PBA v. NYPD, 47 OCB 8 (BCB 1991) [Decision No. B-8-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioner,

-and-

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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DECISION NO. B-8-91

DOCKET NO. BCB-1055-88

DECISION AND ORDER

On May 6, 1988, the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA" or "Association") filed a verified improper practice petition, together with the supporting affidavit of Police Officer William Genet, PBA Financial Secretary, Manhattan North, alleging that the New York City Police Department ("City" or "Department") violated the New York City Collective Bargaining Law ("NYCCBL") by unlawfully interfering with the conduct of a union election.

On December 29, 1988 the City submitted a verified motion to dismiss the petition, and an affirmation in support thereof, on the ground that the petitioner has failed to state a claim upon which relief could be granted. On February 14, 1989 the PBA submitted a verified affirmation in support of its improper practice petition. The City filed a reply to the PBA's answering affidavit on March 17, 1989.

The Board of Collective Bargaining ("Board") issued an Interim Decision and Order (Decision No. B-7-89) on March 30, 1989. Therein, the Board determined that the PBA's unrebutted allegations concerning management's conduct constitutes a claim of improper practice within the meaning of Section

12-306a(1) and (2) of the NYCCBL.[1] Accordingly, the Board denied the City's motion to dismiss and ordered it to serve and file its answer within ten days.

The City filed an answer to the petition on April 14, 1989. After receiving several extensions of time, the PBA filed a reply on June 1, 1989. Upon joinder of issue, the Board ordered that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining. The hearing was held on November 29, 1990,[2] and the parties were given a full opportunity to call witnesses, introduce documentary evidence, and examine and cross-examine witnesses. The parties did not submit post-hearing briefs.

BACKGROUND

On February 4, 1988, Police Officer Genet, in his capacity as Financial Secretary of the PBA,[3] was engaged in conducting an election for Precinct Delegate of the 34th Precinct. Pursuant to the permission granted Genet by the precinct's Captain, he was given the opportunity to speak at roll call for the 4:00 PM -12:00 AM tour, for the purpose of informing PBA members present about the election. Balloting commenced immediately thereafter, as planned,

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[1] Section 12-306a(1) & (2) of the NYCCBL provides:

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;

(2) to dominate or interfere with the formation or administration of any public employee organization;

* * *

[2] Due to the unavailability of essential witnesses, the hearing was rescheduled several times during the intervening period of time.

[3] Pursuant to Executive Order 75, Police Officer Genet, since June 1977, has been on a full-time leave of absence with pay to serve as an elected official of the PBA.

in the station's muster room.

Lieutenant Lawrence Mannion, the administrative officer at the 34th Precinct, testified that after roll call, the Sergeant responsible for "turning out" (assigning) police officers at roll call reported that "he had become involved in some kind of dispute with Police Officer Genet" and that "Genet had made some comments after roll call."[4] Mannion stated that as the administrative officer, it was his duty to investigate any disruption of the "orderly functioning of the precinct." Knowing that the Sergeant would be available to answer questions for the remainder of the tour, Mannion decided first "to find out from Police Officer Genet what had happened during roll call."

While the casting of ballots was still in progress, the Lieutenant entered the muster room. Mannion testified that although he knew Genet was a full-time PBA official,[5] he was unaware that an election was taking place until he saw the ballot box. Mannion stated that he assumed Genet (the only person in the room in civilian attire) was conducting the election and asked if another person could watch the ballot box so that they could meet in his office.[6] In response to Mannion's inquiry, Genet stated that it was necessary for him to stay with the ballot box until the conclusion of voting that day. Mannion then said, "Do me a favor, when you are finished with the election I would like to talk to you in my office," and then proceeded to leave the muster room. Although there are discrepancies in the testimony concerning the actual words exchanged and the tones of voice used, the parties substantially

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[4] Although neither party adduced testimony concerning the specifics of this "dispute," the pleadings filed in this matter describe the incident as a heated disagreement over the amount of time the roll call Sergeant gave Genet to speak to the assembled police officers before they were turned out. Each party ascribes loud and inappropriate language to the other.

[5] Mannion also stated that he never had any contact with Genet prior to that day, but "knew him as one of the Manhattan North trustees."

[6] Mannion also stated he was well aware of the necessity to maintain the integrity of the ballot box, having himself voted in several union elections when he was a member of the PBA.

agree that after Genet repeatedly asked whether the Lieutenant's inquiry was a "request" (as opposed to an order), Mannion, who was by this time at the exit door of the muster room and approximately 20 feet away, raised his voice and used a phrase which reasonably could be construed as an order.[7]

Genet testified that after Mannion left the muster room, he was asked several questions by those who witnessed this verbal exchange, concerning the Lieutenant's authority over a PBA official under the circumstances. Although the actual number of witnesses is in dispute, the parties agree that at least 4-5 members of the PBA were present, some of whom were candidates running in the election. Genet states that the "incident" and the questions that followed delayed the election by approximately 20 minutes.

Balloting resumed and the process was completed by approximately 5:15 PM. Genet, however, did not report to Mannion before leaving the 34th Precinct that day. The PBA does not claim that there were any adverse consequences arising from Genet's failure to report.

Positions of the Parties

Union's Position

The PBA contends that Lieutenant Mannion, a superior officer and agent of the employer, committed a per se violation of the NYCCBL when he "unequivocally interfered" with the election. Moreover, it argues, not only has the City failed to rebut the showing of interference, but the evidence clearly demonstrates that Genet's protected activity evoked an unwarranted and excessive demonstration of management authority. The intended effect, the PBA complains, "was to raise doubt in the minds of the membership, several of whom were present, [concerning] the authority of the union and the integrity of the union process."

According to the PBA, because Genet is engaged full time as a labor representative and performs no police officer duties, supervisory personnel of

[7] Genet testified that Mannion, in a loud and angry voice, said: "I am ordering you into my office." Mannion testified that because the room was noisy and he was some distance away from Genet, he raised his voice and said: "No, I am telling you."

the Department have no direct authority over him. The PBA also submits that the sole reason for Genet's presence at the 34th Precinct on February 4, 1988, was to perform legitimate and authorized business of the Association.

Although the PBA does not question Mannion's responsibility to investigate disruptions within the precinct, the PBA maintains that the dispute alluded to by the Sergeant did not warrant the foreseeable consequences of the Lieutenant's actions. Citing the Lieutenant's own testimony, the PBA contends that the roll call Sergeant gave Mannion no reason to believe that police officers on the 4:00 PM - 12:00 AM tour had not been properly assigned. Rather, the PBA argues, the assertion of Mannion's administrative authority was based merely on the Sergeant having reported that Genet made some comments during roll call which the Sergeant "found upsetting."

In support of its position, the PBA submits that Mannion, rather than ascertain the details of the purported dispute from the roll call Sergeant, instead began his "investigation" by seeking out Genet, whom he knew to be a high-ranking PBA official. Subsequent to learning that an election was in progress and despite the absence of any exigency warranting suspension of the proceedings, the PBA alleges that Mannion interfered with and attempted to cause Genet to violate the integrity of the election. Finally, it alleges, Mannion abused his authority as a superior officer by unduly ordering Genet to report to his office while he was acting in his official capacity as a labor representative. Such harassment, the PBA complains, can only have "the effect of reducing the significance and demeaning the importance of the [Association and its officials] in the eyes of the assembled membership."

Completion of the election notwithstanding, the PBA maintains that the harm was significant and warrants a remedy fashioned to prevent a recurrence. Thus, the PBA seeks an order from the Board of Collective Bargaining ("Board") directing the City to:

> [I]nstruct and insure that superior officers within the Respondent Department do not interfere and disrupt the regular on-duty operations of [the PBA], and to vacate and annul any instruction, rule, regulation or direction to superior officers, either written or oral, which interferes with the regular conduct of business by the Board of Directors, Officers and Delegates of

the [PBA].

City's Position

The City maintains that the PBA has failed to demonstrate that Lieutenant Mannion's conduct was improperly motivated, inasmuch as he acted neither with the requisite knowledge nor the intent to interfere with protected activity. The City submits that although Mannion knew Genet as a PBA official, he was unaware of the purpose of Genet's presence in the 34th Precinct that day and had no idea of how long Genet would remain on the premises. Moreover, the City argues, upon learning that Genet was conducting an election and could not leave the ballot box, in deference to the activity Mannion simply asked to speak with him "after the election" in order to complete his investigation. Therefore, the City asserts, not only did the Lieutenant have legitimate reasons for wanting to speak with Genet in the first instance, but that he attempted to avoid any undue interference once it became clear that Genet was engaged in protected activity.

With respect to the PBA's allegation that Mannion exceeded or abused his authority as a superior officer, the City maintains that the conduct complained of does not, by any standard, constitute "hyperbole of a substantive kind."[8] The City contends that neither the tenor of Mannion's voice nor the content of his speech in any way reflected the alleged "disdain" perceived by the petitioner. Rather, the City argues, if the Lieutenant raised his voice, it was for the purpose of being heard over a distance of 20 feet in a large and noisy room. Otherwise, the City submits, the brief pause in the election, occasioned by a legitimate "request by a superior officer to

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[8] The City cites Town of Southhampton, 15 PERB ¶4555 (1982), where PERB dismissed an improper practice charge based, in part, on allegations that a Town Supervisor spoke of the PBA in a demeaning and derogatory fashion during a meeting of the Town Board. PERB held that:

> While the remarks attributed to the Supervisor may be highly critical of the PBA ... the PBA has neither pleaded that its organizational independence has been compromised nor is the hyperbole of a substantive kind which could evidence either domination or interference with its formulation or administration [emphasis added].

speak to a union delegate," does not rise to the level of an improper practice within the meaning of the NYCCBL.

Finally, the City submits that the PBA has failed to demonstrate any harm arising from the alleged incident. In this connection, the City notes that PBA Financial Secretary Genet has since been reelected to his union post. The City also argues that no negative inference should be drawn from the fact that witnesses asked Genet questions after Mannion left the room. After all, the City reasons, those witnesses who were candidates for Precinct Delegate may someday find themselves in a similar situation and will, therefore, have benefitted from the experience.

Thus, the City contends, because the facts alleged do not establish that the Lieutenant's actions were improperly motivated or that the conduct complained of did, in fact, interfere with protected activity as to constitute a per se violation of the NYCCBL, the improper practice petition should be dismissed in its entirety.

Discussion

On March 30, 1989, this Board issued an Interim Decision and Order (No. B-7-89), in which we denied the City's motion to dismiss on the basis that the PBA's unrebutted account of management's conduct constitutes a claim of improper practice within the meaning of Section 12-306a(1) and (2) of the NYCCBL. In that decision, we stated as follows:

> The unanswered petition alleges facts which demonstrate that Lt. Mannion knowingly and repeatedly issued a directive in his capacity as P.O. Genet's superior in a manner which arguably interfered both with the protected rights of public employees and with the administration of union business. This conduct, if unexplained, would amount to a violation of Section 12-306a of the NYCCBL. [Emphasis added.]

Therefore, we required the City to come forward with evidence sufficient to rebut the PBA's showing,[9] or to demonstrate that there existed some legitimate motivation for Lieutenant Mannion's assertion of his managerial authority under the attendant circumstances.

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[9] It is well settled that on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true.

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),[10] 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.[11]

In the instant matter, the PBA submits that it has satisfied its burden of proving the material and determinative facts of its complaint, i.e., that while engaged in protected activity and in the presence of his constituency, a labor representative was unequivocally ordered to drop what he was doing and come into a superior's office. This conduct in and of itself, the PBA alleges, must be presumed to have coerced and interfered with employees in the exercise of their statutorily protected rights. Moreover, the PBA adds, the City's inability to demonstrate an adequate explanation for this inherently destructive conduct supports a conclusion that the Lieutenant deliberately sought "to disrupt and lessen the esteem held by the [PBA and its officials] among its membership."

Although the City concedes that Mannion "ordered his subordinate ... into his office," the City maintains that the PBA has failed to demonstrate that the order itself, or the circumstances of its issuance, rises to the

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[10] In Decision No. B-51-87, we noted that "the Salamanca test is substantially the same as that set forth by the National Labor Relations Board in its 1980 NLRB v. Wright Line decision [251 NLRB 1083, 105 LRRM 1169, enforced 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981); cert. denied 455 U.S. 989, 109 LRRM 2779 (1982)], and endorsed by the U.S. Supreme Court in NLRB v. Transportation Management Corp., [462 U.S. 393, 113 LRRM 2857 (1983)]."

[11] See e.g., Decision No. B-67-90.

level of an improper practice within the meaning of the NYCCBL. In support of its position, the City submits that at all times relevant, the Lieutenant was legitimately motivated by a desire to maintain order in the 34th Precinct, that he acted with due deference to petitioners' protected activity once he became aware of it, and there is no evidence of record which proves that Mannion's actions had the effect of improperly dominating or interfering with the formation or administration of the PBA.

Based on the pleadings and the testimony adduced at the hearing in this matter, we make the following findings of fact:

Although no details concerning the alleged dispute at roll call were adduced at the hearing in this matter,[12] the pleadings indicate and the witnesses alluded to a heated argument between Genet and the roll call Sergeant. Inasmuch as the dispute was of sufficient magnitude for the roll call Sergeant to include it in his report, we find that Lieutenant Mannion acted prudently and within the realm of his administrative responsibilities when he undertook to investigate the incident.[13] Furthermore, we find both reasonable and consistent, Mannion's explanation for why he decided to begin his investigation by interviewing Genet.

Thus far, we find that the record amply supports the City's contention that, at the outset, Mannion acted "for the purpose of settling a disagreement between two employees and ensuring the 'good order of the Department'." Even though Mannion knew that Genet was a full-time labor representative, we will not impute anti-union animus on a supervisor simply because he initiates an investigation into the potential wrongdoing of a labor representative.[14]

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[12] Mannion and Genet were the only witnesses called to testify.

[13] In this connection, we are not persuaded by the PBA's argument that the dispute did not warrant Mannion's intervention because the Sergeant only complained of remarks which he "found upsetting." Rather, we credit Mannion's testimony that any reported disruption of roll call warrants an investigation by the precinct's administrative officer.

[14] See Decision No. B-35-80. See also, Uniondale Union
(continued...)

Moreover, the PBA has failed to present any evidence which would even suggest that the initiation of Mannion's investigation was a pretext for improperly motivated conduct.[15] Therefore, we find that the PBA has not met its burden of proving that union activity was a motivating factor in Genet's assertion of his managerial authority.

Accordingly, the ultimate disposition of this case hinges upon whether we find that the events which transpired after Mannion entered the muster room were "inherently destructive" of important employee rights so as to constitute prohibited interference irrespective of his motivation. In other words, if Mannion had engaged in discriminatory conduct which was inherently destructive of employee's protected rights, we would find that his actions constituted a per se violation of the NYCCBL.[16]

There is no dispute that the Lieutenant phrased his initial inquiry as to Genet's availability to speak with him as a "request," followed by another "request" that Genet report to him "after the election." Regardless of the

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[14](...continued)
Free School District, 11 PERB ¶4584 (1978), citing Crown Central Petroleum Corp. v. NLRB, U.S. Court of App. (5th Cir.) 430 F2d 724 (1970). Therein, the court held that "[a]n employee may not act with impunity even though he is engaged in a protected activity."

[15] In Decision No. B-50-90, we held that "the exercise of managerial authority may give rise to an improper practice finding if it can be shown that it was used as a pretext for interference with an employee's rights under the NYCCBL." See also, Decision Nos. B-16-90; B-61-89; B-3-88; B-3-84; B-25-81.

[16] See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967), wherein the U.S. Supreme Court declared:

> [I]f it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed ....

See also, Board of Education of the City of New York, 17 PERB ¶3046 (1984); Whitney Point Central School District, 15 PERB ¶4608 (1982); Plainedge Public Schools, 13 PERB ¶3037 (1980); Uniondale Union Free School District, 11 PERB ¶4584 (1978); State of New York, 10 PERB ¶3108 (1977); Lawrence M. Quinlan, Sheriff, Dutchess County, 10 PERB ¶3026 (1977).

semantics, however, there is no doubt that Mannion expected Genet to comply.[17] Even assuming, arguendo, that the inquiry was ambiguous, and that Genet was completely puzzled as to the nature and reason for the request,[18] it is clear that Genet took advantage of Mannion's equivocal choice of words and provoked a definitive response by repeatedly demanding to know whether the Lieutenant's inquiry was a request or an order. Genet's insistence, we conclude, precipitated a loud and angry retort by Mannion, in the form of a direct and unmistakable order. The entire episode, including the time it took Genet to answer questions from PBA members who witnessed this exchange, resulted in a 20 minute delay in completion of the election. Although the PBA alludes to having suffered damage to its "image" (in addition to the delay) as a result of this incident, the record is devoid of any evidence of appreciable harm.

In our view, it is apparent that what began as the issuance of a legitimate and politely phrased "command" from a superior officer to a subordinate, soon escalated into a showdown between them which resulted in a brief interruption of the ongoing union election. Clearly, however, the record as a whole does not support a finding of improper practice in the absence of proof of improper motivation. Rather, we find it more reasonable to conclude that Mannion's display of temper was, at worst, not in accord with harmonious labor relations and, at best, an understandable response to provocation.[19] In neither case, however, do we find that the order, or the circumstances of its issuance, rises to the level of conduct which carries with it "unavoidable consequences which the employer not only foresaw but

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[17] In this connection, Mannion testified that he would use the same formulation of words with any subordinate who had as much experience on the force as Genet has had.

[18] It is more likely, however, that Genet fully understood the import as well as the reason for Mannion's request, inasmuch as the incident at roll call occurred only minutes earlier. See discussion, infra.

[19] In Johnstown City School District, 15 PERB ¶3089 (1982), PERB found that although the school principal made threatening statements, the Board characterized them as "an understandable response to provocation" and held that they did not constitute an interference with the Taylor Law rights of the petitioner.

which he must have intended."[20]

We find that while Mannion's outburst does not evidence an enlightened approach to labor relations, by itself and in the absence of any other evidence from which an inference of improper motivation might be drawn, this is not a sufficient basis for us to view his conduct as having the "unavoidable" effect of lessening the esteem, usefulness and reputation of the Association and its officials, as the PBA alleges.[21] Moreover, the PBA has neither introduced any evidence (other than Mannion's statements) of any overt action taken by him for the purpose of discriminating against Genet,[22] nor shown that Genet or the Association has suffered any political harm as a result.[23] Therefore, the substantial evidence of record fails to even suggest any such effect flowing from the incident.

As for the prospect that Mannion may have been provoked, it is conceivable that Genet, a high-ranking and long-standing PBA official who was clearly engaged in protected activity, took advantage of the opportunity to challenge a superior officer's authority in the presence of his constituency. We base this conclusion on the fact that the Lieutenant, the administrative officer of the precinct, appeared in the muster room immediately on the heels of an argument during roll call, which involved Genet and the roll call

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[20] Great Dane Trailers, Inc., 65 LRRM 2465, 2468, citing Erie Resistor Corp. v. Labor Board, 371 U.S. 221, 53 LRRM 2121 (1963). The Court, in Erie Resistor, held that the act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.

[21] Compare with, Yonkers Board of Education, 10 PERB ¶3057 (1977), where PERB held that statements of certain board of education members allegedly vilifying a union president, while not conducive to harmonious labor relations, did not constitute a violation of the Taylor Law.

[22] In this connection, we note that Genet did not suffer discipline for having disobeyed the order.

[23] Genet has since been reelected to his PBA position.

Sergeant.[24] Under these circumstances, it is reasonable to assume that Genet knew, or should have known, why Mannion wanted to speak with him.[25]

In any event, inasmuch as the record is devoid of any evidence that the Lieutenant's statements were anything more than rhetoric, or which suggests that Mannion's actions had the effect of improperly influencing or dominating the administration of the PBA, we decline to conclude that Mannion's conduct was "inherently destructive" of important employee rights as to constitute a per se violation of the NYCCBL. Having also found, supra, that the PBA has not met its burden of proving a causal connection between Mannion's assertion of managerial authority and Genet's protected activity, we therefore dismiss the Association's 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 the Patrolmen's Benevolent Association of the City of New York be, and the same hereby is, dismissed.

DATED: New York, N.Y.
February 21, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

[24] Neither party denies that this dispute took place. See supra, note 4, at 3.

[25] In this connection, we are not persuaded by Genet's testimony that he repeatedly asked the Lieutenant for the nature and purpose of the "request" in order to determine whether there was "some kind of emergency."

JEROME E. JOSEPH
MEMBER

ELSIE A. CRUM
MEMBER

GEORGE B. DANIELS
MEMBER