Seabrook v. DOC, 55 OCB 7 (BCB 1995) [Decision No. B-7-95 (IP)]

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

NORMAN SEABROOK

Petitioner,

-and-

HONORABLE ANTHONY SCHEMBRI, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION

Respondent.
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DECISION NO. B-7-95
DOCKET NO. BCB-1664-94

DECISION AND ORDER

On July 6, 1994, Norman Seabrook ("Petitioner") filed a verified improper practice petition against the New York City Department of Correction ("Department" or "City"). The petition alleges that the City violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] when it refused to allow Petitioner to respond to political literature distributed by the Correction Officers Benevolent Association ("COBA" or

[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.

"Union") at work locations, threatened to file grievances against him, and conducted "improper surveillance of his employment routine". The City, by its Office of Labor Relations, filed a verified answer on August 15, 1994 and Petitioner filed a verified reply on October 3, 1994.

Background

Petitioner, an employee of the Department of Corrections, is an "announced candidate" for the presidency of COBA. Petitioner alleges that in the months preceding the filing of the instant petition, COBA's incumbent administration distributed leaflets concerning him at Department work locations and posted the leaflets on Department bulletin boards. Petitioner attached six leaflets to the petition as an exhibit. They refer to Petitioner as a "goon", "too stupid to understand the COBA contract", a "sell out", and a "loser". They further state that Petitioner, and others, "would destroy our union" and "would sell out the entire membership to get elected". In the lower portion of three of the attached leaflets the names of the incumbent president and several individuals in his administration appear, the name of a Union delegate appears on one of the leaflets, and the remaining two bear no names. According to Petitioner, the Department would not allow him to respond to these attacks on the ground that it was "premature to permit Petitioner to respond."

Additionally, the petition alleges, "officials of the Department of Correction are harassing Petitioner, threatening him with the filing of grievances against him, and also by conducting improper surveillance of his employment routine..." The City denies this allegation.

The City alleges that Department rules and regulations prohibit the distribution of literature on Department premises except by agents of the certified collective bargaining representative. However, the City asserts, the Department "has a long standing practice during Union election campaigns to recognize candidates who wish to campaign for union office after nominations have occurred."[2] According to the City, since

[2] In support of these statements, the City submitted two documents with its answer: Department of Correction Memorandum Number 002-84 which is entitled "Union Election Campaigning", and a memorandum from the Director of Labor Relations to "commanding officers, facilities and divisions" concerning "soliciting, distributing or posting on departmental premises." The memorandum from the Director of Labor Relations prohibits the "distribution or posting of literature or soliciting of petitions or any other similar activities on departmental premises." "However," the memorandum states, "certified or designated employee organizations upon notification to the Department's Office of Labor Relations, who will advise the Rikers Island Security Division, shall be permitted to distribute official union material at the control building." The memorandum notes that an exception to the general prohibition against distribution of material within the institutions is provided by Memorandum Number 002-84. Memorandum Number 002-84 restricts "campaigning activities" to locker room areas. "Campaigning activities" include posting literature, greeting and speaking to voters, distributing campaign literature and depositing literature for pick up by voters. The Memorandum further provides that candidates wishing to campaign at Department locations must file a specific campaign schedule with the Department's Office of Labor Relations for approval. The Memorandum is silent as to when campaigning may commence with respect to the election date.

nominations will not take place until the Union's May 1995 meeting, Petitioner's election activity will not be permitted until then.[3]

Positions of the Parties

Petitioner's Position

Petitioner contends that by denying him the right to respond to the leaflets, the City interfered with the administration of the Union in violation of §12-306a.(2) of the NYCCBL insofar as it aided and supported the incumbent administration. Moreover, Petitioner argues, when the City permitted the incumbent administration to use its facilities and bulletin boards while denying him the same privilege, it discriminated against Petitioner for the purpose of discouraging his participation in Union activity, i.e., campaigning for the presidency. As for the City's assertion that Petitioner was not permitted to reply to the leaflets because the campaign period does not commence until

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It makes only one reference to a campaign time frame; it provides that leave requests by announced candidates "which incurs overtime costs shall be approved up to the equivalent of one cumulative day per week, per candidate, commencing one month prior to the election date."

