grievance and, in fact, was successful in making some change in petitioner's work place.

As for petitioner's discharge, DC 37 argues that as a provisional employee with less than two years of service, the Union was not entitled to assert any legal or contractual right of continued employment on her behalf.[8]

[8] The Union cites the provisions of §75 of the Civil
(continued...)

Despite this limitation, however, the Union contends that it did make a good faith attempt to informally assist petitioner. The mere fact that its efforts were unsuccessful, DC 37 argues, does not constitute proof that the Union treated petitioner differently from any other similarly situated unit member.

DC 37 submits that a breach of the duty of fair representation cannot lie in the absence of any facts that tend to establish arbitrary, discriminatory or bad faith conduct on the part of the Union. Because petitioner has failed to meet her burden of proof, the charges against the Union should be dismissed as a matter of law.

Discussion

Inasmuch as respondent HHC has moved to dismiss in lieu of submitting an answer to the petition, this decision is limited to the question whether petitioner has sufficiently set forth the material elements of a claim of improper public employer practice under Section 12-306a of the NYCCBL.[9]

In cases where a violation of Section 12-306a of the NYCCBL has been alleged, 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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[8](...continued)
Service Law (which does not provide coverage for provisional employees); Articles I and VI of the 1984-87 Clerical Agreement (which limits the Union's ability to assert a claim of wrongful disciplinary action to permanent employees); the HHC Personnel Review Board appeal procedure (which applies only to provisional employees hired on or after August 11, 1982); and the December 22, 1987 Letter Agreement between DC 37 and the City of New York (which grants certain due process rights only to provisional employees who have served for two years).

[9] Supra, note 1, at 1-2.

2. the employee's union activity was a motivating factor in the employer's decision.[10]

When deciding a motion to dismiss, we deem the moving party to concede the truth of the allegations of the pleading to which it is addressed. Giving the petitioner every favorable inference from those assumed facts, the only question presented is whether a cause of action has been stated.[11]

Applying these principles to the instant matter, we must reject respondent HHC's claim that no causal connection has been shown between petitioner's initiation of a formal working conditions grievance and her informal attempt to resolve the "harassment issue" (on the advice of her Union representative) and the events which followed. Even assuming, arguendo, that petitioner's working conditions grievance was directed at the activities of patients in her work area and not toward any agent of NCB Hospital, as HHC contends, the petitioner is now claiming that the employer retaliated by lodging a series of false disciplinary charges against her. Assuming, as we must, that the allegations of the petition are true, such a course of retaliatory conduct, if proved, would constitute a violation of Sections 12-306a of the NYCCBL.[12]

Therefore, we are satisfied that sufficient facts have been alleged to find that the petition states a cause of action under the NYCCBL. Accordingly, we shall deny respondent HHC's motion to dismiss and order

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[10] This test was adopted by this Board in Decision No. B-51-87, and applies the standard set forth by PERB in City of Salamanca, 18 PERB 3012 (1985).

[11] Decision Nos. B-36-91; B-33-91; B-26-90; B-34-89.

[12] E.g., Decision No. B-36-91.

respondent HHC to serve and file an answer within ten days of receipt of this decision.

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 respondent HHC's motion to dismiss be, and the same hereby is, denied; and it is further

ORDERED, that respondent HHC shall serve and file an answer to the petition within ten days of receipt of a copy of this Interim Decision and Order.

DATED: New York, New York
October 23, 1991

MALCOLM D. MacDONALD
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