Ottey v. OLR & District Atty of Kings County, 67 OCB 19 (BCB 2001) [Decision No. B-19-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DONNA M. OTTEY

Petitioner,

-and-

Decision No. B-19-2001
Docket No. BCB-1698-94

NEW YORK CITY OFFICE OF LABOR RELATIONS
And DISTRICT ATTORNEY OF KINGS COUNTY,

Respondents.

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DECISION AND ORDER

On November 17, 1994, Donna M. Ottey ("Petitioner") filed a verified improper practice petition against the District Attorney of Kings County ("Respondent"), alleging that Respondent demoted her from the in-house title of Paralegal Specialist to Paralegal Level III, cut her pay, and transferred her to a less desirable assignment in retaliation for filing an out-of-title grievance.[1] Respondent contends Petitioner has demonstrated no causal connection between her filing the out-of-title grievance and the management decision to reassign her. This Board of Collective Bargaining dismisses the instant improper practice petition because Petitioner has failed to show that Respondent discriminated against Petitioner because of protected activity.

[1] Petitioner has not specified the applicable statutory provisions which she alleges have been violated but the allegations arguably pertain to claims arising under § 12-306a(3), and derivatively under § 12-306a(1), of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

BACKGROUND

On September 12, 1988, Donna Ottey was hired by the Kings County District Attorney's office as a provisional Office Associate with the office title of Paralegal. Two years later, she was assigned to the Sex Crimes Unit. Less than two years after that, she became a non-competitive employee in the Civil Service title of Community Associate with the office title of Paralegal Specialist.

On February 18, 1994, Ottey went on approved maternity leave. In March and April 1994, while she was on leave, her supervisors discovered that she had failed to investigate a number of cases assigned to her before she went on leave and had misplaced documents in other cases. By memoranda dated March 24, April 26, and May 6, 1994, her immediate supervisor, Louise Cohen, deputy chief of the Child Abuse Bureau, reported the findings to Suzanne Melendez, chief of the Child Abuse Bureau, and recommended that Ottey be transferred from that Bureau when she returned from maternity leave later in May. (Answer ¶ 7; Affidavit ¶ 3)[2]

Melendez in turn told David Fader, Director of Human Resources/Personnel, about the problems with Ottey's work. Fader relayed the information to his supervisor, William L. McKechnie, then Special Assistant to the District Attorney. McKechnie was responsible for labor relations including oversight of grievances and discipline. McKechnie also spoke about the problem concerning Ottey's work to Lorraine Gross who handled disciplinary matters for him. They agreed to return Ottey to her earlier, less demanding job assignment as Paralegal, with a commensurate $3,225 reduction in salary. (Aff. ¶ 5)

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[2] The abbreviation in this decision for "Exhibit" is "Ex.,""Petition" is "Pet.," "Answer" is "Ans.," "Affidavit of William L. McKechnie" is "Aff."

On May 25, 1994, Ottey returned from maternity leave. She was given her "unsatisfactory" performance evaluation. She was immediately taken off assignments which she had as a Paralegal Specialist and was told that she was going to be transferred. (Ans. ¶ 7; Aff. ¶ 6)

On June 2, she appealed the performance evaluation to the in-house Evaluation Appeals Board. After McKechnie spoke with Fader and Gross, it was agreed that the District Attorney would stay the transfer and office title change until the Appeals Board issued its final determination on her appeal of the performance evaluation. (Aff. ¶ 7) On July 14, 1994, that board rejected her appeal on grounds that Ottey's supervisors had substantiated their findings about her work performance and that the issue of her transfer was more appropriately directed to Personnel. (Ans. Ex. 1). That same day, Petitioner filed a grievance under Article 10 ("Evaluations and Personnel Folders") of the Citywide Agreement demanding removal of the three memos by her supervisor from her personnel file.[3] (Ans. Ex. 2) The next day, she filed a grievance under Article VI ("Grievance Procedure"), § 1(c) of the unit agreement claiming out-of-title work and protesting her transfer and reassignment.[4] (Pet. Ex. A)

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[3] The cited article of the Citywide Agreement for the period from July 1, 1990, to June 30, 1992, which continued in effect pursuant to NYCCBL § 12-311d ("status quo"), provides, in relevant part, that an employee shall have the right to answer an evaluatory statement of work performance and to have that answer attached to the permanent file copy. The article also provides that an employee shall have the right to file an answer to material in the personnel file relating to work performance or conduct other than evaluatory statements.

[4] The cited section of the Social Services unit agreement for the period from October 1,1990, to December 31, 1991, which continued in effect pursuant to NYCCBL § 12-311d ("status quo"), defines a grievance, *inter alia*, as "a claimed assignment of employees to duties substantially different from those stated in their job specifications. . . ."

On July 18, 1994, McKechnie responded to both grievances at Step I. With regard to July 14 grievance demanding removal of the memos, McKechnie found that the memos had not been made a part of her permanent record at that time but that, before they were, she would have an opportunity to respond in writing to each and that her response would become part of her permanent record also. (Ans. Ex. 3) With regard to the July 15 grievance protesting the transfer and reassignment, McKechnie denied it on the ground that the Paralegal assignment was commensurate with her Civil Service title and salary. (Ans. Ex. 4)

By memo dated July 22, 1994, Gross advised Ottey that, effective July 25, 1994, her office title would revert to Paralegal with a commensurate salary reduction and that she would be reassigned to the Complaint Room instead of the Sex Crimes Unit. The memo warned that Ottey's work would be closely supervised and that her continued employment would be conditioned on all phases of her job performance. (Pet. Ex. B)

In November 1994, four months after McKechnie denied the out-of-title grievance, the Union appealed that Step I decision, bypassing Step II. (Ans. ¶ 9) The Step III hearing officer denied the request for a hearing because it was untimely. (Ans. Ex. 5) The instant petition was filed November 17, 1994.[5] Efforts to settle the instant matter prior to adjudication were unsuccessful.

POSITIONS OF THE PARTIES

Petitioner's Position

[5] Petitioner chose not to file a Reply.

Petitioner argues that, in retaliation for Ottey's filing an out-of-title grievance to protest her reassignment to less demanding work, Respondent demoted her from her office title of Paralegal Specialist to Paralegal Level III, cut her pay by $3,225, and reassigned her from the Sex Crimes Unit to the assertedly less desirable position of Paralegal in the Complaint Room.

The instant petition seeks restoration to Ottey's office title of Paralegal Specialist and back pay to the date of restoration from July 25, 1994. It also seeks reassignment to the Sex Crimes Unit.[6]

Respondent's Position

Respondent contends that the decision to return Ottey to less demanding duties was a proper exercise of managerial prerogative under NYCCBL § 12-307(b) to determine the methods, means and personnel by which governmental operations are to be conducted. The decision was supported by ample evidence that Ottey mishandled child abuse cases assigned to her.

Respondent also maintains that the decision to transfer Ottey was made before she returned from maternity leave. She was aware – at least as early as May 25, 1994 – that her assignment would be changed because the Appeals Board's determination denying her performance-rating appeal made reference to the transfer issue. Respondent points out that Ottey sought the Appeals Board's determination on June 2 and that her contract grievances were filed on July 14 and 15, more than a month after the employer's actions.

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[6] According to Counsel for Petitioner, Ottey left the payroll October 10, 1995.

Respondent concludes that Petitioner has failed to present legally sufficient facts to support its contention that changing Ottey's office title from Paralegal Specialist to Paralegal Level III with the associated pay cut and reassigning her to the Complaint Room were effected as retaliatory or discriminatory and not as a valid exercise of the City's management rights.

Respondent further argues that Ottey did not have a right either under the unit contract or as a non-competitive employee to grieve a change of assignment which resulted from her unsatisfactory job performance. Respondent urges that the instant petition be denied.

DISCUSSION

The question before this Board is whether, by reassigning Petitioner Ottey to reduced duties, cutting her pay accordingly, and transferring her from one unit within the District Attorney's office to another, Respondent retaliated or discriminated against her in violation of the NYCCBL for her filing the out-of-title grievance of July 15, 1994. After considering the totality of the record, this Board finds that those actions did not violate the NYCCBL.

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 § 306a for a public employer or its agents, *inter alia*:

> (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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> ***
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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 employee organization. . . .

To determine whether alleged discrimination or retaliation violates § 12-306a(3), this Board uses the standard articulated by the New York State Public Employment Relations Board in *City of Salamanca and D.P.W. Employees, Council 66, Local 1304C*.[7] That test, adopted by this Board in *Bowman and District Council 37, AFSCME, City of New York, Judith Levitt, as Personnel Director of the City of New York*,[8] 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
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> 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 either to refute the petitioner's showing on one or both elements of the applicable standard or to show that it would have taken the same action even in the absence of the protected conduct.[9]

Here, Petitioner alleges that agents of the District Attorney's office who reassigned Ottey

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[7] 18 PERB ¶ 3012.

[8] Decision No. B-51-87.

[9] *Bowman,* B-51-87 at 18-19; *Salamanca,* 18 PERB ¶ 3012, at 3027; *see also Unif. Firefighters Ass'n,* Decision No. B-1-98 at 9-10. In addition, NYCCBL §12-307b reads, in pertinent part:

> It is the right of the city . . . , acting through its agencies, to . . . direct its employees; take disciplinary action . . .; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work.

and reduced her pay did so because of her July 15 grievance.[10] In order to satisfy Petitioner's burden, she must set forth specific allegations of fact that demonstrate at least an arguable basis for an improper practice claim because allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[11] Merely alleging improper motive does not state a violation where a union fails to prove a causal link between the management act at issue and the grievant's union activity.[12]

There is no dispute that McKechnie knew of the July 15 grievance Ottey filed. It was McKechnie who responded to it on July 18. However, it is not clear if that knowledge was shared with David Fader and Lorraine Gross who, along with McKechnie, were responsible for carrying out employee discipline. Moreover, Petitioner has not named individuals whom she claims were responsible for reassigning her. The instant petition fails for want of sufficient specificity with regard to these two points.

Even if we were to conclude that Fader and Gross knew about the out-of-title grievance as did McKechnie, the instant petition would fail nonetheless because Petitioner does not support her contention that, but for the July 15 grievance, she would not have been reassigned. Petitioner does not dispute that Ottey's immediate supervisor first called attention to the shortcomings in

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[10] Petitioner makes no allegation with respect to the filing of the July 14, 1994, grievance.

[11] *See, e.g., Patrolmen's Benevolent Association v. City of New York and New York City Police Department*, Decision No. B-33-00 at 8; *see*, also, *Communications Workers of America, Local 1180 v. City of New York and Health and Hospitals Corporation*, Decision No. B-19-99 at 12.

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

her work in March 1994. It is also undisputed that the supervisor first called for the reassignment beginning that month and continuing through May 1994 when the performance evaluation was issued. There is also no dispute that Petitioner learned on May 25, 1994 – when she received her performance evaluation – that she was being reassigned to perform clerical rather than case management duties as a result of that evaluation. Neither party disputes that Ottey submitted her appeal to the Evaluation Appeals Board on June 2 and that the appeal determination, dated July 14, addressed the transfer issue. Since we find that the decision to reassign Ottey was made *before* the July 15 grievance was filed, we conclude that it was not the result of the July 15 grievance filing and that, in the absence of any other allegation of improper motive, management's action did not violate the NYCCBL.

For all these reasons, the instant improper practice petition is denied 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 at BCB-1698-94 be, and the same hereby is, denied in its entirety.

Dated: New York, NY
May 22, 2001

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER