L. 299, DC 37 & Dawkins-Blyden v. Dep't of Parks and Recreation, 67 OCB 27 (BCB 2001)
[Decision No. B-27-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
on behalf of its affiliated Local 299 and PAMELA
DAWKINS-BLYDEN,

Petitioners,

Decision No. B-27-2001
Docket No. BCB-2167-00

-and-

NEW YORK CITY DEPARTMENT OF PARKS AND
RECREATION,

Respondent.
--x

DECISION AND ORDER

On November 29, 2000, District Council 37 filed a verified improper practice petition on behalf of Local 299 ("Union") and Pamela Dawkins-Blyden against the New York City Department of Parks and Recreation ("City" or "DPR"). The petition alleges that DPR interfered with and discriminated against Dawkins-Blyden by terminating her from her position because she attended a union meeting and filed a grievance regarding DPR's failure to pay her for one day's work.[1] For the reasons stated below, we defer the Union's improper practice

[1] The Union claims that DPR'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) (continued...)

petition to arbitration.

BACKGROUND

Pamela Dawkins-Blyden began working for DPR on July 7, 1994, as a per diem Playground Assistant. As of May 9, 1997, she served as a year-round per diem Playground Associate until her termination on September 1, 2000. In 1997, Dawkins-Byden was transferred to St. Mary's Recreation Center where she worked on senior citizens' programs. During the course of her assignment at St. Mary's Center, Dawkins-Blyden was involved in four incidents which the City alleges were the basis for her termination. The incidents occurred as follows:

1. On September 2, 1999, Dawkins-Blyden was given complimentary WNBA basketball tickets to be distributed amongst the staff and center members. Peter Jones, Deputy Chief of Bronx Recreation, informed her that due to a miscalculation, some tickets had to be returned. It is undisputed that Dawkins-Blyden responded with profanity. (Resp. Ex. 7.)[2]

2. A few days later, on September 9, 1999, Deputy Chief Jones was discussing the September 2 incident with Dawkins-Blyden's supervisor, Kim Butler. Dawkins-Blyden allegedly stated, "If I hear that someone is talking about me behind my back, I am going to come after them." (Resp. Ex. 8.)

3. On September 13, 1999, Dawkins-Blyden was directed to report to Bronx Chief of Operations Dorothy Lewandowski's office for a supervisory conference meeting. Dawkins-Blydon stated that Supervisor Butler was "trying to set her up." The parties dispute what else transpired but do not dispute that Parks Enforcement Patrol escorted Dawkins-Blyden off the premises. (Resp. Ex. 9.)

4. On November 16, 1999, Dawkins-Blyden was involved in a physical and verbal

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[1](...continued)
("NYCCBL").

[2] The abbreviation in this decision for "Exhibit" is "Ex.," "Petition" is "Pet.," "Answer" is "Ans.," "Reply" is "Rep."

> altercation with a senior citizen of St. Mary's Center, Elizabeth Alamo. Ms. Alamo filed a complaint alleging that Dawkins-Blyden attempted to hit her with her car. It is undisputed that Dawkins-Blyden used expletives and called Ms. Alamo a "liar." (Resp. Ex. 9.)

On or around November 19, 1999, Dawkins-Blyden went on disability leave due to a foot injury and returned in February 2000. By memorandum dated January 7, 2000, Iris Rodriguez-Rosa, DPR Chief of Recreation for the Bronx, wrote to Parks Advocate Alessandro Olivieri and requested that disciplinary charges be filed against Dawkins-Blyden. Olivieri responded to the request by memorandum dated April 19, 2000, in which he recommended that Dawkins-Blyden's employment be terminated based upon the four aforementioned incidents.

The parties agree that a union meeting was held at St. Mary's Center in July 2000, but dispute the date of the meeting. Although the record reflects that three union members attended the meeting, it is unclear as to whether Dawkins-Blyden was present. On July 17, 2000, Dawkins-Blyden allegedly refused to transport a group of seniors by van to a show. Hugo Chance, the manager at St. Mary's Center, and Dawkins-Blyden discussed the incident during a supervisory conference and Dawkins-Blyden was not paid for that day. (Resp. Ex.15.) On July 21, 2000, Dawkins-Blyden was notified that she would be transferred to Behagan Playground.

On August 8, 2000, Dawkins-Blyden filed a grievance regarding lack of payment for the July 17 workday.[3] The City did not respond to the grievance and a Step II was filed on August 21, 2000. The grievance was denied at Step II on October 11, 2000. Dawkins-Blyden never filed

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[3] The grievance filed by Dawkins-Blyden states that the incident occurred on July 19, 2000, rather than July 17 as the pleadings state.

a Step III grievance. The Union filed a request for arbitration on January 18, 2001.

By memorandum dated August 16, 2000, Chief Rosa-Rodriguez notified Dawkins-Blyden that she would be terminated effective September 1, 2000. On August 30, 2000, Dawkins-Blyden filed a second grievance alleging wrongful termination. On September 5, 2000, Joseph Bernstein, DPR Director of Labor Relations, wrote to Stephanie Miller, a union representative, to explain that as a per diem employee, Dawkins-Blyden was not covered by the contractual provisions. By letter dated September 20, 2000, the Union replied to Bernstein's letter and expressed its intention to withdraw the grievance. The grievance was not withdrawn and on October 31, 2000, Dawkins-Blyden filed a Step II grievance that was denied on November 16, 2000. Without filing a Step III grievance, Dawkins-Blyden filed a request for arbitration on January 18, 2001. The parties agreed to consolidate both grievances for arbitration.

