

L. 237, CSBA v. Comm, DOF, DOF & City, et al, 59 OCB 29 (BCB 1997) [Decision No. B-29-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding :

-between- : Decision No. B-29-97
Docket No. BCB-1868-96

CIVIL SERVICE BAR ASSOCIATION, and :
LOCAL 237, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS :

Petitioners, :

-and- :

Alfred C. Cerullo III as COMMISSIONER
of FINANCE of the CITY OF NEW YORK, :
DEPARTMENT OF FINANCE of the CITY OF
NEW YORK, Marilyn Gerber as former :
COMMISSIONER OF DEPARTMENT OF
ENVIRONMENTAL PROTECTION of the CITY :
OF NEW YORK and the DEPARTMENT OF
ENVIRONMENTAL PROTECTION of the CITY :
OF NEW YORK,

Respondents. :

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DECISION AND ORDER

On October 25, 1996, the Civil Service Bar Association ("CSBA") and Local 237, International Brotherhood of Teamsters ("L.237") (hereinafter collectively known as "Union" or "Petitioner") filed an improper practice petition against Respondents Alfred C. Cerullo III as Commissioner of the City of New York Department of Finance ("Cerullo"), the Department of Finance of the City of New York ("DOF"), Marilyn Gerber as the former Commissioner of the Department of Environmental Protection ("Gerber"), and the Department of Environmental Protection of the

City of New York ("DEP") (hereinafter collectively known as "City" or "Respondents"). The petition alleges that, "Respondents have engaged in a pattern of violating the rights of the petitioning Unions pursuant to §12-306(A) of the [New York City Collective Bargaining Law] NYCCBL."

Respondents, through the Office Of Labor Relations ("OLR"), filed an answer on January 7, 1997.

BACKGROUND

In 1988, the Environmental Control Board ("ECB") established an In-House Collections Unit in order to collect post-Civil Court docketed debts. In November, 1995, discussions between the ECB, DOF, Office of Management and Budget ("OMB"), Law Department and the OLR were commenced, regarding the planned consolidation of the In-House Collections Unit into the DOF.

Mr. William Lasko was hired by the ECB on November 22, 1993, as an attorney in the In-House Collections Unit. While working at that Unit, Mr. Lasko questioned the signing of execution forms "in blank," which was being practiced at the DEP. Lawyers engaged in collecting judgments would pre-sign blank judgment execution forms, omitting the necessary and pertinent information, and would supply these pre-signed forms to a sheriff

in order to expedite the collection process.¹ Mr. Lasko notified the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, seeking an opinion on this matter. The Committee held that the pre-signing, "in blank", of execution forms to a sheriff, in order to facilitate the judgment collection process, would be a misrepresentation and therefore unethical.²

On January 11, 1996, Mr. Lasko filed a Step I grievance alleging out of title work. It was claimed that, while being appointed to the civil service title of Attorney (equivalent of Attorney at Law level I), Mr. Lasko had been performing the work of an Attorney at Law level III.³ The Union also states that Mr. Lasko informed the Union of an improper practice being visited

¹ Data required to be filled in on a judgment execution form include the names of the parties, the court in which judgment was entered, the amount of the judgment entered and against whom, and the amount of the judgment remaining due and unpaid at the date of the execution.

² See, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion No. 1995-4, issued February 22, 1995.

³ Mr. Lasko sought retroactive appointment to the position of Attorney at Law level III with the appropriate retroactive payments, or, in the alternative, appointment to the position of Attorney at Law level II with the appropriate retroactive payments. Whether a hearing has been held in this matter, and, if so, the outcome of that hearing, was not stated in the petition or answer.

upon William Macron, Esq., in that he was required to perform legal work while on a Community Coordinator line.⁴

In June, 1996, the Union received notification that the collection duties of the ECB were to be functionally transferred from its location in Queens, to the DOF in Brooklyn, and that only one attorney was to be transferred: William J. Lasko. At that time, Mr. Lasko was a Director of the CSBA,⁵ as well as shop steward for the members of the CSBA at the DEP located in Queens.

On June 13, 1996, Mr. Lasko wrote a letter to Ms. Iris Weinshall, Deputy Commissioner, OMB, and Ms. Sheila Gutis, Assistant Commissioner, Administration, protesting/appealing his

⁴ There is no information pertaining to the formal filing of a grievance with the Union in this regard, or the date that this occurred.

⁵ According to the petition, the CSBA is governed by a Board of Directors, each Director serving as shop steward for the location at which they work.

impending transfer, based on the hardship it would cause him.⁶
This appeal was denied.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the functional transfer of Mr. Lasko was in retaliation against his union activism, exposing improprieties being committed at the DEP. The Union claims that Mr. Lasko's transfer was carried out in contravention of the applicable statute, contracts and rules and regulations pertaining to partial functional transfers. It is alleged that, as a result of this "whistle-blowing," anti-union animus manifested itself in the guise of Mr. Lasko's functional transfer to Brooklyn.

The Union states that two other attorneys working in the In-House Collections Unit who performed related work, and were not staff analysts, were not transferred. "According to the rules

⁶ Mr. Lasko stated that he was living in Stamford, Connecticut, and that the transfer to Brooklyn would greatly increase his commutation time. The letter also stated other personal reasons bearing on the impracticality of his moving outside the Stamford area, and closer to Brooklyn: (1) he was needed to assist his elderly, infirm parents; (2) both he and his wife have personal ties to the Stamford area; (3) there would be an increased financial burden from having to commute an extra estimated 25 hours per week; and (4) the "technology" is in effect at ECB-DEP to allow him to carry out his job functions at his office in Queens, while working for the DOF. This "technology" was not elaborated upon in the letter; it is taken to mean computerization and the electronic transfer of data between the offices.

for partial functional transfers the person with the least seniority in the unit being transferred is to be involuntarily transferred first."⁷ The "transparency of this anti-union activity became even more apparent," upon Mr. Lasko's arrival at the DOF: it is alleged that he is working in a unit of non-attorneys which primarily performs clerical functions, and that this has created an atmosphere which is not conducive to professional work. Moreover, the Union states that he is supervised by a non-lawyer, which "poses many ethical and confidentiality issues."

Respondent's Position

The City claims that the petition fails to state facts which adequately allege discrimination against Mr. Lasko for his participation in protected Union activities.⁸ The City states that it has not been shown that the employer's agent responsible for the alleged discriminatory act had knowledge of Mr. Lasko's union activity, or that Mr. Lasko's union activity was a motivating factor thereto.⁹ The City states that merely alleging that Mr. Lasko is a shop steward, and that he was transferred, does not equate to discriminatory treatment. Nor will his

⁷ Petitioner did not state which rule or regulation with regard to partial functional transfers was violated.

⁸ The City cites NYCCBL §12-306a.(3).

⁹ The City cites City of Salamanca, 18 PERB 3012 (1985).

position as shop steward exempt him from a functional transfer; Mr. Lasko was merely one of eleven employees in the collection unit of the ECB who was being transferred to the DOF.

Assuming arguendo, that Petitioner did meet the burden of proving anti-union animus directed at Mr. Lasko, the City believes that the instant petition should fail because the functional transfer of Mr. Lasko was effected pursuant to managerial prerogative, motivated by a legitimate business reason.¹⁰ The City argues that the mere assertion of improper motivation in the face of a legitimate business reason is not sufficient; that the union activity of which Petitioner speaks preceded the functional transfer of Mr. Lasko by a few months is inconsequential. The City claims that this transfer was promulgated under the auspices of Civil Service Law ("CSL") §70, "Transfers," together with a city-wide effort to consolidate collection functions, and must be seen as a legitimate exercise of management rights.¹¹ Therefore, it is argued that it would be

¹⁰ The City cites NYCCBL §12-307(b).

¹¹ The City points to the numerous other departments which have been merged and consolidated recently as further evidence of the lawfulness of the functional transfer of Mr. Lasko, e.g., the EMS merger with the Fire Department, the consolidation and transfer of construction functions from the Department of Transportation and other agencies to the Department of Design and Construction, and the consolidation and transfer of administrative duties from the Department of General Services and Department of Personnel to the Department of Citywide Administrative Services.

inappropriate to diminish the City's right to act unilaterally with regard to the determination with which the methods, means and personnel by which governmental operations are to be conducted.

The City maintains that, at the time of the transfer, Mr. Lasko was the only attorney working full time in collections; no staff analyst was employed in that unit.¹² The City also points out that no one named William Macron is employed by the ECB; James Macron is employed by the ECB in a Community Coordinator title, hired as a permanent employee on January 18, 1992, and, at the time of the transfer, he was not performing legal work. It is further alleged that, since Mr. Lasko was hired on November 22, 1993, and was the last member of the entire group to be hired by the ECB, he is the least senior member of the Unit and was properly chosen to be transferred.

The City claims that the allegations pertaining to the propriety of the duties of Mr. Macron and Mr. Lasko are matters addressed in the parties' collective bargaining agreement, beyond the scope of the NYCCBL. In such circumstances, the City argues that the Board has held that it will not entertain such

¹² Included in the City's answer is an affidavit from Anne J. McCarthy, Executive Director of the ECB. Ms. McCarthy states that, pursuant to CSL §70, the City has the right to transfer individuals who work more than 50% of their time in the function to be transferred, and only those individuals who worked more than 50% of their time on post-judgment debt collection were transferred to the DOF.

complaints in an improper practice filing, because they are in an improper forum.¹³

Lastly, the City argues that this petition should be dismissed because it alleges a violation of CSL §70(2), "Transfer of personnel upon transfer of functions," which is beyond the confines of the NYCCBL and the jurisdiction of the Board. Moreover, insofar as the petition alleges that Mr. Macron was inappropriately classified as a "Community Coordinator," it is asserted that this is a title over which the Board has held that it does not have jurisdiction.

DISCUSSION

The allegations in the petition raise the issue of whether Respondents have discriminated against Mr. Lasko in retaliation against his participation in Union activities and for availing himself of rights entitled him through the grievance process.

Where the employer's motivation is at issue, initially the petitioner must demonstrate that the action complained of falls within the parameters established by the City of Salamanca test: 1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union

¹³ The City cites Decision Nos. B-45-88; B-39-88; B-36-87; B-24-87.

activity; and 2) the employee's union activity was a motivating factor in the employer's decision. Once the petitioner has satisfied both elements of this test, then, if the respondent does not refute the petitioner's showing on one or both of these elements, the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.

We find that the City has established, in its answer, valid business reasons for transferring Mr. Lasko; reasons which stand uncontested as a result of the Union's failure to submit a reply. The Rules of the City of New York ("RCNY") Rules provide that additional facts or new matters alleged in an answer will be deemed admitted unless they are denied in a reply.¹⁴ In light of the foregoing, we are constrained to accept as true the allegations asserted in the City's answer. We therefore decline to rule on issues pertaining to protected union activity and employer motivation and dismiss the petition 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,

¹⁴ RCNY §1-07(i) states, in pertinent part:

"Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

ORDERED, that the improper practice petition docketed as BCB-1868-96 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
June 26, 1997

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Saul G. Kramer
MEMBER

Carolyn Gentile
MEMBER

Robert H. Bogucki
MEMBER

MEMBER

MEMBER