Nelson v. Dep't of Sanitation, 49 OCB 16 (BCB 1992) [Decision No. B-16-92(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-16-92

DOCKET NO. BCB-1377-91

GERALD NELSON,
Petitioner,

-and-

CITY OF NEW YORK DEPARTMENT OF SANITATION,
Respondent.

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DECISION AND ORDER

On March 1, 1991, Gerald Nelson, pro se, filed a verified improper practice petition against the City of New York and the New York City Department of Sanitation ("the Department"). The petition alleges that the Department committed an improper practice in violation of Section 12-306a.(3) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it extended the Petitioner's probationary period and ultimately terminated his employment.

The City of New York Office of Labor Relations, on behalf the Department, did not answer, but, instead, on March 12, 1991,

[1] NYCCBL 512-306a.(3) reads as follows:

> **Improper public employer practices**. It shall be an improper practice for a public employer or its agents:
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> (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;

moved to dismiss the petition on, the ground that it failed to state a prima facie violation of the Law. On May 16, 1991, the Petitioner filed an answering affidavit opposing the motion. On July 30, 1991, the Board of Collective Bargaining, in Interim Decision No. B-36-91, held that the Petitioner had stated a claim of an improper employer practice within the meaning of NYCCBL Section 12-306a.(3) sufficient to withstand the City's motion to dismiss. The Board ordered the City to serve and file an answer to the Petitioner's charge, which it did on August 15, 1991. The Petitioner filed a reply on September 10, 1991.

On October 15, 1991, the parties attended a pre-hearing conference held before a Trial Examiner designated by the Office of Collective Bargaining. The conference was adjourned at the Petitioner's request so that he could retain legal counsel. By letter dated October 28, 1991, the Petitioner advised that he was unable to obtain counsel and asked that his case be put back on the calendar. He confirmed that he would continue to represent himself during the hearing.

The hearing began on February 6, 1992 and continued on February 7, 1992. On February 18, 1992, the Petitioner concluded the presentation of his case. Instead of going forward with a defense, the City renewed its notion to dismiss the petition on the ground that the Petitioner had failed to present evidence to support his claim that the City violated Section 12-306a.(3) of

the NYCCBL. The Trial Examiner asked the City to submit its motion in writing, which it did on March 10, 1992. On April 9, 1992, the Petitioner filed an answering affidavit opposing the motion.

Petitioner's Evidence

The Petitioner and three current or former Sanitation Enforcement Agents testified on the Petitioner's behalf. They established that the Petitioner had worked as a probationary Sanitation Enforcement Agent from November 12, 1989, until the Department terminated his employment on January 29, 1991.

The Petitioner and the witnesses each gave similar accounts of an August 1, 1990 roll call incident, during which a Lieutenant Bolstadt, the zone coordinator, used what they described as abusive and obscene language toward a co-worker, former Sanitation Enforcement Agent Duane Wise. Former Agent Wise notified the Department of the incident by writing a letter to the Commissioner, dated August 20, 1990. The letter apparently provoked an internal investigation. Each witness, including the Petitioner, testified that shortly after that, a captain in the Department ordered each Sanitation Enforcement Agent who attended the August 1 roll call to submit a written statement describing what took place. The Petitioner complied, as did two of the witnesses and number of other Agents who were

there. Several weeks later, the Department transferred the zone coordinator to another facility.

Former Agent Wise testified that he was a shop steward during his tenure with the Department. He said that he had received formal training when he became a union representative, and that he was familiar with the contractual grievance procedure. Mr. Wise testified that the letter he had written to the Commissioner "was a memo" that would become a grievance when "the Union backs it up." Although the witness told the Union that "I was going to file a grievance about it," no other instrument concerning the Bolstadt incident ever was filed.

All the witnesses testified that adverse working conditions and personnel action seemed to follow the Petitioner's participation in the Department's investigation of the Bolstadt incident. Allegedly substandard vehicles were assigned to him, and he was ordered to work in the least desirable neighborhoods of his zone. Between August 10, 1990 and December 13, 1990, the Petitioner received twelve written disciplinary warnings and formal complaints accusing-him of committing various infractions that included insubordination, lateness, incompetence, and other types of misconduct. The write-ups led to an unsatisfactory annual evaluation, which, in turn, led to the Petitioner's probationary period of employment being extended. The extension was negotiated and consented to, on October 16, 1990, by both the

Petitioner and a union representative, although on October 26, 1990, the same representative, filed a grievance on the Petitioner's behalf protesting the extension. After holding a hearing on December 11, 1990, the Department's Director of labor Relation issued a Step 11 decision denying the grievance. The Step II decision was not appealed. Three months later, the Department terminated the Petitioner's employment for alleged misconduct and for not successfully completing the extended probation period.

Positions of the Parties

Respondent's Position

According to the City, the Petitioner in this improper practice proceeding had the burden of proving three things: He was required to show that the submission of his written statement concerning the Bolstadt incident qualified as union activity; he had to show that the Department's personnel responsible for the allegedly retaliatory actions were aware that he submitted the statement; and he had to show that the statement was the motivating factor behind the alleged retaliation.

Concerning the first element, the City notes that in Decision No. B-36-91, the letter written by former Agent wise was deemed equivalent to a Step I grievance. It points out, however, that during his testimony, Mr. Wise admitted that he had not

submitted a grievance concerning the incident. The City argues that this could not have been an oversight, since Mr. Wise qualified himself as someone who understood and was familiar with the contractual grievance procedure. Finally, the City points out that every witness, including the Petitioner, testified unequivocally that they submitted statements about the Bolstadt incident, not at the request of Mr. Wise, but in compliance with a direct order of a supervisor.

With respect to knowledge of union activity, the City contends that Lieutenant Bolstadt was the only person who possibly could have resented the submission of the Agents' statements. It notes that he ceased serving as the zone coordinator before most of the adverse personnel actions cited by the Petitioner took place. The City argues that even if Lieutenant Bolstadt's replacement ran the zone the way his predecessor had, there was no evidence that the replacement knew who wrote the statements, or that he harbored animus against the Agents who submitted them.

As to the third element, motivation, the City maintains that there was no evidence linking the Petitioner's statement to the extension of his probation and eventual discharge. It points out that not every employee who submitted a statement lost his or her job, or claims to have been retaliated against. Recalling Agent Bettis' testimony, for example, the City notes that she also was

a probationary employee when she submitted a similar statement, yet she became permanent when her probationary period ended, while the Petitioner did not.

In conclusion, according to the City, the Petitioner did not sustain his burden of proving any of the three elements necessary to sustain his claim that the Department violated §12-306a.(3) of the NYCCBL when it terminated his employment.

Petitioner's Position

The Petitioner insists that the statement former Agent Wise submitted to the Department was, in fact, a Step I grievance. The Petitioner maintains that, as a direct result of his having written a statement supporting this grievance, the Department terminated his employment.[2]

The Petitioner points out that he had an "unblemished record" before the Bolstadt incident occurred. It was only after he became involved in the investigation that he suffered "a sudden rash" of "irrational write-ups," leading to a change in his evaluations from satisfactory to unsatisfactory.

According to the Petitioner, the recommendation by the new zone coordinator to extend his probation period "does in fact

[2] We note that the Petitioner did not and does not claim that the grievance filed in his behalf by his Union local's Executive Vice President on October 26, 1990 contributed to the alleged retaliation that he suffered.

imply that the supervisor had both knowledge and animus because of [the Petitioner's] statement." The Petitioner concludes that the retaliation against him for having written the statement was inspired by anti-union animus. In his view, the evidence "shows beyond a shadow of a doubt that the respondent did discriminate against me by changing normal probation policies to discourage my membership in the union. Job termination discouraged and prevented [my] union membership and activities."

Discussion

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 requires an initial showing by the Petitioner 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 can be done, the employer must present uncontroverted testimony and evidence that attacks directly and refutes the evidence put forward by the Petitioner, or it must put forward unrefuted evidence 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.[3] Implicit in this employer improper practice test is the assumption that if discrimination or retaliation arguably is present, it is of a sort that is protected by the NYCCBL.[4]

In Interim Decision No. B-36-91, which led to a hearing in this case, we indicated that the issue of whether the letter written by the Petitioner's co-worker (former Sanitation Enforcement Agent Wise) to the Commissioner was equivalent to a Step I grievance was crucial. For purposes of determining the notion to dismiss the petition dealt with in Interim Decision No. B-36-91, all allegations of the petition were presumed to be true, including the Petitioner's claim that Agent Wise's letter to the Commissioner was a Step I grievance, and that management had retaliated against the Petitioner for supporting Agent Wise.

After reviewing carefully the Petitioner's and his witnesses' sworn accounts of the events leading up to the

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[3] The test is substantially the same as that set forth by the National Labor Relations Board in its 1980 Wright Line decision, (251 NLRB 1083, 105 LRRM 1169, enforced, 662 F.2d 899, 106 LRRM 2513 (1st Cir. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779, [1982], and endorsed by the United States Supreme Court in NLRB v, Transportation Management Corp. (103 S.M. 2469, 113 LRRM 2857 [1983]. The Public Employment Relations Board adopted the test in City of Salamanca (18 PERB ¶3012 [1985], and we first applied it in Decision No. B-51-87. We have used the test consistently since then. (Decision Nos. B-59-91; B-43-91; B-36-91; B-21-91; B-8-91; B-4-91; B-50-90; B-24-90; B-4-90; B-3-90; B-61-89; B-36-89; B-28-89; B-25-89; B-17-89; B-8-89; B-7-89; B-1-89; B-46-88; B-12-68; B-3-86; and B-58-87).

[4] Decision Nos. B-43-91 and B-36-91.

Petitioners's discharge, however, we now find that the evidence does not support these presumptions.

Former Agent Wise established his knowledge of grievance filing procedures by testifying that he had been shop steward during his three year tenure with the Department, and that he attended "training meetings in the beginning at the office at the local" and "leadership school at Cornell University for a week." The witness undermined the Petitioner's argument that his letter to the Commissioner was equivalent to a grievance by testifying that "I told [the Union] that I was going to file a grievance about it." This statement, describing a future act that never took place, negates the presumption that we attached to the letter in our earlier decision.

Moreover, even if we accept, arguendo, the premise that former Agent Wise may have intended his letter to the Commissioner to be a grievance filing, we do not believe that the Department reasonably could have understood the letter as such. It came from a shop steward but it was not prepared on a standard grievance form nor was it marked as a grievance; it was never acknowledged by management as a grievance; and the Union never pursued the matter to the next step of the grievance procedure. Instead, management responded by ordering an internal investigation and directing a supervisor to request written statements from those Agents who witnessed the incident.

Similarly, there is no evidence that any of former Agent Wise's co-workers believed that they were engaging in union-related activity when they wrote their supporting statements. All the witnesses testified unequivocally that they acted at management's behest, and not in conjunction with any initiative from the Union. Not one witness, including the Petitioner, said that they were acting under the belief that they were participating in grievance filing or other union-related activity when they submitted their statements.

Our inquiry must end with that finding. As a matter of law, the absence of evidence of union-sponsored or union-related activity by the Petitioner removes his claim from the jurisdiction of the New York City Collective Bargaining Law. In other words, even if we were to assume that the Petitioner's termination was a direct retaliation for his having written a statement concerning the Bolstadt incident, under these circumstances, the retaliation would not be actionable under the NYCCBL.

The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees set forth therein, i.e., the right to bargain collectively through certified public employee organizations; the right to organize, form, join, and assist public employee organizations; and the right to refrain

from such activities. The Petitioner was unable to sustain his burden of showing that his alleged treatment by the Sanitation Department was intended to, or did, affect any of these rights. Without such proof, his allegations that he was retaliated against by being disciplined falsely and then discharged, even if true, do not allege facts sufficient to constitute an improper practice within the meaning of NYCCBL §12-306a.

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 herein by Gerald Nelson, and docketed as BCB-1377-91 be, and the same hereby is, dismissed.

DATED: New York, New York
April 30, 1991

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

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