[3] The documents attached to the City's answer do not state when the campaign period commences. However, based on documents attached to a related improper practice petition, docketed as BCB-1668-94, it appears to be the City's position that the campaign period begins when the Department announces that it has commenced.

the candidates have been officially nominated, Petitioner argues that the City's application of this artificial and arbitrary time period does not make its conduct any less discriminatory; it does not justify the granting of additional rights to officers of the Union or officially nominated candidates.

Petitioner also contends that by threatening to file grievances against him and "conducting improper surveillance of his employment routine," the City has discriminated against him on account of his union activity.

Finally, addressing the City's argument that Petitioner lacks standing to claim a violation of §12-306a.(2) because he is not a union official, Petitioner contends that there is no requirement that a petitioner be an officer of the Union in order to have standing.

City Position

The City contends that the factual allegations made by Petitioner do not support his claim that the Department's actions violated §12-306a.(1) of the NYCCBL. According to the City, Petitioner's claim that he was denied the right to respond to the leaflets is unrelated to his right to self-organize, form, join or assist in a public employee organization. In this case, the City contends, Petitioner was simply expected to follow the same rules that every other employee must follow.

As for the alleged violation of §12-306a.(2) of the NYCCBL, the City contends that Petitioner does not have standing to raise this claim because he is not a union official. The City argues that because this section of the NYCCBL addresses interference with the administration of a public employee organization, only a union as an entity or a union official has standing to raise this type of claimed violation.

Finally, regarding the alleged violation of §12-306a.(3), the City argues that Petitioner has failed to establish any anti-union animus. The City contends that "adhering to the rules of the Department is not anti-union activity."

Discussion

By its issuance of the memorandum concerning "soliciting, distributing or posting on departmental premises" and of Department of Correction Memorandum Number 002-84, the Department has promulgated a broad "non-solicitation and non-distribution" rule. The rule prohibits employees from distributing or posting literature and from soliciting petitions on Department premises. There are two exceptions to this general rule. First, the certified representative of the employees may, after notifying the Department, distribute "official union material" at the control building. Second, employees may engage in "campaign activities" in the locker room areas. Campaign activities

include posting literature, speaking to voters, distributing campaign literature and depositing literature for pick up by voters. As to this second exception, however, there is a caveat; the City claims that campaign activities may only take place during the "campaign period". The campaign period begins when the Department announces that it has commenced.

We find that the literature distributed by COBA's incumbent administration falls within neither of the two exceptions to the Department's non-solicitation and non-distribution rule. While the first exception permits the Union to distribute "official union material", this literature can hardly be described as official union material. The leaflets contain, at best, the opinions of the incumbent president and administration regarding the character of an announced candidate for union office. It is more accurate to characterize the material as a series of personal attacks against Petitioner as an individual and as a candidate for the Union presidency. The material serves no "official" purpose. Such a personal attack or statement of opinion does not qualify as official union business merely because it is espoused by the president, his administration, or a delegate. We do not believe that the Department, in carving out this exception to the rule, intended to authorize the distribution of this type of material. As for the second exception, it is undisputed that the "campaign period" as defined by the Department had not begun at the time that the literature

was distributed. Therefore, the literature, even if viewed as campaign literature, does not fall within the campaign exception.

As the literature which the Department permitted the incumbents of the Union to distribute is not within the exceptions to the non-solicitation and non-distribution rule, we find that the Department did not enforce the proscription of that rule against the incumbents. However, the City admits that the rule was enforced against Petitioner. According to Petitioner, this conduct constitutes a violation of §12-306a.(2) of the NYCCBL.

Section 12-306a.(2) of the NYCCBL makes it unlawful for a public employer to "dominate or interfere with the formation or administration of any public employee organization." A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving a favored union improper privileges.[4] Claims of interference generally arise in the context of organizational drives by competing unions. However, interference can also be found when an employer enforces a plainly stated rule

[4] Decision No. B-36-93; B-47-88.

governing on premises solicitation and distribution of literature so as to allow incumbent union officers to distribute written material on premises criticizing an announced candidate and thereafter to prohibit that individual from responding by distributing a writing on premises. We find that by allowing the incumbents to violate the employer's plainly stated non-solicitation and non-distribution rule, while enforcing it against Petitioner, the Department interfered with the operation of the union in a manner that violates Section 12-306a.(2). Because we recognize that anti-union motivation is not a necessary element of a claimed violation of §12-306a.(2) of the NYCCBL[5], we emphasize that our holding in this case is limited to its particular facts and circumstances. Moreover, our decision herein should not be construed to impose any right or duty on the employer to police the fairness of any internal union process; the question of such a duty is not before us for determination in this case. Nor should this holding be interpreted to impose a broad obligation upon the employer to provide an even playing field in the workplace during union election campaigns, unless it has plainly committed to do so in a stated rule or policy.

Regardless of whether the Department's actions constitute a violation of Section 12-306a.(2), the City argues, only a union, and not an individual member, has standing to raise claims of alleged violations of §12-306a.(2) of the NYCCBL. The City cites

[5] See Decision No. B-8-91.

no authority for this proposition and neither this Board nor the Public Employment Relations Board ("PERB") has ever held that only a union has such standing. To hold that an individual cannot raise such a claim would render illusory the prohibition against an employer favoring one faction within a union over another. If only an incumbent union official could raise such a claim and the incumbent's faction was the recipient of favorable treatment from the employer, then the employer could violate §12-306a.(2) with impunity.

Petitioner also alleges that when the Department allowed the incumbents to distribute leaflets while denying the same privilege to Petitioner, it discriminated against him for the purpose of discouraging union activity in violation of §12-306a.(3) of the NYCCBL. Under a variety of circumstances, it is possible that an otherwise proper and legal action of the employer may have a detrimental effect upon the petitioner and can be perceived as being discriminatory. This does not necessarily mean that the act constitutes a violation of §12-306a.(3) of the NYCCBL. To establish such a violation it must be shown that the employer acted with the intent to do petitioner harm; to discourage union activity.[6] Only then would we sustain the element of improper motivation essential to a finding of improper practice within the meaning of §12-306a.(3). Thus, in the instant case, the petitioner must show that the Department

[6] Decision Nos. B-36-93; B-25-89; B-59-88.

knew that petitioner was involved in union activity, that its action i.e., the refusal to allow petitioner to distribute literature, adversely affected petitioner's right to campaign for union office, and that the negative impact on that right was a motivating factor behind its decision to refuse petitioner's request.

Applying these principles to the instant matter, we find that the Department had to have known about Petitioner's union activity since he requested the right to respond to the leaflets and his request was denied on the ground that the campaign period had not commenced. Based on the evidence in the record, however, even if we assume that the Department's denial of Petitioner's request adversely effected Petitioner's campaign, we do not find that Petitioner has established that this adverse impact was the motivating factor behind the Department's decision. Petitioner has put forth no evidence which would tend to show that the Department was motivated by a desire to punish or interfere with protected activity.

Finally, Petitioner alleges that, on account of his union activity, "officials of the Department of Correction are harassing [him], threatening him with the filing of grievances against him, and also by conducting improper surveillance of his employment routine..." Petitioner provides no specific facts to support these conclusory allegations. Petitioner has not named any of the "officials" who have harassed or threatened him; he

has failed to set forth where and when any instances of harassment took place; he has not indicated when or under what circumstances the alleged surveillance took place. Allegations of retaliation made pursuant to §12-306a.(3) of the NYCCBL must be based on statements of probative facts, rather than recitals of unsupported conjecture and speculation.[7]

Accordingly, for all of the reasons stated above, we grant Petitioner's improper practice petition to the extent that it alleges a violation of Section 12-306a.(2) of the NYCCBL. However, we deny the petition in all other respects because Petitioner has failed to demonstrate that the Department's decision to refuse Petitioner's request to respond to the leaflets was motivated by a desire to discourage union activity and because Petitioner has failed to set forth specific facts to support his allegations of harassment.

[7] Decision No. B-41-91.

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 Norman Seabrook be, and the same hereby is, granted to the extent that it alleges a violation of Section 12-306a.(2) of the NYCCBL; and it is further,

ORDERED, that the improper practice petition filed by Norman Seabrook be, and the same hereby is, denied in all other respects; and it is further,

DIRECTED, that the New York City Department of Correction cease and desist from permitting the incumbent administration of the Correction Officers Benevolent Association to distribute leaflets concerning the Petitioner, an announced candidate for the Presidency of the Union, at Department work locations and to post these leaflets on Department bulletin boards, while not permitting Petitioner a similar opportunity to respond; and it is further,

DIRECTED, that the New York City Department of Correction cease and desist from enforcing the within described non-solicitation and non-distribution rule against Petitioner while failing to enforce it against the incumbent administration of the Union.

DATED: New York, New York
March 29, 1995

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER

Jerome E. Joseph
MEMBER

Thomas J. Giblin
MEMBER