L.1182, CWA v. Dep't of Invest. & Dep't of Sanitation 57 OCB 8 (BCB 1996) [Decision No. B-8-96 (IP)]

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

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA

DECISION NO. B-8-96
DOCKET NO. BCB-1753-95

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF INVESTIGATION AND NEW YORK CITY DEPARTMENT OF SANITATION

Respondent.
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DECISION AND ORDER

On May 25, 1995, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Investigation ("DOI") and the New York City Department of Sanitation ("Department" or "City"). The petition alleges that the Department violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] when DOI employees questioned Sanitation Enforcement

[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

(continued...)

Agent Dennis Selby ("Petitioner") regarding corruption 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 July 14, 1995 and the Union filed a verified reply on August 25, 1995.

Background

On or about February 3, 1995, two DOI Investigators, from the Office of the Inspector General for Sanitation, approached Petitioner outside of his residence.[2] The Investigators asked Petitioner to come with them to their offices and Petitioner did so. Once at the Office of the Inspector General, Petitioner was questioned about alleged "corruption." More specifically, the City alleges, Petitioner was questioned in connection with a complaint it had received concerning bribe solicitation.

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

[1](...continued)
purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

[2] As to the time of this encounter, the Union alleges that it took place at approximately 4:45 a.m.. The City states that it took place "before [Petitioner] left for work."

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 statutory right to such representation and then questioning him in the absence of a representative, the City committed an improper practice. According to the Union, the City interfered with the Union's ability to administer an entitlement, i.e., the right to union representation during an investigatory interview, which has been statutorily granted to the employees it represents.

Moreover, the Union argues, the facts of this case "support the charge that DOI was motivated by anti-union animus in interfering with the administration of the right to union representation." According to the Union, the fact that Petitioner was confronted in front of his house before 5:00 a.m. is "clear evidence of the employer's anti-union motivation."

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.
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> 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 the contractually granted entitlement to union representation in violation of Section 12-306.

As for Decision No. B-17-91, in which the Board held Weingarten rights inapplicable to employees covered by the NYCCBL, the Union argues, essentially, that it should be overturned. The Union maintains that since the issuance of Decision No. B-17-91, Public Employment Relations Board ("PERB") hearing officers have found Weingarten rights applicable to

employees covered by the Taylor Law.[3]

City Position

The City contends that the Union has failed to allege facts sufficient to support a claimed violation of §12-306a of the NYCCBL. This is so, the City argues, because the Board has held that the right to union representation during a disciplinary interview is not protected activity under the NYCCBL and protected activity is a condition precedent to a finding of improper practice. Moreover, the City maintains, as the Board held in Decision No. B-14-95, the fact that this activity is now protected by Section 75(2) of the Civil Service Law does not render it protected by the NYCCBL.

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. Similarly, the City contends that the Board has no jurisdiction over an alleged violation of the Citywide Agreement.

Discussion

The Union argues that by failing to notify Petitioner of his §75 right to union representation during an investigatory

[3] The Union cites Buffalo Teachers Federation, Inc., NEA/NY v. City School District of the City of Buffalo, 28 PERB ¶4582 (1995) and Gates-Chili Teachers Association, NYSUT/AFT, AFL-CIO, v. Gates-Chili Central School District, 25 PERB ¶4683 (1992).

interview, and then questioning him in the absence of a representative, the City committed an improper practice. At the outset, we note that most of the issues presented in the instant case were previously decided by this Board in Decision No. B-14-95.

In NLRB v. Weingarten,[4] 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.

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

[4] 420 US 251, 95 S.Ct. 959, 43 L.Ed.2d 171, 88 LRRM 2689 (1975).

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 PERB and the New York State courts which addressed the issue. These decisions strongly suggested that public sector employees do not enjoy Weingarten rights. Most significantly, in City of New York Department of Investigation v. SSEU, Local 371,[5] PERB specifically "disassociated" itself from the hearing officer's opinion that the Weingarten doctrine was applicable to employees covered by the Taylor Law. PERB's decision was affirmed by the Appellate Division, First Department.[6]

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

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[5] 9 PERB ¶3047 (1976).

[6] Sperling v. Helsby, 60 A.D.2d 821, 400 N.Y.S.2d 821 (1977).

> 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.[7] 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.

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.[8] 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 or the Taylor Law.[9] As for the Union's argument that we should overturn Decision No. B-17-91 based on PERB hearing officer decisions granting Weingarten rights, we reiterate that PERB has

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[7] 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.

[8] Decision Nos. B-14-95; B-17-94; B-2-93.

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

spoken on the Weingarten issue on only one occasion and that was to disassociate itself from a hearing officer decision granting Weingarten rights. Under these circumstances, our decision on the issue must stand unless and until PERB revisits the issue.

The fact that this activity is now protected by §75(2) of the Civil Service Law does not render it protected by the NYCCBL. The employer does not commit an improper practice simply by violating a statute, other than the NYCCBL, that governs the employment relationship. Our authority does not extend to the administration of any statute other than the NYCCBL;[10] 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.

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

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

right on its part to administer this non-benefit.[11]

The Union further maintains that by violating the Citywide Agreement, the City has interfered with the contractually granted entitlement 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 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

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[11] 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 is an employee right, not a union right; that provision states that "an employee...shall have a right to union representation." See, Decision No. B-14-95.

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
February 27, 1996

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER