Heidt v. ACS, 63 OCB 41 (BCB 1999) [Decision No. B-41-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
Nathaniel Heidt,	:	
	:	Decision No. B-41-1999
Petitioner,	:	Docket No. BCB-2029-98
	:	
-and-	:	
	:	
NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,	:	
	:	
Respondents.	:	

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"), [1] Nathaniel Heidt ("petitioner") filed a Verified Improper Practice Petition on December 9, 1998, alleging that his termination from employment by respondent, Administration for Children's Services ("ACS" or "respondent"), was because of the intervention of Local 371, District Council 37 ("Union") on his behalf in a disciplinary matter. ACS, through the Office of Labor Relations, filed its answer on February 5, 1999. The petitioner filed his reply on March 19, 1999.

BACKGROUND

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

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

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

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Petitioner was employed by ACS as a per diem Houseparent since 1995. In 1998, petitioner was assigned to the Laconia Group Home ("LGH"). On September 22, 1998, petitioner was involuntarily transferred to the Crossroads Facility after allegations of improper conduct were made.

On that same date, Harry Bryan sent a memorandum to Roger Hannon, Assistant Commissioner, Office of Personnel Services, recommending disciplinary action be initiated against petitioner after deeming the allegations substantiated. It concluded, "Mr. Heidt's actions cannot be condoned and termination of Mr. Heidt on an expedited basis is recommended."

Petitioner alleges that he contacted his collective bargaining representative, Social Service Employees Union Local 371 ("Union") and spoke with Diane Savino, a grievance representative on September 25, 1998 regarding his involuntary transfer. That day, Savino contacted Eliot Sussman, Labor Relations Consultant for the respondent and informed Sussman that petitioner's involuntary transfer violated the transfer provision of the parties' collective bargaining agreement. Sussman stated that he would get back to Savino after investigating. Savino contacted Sussman several times between September 28 and October 5, 1998, reiterating her prior statements and requesting that petitioner be transferred back to LGH. On October 6, 1998, Savino phoned Miles Driscoll, assistant to Hannon. On October 7, Hannon sent petitioner a letter terminating his employment effective the close of that business day. The termination letter was delivered to petitioner on October 9, which was petitioner's last day of employment.

As a remedy, the petitioner seeks reinstatement to his former position of employment with full back pay and emoluments.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that his termination from employment by respondent was because of the Union's intervention on his behalf demanding the recission of his wrongful transfer and his reassignment back to the LGH as required under Article VII of the collective bargaining agreement. Petitioner contends that respondent, recognizing the correctness of the Union's demand, decided to discharge petitioner. He argues that it is apparent that respondent would not have decided to discharge petitioner on October 7, 1998, but for the Union's assertion of his contractual rights under the transfer clause of the parties' agreement. Therefore, he argues, respondent has discriminated against petitioner for the enforcement of his rights under the parties' agreement, in violation of § 12-306 of the NYCCBL.

Respondent's Position

The respondent contends that the appropriate forum for the resolution of these allegations, if at all, is through the mechanisms provided by the contract. It also argues that the highly speculative conclusions alleged by petitioner ignore the fact that the recommendation to terminate petitioner's employment was formally submitted for final consideration several days before the Union made any efforts to intervene on petitioner's behalf. It argues that the Union has failed to show that: 1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's protected union activity and 2) the employee's union activity was a motivating factor in the employer's decision.[2]

The respondent argues that petitioner did not exercise his rights pursuant to the NYCCBL until several days after management recommended the termination of petitioner's employment, as petitioner himself admits. Thus, respondent contends that the coincidence in timing between the

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[2] The City cites Decision Nos. B-49-98; B-25-89; B-41-91 and B-21-92.

Union's phone calls on petitioner's behalf and the termination of his employment is just that. It argues that coincidence alone is insufficient to support the conclusion of departmental anti-union animus, especially in light of the written record.[3] It argues that petitioner has failed to offer any other evidence in support of its highly speculative conclusion, and the Board need not reach the merits of ACS's legitimate business reason for terminating the employment of petitioner. The respondent also argues that ACS acted within its statutorily granted management rights when it investigated the allegations against petitioner, recommended the termination of his employment and then implemented the termination.

DISCUSSION

The petitioner's position is that his employment was terminated in retaliation for having the Union intervene on his behalf in a disciplinary matter. Therefore, this matter was properly brought as an improper practice, and not as a contractual grievance as ACS contends.

The City properly outlined the standard to be utilized in this matter, the test set forth in *City of Salamanca* and adopted by this Board in Decision No. B-51-87. In applying this standard to the undisputed facts of this case, we find that the petitioner has failed to show that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity and that the employee's union activity was a motivating factor in the employer's decision. Although the final decision to terminate the employment of petitioner was made after the Union acted on his behalf, Bryan's strongly worded September 22, 1998 memorandum recommending the termination of petitioner's employment on an expedited basis was written three days prior to petitioner's call to the

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[3] The respondent argues that the Board has held that "mere proximity in time between two events, without other supporting evidence, is insufficient to support a conclusion that the [employer] harbored anti-union animus." It cites Decision No. B-49-98.

Union. This makes it impossible for ACS to know of his union activity before making that recommendation. As such, the timing of the City's action alone does not support the conclusion of improper motivation.[4] Since the petitioner failed to offer any other evidence in support of its conclusion, we need not look any further. Accordingly, the petition is dismissed in its entirety.

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 docketed as BCB-1966-98 be, and the same hereby is, dismissed in its entirety.

DATED: September 28, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER

[4] Decision No. B-49-98.