PBA v. City & NYPD, 65 OCB 33 (BCB 2000) [Decision No. B-33-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
Patrolmen's Benevolent Association,	:	
	:	
Petitioner,	:	Decision No. B-33-2000
	:	Docket No. BCB-1974-98
-and-	:	
	:	
City of New York and New York City Police Department,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On April 20, 1998, the Patrolmen's Benevolent Association ("Union") filed a verified improper practice petition, on behalf of Carlos Muentes against the City of New York and the New York City Police Department ("NYPD" or "Department"). The petition alleges that the Department violated §§ 12-306(a)(1) and (a)(3) of the New York City Collective Bargaining Law ("NYCCBL") by transferring Muentes after he requested union representation during an investigatory interview.[1]

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[1] §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;
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(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;
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§12-305 **Rights of public employees and certified employee organizations.**
(continued...)

The City filed an answer on June 5, 1998 and the Union filed a reply on August 11, 1998. As a remedy, the Union asks that the Department be ordered to reassign Officer Muentes to the 115th Precinct on the 4x12 tour and give any other relief that may be deemed just and proper.

BACKGROUND

Police Officer Carlos Muentes ("Muentes" or "Petitioner"), was assigned to patrol duty on the 4x12 tour in the 115th Precinct until February, 1998. The events that precipitated the Petitioner's transfer out of the 115th Precinct occurred in early 1998. According to the City, Muentes was involved in an incident with Lt. John Henry of the 115th Precinct on January 28, 1998. Allegedly Muentes became angry and frustrated and was counseled on professionalism and conduct. Two weeks later, Muentes was the subject of a civilian complaint filed on February 12, 1998 concerning an allegation that he yelled and screamed at a civilian who appeared at the Precinct with her attorney.[2] After the complaint was filed, Captain Izzo, Commanding Officer of the 115th precinct, interviewed Muentes about the matter.[3] The City claims that during the course of the interview,

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[1](...continued)

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

[2] Apart from the February 12, 1998 complaint, Muentes has been the subject of nine other civilian complaints. One complaint was substantiated by the Civilian Complaint Review Board ("CCRB") on November 5,1997. The CCRB recommended administrative charges be filed; the action is still pending.

[3] The Department asserts that the interview took place on February 17, 1998 and a memorandum from Captain Izzo to the Commanding Officer of Patrol Borough Queens North uses the February 17, 1998 date as well. The Union maintains that the interview occurred on February 13, 1998.

Muentes became angry and banged his fist on the table. The City also claims that Muentes was given the option to stop the interview at any time if he desired to obtain union representation. The Union denies these claims and alleges that Captain Izzo refused Officer Muentes' request for union representation.[4]

It is undisputed that Patrick Burke ("Burke"), a Union trustee, met with Captain Izzo on February 19, 1998. The Union alleges that Burke complained about the Captain's failure to allow union representation during the interview concerning the civilian complaint. The Union further alleges that following the meeting, Muentes was subjected to unusual scrutiny by the Integrity Control Officer; Muentes was watched signing in and out, sergeants were questioned about his performance, and he was twice subjected to a Civilian Complaint Review Board ("CCRB") field test. The City denies the Union's allegations.

On March 4, 1998, the Union's attorney filed a grievance with the Department's Office of Labor Relations on behalf of Muentes alleging that he was denied representation during the interview. The Department denied the grievance. By memorandum dated March 5, 1998 to the

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[4] Article XIX of the collective bargaining agreement between the parties provides: The Guidelines for Interrogation of Members of the Department in force at the execution date of this Agreement will not be altered during the term of this Agreement, except to reflect subsequent changes in the law of final decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York regarding the procedures and conditions to be followed in the interrogation of a member of the Department. No less than two (2) weeks' written notice of such proposed alteration of the said Guidelines shall be given to the Union. The parties shall discuss and may mutually agree upon other amendments to these Guidelines at any time.

Patrol Guide Procedure No. 118-9 ("Interrogation of Members of the Service") permits a police officer "who is the subject or a witness in an official interrogation" to have a representative of a department line organization present at all times during the interrogation.

Commanding Officer of Patrol Borough Queens North, Captain Izzo requested that Muentes be transferred to an assignment that would limit his contact with the public based upon his disciplinary record,[5] civilian complaint history and excessive use of sick leave. The City contends that at the time Captain Izzo requested the transfer, he was unaware that a grievance had been filed.

By memo dated March 9, 1998, the Department informed Muentes that effective immediately, he had been entered into the Department's Early Intervention Unit ("EIU") for counseling. On the same day, the Personnel Officer at the Queens North Patrol Borough approved Muentes' transfer from the 115th Precinct to the 104th Precinct. At the time the transfer was approved, the Personnel Officer asserts that she was unaware that Muentes had filed a grievance.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that Captain Izzo was notified that a grievance would be filed when he met with Burke, the Union trustee, on February 19, 1998. Furthermore, the Union maintains that the negative employment actions taken against Muentes occurred after this meeting and argues that they were taken in retaliation for union activity. The Union asserts that only after Captain Izzo learned of Muentes' intention to file a grievance did the Department restrict Muentes to station house duty, monitor him closely, refer him to the EIU for counseling, and transfer him. Therefore, the Union claims it has satisfied both elements of the *Salamanca* test by showing that Captain Izzo knew

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[5] According to the City, Muentes had been served with charges on three separate occasions and had received at least three Command Disciplines for being disrespectful to his supervisors. It is undisputed that on January 20, 1997, Muentes was placed on modified duty for an off-duty incident during which time he pointed his weapon at another person because of a verbal dispute.

Muentes intended to file a grievance and that Muentes' intention motivated Izzo to take retaliatory action.

The Union also argues that the Department should not be permitted to justify the retaliatory actions it took after the grievance was filed by claiming that the reason for such action was Muentes' poor service record because that record existed before the grievance was filed. The Union notes that one reason offered by the Department for the transfer was that Izzo felt that Muentes' contact with the public should be limited. However, the Union alleges that there was less supervision over Muentes at the new precinct to which he was assigned.

City's Position

In its Answer, the City states that Muentes has been "a progressive disciplinary problem" and has not performed his work acceptably. Muentes was quick to lose his temper and exhibited aggressive tendencies. Aside from the recent February 12, 1998 complaint, nine other civilian complaints were filed against Muentes, one of which was found to be substantiated on November 5, 1997 by the CCRB and disciplinary action was recommended. Muentes had also been served with charges on three different occasions and had received three Command Disciplines for being disrespectful towards his supervisors. Furthermore, it is undisputed that on January 20, 1997, Muentes had been placed on modified duty for an off-duty incident in which he pointed his weapon at another person during the course of a verbal dispute.

The City argues that the petition should be dismissed for failure to allege facts sufficient to demonstrate that the City's actions were taken for the purpose of frustrating the Petitioner's statutory rights in violation of the NYCCBL. It maintains that the Union has not shown that Department

personnel who made the decision to transfer Muentes and provide him with counseling knew of his intention to file a grievance. Thus, it claims, the Union has failed to demonstrate that the employer's agent knew of the protected activity, and so has not shown facts sufficient to make a claim under the first part of the *Salamanca* test. The City cites several cases in support of the proposition that the employer's agent responsible for the discriminatory action must have had knowledge of the employee's union activity.[6] Furthermore, the City asserts that receipt and knowledge by the Department's Office of Labor Relations that the Union had filed a grievance on behalf of Muentes may not simply be imputed to Captain Izzo nor to the Personnel Officer who approved the transfer in order to satisfy the first element of the *Salamanca* test.

The City asserts that the Union has not shown that the actions of Captain Izzo or other Department personnel involved in this dispute were motivated by Petitioner's union activity. Thus, the Union has failed to prove the second element of the *Salamanca* test. The City maintains that Petitioner has not proved that the actions of the Department were the result of an improper motive simply because a grievance was filed with the Deputy Chief at the Department's Office of Labor Relations. The City also argues that the Union's allegations are not based on fact, but rather on conjecture and surmise, and so the petition must be dismissed.

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[6] The City cites Decision No. B-41-91 in which the Board dismissed an improper practice petition where Petitioner failed to establish that the respondent knew of Petitioner's pending grievance before deciding to terminate him. The City also cites *City of Lockport*, 22 PERB 3059 (1989), in which the Board concluded that the employee's improper practice charge warranted dismissal when the employee failed to establish that the party who threatened and terminated him knew that he had filed a charge. The City also cites *NLRB v. McCullough Svcs* 144 LRRM 2626, 2633 (5th Cir. 1993) in which the Board held that "'[i]n establishing the knowledge element, the Board may not simply impute the knowledge of a lower-level supervisor to the decision-making supervisor." Instead, the Board must demonstrate that the individual allegedly responsible for the discriminatory activity actually knew about the protected activity.

Furthermore, the City argues that even if the Petitioner had established a *prima facie* case of improper practice by satisfying both prongs of the *Salamanca* test, the Department was motivated by legitimate business reasons when it reassigned Muentes. The City argues that it acted within the scope of management rights set forth in §12-307(b) of the NYCCBL.[7] Muentes' transfer was reasonable and proper under the circumstances because of his history of disciplinary problems, civilian complaint history, and absence record. Muente's propensity to become angry under stressful situations while on duty and his problems interacting with the public and his co-workers necessitated his transfer to an assignment that would limit his contact with the public.

DISCUSSION

The Union alleges that the grievant's reassignment was in violation of 12-306(a)(1) and (3) of the NYCCBL. Merely alleging retaliation is not sufficient to establish that a management action constitutes an improper practice. When such a violation is alleged, we have steadfastly applied the test set forth by the New York State Public Employment Relations Board ("PERB") in *City of Salamanca*[8] which we adopted in Decision No. B-51-87. Under this two-tiered test, the petitioner must show 1) that the employer's agent responsible for the alleged discriminatory action had

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[7] §12-307(b) of the NYCCBL provides, in relevant part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; 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; . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. . . .

[8] 18 PERB ¶ 3012 (1985).

knowledge of the employee's union activity, and 2) that the employee's union activity was a motivating factor in the employer's decision. If the petitioner makes a *prima facie* showing of both elements, then the burden shifts to the employer either to refute the petitioner's showing or to demonstrate that its actions were motivated by a legitimate business reason.[9]

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. Allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[10] Merely alleging improper motive does not state a violation where the union has failed to prove the requisite causal link between the underlying management act complained of and the grievant's union activity.[11]

It is in dispute whether the Union trustee, Burke, told Captain Izzo of Muentes' intention to file a grievance and whether Captain Izzo knew a grievance had subsequently been filed. However, we need not resolve those questions because we find that the City has successfully demonstrated the existence of a legitimate business reason which would have resulted in the petitioner's transfer regardless of his union activity. Specifically, the City has demonstrated that Muentes' transfer to the 104th Precinct was considered to be necessary given his disciplinary record, civilian complaint

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[9] *Patrolmen's Benevolent Association v. City of New York and New York Police Department*, Decision No. B-16-99 at 6; *Ronald Perlmutter v. Uniformed Sanitationmen's Association, Local 831, et al*., Decision No. B-16-97 at 4.

[10] *Communications Workers of America, Local 1180 v. City of New York and Health and Hospitals Corporation*, Decision No. B-19-99 at 12.

[11] *Charles Procida v. Commissioner of the Human Resources Administration, Department of Social Services*, Decision No. B-2-87 at 13.

history, and his excessive absences.[12] Therefore, 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 docketed as BCB-1974-98 be, and the same hereby is, dismissed in its entirety.

Dated: October 10, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

[12] Not only does the record before us support the City's contentions, but we take administrative notice that the arbitration award in the case between the PBA and the City concerning Captain Izzo's interview of Muentes further substantiates the City's position. *Police Department v. PBA*, Case No. A-7330-98. The arbitrator found that Muentes stated that he "may wish" for union representation, but did not actually request it. *Id.* at 3. Furthermore, the arbitrator found that Muentes' responses to Captain Izzo's questions were loud and agressive. It was also found that Captain Izzo had requested that Muentes be placed in the EIU on a date that was prior to the date Muentes' grievance was filed.

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER