Doctors Council v. City, 59 OCB 12 (BCB 1997) [Decision No. B-12-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
-between-	
DOCTORS COUNCIL,	
Petitioner,	Decision No. B-12-97 Docket No. BCB-1489-92
-and-	
CITY OF NEW YORK,	
Respondent.	

DECISION AND ORDER

On April 16, 1992, a verified improper practice petition was filed by Doctors Council ("the Union") on behalf of Roy B. Reynolds, M.D. The petition charged that the City of New York ("the City") violated §12-306 (a) when it terminated Dr. Reynolds' employment in retaliation for his protected activity. The City, appearing by its Office of Labor Relations, filed an answer on June 2, 1992. The Union filed its verified reply on June 26, 1992. With the permission of the Trial Examiner, the City filed a verified sur-reply on July 8, 1992.[1] On October 25, 1996 the new Trial Examiner assigned to handle this matter contacted the parties to ascertain whether the matter was resolved. In a letter dated October 29, 1996, counsel for the Union stated that the issue was

[1] The Trial Examiner originally assigned to this matter left the employ of the Office of Collective Bargaining (OCB) and the case was reassigned to a Trial Examiner in October, 1996.

not resolved and that he believed the Board of Collective Bargaining (the "Board") was "in a position to decide the case on the papers before it." On January 15, 1997, the Trial Examiner requested additional information from the parties regarding their positions. The Union responded to this request on February 5, 1997. and the City responded on February 6, 1997.

BACKGROUND

The Union contends that in or about October, 1991, Dr. Reynolds inquired about attaining a position with the Department of Health, Bureau of Correctional Health Services ("Bureau"). It is undisputed that on or about November 25, 1991, Dr. Reynolds was interviewed by Paula Clair, the Special Assistant to the Director of Field Services of the Bureau. The Union submits, however, contrary to the City's denial, that during this interview, Ms. Clair informed Dr. Reynolds that he was qualified for, and would be hired in, the position of Medical Specialist. It is undisputed that, on or about December 2, 1991, Ms. Clair sent three (3) reference forms to Dr. Reynolds requesting that they be completed and returned "as soon as possible." The Union claims, and the City denies, that Dr. Reynolds' employment was authorized, on December 4, 1991, by Roselyn Johnson, the Labor Relations Coordinator for the Bureau. It is undisputed that Dr. Reynolds did not report to work at the Bureau until March 17, 1992.

Dr. Reynolds' processing interview was scheduled for March 5, 1992. The Union contends that when Dr. Reynolds was informed of his

interview date he was also informed, for the first time, that he would be processed as a City Clinician, not a "Medical Specialist, as he applied for and was hired [as] in December, 1991." According to the Union, Dr. Reynolds, on the day of his processing interview, complained to the Chief of the Qualification Unit, Mr. Wembly, and the Medical Director of Correctional Health Services, Dr. Rooney. The Union alleges that both men assured Dr. Reynolds that he was indeed qualified for the position of Medical Specialist but that they were unable to help him.

On March 6, 1992, the Union contends that Dr. Reynolds wrote a letter to James Neal, a doctor at the Bureau, "to object to his being placed into the position of City Clinician when he had been hired into the title of Medical Specialist." According to the Union, Dr. Reynolds received no response to this letter. Dr. Reynolds started work at the Bureau on March 17, 1992. The Union contends that after Dr. Reynolds raised his complaint on three separate occasions, without success, he contacted the Union which, on March 20, 1992, submitted a grievance by mail on his behalf.

Also on March 20, 1992, Dr. Rooney, according to the City, requested Dr. Reynolds' work references and was informed, on March 23, 1992, that Dr. Reynolds' past employer felt that because Dr. Reynolds was frequently late and sometimes did not show up or call in, he would be inappropriate for supervisory responsibilities. The City contends that on March 20, 1992, Dr. Neal also sought to obtain Dr. Reynolds' references and was informed by Dr. Reynolds'

previous employer that a positive reference could not be given since Dr. Reynolds was asked to resign on account of his negative performance.

The City claims that after Dr. Neal received the negative reference, he relayed what he learned to "other members of the staff responsible for personnel decisions" and that the members of this group, two of whom were members of Doctor's Council, made a decision to terminate Dr. Reynolds' employment based on the poor references. The City claims that, on March 23, 1992, Ms. Johnson was told of the decision to terminate Dr. Reynolds' employment and she prepared a letter of separation which was sent to Dr. Reynolds by certified mail on or about March 24, 1992.

