PBA v. City & NYPD, 63 OCB 16 (BCB 1999) [Decision No. B-16-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding :

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

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Decision No. B-16-1999
Docket No. BCB-2030-98

DECISION AND ORDER

On December 21, 1998, the Patrolman's Benevolent Association ("PBA" or "Union"), on behalf of Police Officer Joseph Thompson ("Thompson"), filed a verified improper practice petition against the City of New York and the New York City Police Department ("Department"). The petition alleges that the Department violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (NYCCBL)[1] when the Department transferred Thompson from his assignment in retaliation for refusing to remove a union sign from his private car. The City, by its Office of Labor Relations filed a verified answer on March 9, 1999 and the

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[1] Section 12-306(a) of the NYCCBL provides in relevant part:
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;

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization;

* * *

Union filed a verified reply on April 15, 1999. The Union seeks the reassignment of Thompson to the Burglary Auto assignment and payment of overtime for all changed regular days off.

BACKGROUND

On June 10, 1998, Thompson was one of two officers selected by Captain James O'Brien ("the Captain" or "O'Brien") of the 108th Precinct to work in the Burglary Auto assignment. On November 30, 1998, approximately thirty police officers assigned to the 108th Precinct conducted a PBA demonstration in front of the station house. The purpose of the demonstration was to protest the Captain's alleged summons and arrest quotas. The officers chanted slogans and carried signs at the demonstration. Neither the Captain nor the Department interfered with the demonstration.

On December 3, 1998, three days after the demonstration, Thompson was called into O'Brien's office along with PBA delegate Officer Anthony Iurillo and Lt. Ryan. The Captain ordered Thompson twice to remove a sign from the window of Thompson's private automobile which was legally parked in the vicinity of the precinct. The sign, which was used at the November 30, 1998 demonstration read, "Capt. O'Brien 108 Precinct. Stop summons/arrest quotas transfers now." Thompson did not remove the sign while the automobile was parked.

On December 11, 1998, Thompson was transferred from the Burglary Auto assignment to Squad B-3.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that Thompson was removed from the Burglary Auto assignment in

retaliation for his union activity. The Union argues that the utilization of the sign at the demonstration on November 30, 1998, was protected activity and similarly, the display of the sign in Thompson's car window was protected activity as well. The Union contends that there were no changes in Thompson's activity or productivity that would justify his removal from the assignment and that his transfer was not the result of disrespecting his commanding officer as the City alleges. Rather, the Union argues that the Captain retaliated against Thompson after he asserted his statutory rights of participating in union activity. The Union contends that by reassigning Thompson, the Department interfered with, restrained and coerced a public employee in the exercise of his rights under 12-306 (a) of the NYCCBL.

City's Position

The City argues that the Union fails to state a *prima facie* claim of improper practice and fails to allege facts sufficient to maintain a charge of retaliation. The City alleges that pursuant to *City of Salamanca*,[2] the Union must demonstrate that the employer's agent responsible for any alleged discriminatory act must have knowledge of the employee's union activity and that activity must be a motivating factor in the employer's decision to act in a discriminating manner.

The City argues that Thompson was not participating in union activity when he displayed a poster in his automobile window. Furthermore, the City contends that the Union has not demonstrated a causal connection between the alleged union activity and the alleged improper act. The City argues that the Captain never made anti-union statements nor did he display anti-union animus and no other employee who participated in the November 30, 1998 demonstration

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[2] 18 PERB ¶ 3012 (1985).

was subject to adverse action. The City states that Thompson was not reassigned after participation in the demonstration, but only after he showed "flagrant disrespect to his commanding officer."

The City further states that, assuming *arguendo*, the petition does establish a *prima facie* claim, the Captain's actions were predicated upon a legitimate business reason; Thompson's failure to respect the authority of his commanding officer. The City argues that the improper practice petition should be dismissed because Thompson's union activity is not what provoked his transfer. Rather, it was his lack of respect toward his commanding officer. The City contends that when the Captain asked Thompson what he had to say about the sign in his car, Thompson disrespectfully replied, "nothing." The City claims that O'Brien then asked Thompson, "How would you like it if I displayed a sign with your name on it in the window of my private vehicle?" Thompson responded, "wouldn't bother me." The Captain then told Thompson that he wanted the sign removed and Thompson replied, "and what if I don't?" According to the City, Thompson did not indicate that he would comply with the instruction of his commanding officer.

The City contends that once it became clear to the Captain that Thompson exhibited a "poor demeanor and negative attitude," he lost confidence in Thompson's ability to carry out the mission of the Burglary Auto assignment. The City argues that the officers assigned to the Burglary Auto detail must follow the commanding officer's instructions. Since the Captain believed that Thompson would not follow his instruction, the Captain removed him from the assignment.

The City further argues that under §12-307(b) of the NYCCBL,[3] the City's managerial rights allow the Department to determine the methods, means and personnel by which governmental operations are to be conducted. Thus, the City contends that it was within the Captain's discretion to reassign Thompson after he disrespected the authority of his commanding officer.

The City also explains that subsequent to Thompson's transfer, the Captain felt that he could no longer afford to maintain the Burglary Auto unit. He decided to end the assignment altogether and reassigned the other officer in the unit as well.

DISCUSSION

In cases in which a violation of §12-306(a)(1) and (3) of the NYCCBL is alleged, we apply the test set forth by the New York State Public Employment Relations Board ("PERB") in *City of Salamanca*[4] and adopted by this Board in Decision No. B-51-87. The *Salamanca* test requires that a petitioner demonstrate the following:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. The employee's union activity was a motivating factor in the employer's decision.

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[3] Section 12-307(b) of the NYCCBL provides in relevant part:
It is the right of the City, or any other public employer, acting though its agencies, to ... 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 ...

[4] 18 PERB ¶ 3012 (1985).

If the petitioner succeeds in establishing the above, the burden of persuasion shifts to the employer to either attempt to refute the petitioner's showing or to establish that its actions were motivated by legitimate business reasons which do not violate the NYCCBL.[5]

The threshold issue we must resolve is whether the display of a union demonstration sign in Thompson's private automobile window constitutes protected activity. In order for union activity to be protected, the activity must be related to the employment relationship, it must be engaged in on behalf of an employee organization and must not be strictly personal.[6]

We find that Thompson was engaged in protected activity when he displayed a union sign in his automobile window. We rely primarily upon PERB's holding in *New York City Transit Authority (Alston)*.[7] In that decision, PERB found that the distribution of printed material by Alston, who was neither a union officer nor union official, to other members of his bargaining unit, in protest of his discipline, constituted, "a communication to fellow bargaining unit members about perceived improper treatment, as well as a solicitation of bargaining unit support for his position..." PERB held that, "These purposes fall within the range of participation in employee organization activities and lie within the context of the employer-employee relationship." PERB concluded that Alston's activity was protected union activity under the Taylor Law.

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[5] *Velyn Hennings, pro se v. Administration for Children's Services*, Decision No. B-45-98 at 5; *Ronald Perlmutter v. Uniformed Sanitationmen's Association, Local 831, et al.*, Decision No. B-16-97 at 4.

[6] *Emanual Archibald, et al. v. Michael Jacobson, Commissioner of Correction, et al.,* Decision No. B-38-96 at 17.

[7] 20 PERB ¶ 3065 (1987).

PERB, however, came to a contrary result in *Metropolitan Suburban Bus Authority (Lomuscio)*.[8] In that case, PERB held that an employee's filing of bus defect cards was not a protected activity where that filing was not "pursuant to an employee organizational campaign or pursuant to a collective bargaining agreement authorizing and/or encouraging such actions." The Board in *Lomuscio* distinguished *Lomuscio* from *Alston* because Lomuscio never testified that she filed the defect cards as part of an employee organizational campaign or activity, and she did not file the cards pursuant to the collective bargaining agreement which was silent on the subject of filing defect cards. In fact, Lomuscio testified that she considered the filings part of her responsibility as a bus operator, as required by her bus operator's handbook.[9]

PERB, in *Lomuscio* followed the holding of *Rosen v. Public Employment Relations Board.*[10] In *Rosen*, the Court of Appeals found that "the Taylor Law was not intended to protect unorganized— though concerted— activity." Thus, PERB concluded that the Court of Appeals established that the protections of the Taylor Law "apply only in cases of adverse action arising out of participation in employee organizational activity."[11] Consequently, PERB held that Lomuscio's filing of bus defect cards was not protected by the Taylor Law.

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[8] 23 PERB ¶ 3006 (1990).

[9] *See also, Julio Cesar Rivera v. New York City Transit Authority*, 27 PERB ¶ 4514 (1994).

[10] 72 N.Y.2d 42, 530 N.Y.S.2d 534 (1988).

[11] *Metropolitan Suburban Bus Authority*, 23 PERB ¶ 3006 (1990).

This Board made a similar finding in B-16-92.[12] In that case we held that a petitioner's written statement describing an "abusive" incident was not protected because it was part of an internal department investigation and the petitioner did not believe that he was participating in union related activity when he submitted his statement.[13]

The sign in Thompson's automobile window which was used in a PBA demonstration protesting the Captain's arrest and summons quotas is analogous to the literature that Alston was distributing to union members. Just as Alston was attempting to gain union support for his position, similarly, Thompson hoped to further union support for the cause that he promoted. Unlike *Lomuscio*, where it was Lomuscio's responsibility as an employee to report dangerous conditions and defects, Thompson did not display the sign in his car as part of his responsibilities as a police officer. Rather, Thompson believed that he was participating in employee organization activity. We find that Thompson's purposes fall within the proper range of participation in employee organization activities and lie within the context of the employer-employee relationship. Accordingly, we find that the Captain was motivated by Thompson's protected activity when he ordered Thompson to remove the union demonstration sign from his car window and, thereby, committed an improper practice in violation of §12-306(a) of the

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[12] *Gerald Nelson v. City of New York Department of Sanitation*, Decision No. B-16-92.

[13] *Id.* at 11. *But see, Emanuel Archibald and the Correction Officers Democratic Alliance v. Michael Jacobson et al.*, Decision No. B-38-96. (Writing a letter to the Mayor on behalf of a fellow unit member where the writer was not a shop steward and the letter was not sanctioned by the union was found not to be protected activity because, among other considerations, the letter was "not prepared on union stationery nor was it marked as a grievance...")

NYCCBL.

We next consider whether O'Brien committed an improper practice when he transferred Thompson from the Burglary Auto assignment. We find that the City meets its burden of establishing a legitimate business reason under *Salamanca*.[14] Even if Thompson's protected activity was the motivating factor in his reassignment, we are satisfied with the City's argument that the Captain would have transferred Thompson, in any event, for a legitimate business reason. The police department requires that its officers respect and follow the orders of superior officers. Commanding officers must also be confident that their directions will be carried out by their subordinates. The City has established that the Captain had a sound basis for reassigning Thompson when he lost confidence in Thompson's ability to respect his authority.

While Thompson may have believed that the Captain's order to remove the sign from his car was a violation of the NYCCBL, he was nevertheless obligated to follow the Captain's order. In these circumstances, we follow the labor relations maxim, "Obey now, grieve later." We have previously held in cases where management has committed a statutory violation in its order to an employee that, "an adversely affected employee will have to comply with management's allegedly erroneous order, and inform the union or submit a grievance at the earliest opportunity thereafter."[15] Thompson should have followed the Captain's order and removed the sign from

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[14] 18 PERB ¶ 3012 (1985) at 3027.

[15] *Albert Cunningham v. New York City Department of Probation*, Decision No. B-15-93 at 43; *Clifton R. Earp v. Uniformed Sanitationmens' Association*, Decision No. B-53-87. (where the Board has applied this principle in duty of fair representation cases.) *See also*, *Island Trees Public Schools* 14 PERB ¶ 3020 (1981) (An employee refused to work on Lincoln's Birthday believing that being directed to work on the holiday was in violation of the collective bargaining agreement. PERB held that the "appropriate recourse for the employees is to perform

his car. He could have then filed an improper practice petition against the Department for interfering with his protected union activity. We thus find that the Captain reassigned Thompson for a legitimate business reason and did not violate §12-306(a)(1) and (3) of the NYCCBL when he reassigned Thompson from the Burglary Auto unit.

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 be, and the same hereby is, granted only to the extent set forth below;

We find that Captain James O'Brien committed an improper practice in violation of § 12-306(a) (1) and (3) of the New York City Collective Bargaining Law when he ordered Officer Joseph Thompson to remove a union demonstration sign from his private automobile window; and it is further,

ORDERED, that the improper practice petition be, and the same hereby is, dismissed in all other respects.

Dated: June 7, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

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the work assignment while seeking redress through available legal channels." (quoting *Farmingdale UFSD*, 11 PERB ¶ 3055 (1978))).

RICHARD A. WILSKER
MEMBER

ANTHONY P. COLES
MEMBER

I dissent. THOMAS J. GIBLIN
MEMBER

I dissent. ROBERT H. BOGUCKI
MEMBER