

L. 375, CSTG & Jaber v. City & DOT, 63 OCB 11 (BCB 1999) [Decision No. B-11-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice
Proceeding :

-between- :

LOCAL 375, CIVIL SERVICE TECHNICAL :
GUILD, AFSCME, AFL-CIO, and :
BORHAN JABER, :

Petitioners, :

-and- :

CITY OF NEW YORK and THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,:

Respondents. :

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DECISION NO. B-11-1999
DOCKET NO. BCB-2000-98

INTERIM DECISION AND ORDER

On July 1, 1998, Local 375, Civil Service Technical Guild, District Council 37, AFSCME, AFL-CIO, ("Petitioner" or "Union") filed a verified improper practice petition alleging the City of New York and the New York City Department of Transportation ("Respondents" or "City") interfered with, restrained and coerced Borhan Jaber ("Jaber") by retaliating against him for filing a grievance alleging non-payment of overtime and disciplinary transfer. The petition also alleges that retaliation against Jaber interfered with the administration of the Union. In addition, the petition alleges discrimination against Jaber as well as other employees for the purpose of discouraging unit members from participating in union activities. Petitioner asserts Respondents' conduct violates §§ 12-306(a)(1), (2), and (3) of the New York City Collective Bargaining Law ("NYCCBL"). The City filed its answer on August 6, 1998, and

the Union filed its reply on September 23, 1998.

Background

Borhan Jaber has worked for the Department of Transportation since April 16, 1990. He holds the permanent Civil Service title of Civil Engineer, Level I. On May 5, 1997, he was assigned to the in-house title of Section Chief, known also as “Engineer-in-Charge,” for the East River Bridges section in the Division of Maintenance of the Bureau of Bridges. In that capacity, he supervised 48 employees, most of them skilled tradespeople.

On February 11, 1998, his overall performance evaluation for the 1997 calendar year was “very good.” On the evaluation, his supervisor, Division Director Michael S. Hershey, commented that Jaber needed to improve his skills as a team leader and listener but also that he was effective in getting his unit to perform well. The commentary stated that Jaber was considered an “important asset” to the in-house maintenance program and that he demonstrated “initiative, dependability and sound judgment.”

On March 5, 1998, Jaber was notified that emergency repair work was needed on the Williamsburg Bridge. It is disputed whether Jaber was directed to “take care of” the repairs or merely to assign another engineer to oversee the work. According to the Union, the repair “required” Jaber to work eight-and-a-half hours of overtime. According to the City, Assistant Commissioner Henry Perahia told Jaber some two weeks earlier that he had exceeded his contractual overtime cap¹ and that he was not to assign himself any more overtime without Perahia’s prior approval.

¹ No section of the parties’ collective bargaining agreement is cited.

On March 11, 1998, Director Hershey told Jaber that he would not receive premium cash pay for the eight-and-a-half hours he worked overtime but that he would be compensated in time off, because the work he did was considered voluntary overtime, not mandatory overtime requiring cash premium pay. On March 15, 1998, Union Grievance Representative Karl Toth contacted the Department's Labor Relations Director, Gordon Goldberg, about the decision not to authorize Jaber's overtime as mandatory overtime. Goldberg agreed to investigate the matter informally.

When Toth contacted Goldberg again on March 17, 1998, Goldberg told him Perahia would not change his mind about the matter. Toth told Goldberg the Union would then file a formal grievance, which was done on March 18, 1998. The Union described the nature of the grievance, saying, "The employee was forced to work overtime during the Williamsburg Bridge emergency but was later told he would be given comp time, not overtime pay. This action is in violation of the Citywide Contract."²

On March 24, 1998, a meeting took place between Jaber and Director Hershey. The parties' accounts of what was said at the meeting differ, but they agree Jaber was told that his assignment was being changed, effective April 6, 1998, from one supervising other employees to one being supervised by another Engineer-in-Charge.

