UPOA & Whitney v. City & Dep't of Probation, 61 OCB 21 (BCB 1998) [Decision No. B-21-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
Between	:	
	:	
United Probation Officers Association and Rose Whitney,	:	
	:	
Petitioners,	:	
	:	
And	:	Decision No. B-21-98
	:	Docket No. BCB-1940-97
City of New York and New York City Department of Probation,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On October 16, 1997, the United Probation Officers Association ("Union") and Rose Whitney filed a verified improper practice petition against the City of the New York and the New York City Department of Probation ("Department"), alleging retaliation in the exercise of protected activity. After requesting an extension of time, the Department filed an answer on November 12, 1997. The Union was granted an extension of time in which to file a reply, which it filed on December 5, 1997.

BACKGROUND

Rose Whitney is a Supervising Probation Officer employed by the Department. On June

19, 1997, Whitney was not allowed to attend a Step III conference in an out-of-title group grievance in which she was one of the grievants. According to the Department, Whitney was required to remain at work to complete a project due that day and was not allowed to attend the Step III hearing. The Department says it offered to consent to a continuance of the hearing so that Whitney could be present on another day, but the Union stated it would go ahead without her.

POSITIONS OF THE PARTIES

Union's Position

As its entire statement of the nature of the controversy, the Union wrote in its petition:

> Beginning on June 19, 1997 and on an ongoing basis, the Department of Probation has retaliated against and continues to retaliate against Supervising Probation Officer Rose Whitney in response to her exercise of protected activities, specifically, her involvement in a grievance brought on her behalf by her labor union, the United Probation Officers Association.

In its reply, the Union stated that the improper practice charge was not limited to the events of June 19, 1997 but also included a series of incidents that amounted to a pattern of retaliation against Whitney on the basis of her participation in the grievance. According to the Union, these acts included, "but were not limited to, threats by supervision, a proposed negative performance evaluation and falsely critical memoranda...." In addition, it claims that the business reason asserted by the Department is pretextual and that the Department's offer of a continuance was insufficient.

City's Position

The Department asserts that the Union has not fulfilled the minimum initial pleading requirements as set forth in *City of Salamanca*[1] and adopted by us in Decision No. B-51-87: that the petitioner show initially that the employer's agent responsible for the alleged discriminatory acts had knowledge of the employee's union activity and that the union activity was the motivating factor in the employer's decision. Nevertheless, it maintains, the Department had a legitimate business reason for not allowing Whitney to attend. In addition, according to the City, the petitioners failed to allege facts sufficient to maintain a charge that the Department's actions were undertaken for the purpose of retaliating against, interfering with, discriminating against or frustrating Whitney's statutory rights in violation of § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[2]

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[1]18 PERB ¶ 3012 (1985).

[2]Section 12-306 of the NYCCBL provides, in relevant part:

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.

Section 12-305 of the NYCCBL provides, in relevant part:

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....

DISCUSSION

Title 61, § 1-07 of the Rules of the City of New York ("OCB Rules") provides that a petition claiming an improper practice under the NYCCBL must set forth, among other things:

> c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
> d. Such additional matters as shall be relevant and material.

A petition which does not comply with this standard deprives the other party of a clear statement of the charges to be met and hampers the preparation of a defense. Moreover, it must contain at least enough relevant and material facts to make out an arguable case. The conclusory assertion of an improper practice, unsupported by facts that evidence the alleged violative activity, is insufficient to sustain an improper practice petition.[3]

Here, the Union's petition consists of conclusory allegations unsupported by facts, making it difficult, at best, for the Department to respond. When the Department did respond with facts and arguments concerning the events of June 19, 1997, the Union filed a reply alleging in a conclusory manner a number of different retaliatory actions on the part of the Department, but again failing to specify dates or any other material facts.

Specifically, the reply alleged "threats by supervision," but failed to state what these threats were, by whom they were made, and when they occurred. Similarly, the reply alleged "a proposed negative performance evaluation and falsely critical memoranda," which it attributed to a named supervisor, but failed to allege what the evaluation and memoranda contained, when

[3]Decision Nos. B-33-80; B-20-81; B-12-85; B-38-88.

they were written, or the circumstances that made the evaluation a "proposed" one. The Union also referred to a "pattern of actions" by a named Assistant Commissioner, which are alleged to be discriminatory, but failed to identify any such action or allege any facts to support the claim. The Union attempted to refute the business need alleged by the City by characterizing it as "pretextual," but failed to allege facts to support its contention. Furthermore, the Union exceeded the limits imposed for a reply by the OCB Rules when it raised claims which were neither alleged in the petition nor responsive to the assertions made in the City's answer.[4]

Accordingly, the instant petition is dismissed.

[4]Title 61, § 1-07 (i) of the Rules of the City of New York provides, in relevant part:
....petitioner may serve and file a verified reply which shall contain admissions and denials of any additional facts or new matter alleged in the answer.

DECISION AND ORDER

Pursuant to the powers invested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the petition docketed as BCB-1940-97 be, and the same hereby is, dismissed.

Dated: New York, New York
June 30,. 1998

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Robert H. Bogucki
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER