Rivers & L. 1180, CWA v. Olshansky, CCRB, 65 OCB 32 (BCB 2000) [Decision No. B-32-2000 (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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BELYNDA RIVERS and COMMUNICATION WORKERS OF AMERICA, LOCAL 1180,	:	
	:	Decision No. B-32-2000
Petitioners,	:	Docket No. BCB-2034-99
	:	
-and-	:	
	:	
JOAN OLSHANSKY, DEPUTY EXECUTIVE DIRECTOR, CIVILIAN COMPLAINT REVIEW BOARD,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On January 12, 1999, Belynda Rivers and the Communication Workers of America, Local 1180 ("petitioners" or "Union") 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 Civilian Complaint Review Board ("respondent" or "CCRB") retaliated against her because she

[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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complained to the Union about the size of her workstation. On February 9, 1999, the respondent submitted its answer. On January 18, 2000, the petitioner filed its reply. On January 20, 2000, the City objected to the delay in filing the reply.

BACKGROUND

Belynda Rivers was employed by the Civilian Complaint Review Board (CCRB) in the title of Principal Administrative Associate III (PAA III). She started work on April 27, 1998. Rivers was on probation when she started her employment at the CCRB. The Personnel Unit of the CCRB for the period at issue in this case employed a Director of Personnel, Beth Thompson, a Deputy Director of Personnel, Rivers, and two other clerical employees.

The Personnel Unit is assigned to an enclosed work space within the CCRB office. That work space has within it four individual work stations to one side of the enclosed space and a small enclosed office within that space that is across from the work stations. Three of the work stations in the Personnel Unit are the same size while the fourth work station is slightly larger. Rivers was assigned to one of the three similarly-sized workstations within the Personnel Unit. Thompson was assigned to the office within the Personnel Unit.

Within one week of her employment, Rivers began complaining about the size of her work space to other employees; other people in the Personnel Unit, college interns and other clerical personnel. She frequently complained that she was entitled to a larger, more private work space. Thompson was able to overhear those comments and, in an effort to address the complaints, offered her an additional file cabinet and bookshelf for her use. Rivers refused but continued to complain. From time to time, her supervisors discussed the issue with her and explained that there was simply

no means within the CCRB to accommodate her with a private or larger space. Ultimately, it was suggested to Rivers that if the space issue was such a serious one, she may need to look elsewhere for employment.

Rivers created and updated a computer log, referred to as the Job Posting Log, listing all city job postings available to city employees who were interested in finding different employment. The City claims that she devoted significant energy and time to the project even though it was not one of her assigned duties. The Union claims she was authorized to perform the task.

On June 30, 1998, the petitioner states that she informed her supervisor that she was going to contact her union representative about the size of her work station. On July 1, 1998, Thompson sent Rivers a memorandum reminding Rivers of several assignments for which she was responsible. According to the City, Thompson had decided to put all assignments in writing from then on. On that date, Rivers also attended a meeting where, according to her, she was told to "either resign or terminate all complaints" regarding the size of her work station, and "refrain from initiating further complaints." The City denies those allegations and states that she was told to get over her problems with the assigned space since the CCRB did not possess the means for satisfying the complaint.

On July 2, 1998, Thompson, in an e-mail to Rivers, told Rivers to cease work on the job posting log because there was "so much necessary work that needs to be done." That same day, Rivers replied, "Posting log was completed and is functional as of 6/29, there is **no** conflict or problem [emphasis in original]". The petitioner states that on July 6, 1998, she received an e-mail and was told to either resign or terminate all complaints by July 10, 1998.

On the morning of July 8, 1998, Thompson again asked Rivers to cease working on the job

posting project. She also asked Rivers to get approval on projects before she started them and asked about the status of her assignments. At lunch, Rivers met with Joseph Calderone, Staff Representative for the Union. Calderone came to the office and had a cordial discussion with Thompson, but they did not discuss Rivers' situation. Thompson offered to make an office available to him.

On July 9, 1998, Thompson made notations on a printed copy of Rivers' e-mail of July 2, 1998, wherein Rivers stated there was no conflict or problem with the posting log. Thompson's notes indicated that she met with Rivers to let her know her performance was not meeting expectations, that her work on the job posting project was not as crucial as her other duties, reminded Rivers that she was on probation and that Thompson would help Rivers if she were willing to help herself. Thompson's notes also state that she told Rivers to get over the "space" issue and get focused on work.

On September 3, 1998 Thompson, in a memorandum to Rivers' performance file, listed the "unacceptable work practices of Belynda Rivers that have without doubt inconvenienced the individuals named." Following was a list of problems Rivers had with various employees in the CCRB. On September 4, 1998, Thompson, in another memorandum to Rivers' file, listed further problems with Rivers' performance. On September 14, 1998, Rivers attended a meeting with Thompson and Joan Olshansky, Deputy Executive Director of the CCRB, at which time Rivers was informed that her employment was terminated.

POSITIONS OF THE PARTIES

Petitioner's Position

The petitioner maintains that after Rivers decided to involve her union in her complaints about the size of her work station, Thompson and Olshansky began a series of intimidating and harassing activities directed at her. In its reply, the Union addresses the City's claims that Rivers misrepresented her past employment record by stating that the City decided to continue her employment regardless of the allegation of fraud that the agency now claims exist. The Union also claims that she was not terminated because of legitimate work performance, but because she lodged a complaint with the Union. It argues that management increased disciplinary activities after a visit by her Union representative on July 8, 1998.

The Union states that petitioner is challenging the improper termination of September 14, 1998, but it must argue the relevant events leading up to the termination. The Union contends it is therefore proper to refer to those events even though they occurred more than four months before the termination. The Union further contends that the petitioner's claim is not grounded in contract or procedure, and that the instant petition is grounded on improper practice, which is more appropriately dealt with by the Board.

City's Position

The City states that the petition must be dismissed as untimely because all of the dates between June 30, 1998, when Rivers first stated her intention to call the Union, and July 10, 1998, the last day that she was allegedly told to stop complaining, occurred more than four months before the filing of the petition on January 12, 1999. The City argues that these events also occurred more than two months before her employment was terminated, on September 14, 1998.

The City also argues that the petition must be dismissed because the Board lacks jurisdiction

over alleged contract violations. It contends that the claims before the Board relate to CCRB's decision to terminate Rivers for her misconduct. It argues that the appropriate forum for the resolution of these allegations, if any at all, is through the mechanisms provided by the contract.

The City asserts that the Union has not fulfilled the minimum initial pleading requirements of a claim of discrimination for union activity, as set forth in *City of Salamanca*,[2] and adopted by the Board in Decision No. B-51-87.[3] The City states that despite Rivers' constant disruptive complaining about her dissatisfaction with her work space, the employer had no knowledge of her exercising her rights pursuant to the NYCCBL until she stated she would call the Union on June 30, 1998. It claims that the Union, however, never approached CCRB about issues presented by Rivers. It contends that Rivers herself stated to her supervisor that the Union advised her to try to work it out. It contends the only contact the Union had with CCRB was a personal exchange between two former colleagues who had not seen each other for some time.

The City asserts that the very limited involvement of the Union played no role in the agency's determination to terminate Rivers' employment. It states that the action would have been proper on her second day of employment, when Thompson found out that Rivers had misrepresented her background. It contends that Rivers failed to satisfy her work obligations and showed no sign of responding to corrective efforts through the four months.

The City claims that the last straw was when Rivers requested vacation for the period August 29 through September 13, 1998. The City states that the request was approved, except for September

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[2] 18 PERB ¶ 3012 (1985).

[3] The City cites Decision Nos. B-16-92, B-36-91; B-4-91; B-24-90.

8, 1998, because 15 new employees would be processed for employment on that date and it was unusual to have that many employees starting at one time. The City states that Rivers agreed, but failed to show up, stating that she could come to work in the morning, but not the afternoon because she had a doctor's appointment. Thompson, according to the City, told her not to bother reporting to work on that day if she could not be present for the whole day. It was then, the City alleges, that CCRB decided to terminate her employment.

