Griffin v. Vengersky, 57 OCB 42 (BCB 1996) [Decision No. B-42-96 (IP)]

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

-between-

LUCIA GRIFFIN,

Petitioner,

Decision No. B-42-96
Docket No. BCB-1192-89

-and-

ALAN VENGERSKY,

Respondent.
- X

DECISION AND ORDER

A verified improper practice petition was filed by Lucia Griffin ("Petitioner") on August 9, 1989. The petition charged that the New York City Department of Correction, ("the Department") committed an improper practice, in violation of §12-306(a) of the New York City Collective Bargaining Law. Service on Alan Vengersky, Director of Personnel for the New York City Department of Correction, named by Petitioner as respondent, was not completed until September 15, 1989, due to Petitioner's failure to serve him with the complete petition. Mr. Vengersky and the Department appear by the Office of Labor Relations which filed its answer on October 27, 1989. Petitioner filed a reply on December 5, 1989.[1]

[1] The Trial Examiner originally assigned to handle this matter left the employ of the Office of Collective Bargaining. The case file, erroneously, was not placed with active pending

Background

On June 6, 1988, Petitioner was appointed provisionally by the Department to the title of Office Associate. As an Office Associate, her responsibilities included processing the time records of employees in her unit.

Between the Petitioner's date of appointment and the date of the alleged improper practice, the Department contends that Petitioner was chronically late, noting forty-seven (47) separate instances of lateness totaling more than sixteen (16) hours; in contrast, Petitioner denies that contention and admits to only 12 instances of lateness.

The Department asserts that, in addition to Petitioner's "chronic lateness problem" which, it alleges, she was warned about verbally and in writing,[2] Petitioner was dishonest and insubordinate. The Department claims that these characteristics were shown in the events that transpired during the Petitioner's final month of employment with the Department.

During the week of April 17, 1989, Petitioner was excused by the Department and served eight (8) days as a juror in the Bronx County Supreme Court. On the 27th and 28th of April, she did not

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matters and thus, was not reassigned to a new Trial Examiner until October, 1996. On October 21, 1996, the new Trial Examiner assigned to the case contacted the parties to ascertain whether they had resolved the matter and was notified by the Petitioner that they had not.

[2] The Petitioner contends that she never received any verbal or written warnings and that any evidence of such is false.

report for jury duty nor did she return to work. Petitioner contends that she was ill on those days and that she informed Mr. Irwin Goldberg, her supervisor, that she would return to work on Monday, May 1, 1989. The Department disputes this and claims that Petitioner did not inform it of any illness and, in fact, led the Department to believe that she was serving jury duty on April 27th and 28th.

On May 4, 1989, three (3) days after Petitioner returned to work, Mr. Goldberg received a "time due slip" from Petitioner requesting leave[3] for April 27th and 28th. He called Petitioner into his office and informed her that he believed she lied about serving jury duty on those days and that he intended to "write her up" for lying and for failing to submit proof of her jury service. Petitioner responded that she also intended to write a memorandum.

On May 5, 1989, Petitioner submitted a writing entitled "Department of Correction - Intradepartmental Memorandum" to Ms. Amelia Jefferson, the Assistant Director of Personnel. The subject of the memorandum was harassment. Petitioner gave one copy to Mr. Goldberg and another to Mr. Wally Alve, who she indicated was a union representative.[4]

It is undisputed that on May 5th, Ms. Jefferson also

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[3] The record is unclear as to the type of leave requested by Petitioner.

[4] Petitioner does not identify the union in the pleadings.

received a memorandum from Mr. Goldberg recommending that Petitioner's employment be terminated based on his determination that she was incredible and untrustworthy. Ms. Jefferson told Petitioner that she would consider both Petitioner's and Mr. Goldberg's accounts of the situation.

After considering Petitioner's and Mr. Goldberg's memoranda, and Petitioner's employment record, Ms. Jefferson and Mr. Alan Vengersky, the Department's Director of Personnel, agreed to recommend to the Department's Committee on Civilian Personnel (CCP) that the Petitioner's employment be terminated.

On May 11, 1989, the CCP met and voted to terminate Petitioner's employment. According to Ms. Jefferson, she offered Petitioner the opportunity to resign which was declined. Petitioner received a letter of termination from the Department on that day. No grievance was ever filed, nor was any action taken by the union.

On August 9, 1989, Petitioner filed an improper practice petition with the Office of Collective Bargaining, alleging that the Department discharged her in retaliation for her union activity and because Ms. Jefferson wanted to give Petitioner's position to Ms. Jefferson's son's girlfriend. Petitioner seeks reinstatement, punitive damages, payment of back wages and her personnel file expunged of information relating to this incident.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Department terminated her employment on May 11, 1989, for two reasons. The first was as retaliation for her "filing a grievance with [her] union representative" and the second was "to make a position available for persons with whom Amelia Jefferson [the Assistant Director of Personnel] is associated."

In Petitioner's reply, she maintains that she never received verbal warnings or complaints concerning her employment and that the Department's Exhibit G, a warning letter regarding Petitioner's lateness and poor employment record, was "falsified for the sole purpose of this inquiry." She contends that she was only late on twelve (12) occasions and that she was never warned about lateness nor did she ever represent to anyone that she was on jury duty on the 27th or 28th of April.

Petitioner urges that her supervisor never indicated any dissatisfaction with her work performance and that even when she requested a performance evaluation one was never provided. She asserts that if she was made aware of dissatisfaction with her work performance she would have taken corrective action.

Petitioner claims that Mr. Alve, the union representative, took her memorandum and "treated it as a grievance..." She contends that "Mr. Goldberg was furious that [she] gave a memorandum of complaint to [his] supervisor and [the] union representative" and that Ms. Jefferson "used this opportunity to initiate [Petitioner's] termination thus making room for her close associate

to take [Petitioner's] place."

The Department's Position

The Department urges the dismissal of the petition, arguing that Petitioner's employment was terminated for a legitimate business reason and that it was independent of the May 5, 1989, memorandum to Ms. Jefferson.

The Department contends that the discharge was justified because Petitioner was constantly late and failed to perform her duties satisfactorily. It asserts that she was warned verbally and in writing about her lateness and poor employment record. The Department also states:

> Petitioner's termination was precipitated by a two-week absence during which she claimed she was serving jury duty, after which she submitted a Time Due Slip, without prior approval, for two days for which she had represented to her supervisor that she was serving as a juror. Thus, Petitioner's short tenure as a City employee culminated with two days AWOL and charges of dishonesty and insubordination.

The Department asserts that Petitioner's discharge was the Department's "managerial prerogative" since she was a provisional employee with less than two years of service.

The Department denies that a grievance was ever filed on Petitioner's behalf and does not view Petitioner's memorandum, submitted on May 5, 1989, to the Assistant Director of Personnel, as a grievance.

Finally, the Department contends that Petitioner failed to state a prima facie case of improper practice and urges that the

petition be dismissed.

Discussion

Petitioner alleges that the termination of her employment was based on retaliation for union activity and on Ms. Jefferson's personal desire to make a position available to her son's girlfriend.

It should be noted at the outset that the Board of Collective Bargaining ("Board") has no jurisdiction to review the merit of a supervisor's personal motives, alone, which are alleged to constitute a basis for an employee's discharge.

Section 12-306 of the NYCCBL does not empower this Board to consider every perceived wrong arising out of the employment relationship nor does it empower us to deem any and all actions adverse to a public employee, an improper practice.[5] Thus, to the extent that Petitioner's allegation is not that Ms. Jefferson's act of terminating her employment was for the purpose of adversely affecting her §12-305 rights, but instead was for Ms. Jefferson's personal reasons, we cannot deem that action an improper practice since it falls outside of our jurisdiction.[6]

However, Petitioner's allegation that she was discharged in retaliation for union activity does fall within our jurisdiction. It is well settled that a petitioner who alleges a retaliatory

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[5] Decision No. B-21-93.

[6] Decision No. B-29-82.

discharge has the burden of showing that the employer both knew of the union activity and acted on account of that activity.[7] Implicit in the first prong of this test is the threshold issue of whether Petitioner engaged in union activity, protected under the NYCCBL. We find that she has not.

As noted above, the purpose of NYCCBL is not to provide a remedy for every perceived wrong but to safeguard public employees' rights set forth therein.[8] Although those rights include the freedom to participate in union activity without retaliation, a petitioner cannot satisfy its burden of proof by merely alleging retaliation. In order for this Board to make a finding of improper practice based on a claim of retaliatory discharge, the petitioner

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[7] See, e.g., Decision Nos. B-51-87, B-24-84, B-43-82.

[8] Section 12-306(a) of the NYCCBL provides, in relevant part, that it is an improper public employer practice:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in §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 int he activities of any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

NYCCBL §12-305 states that those rights include to the right to:

> self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations ... [and to] refrain from any or all of such activities.

must, among other things, provide evidence that the activity was union-sponsored or union-related.

Petitioner's act of submitting the May 5, 1989, memorandum to Ms. Jefferson and then giving a copy to her union representative, cannot, without more, be deemed protected activity. In support of this conclusion, we credit the Department's contention that the intradepartmental memorandum was never considered to be a grievance. The memorandum's title page contained no written indication that it was to be considered a grievance; there was no remedy requested in the memorandum and it did nothing more than recapitulate the Petitioner's version of the events which led up to its submission.

While Petitioner seeks to buttress her claim by stating that she gave her union representative a copy of the memorandum and he "promised to look into the situation", absent any evidence that Mr. Alve actually pursued the matter with the Department, we cannot assume that such activity existed. Petitioner does not indicate that a grievance was ever filed by her union representative nor does the record reflect any union involvement. Contrary to Petitioner's contention, sending a copy of a memorandum to one's union representative alone does not transform a memorandum into a grievance. Furthermore, the Department did not treat the memorandum as a grievance; its only response was that it would consider Petitioner's memorandum along with Mr. Goldberg's. Under these circumstances, we cannot deem the Petitioner's memorandum to

constitute a grievance.[9]

Even if we were to assume that the submission of the memorandum was tantamount to union activity, an application of the standard set forth in City of Salamanca,[10] which has been adopted and well established by this Board, would not yield a result favorable to Petitioner. The Salamanca test, which is applicable to claims of discrimination based on union activity, requires that a petitioner show that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity [and that]
> 2. the employee's union activity was a motivating factor in the employer's decision.

Aside from Petitioner's conclusory allegation, she at no time shows that her discharge was the result of having submitted a copy of the memorandum to her union representative. We have repeatedly held that a mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity, does not state a violation where no causal connection has been demonstrated.[11]

Accordingly, we conclude that Petitioner has failed to establish, to our satisfaction, that her discharge was improperly motivated. She did not meet her burden of showing that she engaged in union-related or union-sponsored activity and even if she had

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[9] See, Decision Nos. B-38-96; B-16-92.

[10] City of Salamanca, 18 PERB ¶3012 (1985).

[11] See Decision No. B-2-87, and the cases cited therein.

met this burden, that the Department acted on account of this activity. Therefore, the instant petition is dismissed in its 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 herein by Lucia Griffin, docketed as BCB-1192-89 be, and the same hereby is dismissed.

DATED: New York, New York
November 26, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER