

L. 371, SSEU v. HHC & Northern Manhattan Network, et. al., 67 OCB 16 (BCB 2001)
[Decision No. B-16-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----X
In the Matter of the Improper Practice Proceeding

-between-

SSEU, LOCAL 371 and CARROL VICENTE,

Petitioners,

Decision No. B-16-2001
Docket No. BCB-2127-00

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and NORTHERN MANHATTAN
NETWORK HARLEM HOSPITAL CENTER/
RENAISSANCE HEALTH CARE NETWORK,

Respondents.

-----X

DECISION AND ORDER

On March 24, 2000, SSEU, Local 371 (“Union”) and Carrol Vicente filed a verified improper practice petition against the New York City Health and Hospitals Corporation (“HHC”). Petitioners allege that HHC discriminated and retaliated against Vicente by terminating her after she sought the Union’s assistance regarding conflicts she had with her supervisor.¹ Respondents assert that Vicente was terminated because of her unsatisfactory work performance. Because the record fails to demonstrate that HHC discriminated or retaliated against Vicente because of union activities, the Board dismisses the improper practice petition.

BACKGROUND

¹ Petitioner claims that HHC’s actions violated § 12-306a(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).

On September 13, 1999, Carrol Vicente was hired as a Community Liaison Worker (“CLW”) at Harlem Hospital in a newly created program which provides community services to HIV positive clients.² Vicente was employed at Harlem Hospital for two and one-half months prior to her termination. It is undisputed that on at least five occasions during that period, Vicente’s supervisor, Tremaine Sayles, reprimanded her for unsatisfactory work performance. On these occasions, Sayles criticized Vicente for: 1) failing to provide a client with the information he requested (Tr. 102-04,);³ 2) inappropriately telling a client that she would be reported to the Administration for Children’s Services (“ACS”)(Tr.105-07,); 3) arguing with a co-worker in front of a client (Tr. 107-08,); 4) missing the deadline to have the program’s brochure published in a community newsletter (Tr.100-01,); and 5) crossing out her pager number on her business cards. (Tr. 111-12.) Vicente provides explanations for each of these circumstances.

In October 1999, Sayles began meeting with Vicente daily to review her assignments. On November 12, 1999, both Sayles and Program Director Julius Boda met with Vicente for two hours to discuss her problems at work. (Tr. 26.) In the morning of November 17, 1999, Sayles reprimanded Vicente and told her that he could not work with her. (Tr. 40.) Immediately after the meeting, Sayles reported to Boda that Vicente had acted in an insubordinate manner toward him. (Tr. 115-16.) At the same time Vicente called her Union delegate, Eugene Jones, to complain about what she characterized as a hostile work environment. Jones, in turn, called

² A hearing in this case we held on November 2 and November 15, 2000.

³ In this decision, “Transcript” is denoted by “Tr.” and “Exhibits” by “Ex.”

Boda and told him that Vicente was upset and scheduled to meet with him at 1:30 p.m. that day to discuss Vicente's work environment. (Tr. 16, 51-53.)

About an hour later, Boda called Jones to cancel their appointment. He told Jones that he would not meet with him concerning Vicente's hostile work environment claim and that Jones should contact Division Administrator Debra Williams about the matter, instead. (Tr. 54-55.) Jones then contacted Williams, and, according to the Union, Williams told him that she did not have to deal with the Union about the matter because Vicente was a probationary employee. (Tr. 56.) At 4:00 p.m. Boda told Vicente that she was being removed from a training session that she was scheduled to attend the next day.

On the same day, November 17, Sayles submitted a memorandum to Boda in which he delineated Vicente's poor work performance and requested that measures be taken against her because she was "a hindrance to the program." (Ex. R. 2.) On November 22, 1999, Boda submitted a memo to Williams recommending Vicente's termination. (Ex. P. 2.) Vicente was terminated on November 26, 1999. (Ex. P. 4.)

At the hearing, the Union presented two witnesses – Vicente, who testified about her work environment and the sequence of events on the days leading up to her termination; and Jones, who testified about his contact with Vicente's supervisors after receiving her phone call on November 17, 1999. HHC also presented two witnesses – Sayles and Williams. Each testified regarding Vicente's alleged poor work performance and the reasons for her termination.

