L.1182, CWA v. DOT, 55 OCB 14 (BCB 1995) [Decision No. B-14-95 (IP)]

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

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA
Petitioner,

DECISION NO. B-14-95
DOCKET NO. BCB-1659-94

-and-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.
----------X

DECISION AND ORDER

On June 20, 1994, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Transportation ("Department" or "City"). The petition alleges that the Department violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] when its Integrity and Internal Controls Division questioned Traffic Enforcement Agent

[1] Section 12-306 of the NYCCBL, relevant part, 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;
> (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.

Michael Lewis ("Petitioner") regarding a traffic violation notwithstanding the fact that it had failed to notify Petitioner of his right to union representation during such questioning. The City, by its Office of Labor Relations, filed a verified answer on August 12, 1994 and the Union filed a verified reply on September 30, 1994.

Background

Petitioner has been employed by the Department as a Traffic Enforcement Agent since May of 1989. On April 18, 1994, the Department "learned" that Petitioner had allegedly driven his official vehicle through a red light. Consequently, on April 19, 1994, the Department instructed Petitioner to report to its Integrity and Internal Controls Division for an "internal investigatory meeting." Petitioner did so and was questioned about the alleged traffic violation. The Union alleges that during this questioning session "one of the investigators ... told [Petitioner] that his boss said [Petitioner] should resign."

The Union alleges that, pursuant to Section 75(2) of the Civil Service Law, Petitioner had the right to union representation and should have been given notice of this right prior to the meeting. No representative was present during this meeting and Petitioner was not notified in advance of the meeting that he had such a right.

Positions of the Parties

Petitioner's Position

The Union points out that, pursuant to Section 75(2) of the Civil Service Law, "an employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right." The Union argues that by failing to notify Petitioner of his right to such representation and then questioning him in the absence of a representative, the City committed an improper practice.

The Union notes Article IX, Section 19 of the Citywide Agreement, which cover's Petitioner's title, provides, in relevant part:

> When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:
>
> a. Employees who are summoned to the appropriate office of their agency shall be notified, whenever feasible, in writing at least two work days in advance of the day on which the interview or hearing is to be heard, and a statement of the reason for the summons shall be attached, except where an emergency is present or where considerations of confidentiality are involved.
>
> b. Whenever such an employee is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer, and the employee shall be informed of this right. Upon

> the request of the employee and at the discretion of the Inspector General, the Inspector General may agree to the employee being accompanied by a lawyer or a Union representative. Such permission shall not be unreasonably denied. If a statement is taken, the employee shall be entitled to a copy.

The Union argues because the City did not comply with this provision, it "interfered with existing contractual rights to union representation in violation of Section 12-306..."

City Position

The City contends that the Union has failed to allege facts sufficient to support a claimed violation of §12-306a(1) of the NYCCBL. According to the City, the petition merely alleges that Petitioner was denied his right to representation; it does not allege that management interfered with, coerced, or restrained Petitioner in the exercise of his rights granted under §12-305 of the NYCCBL. Similarly, regarding §12-306a(2) of the NYCCBL, the City argues that the petition contains no allegation of interference with the formation or administration of the Union.

The City argues that the petition does not state a claimed violation of §12-306a(3) of the NYCCBL because, as the Board decided in B-43-91, the right to union representation during a disciplinary interview is not protected activity. As to any right granted by §75(2) of the Civil Service Law, the City cites Decision No. B-39-88 and maintains that the Board does not have the authority to interpret the Civil Service Law.

Finally, the City argues that the Union is seeking to

resolve this dispute in the wrong forum. According to the City, because the petition "sounds in contract", the Union should have pursued its claim through the grievance mechanism. The City contends that the Board has held that "matters that are more appropriately dealt with under existing contracts will not be heard in an improper practice forum."

Discussion

The Union argues that by failing to notify Petitioner of his §75 right to union representation during an investigatory interview, and then questioning him in the absence of a representative, the City committed an improper practice.

In NLRB v. Weingarten,[2] the Supreme Court conferred upon private sector employees the right to aid of a union representative during an investigatory interview that the involved employee reasonably believes may result in disciplinary action. The Court based its decision on §7 of the National Labor Relations Act ("NLRA") which provides :

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

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

The right of union representation inheres, the court held, in §7's guarantee of the right of employees to act in concert for mutual aid and protection.

Section 202 of the Taylor Law, the counterpart to the NLRA's §7, provides:

> Public employees shall have the right to form, join and participate in , or refrain from forming, joining or participating in, an employee organization of their own choosing.

Conspicuously absent from this section, but present in §7 of the NLRA, is the phrase "... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This phrase is also absent from §12-305 of the NYCCBL. It is this language which the Supreme court relied upon in reaching its decision in Weingarten.

In Decision No. B-17-91, we held that employees covered by the NYCCBL are not entitled to Weingarten rights. This decision was based upon the absence of the above-quoted language from the Taylor Law and the NYCCBL and upon decisions of the New York State Public Employment Relations Board ("PERB") and the New York State courts which addressed the issue. These decisions strongly suggested that public sector employees do no enjoy Weingarten rights.

In July of 1993, approximately two years after this Board issued Decision No. B-17-91, the New York State legislature amended §75(2) of the Civil Service Law to provide:

> An employee who at the time of questioning

> appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter.

The justification for this amendment is outlined in the New York State Senate Introducer's Memorandum in Support as follows:

> New York State public employees do not have the same protection enjoyed by private sector employees during interviews and discussions by their employers. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer time by getting to the bottom of the incident occasioning the interview or discussion. A single employee confronted by employer interviews or discussions is often too fearful or inarticulate to relay accurately the facts being investigated or does not know to raise extenuating factors and/or circumstances.

Based on this statement it is apparent that, by amending §75 of the Civil Service Law, the legislature intended to give public

sector employees Weingarten rights.[3] However, the legislature chose to place this right in the disciplinary procedures of the Civil Service Law rather than in the public employee rights provisions of Article 14 of that statute (commonly known as the Taylor Law).

In the instant case the Union goes beyond merely arguing that public sector employees now have Weingarten rights. According to the Union, if the employer violates §75(2) of the Civil Service Law, it has also violated §12-306a(1), (2) and (3) of the NYCCBL. The Union has not cited any support for this argument.

As a prerequisite for finding a violation of the NYCCBL, we must find that the union activity which is the target of the allegedly improper practice enjoys statutory protection.[4] As stated above, we have already determined that requesting union representation during an investigatory interview that may lead to discipline is not protected activity under either the NYCCBL of the Taylor Law.[5] The fact that this activity is now protected by §75(2) of the Civil Service Law does not render it protected by

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[3] In the event that the right to union representation is unreasonably denied by the employer, Section 75(2) of the Civil Service Law provides a specific remedy: any statements obtained at the questioning or evidence obtained as a result of the questioning shall be excluded from consideration by the hearing officer.

[4] Decision Nos. B-17-94; B-2-93.

[5] Decision Nos. B-43-91; B-17-91.

the NYCCBL. The employer does not commit an improper practice simply by violating a statute, other than the NYCCBL, that governs the employment relationship. For example, if an employer violates Title VII of the Civil Right Act of 1964 by discriminating against an employee based solely upon gender, the employer has not also committed an improper practice. Our authority does not extend to the administration of any statute other than the NYCCBL;[6] a union may not seek redress in this forum for the alleged violation of the rights of its members arising under a statute other than the NYCCBL.

We find support for this holding in the legislative history accompanying the amendment to §75(2) of the Civil Service Law. PERB's Deputy Chairman and Counsel, John Crotty sent a memorandum dated March 25, 1993 to Elizabeth D. Moore, Counsel to the Governor, concerning PERB's position on the proposed amendment. In that memorandum PERB expressed doubts as to the applicability of the amendment. Specifically, PERB stated that "the protections afforded by the bill are minimally applicable to those public employees who are subject to CSL §75...it is somewhat unclear, however, whether the legislation is intended to extend a right of union representation in disciplinary proceedings to all public employees generally." PERB further stated that "whether applicable only to those public employees who are subject to CSL § 75 or to public employees generally,

[6] Decision Nos. B-39-88; B-1-83.

PERB has no objection to this bill because it does not amend any section of the Public Employees' Fair Employment Act nor does it adversely affect PERB's interpretation thereof."

Section 12-306a(2) of the NYCCBL makes it an improper practice for a public employer to interfere with the administration of any public employee organization. In Decision No. B-43-91, we held that a union has the right to administer entitlements which are granted to it by the NYCCBL. As we stated above, the right to have a union representative present at a disciplinary interview has not been granted to public employees by the NYCCBL. It follows that if individual public employees lack this right, then their union cannot assert an independent right on its part to administer this non-benefit.[7]

The Union further maintains that by violating the Citywide Agreement, the City has "[interfered] with existing contractual rights to union representation in violation of Section 12-306." We are entirely without authority to enforce the terms of a collective bargaining agreement and may not exercise jurisdiction over an alleged violation of an agreement unless the actions constituting such a violation would otherwise constitute an improper practice. This principle flows from §205.5(d) of the

[7] It should be noted that the Weingarten right is an individual right, not a union right. See Prudential Insurance Co. v. NLRB, 108 LRRM 3041 (5th Cir. 1980). Similarly, the right to union representation granted under §75(2) of the Civil Service Law in an employee right, not a union right; that provision states that "an employee...shall have a right to union representation."

Taylor Law, which states:

> [PERB] shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

Even assuming, arguendo, that the City violated the Citywide Agreement, such a violation would not, in and of itself, state an improper practice. We note that the petition does not allege that the Union attempted to bring a grievance pursuant to the Citywide Agreement and was prevented from doing so.

In conclusion, for the foregoing reasons, we find that the Union's allegations fail to state a claim under Section 12-306a of the NYCCBL. Therefore, we will dismiss the improper practice petition in its entirety. This dismissal is without prejudice to any rights the Union or the employee may have in another forum.

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 1182, Communications Workers of America, be and the same hereby is, dismissed.

DATED: New York, New York
June 21, 1995

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Robert H. Bogucki
MEMBER

Saul G. Kramer
MEMBER