The City claims that the Board, in past decisions, has stated that mere proximity in time is insufficient to support the conclusion that the City harbored anti-union animus.[4] Therefore, it argues that the proximity in time between Rivers' statement that she would call the Union, the Union's appearance on July 8 and the termination of Rivers' employment more than two months later is insufficient to support the conclusion that CCRB harbored anti-union animus. The City argues that except for an inflammatory presentation of specific events after the Union appeared at CCRB, the petitioner failed to offer any other evidence in support of its highly speculative conclusion. It contends that petitioner avoided reference to virtually all the events prior to the Union's appearance at the CCRB.

The City argues that the decision to terminate Rivers' employment was a legitimate exercise of management's rights pursuant to the NYCCBL. It states that whatever efforts Rivers made or intended to make to involve her union had no bearing on the CCRB's decision to terminate her employment.

Finally, the City argues that the Union failed to allege anything but conjecture, speculation

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[4] The City cites Decision No. B-49-98.

and surmise, and that these unsupported allegations within the petition do not constitute an improper practice. Based upon the foregoing, the City argues, the Union has failed to allege facts sufficient to establish an improper practice and the petition must be dismissed in its entirety.

DISCUSSION

The City claims that the petition should be dismissed because it fails to state a cause of action under the NYCCBL. But, the petitioner states that she was retaliated against for threatening to go to the Union and then going to the Union to complain about the size of her work station. Since this could constitute protected activity within the meaning of the NYCCBL, we find that, on its face, the petitioner states a cause of action. This petition was also filed properly as an improper practice because the instant petition is grounded on allegations of conduct which, if proven, would constitute an improper practice under the statute, not a contract violation.

The City also contends that the petition is untimely. Where certain of the events alleged to constitute an improper practice occurred more than four months prior to the date on which the petition was filed, the Board finds claims relating to such events to be time-barred; it will consider, however, those events as background to the allegations which are timely asserted.[5] In the present case, only those allegations concerning the termination of Rivers' employment on September 14, 1998 state a timely claim. We will consider the events that occurred in June and July 1998 solely as background.

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*

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[5] *Communications Workers of America v. New York City Board of Elections*, Decision No. B-27-83.

of Salamanca.[6] This test requires that the petitioner show initially that the employer's agent responsible for the alleged discriminatory acts 1) had knowledge of the employee's union activity and 2) that the union activity was the motivating factor in the employer's decision. If the petitioner proves both of these elements, then the employer must establish that its actions were motivated by a legitimate business reason.[7] In conjunction with this test we have held that a finding of improper motivation cannot be based on recitals of conjecture, speculation or surmise.[8] Petitioner maintains that Respondents terminated her employment as harassment for her complaints to the Union about the size of her work station. Since it is undisputed that CCRB knew of petitioner's union activity, she has satisfied the first part of the *Salamanca* test. However, petitioner has not satisfied the second part of the *Salamanca* test, even while taking the time-barred events into consideration as background.

It appears that two months had passed between petitioner's last meeting with Thompson about the work station size issue and the termination of her employment. Furthermore, the day her employment was terminated was only six days after Rivers failed to appear at work when she was scheduled on a day on which she knew an unusually large number of new employees were to be processed. The mere fact that the petitioner complained to her Union did not confer upon her immunity from otherwise appropriate and proper disciplinary procedures nor in any way diminish

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[6] 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.

[7] Decision Nos. B-16-92, B-36-91; B-4-91; B-24-90.

[8] *See United Probation Officers Association for Mamie Simmons v. City of New York, Department of Probation*, Decision No. B-53-90 and the cases cited therein.

the employer's right to take such action. 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. We need not consider the City's objection to the Union's reply because it is not determinative.

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-2034-99 be, and the same hereby is, dismissed in its entirety.

DATED: October 10, 2000
New York, N. Y.

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

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MEMBER

EUGENE MITTELMAN
MEMBER