Ornas v. OLR & HRA (DASIS), 65 OCB 12 (BCB 2000) [Decision No. B-12-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
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-between-	:	
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TERESA ORNAS,	:	
	:	Decision No. B-12-2000
Petitioner,	:	Docket No. BCB-2025-98
	:	
-and-	:	
	:	
THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS and THE HUMAN RESOURCES ADMINISTRATION (DIVISION OF AIDS SERVICES AND INCOME SUPPORT),	:	
	:	
Respondents.	:	

DECISION AND ORDER

On November 17, 1998, Teresa Ornas ("petitioner") filed a Verified Improper Practice Petition alleging a violation of § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1] Petitioner alleges that the Human Resources Administration (Division of AIDS Services and Income Support) ("respondents" or "DASIS") retaliated against her because she is an active Union Delegate. On February 1, 1999, respondent submitted its answer/motion to defer. On

[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:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

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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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March 24, 1999, the petitioner filed a reply to the answer and motion to defer.

BACKGROUND

Petitioner is a Supervisor at the St. Nicholas DASIS Center. Petitioner is also an elected Union Delegate at the St. Nicholas location for Local 371, Social Service Employees Union, District Council 37, AFSCME, AFL-CIO ("Union"). On July 15, 1998, Charges and Specifications[2] relating to alleged misconduct were mailed to petitioner by the Human Resources Administration. The charges alleged that the petitioner was insubordinate, engaged in conduct detrimental to the agency and failed to perform her work competently in violation of Agency Procedures and Executive Orders. An informal conference was held on August 5, 1998 to resolve those charges. On October 28, 1998, the Informal Conference Holder found that the charges had been established and recommended a fine of twenty days pay. According to respondents, petitioner refused to accept the recommended penalty and decided to appeal the case to the Office of Administrative Trials and Hearings ("OATH").

Petitioner's Position

Petitioner argues that the Charges and Specifications brought against her were harassment for her active involvement as an Union Delegate. Petitioner contends that some of the charges allege misconduct by petitioner that are directly related to the performance of her duties as a Delegate for the Union. Petitioner argues that the Charges and Specifications, which are wholly without merit, were brought against petitioner for the purpose of having a chilling effect on her activities as a Union Delegate. Petitioner states that the City admits having knowledge of her Union activity and contends that the causal relationship between the Charges and Specifications and petitioner's status as Union

[2] The Charges and Specifications were issued pursuant to § 75 of the New York Civil Service Law.

delegate is self-evident.

Petitioner also states that no purpose would be served by holding the petition in abeyance pending the resolution of the disciplinary charges, which may take many months. Petitioner contends that it was the bringing of such charges by respondents which was unlawful and that the determination of the merits of the charges is irrelevant to such claim.

Respondents' Position

Respondents argue that petitioner has failed to allege sufficient facts to demonstrate that the City has taken any action for the purpose of frustrating petitioner's statutory rights in violation of the NYCCBL. They argue that to determine whether there has been a violation of Section 12-306(a)(3) of the NYCCBL, the Board has adopted the standard set forth in *City of Salamanca,* 18 PERB 3012 (1985), which provides initially the petitioner must show that: 1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity and 2) the employee's union activity was a motivating factor in the employer's decision. They contend that once both of these elements are satisfied, the burden shifts to the employer to establish that the same action would have taken place in the absence of the protected conduct.[3]

Respondents contend that while it is true that DASIS was aware of petitioner's status as a Union Delegate, the petitioner has not stated any facts which satisfy the second element of *Salamanca*. Respondents contend that proper and legal action of the employer that has an incidental, detrimental effect upon the Union does not constitute an improper practice unless improper

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[3] Respondents cite Decision No. B-51-87.

motivation is demonstrated.[4] They state that petitioner has not shown a causal connection between the alleged improper act and her alleged union activity, as required by the Board.[5]

Respondents argue that although petitioner alleges that the discipline was imposed because of her actions "as a Union representative," the fine that was imposed upon her was clearly based on her improper conduct as detailed in the Charges and Specifications. Respondents contend that once the Director initiated a request for disciplinary action, many layers of people were involved with investigating and/or reviewing the allegations to determine whether disciplinary charges were merited by the circumstances. They contend that only after an exhaustive review were disciplinary charges deemed necessary.

Respondents state that the charges outlined multiple acts of insubordination that include: entering the Unit Director's locked office without authorization, removing confidential information from that office and distributing it to another employee to read, telling other employees to disregard the Director's directions, refusing to perform assigned work and speaking in a disrespectful and insulting manner to the Director and a case manager. They argue that discipline is the usual course of action in such circumstances[6] and since petitioner has not asserted any other proof of a causal connection other than the fact that she was disciplined while she happened to be a union delegate,

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4 Respondents cite Decision Nos. B-15-92 and B-47-89.

