L.1407, DC37 v. Dep't of Health, 47 OCB 59 (BCB 1991) [Decision No. B-59-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B-59-91

LOCAL 1407, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

DOCKET NO. BCB-1289-90

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF HEALTH,

Respondent.

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DECISION AND ORDER

On June 6, 1990, Local 1407, District Council 37, AFSCME, AFL-CIO (the "Union"), on behalf of Mr. Alan Rosenblatt and Mr. Fitz Beaumont, filed an improper practice petition against the New York City Department of Health ("DOH"), alleging:

> Unlawful interference, restraint and coercion, as well as discriminatory treatment against union membership in violation of Section 12-306a (1) and (3) of the New York City Collective Bargaining Law ["NYCCBL"].[1]

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[1] Section 12-306 of the NYCCBL provides, in pertinent part,

> **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;
>
> * * *
>
> (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;

Section 12-306 of the NYCCBL provides, in pertinent part,

> **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

DOH, by its Office of Labor Relations (the "City"), filed an answer to the petition on August 6, 1990. The Union filed a reply on August 31, 1990.

On January 24, 1991, the Board of Collective Bargaining ("Board") issued Interim Decision and Order No. B-1-91, dismissing the petition as to petitioner Rosenblatt. However, the Board found that the petition alleged facts sufficient, as a matter of law, to constitute an arguable claim of improper practice as to petitioner Beaumont. The Board stated:

> [B]ased on facts still in issue, we are unable to determine whether the employer did intend to interfere, coerce, restrain and discriminate against Beaumont on account of his protected activity or that it had some other reason, not violative of the NYCCBL, for its actions. Where, as here, the Union has alleged facts sufficient to support an inference of improper motive, the City must submit evidence sufficient to rebut the Union's showing or establish that its actions were motivated by reasons not prohibited by the NYCCBL.

Accordingly, the Board ordered that a hearing be held for the purpose of creating a record upon which it may determine whether the employer violated Section 12-306a of the NYCCBL.

Two days of hearing were held on June 18 and 19, 1991. The parties were ably represented and afforded a full opportunity to present evidence and argument in support of their positions. At the conclusion of the hearing, which was stenographically reported and transcribed, the record in this matter was closed.

> employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (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;

Background

On or about September 16, 1988, petitioner Fitz Beaumont was hired as a provisional Assistant Accountant in the Internal Accounting Division ("IAD") of DOH's Department of Fiscal Management. Although he applied for a position as an Accountant, petitioner was offered the position of Assistant Accountant after a review of his credentials by the Personnel Division of DOH revealed that he lacked the requisite number of credits in accounting from an accredited college. Petitioner, who claimed to have over 20 years of accounting experience, accepted the position with the expectation that his performance would be reviewed in six months and that he would be promoted to Accountant at that time.

Petitioner originally was assigned to work in the Personal Expense Unit ("PEU") of IAD. PEU staff are responsible for processing claims for reimbursement of out-of-pocket expenses incurred by DOH employees. To fulfill these duties, it is sometimes necessary for PEU staff to physically transport documents and checks to and from other City agencies (e.g., the Comptroller's Office). The processing of such claims also may require the retrieval of documents from storage.

On August 10, 1989, the petitioner filed a Step I grievance, complaining that he was assigned to perform out-of-title work, ("e.g., Messenger and Porter duties"). Specifically, Beaumont complained that he had been assigned the work of a messenger

whose employment had been terminated shortly before petitioner was hired by DOH. Beaumont also protested the assignment of work which he characterized as "porter" duties, alleging that whenever a document had to be pulled from storage, regardless of who needed it or whether it concerned his own work, he would be assigned to retrieve it. This work, Beaumont complained, often required the movement of heavy boxes that had been piled up to 12 feet high in the storage room.

The grievance was initiated with the assistance of Mr. David Selwyn, a Grievance Representative for Local 1407, DC 37. Approximately two weeks later, the petitioner, Selwyn, Mr. Mohamed Younes, who at that time was the Director of IAD,[2] and Mr. Norman Shapiro, PEU Supervisor, met to discuss the grievance. Although the employer did not issue a formal decision, the parties do not dispute that an agreement was reached, whereby, only work which was commensurate with petitioner's title would be assigned.[3] It is apparent, however, that the parties' understanding of the type of duties that fall within the scope of the job description of the Assistant Accountant position

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[2] On May 20, 1991, Younes, title was changed to Deputy Director of IAD.

[3] The record also indicates that the employer agreed to expunge a warning notice from Beaumont's file, the substance of which was never discussed on the record.

differed.[4] Petitioner claims that within a few weeks, the assignment of out-of-title work resumed.

On October 20, 1989, Beaumont wrote a memorandum to Younes, which read as follows:

> ...[Y]ou [continue] to show contempt, disrespect and disregard for our representatives and the union authorities!
>
> August 10, 1989, a grievance was submitted to the union and the union representative came as per your meeting, to wit you assured us that you would reply to my grievance.
>
> You were further told to [remove] all illegal documents that you placed [in] my official file and that you must give them to me to be destroyed.
>
> You were further told by [the union representative] to (cease] and desist from [assigning] me [duties] not [commensurate] with my contract title.
>
> Instead of adhering to these request[s] you [continue] to (harass], intimi[d]ate, and humil[i]ate me ... [b]y having me [perform] out of title functions.
>
> I AM AGAIN REQUESTING A REPLY AND THAT YOU GIVE ME WORK AS PER MY CONTRACT TITLE. [Union Exhibit "C".]

The memorandum indicates that a co-worker, Mr. Mervin Dennis, witnessed the petitioner's signature on the document.

Immediately after signing the memorandum, petitioner entered Younes' office. Petitioner alleges that he handed Younes the memorandum and in response thereto, Younes stated:

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[4] The job description for the Assistant Accountant title provides, in pertinent part:

> General Statement of Duties and Responsibilities
>
> Under close supervision, is trained in and performs beginning level professional work for the purpose of acquiring knowledge, skill and experience in the professional field of accounting for City departments or agencies; assists in making field investigations, and in auditing of business firms; performs related work.

"Mr. Beaumont, you can do what you want to do. As far as I'm concerned, the union cannot do me anything." (Tr. 28.)[5]

According to Younes, the statement attributed to him is "inaccurate and incorrect" and the conversation "never took place." (Tr. 105-106.) Younes also denies ever having seen the memorandum dated October 20, 1989, prior to the filing of the instant improper practice petition. As for the merits of petitioner's grievance, Younes explained that since the City's messenger service could not be used to pick up and deliver checks, all members of the IAD staff, including its deputy directors, performed the so-called "messenger" duties. As for the "porter" duties complained of, Younes testified that Beaumont was never ordered to move heavy boxes. If the retrieval of documents required such work, Younes explained, petitioner was instructed to inform his supervisor who, in turn, would arrange for building services to move the boxes. Finally, with regard to the issue of whether petitioner had been promised a promotion to Accountant after six months on the job, Younes denied having made any such reference.

[5] References are to the official transcript.

In November 1989, Beaumont was laterally reassigned to the Collating Unit ("CU") of IAD, to fill a vacancy created by the recent resignation of another Assistant Accountant. Mr. Paul Romain, Supervisor of the CU, testified that he welcomed petitioner's transfer into his unit. Romain stated that he believed Beaumont "was having a hard time with the supervisor of the PEU" and thought petitioner might be "more comfortable" working for him. (Tr. 160-161.)

On November 28, 1989, Beaumont was given a copy of the Tasks and Standards for the new position. The document was signed by Romain, Younes and petitioner. (City Exhibit "B".) The last page of the document contained a hand-written notation reflecting that petitioner protested his reassignment to the CU "without incentive and/or promotion." The notation also indicates that petitioner stated his intention to take the matter up with the Union.

There is no dispute that the work of the CU largely consists of separating multiple-part forms and matching them with invoices, purchase orders, etc., in order to process vendor payments. The employer contends that since the unit is responsible for processing vendor invoices instead of employee expense vouchers, the position is more important than the one previously held by petitioner. As. Linda May, who at that time

was the Deputy Director of Fiscal Management[6] testified that it was hoped that petitioner's transfer to "a more highly visible area ... would somehow alleviate some of his disappointments working for the [DOH]." (Tr. 142.) The basis for her belief, she explained, was grounded on the fact that Beaumont constantly complained that "he should have been [hired as] an accountant" and that "the work we did in our accounting area ... was menial work." (Tr. 141.) Petitioner testified, however, that the transfer isolated him from his co-workers and that the duties, which were clerical in nature, did not require an accounting background. Therefore, he viewed the reassignment as a punitive measure.

The record reflects widely divergent views as to petitioner's performance while he was assigned to the CU. Beaumont testified that his work was excellent even though he received no training for the position, the atmosphere in the CU was hostile and aggressive, the workload unreasonable and the procedures ill-conceived and a waste of time. Petitioner also complained that his supervisor continued to assign him to perform messenger and porter duties.

In contrast, Romain testified that he spent three weeks training Beaumont for the position, without success. Romain explained that whenever he tried to point out the problems he

[6] In April 1991, May was promoted to Director of Special Projects.

perceived in Beaumont's work, petitioner would complain that the procedures were "stupid" and "time consuming." (Tr. 174.) Romain also denied that Beaumont performed any messenger and porter duties while working in the CU. Younes testified that problems with Beaumont's performance in the CU were brought to his attention by vendors, who complained of delays in processing payment. Such delays were costly, Younes explained, because the DOH loses a discount when payments are late. Essentially, both witnesses claimed that petitioner was uncooperative and argumentative, placing the blame for any delays on ill-conceived procedures rather than his performance. They also contend that petitioner was unresponsive to repeated efforts to train him and, thus, his performance failed to improve.

In early February 1990, Mr. Joseph Novick, the Director of Fiscal Management, May, Romain, and Younes met with petitioner. At this meeting, Beaumont was advised that his performance was unacceptable and was given a time frame within which to either propose alternative operating procedures for the CU or follow the directions of his supervisor. There is no dispute that Beaumont did not offer any suggestions on how the system could be improved.

On February 16, 1990, approximately one week to 10 days after the aforementioned meeting, petitioner received a letter from Romain, which read:

> Please be advised that effective close of business February 16, 1990, your services are no longer needed. [City Exhibit "A".]

The consensus among the employer's witnesses who testified was that no significant improvement in petitioner's work performance was observed. Both Novick and May testified that although the termination notice was written by Romain, it was effected at their direction.

There is no dispute that Beaumont's work performance was never formally evaluated during the 17 months that he was employed. On this issue, Younes stated that to his knowledge, performance evaluations are not required for provisional employees with less than two years of service. Romain also explained:

> "He [Beaumont] worked for me less than three months and I would not even give him one because it would have been a disaster." (Tr. 186.)

Positions of the Parties

Union's Position

The Union maintains that it has conclusively demonstrated the elements necessary to support a finding of improper practice., to wit: the employer's knowledge of petitioner's protected activity and a relationship between that activity and the retaliatory acts which followed. With respect to petitioner's protected conduct, the Union points to the uncontroverted fact

that Beaumont brought a formal out-of-title work grievance in August 1989, which he pursued informally on October 20, 1989.

In support of the latter claim, the Union elicited the testimony of Dennis, Beaumont's co-worker. According to Dennis, Beaumont came to his desk on October 20, 1989, and asked him to witness petitioner's signature on Union Exhibit "C." Dennis states that after he complied with petitioner's request, Beaumont went directly into Younes' office. Approximately 20 minutes later, Dennis testified, he entered Younes' office as Beaumont was about to leave and allegedly heard Younes saying: "Okay, Mr. Beaumont, you can go ahead and do what you want to do because the union cannot do me anything." (Tr. 82).

Following that confrontation, the Union claims that the employer retaliated against petitioner twice: First, by reassigning him to demeaning duties in the CU; and second, by terminating his employment. The Union contends that the City has failed to establish that either personnel action would have happened in the absence of protected conduct. In this connection, the Union points out that the City has not produced an iota of probative evidence in support of the conclusion that petitioner's transfer or dismissal was justified, e.g., a negative performance evaluation. The employer's self-serving statements of poor work performance, the Union asserts, do not constitute evidence sufficient to substantiate its claim. The Union submits that the more plausible conclusion to draw from the

circumstances, given the fact that petitioner was reassigned to what the employer characterizes as an "important" and "highly visible" job, was given no training, was still burdened with messenger and porter duties, and terminated with less than three months in the unit, is that petitioner was set up to fail.

In conclusion, the Union claims that this case is representative of a "classic" improper practice, inasmuch as the employer's actions were designed "to discourage other union members from pursuing grievances or otherwise engaging in protected union activities." As a remedy, the Union seeks an order from the Board of Collective Bargaining ("Board"), directing DOH: to cease and desist from retaliating against its employees on account of their union activity; to require that DOH post notices informing employees that it has been found guilty of improper labor practices; and to reinstate Beaumont with back pay and benefits, plus interest.

City's Position

At the outset, the City denies that Beaumont ever was assigned to perform out-of-title work. Although not enumerated in the job description for the position of Assistant Accountant, the City argues that the duties petitioner complained of in his grievance fall within the purview "related work." In any event, the City maintains that even if the Union could establish that

the duties complained of constitute out-of-title work, that fact would not be probative of the instant improper practice claim.

As for petitioner's claim that the meeting between Beaumont and Younes on October 20, 1989 triggered the alleged retaliatory acts which followed, the City denies petitioner's version of the conversation. The also City claims that the credibility of the Union's corroborating witness, Dennis, is questionable inasmuch as he no longer works for the DOH and that he was subject to disciplinary charges during his tenure with the agency.

In response to each instance of alleged retaliation, the City offers a legitimate business defense. Namely, the City contends that petitioner's transfer to the CU was believed to be in the best interest of all parties concerned, given the petitioner's express dissatisfaction with his position in the PEU, the need to fill a vacancy in the CU, the willingness of Romain to work with Beaumont, and the employer's perception that a position with more responsibility and visibility might improve petitioner's attitude toward his work. The City submits that the record is devoid of evidence that the filing of the out-of-title grievance was a motivating factor in the employer's decision to reassign petitioner. To the contrary, the City argues, the record establishes that the decision to transfer petitioner to

the CU was motivated by a desire to find another position in which he could function more contentedly.[7]

According to the City, after petitioner's reassignment the employer "literally bent over backward to keep [him) on the payroll." (Tr. 11-12.) In this regard, the City relies on the cumulative testimony of several witnesses who stated that petitioner was trained, closely supervised, repeatedly counseled and afforded a final opportunity either to suggest alternatives or conform to the established procedures of the CU. Despite these efforts, the City submits, petitioner refused to follow the direction of his supervisors and failed to complete assignments within the mandated period of time. Therefore, it argues, the DOH had a sound business reason for terminating petitioner's employment.

Finally, the City alleges that the sole reason the Union filed the instant improper practice charge was because Beaumont, as a provisional employee, had no other forum for obtaining review of his discharge. The City submits that since the Union has failed to show that protected activity was a motivating factor in petitioner's discharge and since the employer has established that the only motivating factor was poor work performance, the petition should be dismissed in its entirety.

[7] Both May and Novick testified that the CU was responsible for one of the most important functions of the IAD and that its performance was scrutinized by the Mayor's Office of Operations. (Tr. 143, 195.)

Discussion

In cases where the employer's motivation is at issue, the test which this Board has applied since our adoption, in Decision No. B-51-87, of the standard set forth by PERB in City of Salamanca, 18 PERB 3012 (1985), provides that 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

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

Once the petitioner has satisfied both elements of this test, then, if the respondent does not refute the petitioner's showing on one or both of these elements, the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[8]

In declining to dismiss the instant charge in Decision No. B-1-91, we found that the Union raised a substantial issue concerning whether Beaumont's efforts to pursue his grievance were met with acts arguably intended to discourage this activity. The Union's showing was advanced by, inter alia, its claim that when confronted by Beaumont on October 20, 1989, Younes "flaunted his anti-union animus," when he allegedly said that there is nothing the Union can do to me. We also found other facts in

[8] See e.g., Decision No. B-8-91.

dispute, which, if proven, could be suggestive of a continuing course of retaliatory conduct. Therefore, we ordered that a hearing be held for the purpose of creating a record upon which we may determine whether the employer intended to discriminate against petitioner on account of protected activity or that it had some other reason, not violative of the NYCCBL, for its actions.

The Union maintains that it has met its burden of proving the employer's anti-union hostility by demonstrating that shortly after petitioner threatened to pursue his out-of-title claim, he was assigned to duties so intolerable as to make it impossible for him to perform effectively. As for the City's assertion that Beaumont was terminated for poor work performance, the Union argues that this claim is a pretext for animus, pointing out that the employer failed to produce any documentary evidence to support its position.

The City argues that the Union has failed to prove that any action taken by the DOH was improperly motivated. The mere fact that petitioner filed an out-of-title grievance, the City contends, does not establish that his reassignment three months later was motivated by anti-union animus. Even assuming, arguendo, that the Board accepts petitioner's account of events, the City argues that Beaumont's refusal to confront to established operating procedures was hampering the progress of the agency; thus, it was necessary to terminate his services.

What emerges from the facts adduced at the hearing in this matter is an employee who reluctantly accepted a job as an Assistant Accountant, a position for which he believed he was overqualified, hoping that within six months he would be upgraded to an Accountant title. Because promotional opportunities is a topic one would expect to be discussed during the recruitment process, we do not find credible Younes' testimony that he never referred to that possibility when he offered Beaumont the Assistant Accountant position in September 1988.

The record also reveals that approximately one year later, petitioner became impatient with the fact that he had not been upgraded, disheartened by the regular assignment of duties that he felt were beneath the title of Assistant Accountant, and frustrated because the assignments complained of in his grievance resumed shortly after he was led to believe that they would cease.[9] Given these circumstances, we find it conceivable, if not likely, that Beaumont delivered the memorandum he had written to Younes on October 20, 1989 (Union Exhibit "C").[10] It is also likely, in view of the tone of Beaumont's memorandum, that a heated conversation between petitioner and Younes ensued, during which words similar to those alleged were exchanged.

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[9] Since Younes did not render a formal decision after the Step I grievance hearing, petitioner's "subjective" belief that he had prevailed was reasonable.

[10] See background, supra, at 5.

Clearly, Younes' remarks are bereft of an enlightened approach to harmonious labor relations. Nevertheless, we are not persuaded that this confrontation proves that petitioner's reassignment to the CU one month later was a retaliatory act - or that it was part of a larger scheme to find cause to terminate his services. In reaching this conclusion, we credit the testimony of Romain and May, both of whom stated that Beaumont's transfer was motivated by a good faith attempt to accommodate petitioner, since his discontent in the PEU was widely known.

Even if this was not the employer's true motive, we have no doubt that the agency's need to fill a vacancy in a unit which processes vendor payments has priority over the needs of a unit which processes employee expense vouchers. Although petitioner maintains that the position in the CU did not require accounting skills, we note that the vacancy was created by the departure of an employee in the same title as petitioner. The fact that the position was one of more responsibility does not, in this case, support a finding of retaliatory motive. That is, the notion that a manager of the agency's accounting department would purposefully undertake a course of action designed to jeopardize. its vendor payment record, lose discounts for early payments and, thereby, be called to task by the Mayor's Office of Operations, strains credulity. For all these reasons, we find that the record fails to establish that anti-union animus was the motivating factor behind petitioner's reassignment to the CU.

More importantly, notwithstanding petitioner's perception that his transfer was retaliatory, we find the record devoid of any facts which support his allegation that an assignment to the CU was tantamount to punishment. In this regard, we found petitioner's attitude, in general, an important and relevant factor. A consistent theme throughout the record appears to be petitioner's perception that his assigned duties either were beneath his self-professed level of skills, were menial tasks or that they constituted out-of-title work. We also note that petitioner claimed to have over 20 years of accounting experience and was bitter about the agency's refusal to recognize his degree at hire. Given this as a backdrop and adding to the equation his disappointment that the transfer was "without incentive and/or promotion," it is probable that any personnel action short of a promotion to Accountant at that time would have been viewed by petitioner as punishment.

In light of these findings, we have cause to question Beaumont's characterization of his work in the CU as "menial" and "demeaning," and for the same reason, credit Romain's testimony that Beaumont stubbornly refused to follow procedures that, in petitioner's view, were "stupid" and "time consuming." We also doubt the truth of petitioner's assertion that he received no training for the position. We further note that Beaumont does not deny that he was given a final warning, at which time he was advised that his continued refusal to follow directions would

have serious consequences. On the whole, we find that regardless of whether petitioner's assessments about CU office procedures were correct, Beaumont's attitude rendered his work performance, or lack thereof, unacceptable.

Thus, we do not find that the Union has proved that participation in protected activity was the motivating factor in the employer's decision to terminate petitioner's provisional appointment. Rather, we conclude that the employer made all reasonable attempts to find a position in the agency which would give petitioner a sense of pride in his work, to no avail.

Except under limited circumstances not applicable to this proceeding, provisional employees have no expectation of tenure and, thus, may be terminated at any time without charges proffered, a statement of reasons given or a hearing held.[11] Accordingly, the employer's failure to offer documentation to support its decision to terminate a provisional employee whose work performance is unsatisfactory does not constitute proof of improper motive. Nor will the mere fact that a grievance was filed provide a basis sufficient for a finding of improper practice.[12] We have long held that an allegation of improper motive, even when accompanied by an exhaustive account of union

[11] See e.g., Decision Nos. B-41-91; B-39-89; B-17-89.

[12] Decision Nos. B-41-91; B-1-91.

activity, does not state a violation of the Section 12-306a of the NYCCBL where no causal connection has been demonstrated.[13]

For all these reasons, we shall dismiss the instant 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 of Local 1407, District Council 37, A F S C M E, AFL-CIO be, and the same hereby is, dismissed.

DATED: New York, New York
December 27, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

[13] Decision Nos. B-53-90; B-28-89; B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.