On April 7, 1998, Petitioner and Respondents agreed to permit the overtime grievance to be amended to include a claim of disciplinary transfer arising from management's decision to change Jaber's assignment. On May 14, 1998, a Step II decision denied the overtime claim. It

² The Union does not specify an article or section in its grievance submission.

also denied, in part, the transfer claim, based (i) on the fact that Jaber's Civil Service title of Civil Engineer, Level I, did not change throughout these events and (ii) also on the fact that Jaber had turned down an opportunity for promotion to an "M-1" management position, the minimum salary for which was less than that of a Civil Engineer.³ A Step III grievance hearing was scheduled for August 12, 1998. The record indicates that, as of the filing of the instant improper practice petition, the grievance was still pending.

Positions of the Parties

Union's Position

The Union contends that the emergency work on the Williamsburg Bridge required Jaber to work eight-and-a-half hours of overtime and that, by filing a grievance to protest management's refusal to give him premium pay for those hours, Jaber has engaged in protected activity under the NYCCBL. "By retaliating against Borhan Jaber for his union activities," the Union asserts, "Respondents have interfered, restrained and coerced public employees in their exercise of self-organization rights guaranteed by § 12-305" of the NYCCBL. Secondly, the Union also argues that, "By retaliating against Petitioner Jaber for filing a grievance,

³ The hearing officer stated he had "serious questions" about the "appropriateness" of management's actions in removing Jaber from his position of Engineer-in-Charge without formal disciplinary or evaluative action, adding that the "timing of the events in question lead the hearing officer to believe that there were, perhaps unintentionally, elements of a disciplinary nature involved in the outcome of these events, and the transfer may be considered to be a wrongful disciplinary action."

Management was directed to "take no future actions regarding the grievant without first applying the appropriate disciplinary procedures and/or performance evaluatory procedures, in accordance with the New York State Civil Service Law, applicable contract provisions, and standard personnel policies and procedures."

Respondents interfered with the administration of Petitioner Union.”

Third, the Union contends that the Department of Transportation discriminated against Jaber “because of his Union activities.” It reasons that, “since Petitioner was in a highly responsible and visible position in the agency,” *i.e.*, supervising a number of employees, the change of assignment was “an attempt by Respondent to discourage not only Petitioner, but also other employees from participating in Petitioner Union’s activities.”

In response to the City’s argument that the Union’s petition fails to state *prima facie* claims of violations of NYCCBL §§ 12-306(a)(1) and (3), the Union asserts that it has “pled sufficient facts to demonstrate [a] causal connection [between management’s knowledge of the grievance and its putative motive for transferring Jaber], especially in light of the Board’s liberal construction policy” with regard to specificity of pleadings. The Union points out that Jaber filed his overtime grievance on March 18, 1998, and was informed less than a week later that his assignment would be changed.⁴ The Union also notes that an employer’s reaction to protected activity is another factor to be considered in assessing motivation.⁵ Here, the Union argues it has stated a *prima facie* claim merely by asserting that Director Hershey expressed his displeasure about the grievance directly to Jaber.

The Union further contends that the City’s argument that Jaber’s transfer was for

⁴ The Union cites *Desiree Miller v. City of New York*, Decision No. B-2-93, for the proposition that, although mere proximity in time is in itself insufficient to support a claim of anti-union animus, proximity must be considered as a factor in assessing motivation.

⁵ The Union cites *City of Salamanca*, 18 PERB 3012 (1985), where the employer’s expression of “displeasure over [the] . . . filing of a grievance” was sufficient to constitute a *prima facie* case for an improper practice claim.

legitimate business reasons is pretextual. The Union cites the employer's evaluation of Jaber's "very good" job performance "a few weeks" before the grievance was filed. Assuming the allegation is true, that he disregarded his supervisor and assigned himself overtime, it is "incredible," the Union argues, that "this one incident standing alone" would result in the Department's decision to "demote and transfer" him, "especially" after he was commended in his evaluation for his "responsiveness" to supervisors.⁶

Finally, with respect to the City's request that the Board of Collective Bargaining ("Board") defer the instant improper practice petition to arbitration, the Union agrees that deferral would be proper in this case. The Union insists, however, that the legal questions raised in the pending grievance arbitration are distinct from those raised in the instant proceeding. It requests, therefore, that the Board retain jurisdiction over the instant petition.

As relief in the instant proceeding, the Union requests that the Board order Respondents to cease and desist from retaliating and discriminating against Borhan Jaber, from interfering with the Union's representation of its members, and from interfering with and coercion of unit members in the exercise of their NYCCBL rights. The Union also seeks to have Jaber restored to his prior position as Engineer-in-Charge. Finally, it requests the posting of the Board's order as well as the award of any appropriate monetary relief, including but not limited to lost wages with interest and benefits, and other relief as the Board deems necessary.

⁶ The Union points to Task No. 5 ("Provide liaison with other Bureaus, Agencies and New York State Department of Transportation"), which states, "Liaison is done in an efficient and professional manner." The Union appears to mean Task No. 4 ("Assist the Director of Bridge Maintenance in planning special projects & emergency repairs") which states, "Planning of work is responsive to Director's priorities."

City's Position

The City first argues that the Union has failed to state a *prima facie* claim. Although it does not deny that management knew Jaber filed his overtime grievance, later amended to include the change of assignment, the City argues that the Union fails to allege facts sufficient to maintain the claims that Respondents' actions were taken for the purpose of retaliating or discriminating against him or for interfering with the administration of the Union or for frustrating Jaber in the exercise of his NYCCBL rights.

The City characterizes the change in Jaber's assignment simply as removal from his position of administrative responsibility and reassignment to other duties appropriate to Civil Engineer, Level I. The Department replaced him as East River Bridges Section Chief assertedly, because of his failure to seek prior approval for overtime work after he had been notified that he had reached a limit on the amount of overtime he could make. Assigning himself to work the additional overtime rather than assigning another individual to the task caused concern that Jaber might continue to assign himself unauthorized overtime, the City contends. Thus, the City argues, even if the Union is found to have satisfied both the knowledge and motive requirements under the NYCCBL governing improper practice claims, management's actions were taken for legitimate business reasons.

The City argues that the petition is based on conclusory allegations and unsupported conjecture and surmise with respect to the Department's decision to reassign Jaber. It also contends that the allegation of interference with the Union itself is not supported by any factual allegations.

Finally, the City argues that the instant petition should be deferred to arbitration of the underlying grievance, “because the contractual arbitration procedure provides an appropriate means of resolving the matter.”⁷ As the grievances and the improper practice allegation involve the same facts, same witnesses, and the same claims of wrongful transfer and wrongful denial of overtime, the arbitration may completely resolve these issues, in the City’s view. To avoid duplication of effort and risk of inconsistent determinations, the City requests that the Board hold the instant petition in abeyance pending the outcome of the underlying grievance arbitration.

Discussion

In the instant matter, the City argues for deferral of the instant improper practice proceeding to arbitration of the underlying grievance, in its words, “because the contractual arbitration procedure provides an appropriate means of resolving the matter.” Neither party has provided us with the text of the contractual procedure to which reference is made; however, neither party disputes that such a procedure exists. More importantly, the Union does not dispute that deferral of the instant matter to that procedure would be appropriate. However, the Union seeks to have this Board retain jurisdiction over the dispute to address issues that are not remedied in arbitration.

We note that, although the claims are related, they are not necessarily identical. The issues presented for resolution through the grievance procedure are whether Jaber was entitled to

⁷ The City cites *Joseph M. McManus, pro se, v. Peter Stein, et al.*, Decision No. B-16-93 and *United Probation Officers’ Association*, Decision No. B-38-91, for the proposition that, where a dispute concerns rights derived from both the NYCCBL and the collective bargaining agreement, the Board may direct it first to arbitration.

a cash payment at a premium rate for overtime work and whether he was wrongfully disciplined when his assignment was changed. The issues in the instant improper practice petition, on the other hand, are whether the Department engaged in improperly motivated retaliatory activity in violation of NYCCBL § 12-306(a) when it declined to pay Jaber at a premium rate for working overtime on the occasion in question and when it changed his work assignment.

It is well settled that a controversy arising out of the same set of facts may involve related but separate and distinct rights and that a particular dispute may encompass rights which are derived from both the NYCCBL and the applicable collective bargaining agreement.⁸ In the past, the Board of Collective Bargaining has deferred a dispute to arbitration where the contractual arbitration procedure provided an appropriate means of resolving the matter.⁹ In so doing, the Board stated that permitting the dispute to proceed first to arbitration was consistent with the declared policy of the NYCCBL “to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations,”¹⁰ provided, however, that:

in the event that either the issue raised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, we shall, upon demand, reassert jurisdiction in this matter to hear and determine the allegations of improper practice.¹¹

⁸ *Id.* and cases cited at n. 11.

⁹ *Id.*

¹⁰ NYCCBL § 12-302.

¹¹ *See Joseph M. McManus, et al.*, Decision No. B-38-91 and cases cited at n. 13.

The Board also permitted deferral in which a dispute had not reached the arbitration stage. Where an improper practice petition alleged a failure to bargain over a change in the employer's policy regarding lateness, the Board found the dispute concerned competing claims of management's right to act unilaterally and contractual limits placed on that right.¹² It observed that the parties had a long-established bargaining relationship and that they had agreed to a grievance-arbitration procedure to resolve disputes concerning application or interpretation of their contract. The Board deferred resolution of the improper practice issue to the grievance-arbitration procedure in the interests of promoting the use of the binding, contractual, dispute resolution procedure. The Board retained jurisdiction "to insure that any prospective arbitration award [would be] consistent with, and not repugnant to, the policies and provisions of the NYCCBL."¹³

Deferral to arbitration is appropriate only if the matter in dispute is subject to arbitration.¹⁴ There is no disagreement in the instant case concerning the arbitrability of the grievance claims at issue. Therefore, we shall defer the instant dispute while those claims are

¹² *D.C.37, AFSCME, AFL-CIO, v. City of New York*, Decision No. B-10-80 (holding that the determination of the issue depended, in part, upon interpretation of the parties' collective bargaining agreement).

¹³ *Id.* at 12.

¹⁴ *Sanitation Officers Association, Local 444, Service Employees International Union, AFL-CIO, v. City of New York, et al.*, Decision No. B-10-85 (deferring a failure-to-bargain claim to the arbitration of a grievance concerning the assignment of civilians to work previously performed by the union's unit members; grievance, found arbitrable); *cf. Uniformed Sanitationmen's Association, Local 831, IBT, AFL-CIO, v. City of New York*, Decision No. B-68-90 (declining to defer to arbitration as not appropriate because, *inter alia*, the parties had not agreed to submit to arbitration disputes about whether a position description created exclusivity of work for unit members).

evaluated in the arbitral forum. We shall give no further consideration at this time to the merits of the improper practice claims; nor shall we take any action in this proceeding (i) until an arbitrator has issued an opinion and award, or (ii) until we are duly notified by the parties that the underlying matter has been resolved and the instant petition withdrawn. We shall retain jurisdiction over the improper practice petition until we are able to determine whether any prospective arbitration award has resolved the improper practice charges and is consistent with the policies and provisions of the NYCCBL.

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 by Local 375, Civil Service Technical Guild, D.C. 37, AFSCME, AFL-CIO, and Borhan Jaber, docketed as BCB-2000-98, be and the same hereby is, deferred (i) until such time as an arbitrator reviews the question of whether the New York City Department of Transportation wrongfully denied Jaber overtime pay, as alleged herein, and wrongfully disciplined him, also as alleged, and issues an opinion and award, or (ii) until this Board of Collective Bargaining is duly notified by the parties that the underlying matter has been resolved and the instant petition withdrawn; and it is further

DETERMINED, that this Board of Collective Bargaining shall retain jurisdiction over the improper practice petition until we are able to determine whether any prospective arbitration award has resolved the improper practice charges and is consistent with the policies and

provisions of the NYCCBL.

Dated: April 5, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER