Seabrook v. DOC, 55 OCB 8 (BCB 1995) [Decision No. B-8-95 (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-8-95
DOCKET NO. BCB-1668-94

DECISION AND ORDER

On July 26, 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 threatened to file disciplinary charges against Petitioner in retaliation for his having filed an improper practice charge with the Office of

[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.

Collective Bargaining ("OCB"). The City, by its Office of Labor Relations, filed a verified answer on August 31, 1994 and the Union filed a verified reply on October 17, 1994.

Background

Petitioner, an employee of the Department of Corrections, is an "announced candidate" for the presidency of the Correction Officers Benevolent Association ("COBA"). On July 6, 1994, Petitioner filed an improper practice charge, docketed as BCB-1664-94, in which he alleged that COBA's incumbent administration had distributed political leaflets concerning him at Department work locations and posted the leaflets on Department bulletin boards and that the Department would not allow him to respond to these attacks.

In the instant petition, Petitioner alleges that he was retaliated against for having filed the original petition and for "what petitioner has said" as an "outspoken" advocate of "the rights of employees of the Department of Correction as protected by the Collective Bargaining Law." Specifically, Petitioner alleges that the Department threatened him with disciplinary charges.

As evidence of the alleged retaliatory threat, Petitioner submitted a letter and a memorandum addressed to him. The letter, dated June 17, 1994 and signed by Richard Yates, Assistant Commissioner of Labor Relations, states:

> It has come to our attention that leaflets attributed to you and containing personal attacks on Department supervisory staff have appeared at facilities on Rikers Island.
>
> While you, or any other member of the Department, are free to comment upon matters of public concern, we think you should remember that those comments should not personally denigrate a superior officer or advocate conduct that would disrupt facility operations. As you know, such conduct would violate Department of Correction Rules and Regulations 3.15.140, 3.15.150 and 3.15.250.
>
> You are also reminded that, except during official union election campaign periods (the commencement of which is announced in advance by the Department), distribution of literature on Department premises is prohibited except by agents of certified bargaining representatives.

The memorandum, dated July 11, 1994, is from Eric M. Taylor, Chief of Department. The "subject" of the memorandum is "Conduct Unbecoming an Officer" and it reads as follows:

> You should have received a Memorandum from Assistant Commissioner Richard Yates in which you were made aware that members of the Department should not personally denigrate Superior Officers or advocate conduct that would be disruptive of facility operations.
>
> Public attacks on managers of this agency will not be tolerated. Staff members who exhibit such conduct will be subjected to Departmental disciplinary action for violation of rules and regulations numbers, 3.15.140, 3.15.150 and 3.15.250.
>
> Additionally, be advised that the Department has not yet announced the commencement of the campaign for the COBA election. Based on this fact, there can be no campaigning within any facility of the Department at this time. The distribution of literature on Departmental premises is prohibited except by the agents of certified collective bargaining representatives.

Petitioner also alleges, for the first time in the reply, that there has been "further harassment by Respondent involving the issuance of memos to Petitioner, orders directing him to

report to Correction Department Headquarters and discussions with wardens."[2]

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.[3] Exceptions to these rules and regulations are

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[2] Petition alleges, also in his reply, that in October of 1994 he was involuntarily transferred in retaliation for a demonstration that he took part in front of Commissioner Schembri's office. As this allegation is not relevant to the allegations made in the instant improper practice petition, we will not consider it.

[3] 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. 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."

made only during official campaign periods. Furthermore, the Department asserts, rules and regulations also state that employees may not personally denigrate superior officers or advocate conduct which would be disruptive to facility operations.

Positions of the Parties

Petitioner Position

Petitioner claims that the disciplinary charges threatened in the memorandum, i.e., conduct unbecoming an officer, are "spurious and designed to intimidate Petitioner and other employees of the department." In addition, the Petitioner argues, they were intended "to retaliate against Petitioner for what Petitioner has said [as an outspoken advocate of the rights of employees under the NYCCBL] and because of the [improper practice] charge Petitioner has previously made."

According to Petitioner, the memorandum was also discriminatory because "no one else received such a memo for negotiating protected union political activity."

Finally, Petitioner alleges that there has been "further harassment by Respondent involving the issuance of memos to Petitioner, orders directing him to report to Correction Department Headquarters and discussions with wardens."

City Position

The City contends that in the instant case it did no more than inform Petitioner of the potential consequences of denigrating a superior officer or advocating disruptive conduct; no disciplinary charges were filed. According to the City, Petitioner was treated in exactly the same manner as any other officer is treated when he or she engages in proscribed conduct. For this reason, the City argues, Petitioner's allegations that the "threats" were retaliatory, were intended to intimidate him, and were discriminatory, are entirely unsubstantiated.

Discussion

In the instant case, Petitioner alleges that the Department sent him the above described letter and memorandum in retaliation for his having filed an improper practice petition with the OCB and for his having been "outspoken". According to Petitioner, this act by management was also discriminatory because "no one else received such a memo for negotiating protected union political activity." The mere assertion of discrimination or retaliation, however, is not sufficient to establish that a management action constitutes an improper practice.[4] In order to support such a retaliation or discrimination charge, the petitioner must demonstrate the following:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

[4] Decision Nos. B-61-89.

2. the employee's union activity was a motivating factor in the employer's decision.

If the respondent does not refute the petitioner's showing on one or both of these elements, then the burden of persuasion shifts to the respondent to establish that its actions were motivated by another reason which is not violative of the NYCCBL.[5]

As for the first prong of the above test, we find that the Department had to have known that Petition filed an improper practice petition against it since Title 61, Section 1-07(f) of the Rules of the City of New York requires that respondent be served with the original and three copies of the petition. Likewise, based upon the allegations contained in the original improper practice petition, the Department must have known that Petitioner has been "outspoken".

As for the second prong, however, we are not persuaded that the memo and letter were sent to Petitioner because he filed an improper practice petition or because he has been "outspoken". The letter and memorandum sent to Petitioner by the Department address certain specific conduct by Petitioner, namely, the unauthorized distribution of literature which personally denigrates superior officers or advocates disruptive conduct. These documents assert that this type of literature is prohibited

[5] Decision Nos. B-1-94; B-20-93; B-2-93; B-21-92.

by Departmental rules and could lead to discipline.[6] Petitioner denies neither that literature of the variety prohibited by Departmental rules was distributed nor that the Department had a right to enforce its rules. Beyond surmise, Petitioner offers no support for his conclusion that there is a causal connection between the memo and letter and Petitioner's filing of an improper practice petition. A retaliation charge must be based upon more than speculation and conjecture. Based upon the evidence presented to us, we cannot conclude that the Department's acts were arguably retaliatory in nature.

Finally, we will address Petitioner's allegations that there has been "futher harassment by [the Department] involving the issuance of memos to Petitioner, orders directing him to report to Correction Department Headquarters and discussions with wardens." Petitioner provides no specific facts to support these conclusory allegations. Petitioner has failed to set forth when, where and by whom these orders were given, when and with whom any discussions took place, or when and by whom any memos were issued. Allegations of retaliation made pursuant to the NYCCBL must be based on statements of probative facts.

Accordingly, for all of the above reasons, we reject the allegation that Petitioner was retaliated against on account of union activity and we shall dismiss the petition herein in its

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[6] We note that neither party has submitted a copy of the literature at issue.

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 Norman Seabrook be, and the same hereby is, dismissed.

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