L. 1182, CWA v. DOS, 59 OCB 49 (BCB 1997) [Decision No. B-49-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding :
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Between :
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Local 1182, Communication Workers of America, :
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Petitioners, :
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And : Decision No. B-49-97
: Docket No. BCB-1908-97
New York City Department of Sanitation, :
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Respondent. :
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DECISION AND ORDER

On May 9, 1997, Local 1182 of the Communication Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Sanitation ("Department"). The Union alleged that the Department retaliated against a union representative for providing representation to a member of the bargaining unit. As a remedy, the Union seeks reimbursement of monies lost by its representative plus interest, attorneys' fees, a cease and desist order, and the posting of a notice communicating the provisions of the cease and desist order to bargaining unit members.

After it requested, and was granted, several extensions of time, the City filed an answer on July 22, 1997. The Union then requested, and was granted, several extensions of time and filed a reply on October 29, 1997.

BACKGROUND

On January 8, 1997, Cazetta Owens, a Department employee and a member of the bargaining unit, was told to report to the Department's health care clinic for an examination. Owens asked Ruth Thomas, a Vice President of the Union, to accompany her. Thomas told her immediate supervisor, Sgt. Gracia, that she was leaving her shift to accompany Owens on a union matter and Gracia told Lt. Stoudmire, his immediate supervisor. Stoudmire told Thomas that she was not authorized to leave her assigned patrol and that, if she left without permission, she would be considered to be absent without leave ("AWOL").

Gracia then contacted Capt. Kelley, the Department's administrative supervisor. Kelley told Gracia that Thomas had used her assigned union release time the previous day and was not authorized to use additional release time on January 8th. Kelley called the President of the Union and suggested that, if Owens wanted Union representation at the clinic, she be accompanied by the President or another union representative who was authorized for release time on that day.

Kelley ordered Thomas to return to work and advised her that she would be considered AWOL if she left without permission. Thomas told Kelley she intended to accompany Owens to the clinic, and requested permission to sign out at 12:50 P.M. When she was refused permission to do so, Thomas left without signing out.

As a result of this incident, Thomas was charged with violations of the Department's Code of Conduct, including charges of AWOL, disobeying orders, failing to perform her assigned duties, and failing to act in a manner conducive to order and discipline. The charges

were upheld in a Departmental disciplinary hearing and Thomas was fined three days' pay or annual leave.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Department has retaliated against Thomas for, and attempted to discourage her from, protected union activity in violation of §§12-305 and 12-306a. of the New York City Collective Bargaining Law ("NYCCBL").[1] Further, it asserts, the City's arguments concerning *Weingarten* rights do not apply in the instant case because the Union does not allege denial of union representation to an individual.[2] It also alleges that, although the Board has ruled

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[1]**§12-305 Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities....

§12-306 Improper practices; good faith bargaining. 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;
(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.

[2]In NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), the Supreme Court conferred upon private sector employees the right to be represented by a union representative during an investigatory interview that the employee believes may lead to disciplinary action. This concept has become known as *"Weingarten* rights."

that employees have no *Weingarten* rights under the NYCCBL, the applicable collective bargaining agreement provides for union representation at an investigatory interview outside the normal chain of command.

According to the Union, the Department's actions were inherently destructive of important employee rights.[3] It claims that the ability to provide assistance, aid and advice is the function of a union and that the ability of a union representative to perform this function is severely threatened when a representative is subject to retaliation.

The Union contends that, even if the Board does not find that the Department's behavior was inherently destructive, it has made an arguable claim according to the *Salamanca* test.[4] Further, the Union maintains, it contests the City's assertion that it was motivated by a legitimate business reason and argues that the issue is a question of fact that requires a hearing.

City's Position

The City asserts that its employees do not have the right to be represented during an investigatory interview[5] and, therefore, Thomas' decision to accompany Owens to the interview

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[3]The Union cites NLRB v. Great Dane, 388 U.S. 26 (1967) ("if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations"); Decision No. B-26-93 (the Board found a manager's behavior to be inherently destructive when, in the presence of a majority of the bargaining unit members, he threatened two employees because they initiated a grievance).

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

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

is not protected union activity under the NYCCBL. According to the City, even if Thomas' actions were protected, the Union has not alleged facts sufficient to show that the Department's actions were improperly motivated. It cites Decision Nos. B-15-92 and B-47-89 for the proposition that proper and legal action of the employer that has an incidental, detrimental effect on the union does not constitute an improper practice unless improper motivation is demonstrated.

The City claims that, although Thomas is a Union representative, she has neither an unlimited right to attend to union matters during her scheduled working hours nor a right to abandon her post when an employee requests her presence. It asserts that Union representatives have a certain amount of assigned release time during which they may attend to union business, and that Thomas had used her allotted release time before the incident in dispute. Further, it claims, Thomas has never been prevented from attending to union matters during her regularly scheduled release days and continues to do so. The City also cites several private sector cases for the proposition that an employee does not have the right to the presence of a specific union representative.[6] Consequently, it argues, the Union has not made a viable allegation that the Department restrained or coerced employees in the exercise of their rights or interfered in the formation or administration of a public employee organization.

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[6] *Roadway Express, Inc.*, 246 NLRB 1127 (1979) at 1053 (an employer did not violate the LMRA when it disciplined an employee who refused to attend an investigatory interview in the absence of a specific union representative who was unavailable, and where the employer informed the employee that alternate union representation was available); *see also, Pacific Gas Co.,* 253 NLRB 1127 (1981) (*Weingarten* decision does not require an employer to provide an employee with a union representative of his choice at an investigatory interview); *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977) (*Weingarten* decision does not require that an employer postpone interviews with employees because a particular union representative is unavailable).

The City claims that the Department's refusal to allow Thomas to accompany Owens was motivated by legitimate business reasons. Therefore, it maintains, when she left her post without permission, the Department was justified in penalizing her for violating its rules.

DISCUSSION

When a union claims that an employer acted in retaliation for protected union activity, it must first show that the employer's agent responsible for the challenged action had knowledge of the employee's protected union activity and that the employee's union activity was a motivating factor in the employer's decision. If the employer does not refute the petitioner's showing on one or both of these elements, then the burden of persuasion shifts to the employer to establish that its actions were motivated by another reason which is not violative of the statute.[7]

There are no material facts in dispute here. Thomas had used her allotted paid release time before she asked to accompany Owens to the examination. The Department then asked the Union to have Owens accompanied either by the representative who was assigned to release time that day or by the Union's President. Thomas decided to accompany Owens despite warnings that she would be considered to have abandoned her post if she did so. The Department penalized Thomas for being AWOL from her post.

Since it is undisputed that the Department knew of Thomas' actions, the Union has satisfied the first part of the *Salamanca* test. It fails, however, to carry its burden on the second part of that test; it has not shown that protected union activity was a motivating factor in its

[7]Decision No. B-57-87.

refusal to let Thomas accompany Owens. In fact, it has not shown that the Department interfered in the administration of Union activity or retaliated against Thomas because she was engaging in union activity. The record is clear that the Department objected to having Thomas leave her post because she had exhausted her assigned release time. Thomas' supervisors took great pains to ensure that Owens would be accompanied by a Union representative; they just did not guarantee that she would be accompanied by Thomas.

Even if, as the Union claims, the parties here have agreed in collective bargaining that unit members will be accompanied to investigatory interviews by a Union representative, Owens did not have the right to be accompanied by the Union representative of her choosing.[8] The City's undisputed allegations show that the Department was motivated by its legitimate need to ensure compliance with the release time provisions of the contract. There is no evidence that the Department was motivated to hinder representation or interfere with the Union's selection of a representative other than one who had used up her allotted release time. Accordingly, the Union's petition is dismissed.

[8]Decision No. B-9-97. For this reason, we need not consider the Union's contention that its members have been granted *Weingarten* rights in collective bargaining.

DECISION AND 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 petition docketed as BCB-1908-97 be, and the same hereby is, dismissed.

Dated: New York, New York
December 18, 1997

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Richard Wilsker
MEMBER

Saul G. Kramer
MEMBER