Hennings v. ACS, 61 OCB 45 (BCB 1998) [Decision No. B-45-98 (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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| Velyn Hennings, *pro se,* | : | |
| | : | |
| Petitioner, | : | Decision No. B-45-98 |
| | : | Docket No. BCB-1944-97 |
| And | : | |
| | : | |
| Administration for Children's Services, | : | |
| | : | |
| Respondent. | : | |

## DECISION AND ORDER

On November 20, 1997, Velyn Hennings ("Petitioner"), *pro se*, filed a verified improper practice petition against the Administration for Children's Services ("the Agency"), alleging that a supervisor stated that she did not want a union representative present at a meeting and that the Petitioner "runs to the union too much." The Agency filed an answer on December 31, 1997. The Petitioner did not file a reply.

## BACKGROUND

The Petitioner has been employed by the City of New York in the title Caseworker since 1994. In October, 1997, she was working at the Division of Family Permanency in Brooklyn, under the supervision of Edward Ross. One of her job duties was to deliver petitions to Family Courts throughout the City. Because the Petitioner traveled to various courts, she could not always clock out at the close of her shift. At such times, her supervisor verified her time card

before she submitted it to the agency timekeeper.

The customary agency practice is for employees to submit their time cards for the week on the following Monday. The Petitioner claims that if her time card is not signed on a Friday, she cannot cash her paycheck.

On Friday, October 31, 1997, the Petitioner asked Ross to sign her time card for the preceding week. According to the Agency, Ross said he would do so when he finished reviewing some papers. The Petitioner contacted her union representative, Clarence Hayes, who asked Ross to his office to meet with the Petitioner. The parties disagree about the outcome of the meeting: the Petitioner says that Ross refused to sign her time card and the Agency claims that the parties were unable to resolve the issue of the Petitioner's inappropriate and unprofessional behavior. However, all agree that the conflict was not resolved.

Immediately thereafter, the Petitioner, Hayes and Ross met with Yolanda Dillard, the Site Supervisor. The Petitioner claims that, before the meeting began, Dillard said that she did not want Hayes to be present and that the Petitioner "run[s] to the union office too much." The Agency maintains that Dillard stated she did not believe it was a union issue and it was unnecessary to have Hayes present during the meeting, but does not mention the alleged remark about "running to the union." The result of the meeting was that Ross signed the time card and the Petitioner received her check that day. Dillard also told the Petitioner and Ross that, from then on, the Petitioner would have to observe Agency rules and submit her time card for the preceding week to Ross each Monday.

## POSITIONS OF THE PARTIES

*Petitioner's Position*

The Petitioner has not specified which provision of § 12-306 of the New York City Collective Bargaining Law she alleges has been violated or on what grounds she alleges an improper practice.[1]

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[1] 12-306 of the NYCCBL 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 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.

**b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

**c. Good faith bargaining.** The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(1) to approach the negotiations with a sincere resolve to reach an agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

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....

*Agency's Position*

The Agency claims that the Petitioner has failed to state an arguable claim or facts sufficient to maintain a charge that its actions were taken for the purpose of retaliating against, interfering with, discriminating against or frustrating the Petitioner's statutory rights. It relies on the *Salamanca* test,[2] arguing that the Petitioner has not shown improper motivation. It alleges, further, that the Petitioner has not shown that she was discriminated against, since all she claims is that Ross said he would not sign her time card.

The Agency maintains that its action was motivated by a legitimate business reason, even assuming that the Petitioner had met her initial burden under *Salamanca*. According to the Agency, it acted within its rights under the New York City Collective Bargaining Law to determine the methods, means and personnel by which its operations were to be conducted when Ross did not sign the time card.[3] It maintains that Ross had a legitimate reason for wishing to finish reviewing papers before signing the Petitioner's time card.

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[2]*Bowman v. City of New York,* Decision No. B-51-87, in which we held that where a petitioner claims improper motivation, she 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, 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.

[3]Section 12-307b of the NYCCBL provides, in relevant part:

**b.** It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

The Agency contends it did not interfere with or deny Mr. Hayes in his effort to represent the Petitioner at the meetings. It claims that all reasonable efforts were made to accommodate union activity for the benefit of the Petitioner. In addition, it argues, the Petitioner has not alleged facts sufficient to show that the Agency refused to bargain in good faith.

## DISCUSSION

We have before us two allegations by the Petitioner. One is that an Agency manager told her that a union representative should not attend a conference to resolve a dispute between the Petitioner and her supervisor. The second is that the manager then remarked that the Petitioner "runs to the union too much."

The Petitioner has not told us her grounds for a claim of improper practice, so we can only surmise that she intended to claim that Dillard's statements constituted interference with or restraint, coercion or domination of protected union activity. Not all activity engaged in by union members or representatives is protected, however. In this case, the Petitioner had no statutory right to representation in the meeting with Ross and Dillard.[4]

According to *Salamanca*, when a petitioner claims discrimination or retaliation because of union activity, she 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

[4]The Petitioner is covered by the Citywide Agreement, which confers upon union members the contractual right to union representation at a meeting that might lead to disciplinary action; however, the meeting in dispute was only a conference held to resolve a problem about having the Petitioner's time card signed.

showing on one or both of these elements, the burden of persuasion shifts to the employer to establish that its actions were motivated by another reason which does not violate the statute.

The Petitioner, however, appears to conclude that Dillard's remark about the Petitioner's propensity to request assistance from her union demonstrates an anti-union animus that violates the statute. Because the Petitioner was not engaged in protected activity, the *Salamanca* test does not apply here. The Board has occasionally used the "inherently destructive" standard,[5] noting that there are two categories of conduct which have been held to be inherently destructive of important employee rights.[6] One "creates visible and continuing obstacles to the future exercise of employee rights"[7] and "jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit."[8] The second type "directly and unambiguously penalizes or deters protected activity."[9] "Generally, those courts that have addressed the question have described 'inherently destructive' conduct as that 'with far reaching effects which would hinder future bargaining, or conduct which discriminated

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[5] *Ass't Dep. Wardens Ass'n v Dep't of Correction,* Decision No. B-19-95; *Committee of Interns and Residents*, Decision No. B-26-93.

[6] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967)

[7] *National Fabricators, Inc. v. NLRB*, 903 F.2d 396 (5th Cir. 1990), quoting *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981); *see also*, *Inter-Collegiate Press, Graphic Arts Division v. NLRB*, 486 F.2d 837 (8th Cir. 1973), *cert. den'd*, 416 U.S. 938 (1974); *Loomis Courier Service v. NLRB*, 595 F.2d 491 (9th Cir. 1979).

[8] *Haberman Construction Co., supra; see also, Inter-Collegiate Press, Graphic Arts Division v. NLRB,* 486 F.2d 837 (8th Cir. 1973), *cert. den'd*, 416 U.S. 938 2924 (1974); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331 (9th Cir. 1976).

[9] *Haberman Construction Co., supra; see also, Kaiser Engineers v. NLRB*, 538 F.2d 1379 3153 (9th Cir. 1976); *Portland Willamette Co.,supra; NLRB v. Lantz*, 607 F.2d 290 (9th Cir. 1979); *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979).

solely upon the basis of participating in strikes or union activity."[10] The statement at issue, made in a context in which there was no protected activity, cannot fall within the standard described. Accordingly, the instant improper practice petition must be dismissed.

[10] *NLRB v. Sherwin Williams*, 714 F.2d 1095 (11th Cir. 1983), quoting *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3rd Cir. 1981), in turn quoting *Portland Willamette Co. v. NLRB, supra.*

**DECISION AND ORDER**

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

ORDERED, that the improper practice petition docketed as BCB-1944-97 be, and the same hereby is, dismissed.

Dated: New York, New York
October 26, 1998

STEVEN C. DECOSTA
CHAIRMAN

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MEMBER

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MEMBER

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