5 Respondents cite Decision Nos. B-21-91 and B-53-90.

6 Respondents cite Decision No. B-49-97 (they argue that the Board dismissed an improper practice when an employee representative was fined for disobeying orders and failing to act in a manner conducive to order and discipline); Decision No. B-21-91 (they argue that the Board dismissed an improper practice when a shop steward was suspended for engaging in a physical altercation with another employee); and Decision No. B-20-81 (they argue that the Board dismissed an improper practice when an employee was twice suspended for insubordination and refusing to follow and order).

the improper practice must be dismissed.

Respondents argue that assuming, *arguendo*, that the petitioner satisfied both requirements of the *Salamanca* test, the management actions complained of were motivated by legitimate business reasons and were reasonable under the circumstances. Respondents contend that the fact that petitioner is a union delegate does not insulate her from Departmental actions such as discipline[7] and that the Department cannot condone unprofessional behavior from any employee just because of the employee's union status. Respondents also contend that the Board has held that allegations based on speculation and surmise rather than probative value must be dismissed[8] and the claims by petitioner that DASIS disciplined her for the purposes of frustrating the petitioner's statutory rights is wholly false, speculative and unsubstantiated.

Respondents contend that the Board should defer this matter until the petitioner's disciplinary case before OATH is resolved. They argue that petitioner has appealed the recommended fine of twenty days pay to OATH under Section 75 of the Civil Service Law, alleging that she has been wrongfully disciplined and that the events surrounding the wrongful discipline case form the basis for the improper practice claim filed by petitioner. They argue that the Board has held that it will not exercise jurisdiction over an improper practice when the claim and issues have been raised in another forum before a neutral party "in order to avoid unnecessary duplication of effort and risk of

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[7] Respondents cite Decision Nos. B-35-80 and B-21-79.

[8] Respondents cite Decision Nos. B-18-93; B-55-87; B-18-86; B-12-85; B-35-82; B-30-81 and B-33-80.

inconsistent determinations."[9] They state that the OATH trial will completely resolve the issues in the case at bar.

DISCUSSION

As a preliminary matter we shall discuss the respondents' contention that this matter should be deferred until the petitioner's disciplinary case before OATH is resolved. We note that deferral is discretionary.[10] When a party asks us to defer a charge of improper practice, we examine the relevant facts and circumstances on a case by case basis and weigh the consequences of deferral.[11] In considering the facts and circumstances of the instant matter, it is apparent that should the petitioner prevail at OATH, she will not necessarily and automatically be made whole for her claims that the employer was improperly motivated in bringing disciplinary charges. Although an OATH determination may decide the question of whether the charges have merit, it will not determine whether respondents committed an improper practice in violation of the NYCCBL. Therefore, we decline to defer this matter.

Respondents correctly state the test to be utilized when it is alleged that an employer has committed an improper practice within the meaning of § 12-306(a)(1) and (3) of the NYCCBL, *City of Salamanca*.[12] In conjunction with this test we have held that a finding of improper motivation

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[9] Respondents cite Decision No. B-68-90.

[10] *Albert Cunningham v. New York City Department of Probation and District Council 37, AFSCME, AFL-CIO*, Decision No. B-15-93. *See also* Decision No. B-57-87 and B-3-85.

[11] Decision No. B-15-93.

[12] The test set forth in *City of Salamanca*, 18 PERB ¶ 3012 (1985), was originally adopted by the Public Employment Relations Board ("PERB") and was endorsed by this Board in *Bowman v. City of New York*, Decision No. Decision No. B-51-87.

cannot be based on recitals of conjecture, speculation or surmise.[13] Petitioner maintains that Respondents brought disciplinary charges against her as harassment for her active involvement as a Union delegate. Since it is undisputed that DASIS knew of petitioner's union activity, she has satisfied the first part of the *Salamanca* test. However, petitioner has failed to allege any facts showing a causal link between her union activity and the actions of DASIS.

The record in this regard is confined to conclusory allegations based upon petitioner's speculations and suspicions and lacks any probative evidence to show that the disciplinary action taken against petitioner was in retaliation for her union activity. While petitioner need not present irrefutable evidence that the employer's action discriminated against her as an individual or was designed to or did, in fact, interfere with union administration, she must make specific allegations of fact at least sufficient to demonstrate the need for a hearing in the matter.[14] No such allegations have been made here.

The mere fact that the petitioner was a Union delegate did not confer upon her immunity from otherwise appropriate and proper disciplinary procedures nor in any way diminish the employer's right to take such action.[15] In the absence of showing of discriminatory intent on the part of the employer, we find that no violation of the NYCCBL has been stated and we shall dismiss the petition.

ORDER

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[13] *See* Decision No. B-53-90 and the cases cited therein.

[14] *Harry J. Muller v. New York City Department of Parks and Recreation*, Decision No. B-35-80.

[15] *Id.*

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-2025-98 be, and the same hereby is, dismissed in its entirety.

DATED: June 27, 2000
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
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MEMBER