POSITIONS OF THE PARTIES

Petitioners' Position

The Union makes the following arguments in support of its claim that Vicente was discharged because she sought and obtained the assistance of her union. Prior to November 17, 1999, the day that she complained to the Union, Vicente had never received any negative written evaluations or memos indicating that her work was unsatisfactory. (Tr. 127.) In fact, the first time that Sayles asserted in writing that he was dissatisfied with Vicente's performance was on November 17, 1999. (Tr. 128.) Furthermore, the Union alleges that the sequence of events following the Union's intervention on Vicente's behalf, supports a finding that her termination was retaliatory. Indeed, shortly after Jones scheduled a meeting with Boda to discuss Vicente's concerns, Boda cancelled the meeting and told Jones to call Williams, who in turn said that she did not have to speak to the Union about Vicente because she was a probationary employee. (Tr. 56.) On the same day, Boda also removed Vicente from a training program that she had been scheduled to attend the next day. (Tr. 18.) The Union also claims that a second memo, in which Boda requested that Vicente be terminated, was generated in retaliation for the Union's having contacted her supervisors. Vicente was then discharged approximately one week later.

The Union asserts that HHC's contention that Vicente was terminated for poor work performance is pretextual and that HHC overstates Vicente's shortcomings. Vicente explains that she did not provide housing information to a particular client because the client had been transferred to a different CLW's caseload. She contends that she never informed another client that she would be reported to ACS because the client left as soon as she realized that Sayles would be sitting in on their appointment. She also never argued with a co-worker in front of a client; rather, she simply had a conversation regarding the reason the co-worker was handling one

of her assigned cases. (Tr. 197-200.) Furthermore, Vicente alleges that when Sayles gave her an assignment to translate the program brochure to Spanish on October 15, 1999, he did not give her a deadline. When she completed the assignment on October 21, Sayles told her that it was too late and that she missed the deadline to submit the pamphlet for publication in the newsletter. Vicente contends that she had another week to submit the brochure for publication. (Tr. 194-96.) Finally, Vicente explains that she crossed out her pager number on only two or three business cards that she was going to give to clients because she did not wish to be paged after hours. (Tr. 201.)

The Union asserts that there is no documentation supporting HHC's contention that Williams had decided to terminate Vicente at the end of October 1999, but decided not to implement the termination until after the hospital underwent an accreditation review. The Union also questions why Vicente would be scheduled to attend a two day training program on November 18 and 19 if her supervisors had already decided to terminate her.

Respondents' Position

HHC asserts that Vicente's termination had nothing to do with her union activity – she was terminated solely because her work was unsatisfactory from the time that she began her employment as a CLW. By the time Vicente was terminated, Sayles had expressed his dissatisfaction with her performance on at least five occasions. Even after Sayles reprimanded her for poor work, asked her to be more “clinical” with clients, and reviewed her assignments with her on a daily basis, she still did not improve. (Tr. 97-99, 110.)

According to HHC, its decision to terminate Vicente was independent of any Union

activity on her behalf. All along, Sayles informed Boda of the problems he was having with Vicente. Both Sayles and Boda met with her in early October and told her that her work was unsatisfactory. (Tr.112.) Williams testified that in October, Boda informed her that Vicente was incapable of performing the duties of a CLW and, HHC asserts, at that time Williams decided to terminate her. HHC states that Williams took no immediate action, however, because she felt that it would be better to wait until after the hospital's accreditation review in November to terminate her. (Tr. 144.)

HHC contends that matters intensified on November 16, 1999, following a heated discussion between Sayles and Vicente concerning her work performance. On November 16, Vicente told Sayles that she had crossed out her pager number on her business cards. He was angry that she did this without his permission. Vicente, however, argued that she did nothing wrong and she merely did not want to be paged after her work hours. Sayles told her, "that's it, I'm not going to argue with you." He then went to speak to Boda. (Tr. 113.) On the morning of November 17, Sayles and Vicente argued again. Sayles had criticized Vicente's work, and she responded that she did not have to be "clinical." Sayles immediately told Boda about their argument and explained that Vicente was insubordinate. (Tr. 115-16.) That same day, Sayles wrote a memo to Boda asking that measures be taken against Vicente. He described numerous occasions that her work was unsatisfactory, explained that she was insubordinate, and wrote that she "does not have the clinical skills to be successful within the program." (Ex. R. 2.) On November 22, 1999, Boda submitted a memo to Williams asking for Vicente's termination. (Ex. P. 4.) Vicente was terminated on November 26, 1999. (Ex. P. 2.)

DISCUSSION

In evaluating the petitioners' charge of retaliation, the Board must determine whether HHC discriminated or retaliated against Vicente for union activity when it terminated her employment. Because we find that Vicente's termination was unrelated to union activity and was, rather, the result of her work performance, we dismiss the charges.