The record reveals that the Bureau received the Step I Grievance submitted by the Union on March 25, 1992.[2] Dr. Reynolds, according to the Union, received Ms. Johnson's letter of separation on March 26, 1992. On April 16, 1992, the Union filed a verified improper practice petition alleging a retaliatory termination of employment and requesting that Dr. Reynolds be reinstated with full back pay, benefits and interest.

POSITIONS OF THE PARTIES

The Union's Position

According to the Union, when Dr. Reynolds complained about his incorrect job title; filed a contractual grievance; involved the

[2] There is a stamp of receipt affixed to the City's copy of the grievance. It states: "NYC DEPT OF HEALTH 92 MAR 25 AM 10:05"

Union in the matter and made "other attempts to enforce the contract" he was engaging in protected activity.[3] The Union posits that Dr. Reynolds' discharge was a retaliatory measure by the Bureau for this activity.

The Union also claims that the Bureau had knowledge of Dr. Reynolds' complaints about the title into which he was hired, and notes that the City does not deny that Drs. Neal and Rooney knew of Dr. Reynolds' complaints when the reference check was executed and Dr. Reynolds was discharged. The Union points out that Dr. Rooney and Dr. Neal were the recipients of Dr. Reynolds' complaints and were the "same individuals who, according to the City's Verified Answer, initiated reference checks of [Dr. Reynolds] on March 20, 1992."

The Union further contends that the reference check executed by the Bureau was a pretext for terminating Dr. Reynolds' employment after he sought to enforce his rights and that "[t]he timing of the City's actions is compelling confirmation of this fact." The Union supports this contention by asserting that Dr. Reynolds' complaints to Mr. Wembly, Dr. Rooney and Dr. Neal preceded the Bureau's reference check and Dr. Reynolds' discharge. It additionally asserts that, "there was never any substantive reason raised about [Dr. Reynolds'] references until after [Dr. Reynolds] complained about the City's failure to place him in the

[3] The Union cites Decision No. B-41-91 for the proposition that pre-grievance complaints constitute protected activity.

title of Medical Specialist as agreed." The Union submits that Dr. Reynolds' references were not checked in the ordinary course of processing his employment application and that the City cannot identify any legitimate reason for initiating a reference check after Dr. Reynolds already started to work. The Union claims that the reference check "could only have been prompted by a desire to find some purportedly valid justification for terminating him rather than [placing] him in the correct title and higher salary of Medical Specialist."

The City's Position

At the outset, the City posits that the Union failed to allege facts sufficient to show that Dr. Reynolds' discharge was in violation of §12-306(a)1 and 3 of the New York City Collective Bargaining Law (NYCCBL), claiming that the Union only alleges a conclusory statement in its petition.

The City claims that the "alleged union activity, the filing of a Step I grievance, came after the decision to terminate [Dr. Reynolds]" and that no connection could be made between Dr. Reynolds' discharge and his protected activity. According to the City, even if the Union was able to show the City's knowledge of Union activity prior to Dr. Reynolds' discharge, it would be unable to show that the City "harbored anti-union animus" specifically because Drs. Neal and Rooney, the individuals responsible for the decision to terminate Dr. Reynolds' employment, were members of the Union.

Moreover, the City contends, Dr. Reynolds' discharge was based on a legitimate business reason. The City asserts that the negative reference it received during Dr. Reynolds' first week of employment caused it to discharge Dr. Reynolds. It claims that Dr. Reynolds' employment was terminated pursuant to the rules, regulations and policies of the City of New York and thus the instant petition should be dismissed in its entirety.

Discussion

The Union sets forth three reasons upon which it bases its claim that the City engaged in an improper practice when it terminated Dr. Reynolds' employment. First, the Union alleges that Dr. Reynolds was retaliated against for complaining about his incorrect title; second, for filing a contractual grievance and involving the Union in the matter; and third, for "his other attempts to enforce the contract."

While the first and second grounds set forth in the Union's petition warrant review by the Board, the third ground is vague and lacks sufficient specificity to enable the respondent to formulate an adequate response. Accordingly, the Union's third ground is dismissed at the outset.

The first ground in the Union's pleadings alleges that Dr. Reynolds engaged in protected activity when he complained orally and in writing about his incorrect title. We find that, contrary to the Union's position, Dr. Reynolds' oral and written complaints are not protected under the NYCCBL.

In determining whether activity is of the sort that is protected under the NYCCBL, we have found that the activity must not only pertain to the relationship between the employer and the bargaining unit employee but must, "at a minimum, be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual."[4] For example, in Decision B-2-87, we found that sending letters advancing "grievances that are personal to the petitioner ..." is not activity which falls within the protection of §12-306 of the NYCCBL.[5]

Here, we find that Dr. Reynolds' act of orally complaining to Dr. Rooney and Mr. Wembly and of writing a complaint letter to Dr. Neal was undertaken for solely individual reasons. In Dr. Reynolds' letter to Dr. Neal, he at no time indicates or even intimates that the Bureau was engaging in activity that affected his rights under the collective bargaining agreement. Rather, he only expresses his personal objection to being promised one position and being processed into another.[6] Indeed, his complaints seem to be that an individual agreement, rather than a collective one, was being violated. Further, the Union does not indicate that during Dr. Reynolds' conversations with Dr. Rooney and Mr. Wembly that Dr. Reynolds ever expressed a complaint that related to his rights

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[4] See, Decision No. B-2-87 at 12.

[5] See also, Decision No. B-17-94 and the case cited therein.

[6] This is distinguished from Decision No. B-41-91, where there, the employer engaged in activity regarding his contractual rights.

under §12-305 of the NYCCBL, the rights of the employee organization as a whole, or that he did anything other than seek to benefit himself as an individual. The record reveals that Dr. Reynolds acted essentially on his own behalf, in as much as the Union admits that "*[a]fter* raising his grievance at least three times without success, Dr. Reynolds contacted the Union and a grievance was filed on his behalf on March 20, 1996 ..."[7] Moreover, Dr. Reynolds' oral and written complaints were made prior to the time he commenced working for the bureau and at a time when, arguably, he had not yet become a member of the Union's bargaining unit. In light of the foregoing facts, we cannot find that Dr. Reynolds' actions prior to seeking the union's assistance is protected under the NYCCBL.

Regarding the Union's second claim, that filing the contractual Step I Grievance and "involving the Union in the matter" caused the City to retaliate against Dr. Reynolds, we are not persuaded. In accordance with the test set forth in the City of Salamanca[8], which has been applied by this Board since its adoption in Decision No. B-51-87, we require a petitioner alleging a retaliatory discharge to show:

1. the employer's agent responsible for the alleged

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[7] Emphasis added. The Union does not indicate that Grievant communicated with it prior to this time nor does the Union state that it was aware of, encouraged, or had anything to do with Grievant's verbal or written complaints.

[8] 18 PERB ¶3012 (1985).

discriminatory action had knowledge of the employee's union activity; and

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 was not violative of the NYCCBL.[9]

While it is well settled that filing a grievance and seeking the Union's assistance is protected under the NYCCBL,[10] the Union fails to satisfy the Salamanca test because it has not demonstrated that the City had knowledge that Dr. Reynolds sought the Union's assistance prior to Dr. Reynolds' discharge. Although the Union, on Dr. Reynolds' behalf, submitted a Step I Grievance by mail on March 20, 1992, before the City decided to terminate his employment on March 23, 1992, the uncontroverted documentary evidence shows that the City did not receive the Grievance until March 25, 1992. The union provides no evidence that the City had knowledge of the contractual grievance or of the Union's involvement prior to this

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[9] City of Salamanca, 18 PERB ¶3012 (1985); See, e.g., Decision Nos. B-26-96; B-8-95; B-51-87.

[10] See, 26 PERB ¶3073 (1993) at 3140, noting that among public employees' statutory rights are the rights to file and pursue contract grievances. See also, e.g., B-2-93. See also, 26 PERB ¶3073, noting that public employees have, among other rights, the right to "seek advice from their bargaining agent regarding employment matters and to secure the benefit of union representation on any grievance."

time.[11]

Because allegations of improper motivation must be based on statements of probative facts rather than upon recitals of conjecture, speculation or surmise,[12] and because the Union has not provided such probative facts, we find that Dr. Reynolds has failed to provide evidence to warrant a finding that the City engaged in an improper employer practice.

For the forgoing reasons, this Board finds that the Union's improper practice petition must be dismissed.

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[11] Although the Union does attempt to prove the City's knowledge by stating that the City was aware of the complaints that Dr. Reynolds made, we have found that those earlier oral and written complaints were not protected activity, thus knowledge of them does not aid in our analysis of whether the City committed and improper practice.

[12] See, Decision No. B-2-87.

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 Doctors Council, docketed as BCB-1489-92 be, and the same hereby is dismissed.

Dated: New York, New York
March 25, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER