COBA v. DOC, 65 OCB 19 (BCB 2000) [Decision No. B-19-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,	:	Decision No. B-19-2000
Petitioner,	:	Docket No. BCB-2057-99
	:	
-and-	:	
	:	
NEW YORK CITY DEPARTMENT OF CORRECTION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On May 3, 1999, the Correction Officers' Benevolent Association ("COBA" or "Union") filed a verified improper practice petition, on behalf of Anthony Morgello against the New York City Department of Correction ("DOC"). The petition alleges that the DOC violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it reassigned Morgello to another post. The City, by its Office of Labor Relations, filed a verified answer on May 25, 1999 and the Union filed a verified reply on June 8, 1999.

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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;
* * *

Background

The grievant is a correction officer at the Correctional Institution for Men ("CIFM") where until approximately October 21, 1998, he was assigned to mess hall posts consisting of two lines — 231A and 231B. He occupied each post on a two day rotation and both tours were 0500 x 1331 hours. On September 19, 1998, a 119B - Uniformed Table of Organization Modification Form, signed by the Division Chief Robert Davoren, was sent to the Uniformed Resources Allocation and Control unit ("URAC") for processing. The form modified post 231B — A.M. feeding by changing the time for that post from 0500 x 1331 hours to 1030 x 1901 hours. According to DOC, the change was made for security reasons in order to "provide adequate coverage for the afternoon and evening meal."

On or about October 21, 1998, the grievant was reassigned from post 231B to post 575, Modular Corridor Control. The new assignment had a 0500 x 1331 hours tour which was the same tour that the grievant worked prior to the reassignment. The grievant's 231A post was unchanged.

On April 1, 1999, the facility received a new copy of its Table of Organization which, according to DOC, was supposed to reflect changes made at the facility. The new copy, however, did not reflect any change made to post 231B. The Union argues that since the 231B post was not changed in the new Table of Organization, DOC's explanation for transferring the grievant for security reasons was clearly pretextual. The City, however, explains that the unchanged post was an oversight that would be corrected in a new Table of Organization that would be created to reflect this change.

Positions of the Parties

Union's Position

The Union alleges that the grievant is a delegate who represents COBA at grievances and meetings. He is an active and conscientious union member who frequently represents the COBA members whose posts are located near his. The Union alleges that the grievant is often critical of the policies and practices of Warden Glen Sylvester.

Until approximately October 21, 1998, Morgello was assigned to the 231A and 231B mess hall posts. He occupied each post for two days. According to the Union, Warden Glen Sylvester transferred the grievant because of his active support of COBA. He transferred him to a new post where he would not be as easily available to his members.

The Union argues that the DOC's explanation that the grievant was reassigned because the Table of Organization was amended to require this change was merely pretextual. The Union contends that the Table of Organization that it received in either March or April 1999 was not amended and that the grievant's mess hall post still existed. The Union argues that the reason that Morgello was placed for two days of his rotation in the gate post is that his capacity to represent members would be substantially reduced. According to the Union, the transfer was in retaliation for Morgello's criticism of the Warden and his support of COBA. The Union contends that the post transfer was to get rid of the grievant for part of the time.

City's Position

The City argues that the petition should be dismissed as untimely pursuant to § 1-07 of the Rules of Practice and Procedure of the Office of Collective Bargaining which provides that,

"if it is determined that ... the alleged violation occurred more that four (4) months prior to the filing of the charge, it shall be dismissed." The City argues that while the Union indicates that the transfer took place on October 21, 1998, the Union did not file the improper practice petition until May 3, 1999 — more than four months later. The City contends that the Union cannot use the recent receipt of a Table of Organization to overcome the procedural requirements of § 1-07(d). The City contends that if the Union believed that the DOC's reasons for the grievant's transfer were pretextual, it had to file the improper practice petition within four months of his reassignment.

The City maintains that the fact that DOC did not incorporate the change made to post 231B in the new Table of Organization was merely an oversight that the facility noticed on or about May 17, 1999. URAC told the DOC that it was an oversight and that the change to post 231B should have been reflected on the April 1, 1999 Table of Organization. According to URAC, a new Table of Organization reflecting the change to post 231B is in the process of being created.

The City also argues that Correction Officer Eason, the other officer assigned to post 231B prior to the change, was also affected by the change in the Table of Organization. According to the City, he too, was accommodated by the Department by being allowed to replace post 231B with post 575 in order to maintain the same hours.

The City further argues that the Union has failed to allege sufficient facts to demonstrate that the City has taken action for the purpose of frustrating the Union's statutory rights. 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. After satisfying these elements, the burden shifts to the employer to establish that the same action would have taken place in the absence of the protected conduct.

The City argues that the Union has not demonstrated that the DOC was aware of any union activity that would result in retaliation. Also, the Union has not indicated any instance where the grievant was prevented from representing correction officers. The City maintains that the Union has not described any anti-union animus nor has it demonstrated a causal connection between the grievant's activity and the alleged improper act. The Union merely alleges that the transfer was in retaliation for the grievant's criticism of the Warden and his support of COBA. However, the City contends that the mere allegation of improper motive does not constitute a violation of the NYCCBL.

Furthermore, the City maintains that the change in the Table of Organization leading to the grievant's reassignment was the result of the DOC's need to maintain security. The reassignment did not change the grievant's tour nor did it affect his assignment to post 231A in the mess hall. According to the City, the grievant has remained at CIFM since his reassignment and has acted as a union delegate without impediment. Also, the City argues that the reassignment of the grievant from the mess hall to the gate post could not have hindered his capacity as a union delegate because according to Article XVII, § 1 of the agreement, "[n]o

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[2] 18 PERB ¶ 3012 (1985).

employee shall ... engage in Union activities during the time the employee is assigned to the employee's regular duties." Thus, the location of the grievant's post should not affect his ability to act as a delegate.

Furthermore, the City argues that if the grievant was not reassigned simply because of his status as a union delegate, the DOC would then have been discriminating against Correction Officer Eason, the other correction officer assigned to post 231B, in order to encourage membership in an employee organization.

The City further contends that assuming *arguendo* the Union established a *prima facie* case of improper practice, the DOC was motivated by legitimate business reasons when it reassigned the grievant. Under § 12-307 of the NYCCBL, the City is guaranteed the right to reassign its employees because the management rights clause reserves for the employer the right to supervise and direct its employees. The City maintains that the DOC was motivated by its need to maintain the safety and security of the staff and inmates which is a legitimate business reason within its managerial rights.

The City also asserts that allegations based on speculation and surmise rather than probative value must be dismissed. The claim by the Union that the DOC transferred the grievant from one of his mess hall posts for the purpose of discriminating or retaliating against him is "wholly false, speculative, and unsubstantiated." The City argues that the Union has not even indicated any instance where the grievant was prevented from representing any correction officers. Furthermore, the Union does not describe any incident that would demonstrate anti-union animus toward COBA or the grievant. The City points out that the Union has even failed

to attach the Table of Organization that allegedly demonstrates that the transfer was merely a pretext. The City concludes that the Union's allegations lack foundation.

Discussion

The threshold issue we must address is whether the petitioner's improper practice petition was timely filed. Section 1-07(d) of the Rules of the Office of Collective Bargaining provides that a petition alleging an improper practice in violation of §12-306 may be filed within four (4) months of the improper practice. The City argues that the grievant's reassignment took place on October 21, 1998, yet, the Union did not file the improper practice petition until May 3, 1999, which is more than four months after the alleged improper practice occurred. The City contends that the Union cannot use the receipt of the Table of Organization to overcome the procedural requirement of having to file the petition within four months of the grievant's reassignment. The Union, however, argues that it first received the Table of Organization in March or April 1999 and when it discovered that no modification was made to the grievant's mess hall post, it then filed the improper practice petition.

We cannot say, as a threshold matter, that the Union's petition is untimely. The petition admittedly was filed more than four months after the grievant's reassignment. However, the Union's claim that its receipt of the new Table of Organization was its first notice that the DOC's explanation for the grievant's reassignment was pretextual, arguably brings this matter within the limitations period. If the Union could show that the reassignment was, in fact, improperly motivated and that the motivation was not known to the grievant and the Union until the Table of Organization was received, then the petition would be timely.

However, we find that the petition fails to establish that an improper practice was committed. The petition alleges that the grievant's reassignment was in violation of § 12-306(a)(1) and (3) of the NYCCBL. The mere assertion of discrimination or retaliation is not sufficient to establish that a management action constitutes an improper practice.[3] In cases in which such a violation is alleged, we have applied 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
>
> 2. the employee's union activity was a motivating factor in the employer's decision.

In order to satisfy this burden the petitioner must set forth specific allegations of fact that demonstrate at least an arguable basis for an improper practice claim.[5] Allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[6] If a petitioner fails to establish either element, the burden will not shift to the employer to demonstrate that its actions were motivated by a reason not prohibited

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[3] *Local 1182, Communications Workers of America v. New York City Department of Transportation*, Decision No. B-26-96 at 19; *Darren Baker et al. v. Lacy C. Johnson et al.*, Decision No. B-61-89 at 12.

[4] 18 PERB ¶ 3012 (1985).

[5] *Lieutenants Benevolent Association and Lt. William Johnson v. City of New York and NYPD,* Decision No. B-49-98 at 5; *William Chambers v. New York City Landmarks Preservation Commission*, Decision No. B-41-91 at 6-7.

[6] *Id.*

under the NYCCBL.[7]

At the outset, we find that the petitioner has satisfied the first prong of the *Salamanca* test. The DOC was aware of the grievant's status as a union delegate and the City's argument, that "Petitioner has not demonstrated any union activity that the Respondent was aware of which would cause retaliation," really relates to the second element of the Salamanca test. Applying the principles of the second prong of the test to the instant matter, we find that petitioner's allegations are of insufficient probative value to support a claim of improper motivation. All the Union alleges is that the grievant was reassigned because he was a union delegate who often criticized the Warden. Such a speculative and conclusory assumption does not provide the necessary causal link between the grievant's union activity and the actions of the DOC. The Union does not allege any statements made by the Warden which would indicate improper motivation nor does the Union demonstrate that there was anti-union animus. The Union has not met its burden of proving that union activity was the motivation for the grievant's reassignment.

In the absence of any evidence other than the conclusory allegations of the petitioner, a finding that respondent acted with improper motivation would be purely speculative. Accordingly, the improper practice 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 filed by the Correction Officers'

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[7] *Id.*

Benevolent Association be, and the same hereby is, dismissed.

Dated: July 24, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
MEMBER