Under § 12-305 of the NYCCBL, public employees have the right to self-organization and to form, join or assist public employee organizations. It is an improper practice under NYCCBL § 12-306a 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 participation in the activities of, any public employee organization. . . .

To determine whether alleged discrimination or retaliation violated § 12-306a(3), the Board, as HHC noted, uses the standard set forth in *City of Salamanca*.⁴ That test requires a petitioner to demonstrate 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.

If a petitioner establishes this *prima facie* case, the burden of persuasion shifts to the employer

⁴ 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman and City of New York*, Decision No. B-51-87.

either to refute the petitioner's showing on one or both elements of the *Salamanca* standard or to show that it would have taken the same action even in the absence of the protected conduct.⁵

In the present case, the Union has satisfied the first element of the *Salamanca* test since Williams testified that Vicente's Union delegate called both her and Boda to discuss Vicente's allegations about her work environment. Thus, both Williams and Boda knew that Vicente had gone to the Union with her complaints.

Establishing the second element of the test – that Vicente's union activity was a motivating factor in HHC's decision to terminate her employment – must necessarily be circumstantial absent an outright admission.⁶ If a petitioner demonstrates a sufficient causal connection between the act complained of and the protected activity, improper motive may be inferred.⁷

We find that this element of the test has not been satisfied. The Union asserts that from the time Vicente began working at HHC until November 17, 1999, she had never received any negative written evaluations. It was only after her union delegate contacted her supervisors that two memoranda critical of her work performance were written, she was taken off a scheduled training session, and was ultimately terminated. Coincidence in time, alone, however, is

⁵ Bowman, B-51-87 at 18-19; *Salamanca*, 18 PERB ¶ 3012, at 3027; see also *Byrne & Social Service Employees Union, Local 371 and City of New York Admin. For Children's Serv.*, Decision No. B-40-2000 at 9-10.

⁶ *Local 768, District Council 37 and New York City Dep't of Health*, Decision No. B-15-99 at 16.

⁷ *Id.*

insufficient to support a conclusion that Vicente's employer was improperly motivated.⁸

While Vicente had never received any negative written reviews prior to November 17, she concedes that she was verbally criticized by Sayles on numerous occasions regarding her work performance and was often told that she was not "clinical" enough with her clients. (Tr. 26-27, 202.) On November 12, she, Sayles, and Boda had a two-hour long discussion regarding the reasons she did not get along with Sayles. (Tr. 26.) Because Sayles was concerned about her work performance, he provided her with daily supervision. (Tr. 38.) On the morning of November 17, Vicente was meeting with Sayles in his office when he told her that he could not work with her. (Tr. 40.) All of these events occurred before Vicente complained to the Union. Vicente even admits that Sayles was unaware that when she left his office she went to call her Union. (Tr. 40.) Based upon the ongoing corrective counseling that took place prior to November 17, 1999, which Vicente does not dispute, we find Sayles's recital of the actions he took after Vicente left his office on November 17, 1999, to be credible. After arguing with Vicente, Sayles immediately spoke to his supervisor to complain about Vicente's work performance and attitude. His subsequent memo to Boda was the result of the argument he had with her that morning. (Tr. 114.) The credible and largely undisputed evidence thus demonstrates that Sayles's memo and Vicente's subsequent termination were the result of her poor work performance and not the result of anti-union animus.⁹

⁸ See *Heidt v. New York City Admin. for Children's Serv.*, Decision No. B-41-99 at 5.

⁹ We note that we give no weight to Williams' assertion that in October she had decided to terminate Vicente but also decided to wait until after the hospital received its accreditation review in order to carry out the termination.

Furthermore, there is no basis for finding, as the Union suggests, that HHC's arguments are pretextual. Vicente concedes that Sayles reprimanded her numerous times about her work performance before she ever contacted her Union. Moreover, Vicente's testimony – that the disagreement she had with Sayles on the morning of November 17 was serious enough for her to call her Union – supports Sayles's allegation that as soon as Vicente left his office, he too was upset and immediately reported the incident to his supervisor, and subsequently wrote the memo criticizing her. We therefore find that Vicente's contact with the Union and Sayles's writing the memo were independent events. The fact that she went to the Union to complain about her meeting with Sayles does not insulate her from actions that were otherwise being contemplated. Since the Union has failed to demonstrate that Vicente's Union activity was a motivating factor in HHC's decision to terminate her employment, we find that HHC did not violate § 12-306a (1) and (3) of the NYCCBL. Accordingly, the Union's improper practice petition is dismissed.

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 SSEU Local 371 and Carrol Vicente be, and the same hereby is dismissed.

Dated: April 30, 2001
New York, New York _____

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER