Comm. Of Interns&Residents v. HHC, 55 OCB 17 (BCB 1995) [Decision No. B-17-95 (IP)]

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

-between-

COMMITTEE OF INTERNS AND
RESIDENTS,
Petitioner,

DECISION NO. B-17-95

-and-

DOCKET NO. BCB-1660-94

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (CONEY ISLAND HOSPITAL
CENTER),
Respondent.
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DECISION AND ORDER

On June 21, 1994, the Committee of Interns and Residents (the "Union" or the "CIR") filed a verified improper practice petition against the New York City Health and Hospitals Corporation (the "HHC"). The petition alleges that the Corporation committed an improper practice in violation of Section 12-306a.(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] through certain actions by one of its supervisors in connection with the suspension of a medical resident's clinical duties.

The HHC did not answer, but, instead, on July 25, 1994, moved to dismiss the petition on the ground that it failed to state a cause of action under the NYCCBL. On August 12, 1994, the Union filed a letter response opposing the

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[1] NYCCBL §12-306a. (formerly §1173-4.2) provides, in pertinent part, as follows:

> **Improper practices: good faith bargaining.**
>
> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 (formerly §1173-4.1) of this chapter;
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> * * *
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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;

motion.

During the pendency of its dismissal motion, the HHC, on November 29, 1994, filed a new motion seeking to hold the improper practice proceeding in abeyance pending the outcome of arbitration that the Union had requested. On December 5, 1994, the Union filed a letter response opposing the Corporation's second motion. On December 7, 1994, the Corporation replied to the Union's opposition letter.

By letter dated December 22, 1994, the Corporation withdrew both its motion to dismiss and its motion to hold the improper practice charge in abeyance. The Corporation then filed its answer to the improper practice petition on January 4, 1995. The union did not file a reply.

On January 25, 1995, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing was held on May 17, 1995 and July 13, 1995. The parties had a full opportunity to call witnesses, introduce evidence, and examine and cross-examine witnesses. Closing arguments were made on the afternoon of July 13th. Thereupon, the record was closed.

BACKGROUND and FACTS

Richard Sussman is a postgraduate level two Medicine resident in the Department of Medicine at Coney Island Hospital. On or about March 7, 1994 he was suspended from his clinical duties at the hospital. Between March 7 and March 18, 1994, Dr. Sussman had at least four meetings with his superiors during which they discussed terms of his possible resignation. The Union did not participate in any of these meetings, and it contends that statements made by hospital officials at the time interfered with its right to do so.

EVIDENCE

The CIR presented Dr. Sussman and Harry Franklin, the Union's General Counsel, as its witnesses. Dr. Sandor Friedman, Chairman of the Department of Medicine at Coney Island Hospital and Edward Gerken, Executive Vice President

of the Coney Island Medical Group, testified for the Corporation. Prior to the testimony of the Hospital's witnesses, a tape recording of a March 18th conversation between Dr. Sussman and Dr. Friedman, secretly recorded by Dr. Sussman, and a transcript of that conversation, were admitted into evidence over the strenuous objection of the Corporation.[2]

Dr. Sussman's Testimony

Dr. Sussman briefly described the history of his residency at Coney Island Hospital. He said that on the afternoon of March 4, 1994, his supervisor, Dr. Sandor Friedman, informed him that he was being removed from clinical duties. The following Monday, March 7, 1994, he was summoned to Dr. Friedman's office and ordered to undergo a drug test, which he did. He also contacted a Union official who allegedly warned him not to meet with management unless accompanied by a union representative.

The next afternoon, i.e. March 8th, Dr. Sussman again was summoned to Dr. Friedman's office. Those present included Dr. Friedman, Edward Gerken, and Fran Castro, hospital vice president for personnel. According to the

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[2] The Corporation's objection focused on the manner in which the recording was obtained, the fact that the tape offered into evidence was not the original recording, the possibility that the tape had been edited, and the lack at the hearing of audio equipment with which to verify that the transcript matched the tape.

The hearing was adjourned and the Corporation was provided with copies of the tape and transcript. It then had almost two months to subject the tape to audiophonic scrutiny and testing and thereafter to resume cross-examination of Dr. Sussman on the manner in which he prepared the tape and the transcript. When the hearing resumed, the Corporation introduced no evidence to show that the segment of the tape corresponding to the transcript was not accurate. Thereafter, the trial examiner ruled that the manner in which the tape was made did not violate any law in the state of New York, that there was no best evidence problem because the location of the original tape was adequately accounted for, and that, in all significant respects, the transcript was an accurate reproduction of that section of the tape that the Union was seeking to put into evidence.

witness, he thought it would be an informational meeting, "so I felt that it was okay to be there without a union representative." However, he testified that the meeting soon became confrontational:

> The first thing that I was told was to resign immediately and if I didn't resign they were going to ruin my medical career. At that point, I said that I'd better have a union representative present. [Dr. Friedman] said that if I made this a union matter it would be the end of my career and I would never be able to practice medicine again anywhere. . . . [E]ven consulting with the union would be equivalent [to making it a union matter] and that he was giving me no other options and that I would be fired outright. [Hearing transcript, pp. 28-29.]

Dr. Sussman said that he initiated a private meeting later that day with Edward Gerken, "a very decent human being who had been very helpful to me" to discuss further his resignation options. Gerken allegedly "reiterated and said make it a union matter and the options would be changed." The witness acknowledged, however, that he did not feel threatened during the meeting with Mr. Gerken:

> [According to Gerken's understanding], Friedman said that I had been late on several occasions, and that alone would get me fired from the hospital . . . . He was not malicious in the way he said that. He was trying to say that if you don't resign, we will take it to arbitration and win . . . [Hearing transcript, pp.32-33.]

On March 17, 1995, Dr. Sussman again met with Edward Gerken and Fran Castro. He informed them that he had been unable to make a decision on his resignation, and that he "was going to submit it to the union."

The following morning, Dr. Sussman was summoned to Dr. Friedman's office. Friedman allegedly stated: "You have elected to make this a union matter and that's the end of your medical career." A transcript of the tape recording prepared by Sussman and the tape recording itself generally corroborate Sussman's recollection of that discussion:

> Friedman: I don't think we really have anything to say to each other now that this [unintelligible].
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> * * *
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> Sussman: OK, I still don't know what you're charging me with.

Friedman: We've gone beyond. You've elected to make this a CIR thing so we really can't discuss this in a friendly way anymore. Just to say that this will be the end of your medical career. I am really sorry about that, but the other way would have saved you. You're through.

* * *

Sussman: I don't understand why you are doing this.

* * *

Friedman: Richard, you are going to lose a confronta-tion. So go ahead, you're gonna lose. You have two choices. Your choices are: have the confrontation and that's the end of it, or do this [resign].

Sussman: I can't believe that you're doing this simply because I'm late.

Friedman: I can't discuss it with you any further because you have made it a management-labor fight.[3]

Dr. Friedman's Testimony

Dr. Friedman testified that he believed Dr. Sussman's deteriorating performance was due to substance abuse, possibly complicated by some type of psychological problem. The witness stated that during the meeting of March 8, 1994, he offered Sussman the opportunity to resign, with pay and benefits continuing through June if he agreed to seek counseling and therapy. Thereafter, "the reference he would get from the Department would not be injurious." Friedman explained:

> We were trying to avoid disciplinary charges. This was a way for him to get credit for the time and move on with his career, straighten out whatever he needed to straighten out and not be subjected to any disciplinary hearing.
> [Hearing transcript p. 129.]

Dr. Friedman denied having ever told Sussman not to consult with the CIR:

> What I explained to him was that if he brought the union in as a formal party to negotiation, that that constituted setting off the formal hearing process, and we

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[3] Union Exhibit 1 (transcript) and Sussman tape, Side A, approximate footage 258-289.

> would then move toward termination through the formal grievance procedure. [Hearing transcript p. 132.]

Edward Gerken's Testimony

Mr. Gerken confirmed much of Dr. Friedman's testimony. He insisted that the hospital never intended or moved to deprive Dr. Sussman of access to his union:

> [During the March 8th meeting] I told him that he could seek any counsel that he wished as he went through what at that time was an informal process . . . and that would include attorneys, CIR, union representatives, whoever he chose. [Hearing transcript p. 158.]
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> * * *
>
> . . . I did go out of my way to constantly tell Dr. Sussman that he should consult anybody, including his colleagues, other residents. We have CIR representatives as part of the house staff which happen to be the same department as he is. [Hearing transcript p. 164.]

Under cross-examination, Mr. Gerken tried several times to explain what Dr. Friedman meant when he cautioned Dr. Sussman about involving the union in his case:

> Dr. Friedman, in the context of explaining everything to Dr. Sussman, mentioned that if, in fact, the forum was changed from our informal discussions to one of the hearing process, which would involve the union and union representation, then the matter would be out of his hands, and the decision would be out of his hands. [Hearing transcript p. 164.]
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> * * *
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> Dr. Friedman said if the hearing process was started, this settlement process would obviously have to be stopped because that forum would then take over with its own rules and regulations. [Hearing transcript p. 171.]

Harry Franklin's Testimony

Mr. Franklin testified in rebuttal that it is common for the Union to get involved in disciplinary matters at an early stage, "to see if there is any way to avoid formal disciplinary charges." He stated that it was contrary to his experience that negotiations end with the commencement of formal

disciplinary charges.

POSITIONS OF THE PARTIES

Union's Position

According to the CIR, hospital officials clearly warned Dr. Sussman that if he sought help from his union, negotiations over his resignation would end. This would mean that formal disciplinary proceedings would commence with the filing of charges, and would end in Dr. Sussman's termination. In the CIR's view, management intimidated and coerced Dr. Sussman into giving up his right to have a union representative present; his choice was either resign, or bring the union in and be fired. It maintains that once Dr. Sussman sought union assistance, the Corporation was determined to seek his ruination.

The Union further argues that management was well aware of Dr. Sussman's union activity and his desire to get the CIR involved in his resignation negotiations. In the Union's view, this was the motivating factor in management's decision to cease the informal discussions with Dr. Sussman and begin the process that would lead to his termination.

HHC's Position

The Corporation contends that Dr. Sussman's superiors where merely trying to help him by making an offer that would save his medical career, and it maintains that the Union failed to prove any violation of NYCCBL § 12-306a.

According to the Corporation, the hospital counseled Sussman that the resignation offer was his to accept or reject, but that if he rejected it, the hospital would draft formal disciplinary charges that would lead to a hearing and probably to an arbitration proceeding. It points out that neither the collective bargaining agreement nor the law requires that an employer make the type of settlement offer that Coney Island Hospital gave to Dr. Sussman. It also points out that there is no requirement that the union be present when management makes such an offer, nor is it required that the union be involved

when a supervisor suggests that a resident resign.

The Corporation then highlights several asserted inconsistencies in the Union's case. First, it notes that Dr. Sussman repeatedly claimed that he did not understand why his clinical duties had been suspended, yet the record proves that Friedman and Gerken both made it clear to him why they were considering bringing him up on charges. Second, the Corporation emphasizes the context of the March 18th meeting between Drs. Sussman and Friedman. It points out that Sussman testified that he consulted his union immediately after the March 7th meeting, and that he told Gerken on March 17th that he had decided not to accept the resignation offer. Thus, the next day when Friedman told Sussman that he could not talk to him about the matter any further because it had entered a formal process involving the CIR, he was merely stating a fact. Moreover, according to the Corporation, because Friedman does not negotiate labor relations issues with the CIR, he was absolutely right in saying that he could not discuss the matter any further.

Finally, the Corporation notes the dilemma that the Union's claim would impose on management. It maintains that if Friedman, on March 18th, had attempted to dissuade Sussman from invoking the contractual grievance procedure, after Sussman had informed the hospital on the previous day that he had chosen to do so, the Union "would have been up in arms."

DISCUSSION

The thrust of the CIR's improper practice charge is that on at least three occasions hospital officials deliberately tried to dissuade Dr. Sussman from consulting with his union: First, on the morning of March 8, 1994, when Dr. Friedman allegedly told Sussman to resign or have his medical career ruined, and said that if he went to the Union the resignation option would be withdrawn and he would be fired. Second, later that afternoon, when Edward Gerken acknowledged that he told Sussman that if he went to the Union "the settlement process would obviously have to be stopped." Third, on March 18, 1994, when, during an audio taped conversation, Friedman said to Sussman, "You've elected to make this a CIR thing so we really can't discuss this in a friendly way anymore." The Corporation counters that these were neutral statements, or at least were statements that do not rise to the level of improper interference with union activity.

The New York City Collective Bargaining Law encourages employers and bargaining agents to discuss and reach agreement on labor disputes. There is no point in the process at which the law discourages or prohibits settlement discussions from taking place. Indeed, as Mr. Franklin testified, it is common for a union to get involved in the settlement process at an early stage and to remain amenable to discussing settlement throughout the various steps of the proceedings.

Viewed in this light, Friedman's and Gerken's statements to Sussman were necessarily both coercive and threatening. They communicated management's objection to the presence of the employee's union representation and, further, that absent such union presence, the employee may have a one-time chance of resigning and avoiding a potentially career-ending termination proceeding. Such statements made by supervisory personnel obviously discourages an employee's exercise of the protected right to seek union support regarding his/her employment. The statements make clear that retaliation in the form of forcible termination will follow any union involvement, while, if the employee

deals directly and solely with the employer, the benefit of a quiet resignation will result. It is obvious that the protections and benefits of the contract and the NYCCBL are worth little if employees are afraid to invoke the grievance machinery to enforce their rights. By design or otherwise, Friedman and Gerken conveyed to Sussman the message that if he exercised his right to consult with his union, he would be subjected to a higher level of discipline and punishment.

We need not pass upon the trial examiners's ruling on the admissibility of the transcript and the tape recording of the March 18th meeting between Dr. Sussman and Dr. Friedman, since we would find that the Corporation committed an improper practice even if that meeting had never taken place, or if the discussion had not been preserved by electronic means. The March 8th statements of Dr. Friedman and Mr. Gerken warning Dr. Sussman that involving the Union would be followed by more severe discipline, as testified to by Sussman and confirmed by Gerken, are sufficient in themselves to warrant a finding that management's actions in this matter constituted a restraint of a union member's right to seek the aid of his union in responding to his suspension from duty.

Accordingly, we find that management's actions were in violation of Section 12-306a.(1) of the NYCCBL.[4]

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by

[4] This holding is consistent with decisions of the PERB in similar cases. See, e.g., Town of Hempstead, 18 PERB ¶4642 (1985), aff'd. 19 PERB ¶3022 (1986); and Niagara County Dep't. of Social Services, 18 PERB ¶4532 (1985).

the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition herein be, and the same hereby is, granted; and it is further

DIRECTED, that the Health and Hospitals Corporation shall

cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by the NYCCBL.

DATED: New York, N.Y.
September 19, 1995

MALCOLM D. MACDONALD
CHAIRMAN

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MEMBER

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MEMBER

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MEMBER

JEROME E. JOSEPH
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