The Union's petition also stated that on August 3, 2000, Samuel Hollins, a Playground Associate who began working for DPR on a seasonal basis from May 15, 2000, was terminated due to excessive absences. No other information is alleged about this employee.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DPR violated the NYCCBL by interfering with, restraining and coercing Dawkins-Blyden and other Local 299 members, such as Samuel Hollins, in the exercise of their protected rights. The Union notes that to determine whether a public employer has committed an improper practice under NYCCBL § 12-306a (1) and (3), the Board employs a test

enunciated in *City of Salamanca and D.P.W. Employees, Council 66, Local 1304C*.[4] The Union contends that the timing of events is crucial in this case, and it asserts that it has satisfied the *Salamanca* test because DPR knew that Dawkins-Blyden filed a grievance concerning the agency's failure to pay her for July 17, 2000, and then terminated her based upon that knowledge. According to the Union, DPR's claim that Dawkins-Blyden was a problem employee is belied by the fact that she was not let go immediately after Parks Advocate Olivieri issued his recommendation that her employment be terminated. The Union also claims that Hugo Chance, the manager of St. Mary's Center, was aware of the union meeting held in early July 2000 at St. Mary's Center and that the transfer and termination of Dawkins-Blyden and the termination of Samuel Hollins, another union member, constituted retaliation for such protected activity.

The Union requests that the Board order DPR to cease and desist from discriminating against Dawkins-Blyden, and other Local 299 members, in the exercise of lawful union activity and reinstate Dawkins-Blyden with full back-pay.

City's Position

The City argues that the petition is untimely under § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") because the four month statute of limitations should run from July 21, 2000, the date Dawkins-Blyden was transferred to Behagan Playground, rather than the date of her termination.

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

Furthermore, the City argues that the petition must be dismissed because the Union failed to meet its burden under the *Salamanca* test. While acknowledging that Hugo Chance, the manager of St. Mary's Center, knew that a union meeting took place in July 2000, the City knew nothing regarding the subject matter of the meeting or who was in attendance. In addition, the Union's allegations that DPR transferred and terminated Dawkins-Bylyden because she filed a grievance or attended a union meeting is conclusory and speculative. The Union fails to establish any causal connection between protected activity and DPR's conduct.

The City argues that even if the Board found that the Union satisfied the Salamanca test, the petition should still be dismissed because DPR's actions were based on legitimate business reasons. Dawkins-Blyden was terminated because she demonstrated a pattern of unprofessional behavior towards her supervisors, other employees, and patrons. Similarly, the City notes that Samuel Hollins was terminated due to his excessive absences which violated DPR's Code of Conduct. Specifically, the City points out that Hollins was absent on eight occasions during his two and one-half months working for DPR. Five of his absences were without leave ("AWOL"), while the remaining three were taken without submitting the required medical documentation. According to the City, its actions were a legitimate exercise of its managerial prerogative pursuant to § 12-307b of the NYCCBL.[5]

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[5] NYCCBL§12-307b reads, in pertinent part:
It is the right of the city, or an other public employer, acting through its agencies, . . . to 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
(continued...)

Lastly, the City argues that the Board lacks jurisdiction to interpret the meaning of collective bargaining agreements in the form of an improper practice. The City argues that by filing this petition, Dawkins-Blyden is attempting "to circumvent her failure to exercise her rights under the contractual grievance procedure without availing herself of all its steps." Since Dawkins-Blyden did not appeal from the denial of her Step II grievance regarding payment for July 17, 2000, the Board may not assist her to do so now. The more appropriate forum for the resolution of the Union's allegations is through the mechanisms provided by the contract.[6]

DISCUSSION

Dawkins-Blyden has filed two grievances: the first concerns the City's failure to pay salary for July 17, 2000, and the second asserts a claim of wrongful termination. Although the City's answer does not acknowledge that a request for arbitration has been filed for each grievance, we take administrative notice that such requests were filed with the Office of Collective Bargaining ("OCB") on January 18, 2001, and that the cases have since been consolidated for review before an arbitrator. Therefore, this Board elects to defer this matter to arbitration.

Although the nature of Dawkins-Blyden's improper practice claim and grievances are

[5](...continued)

> operations are to be conducted. . . ; and exercise complete control and discretion over its organization and the technology of performing its work.

[6] Although the requests for arbitration concerning Dawkins-Blyden's two grievances were both filed on January 18, 2001, before the City filed its answer on February 1, 2001, the answer does not make any reference to either request for arbitration.

related, they are not identical. The issues scheduled to be resolved via the grievance procedure are whether Dawkins-Blyden was entitled to receive payment for the July 17, 2000 workday and whether she was wrongfully terminated from her position. The issue presented in the improper practice petition is whether DPR interfered with and discriminated against Dawkins-Blyden in the exercise of her protected rights when it transferred and later terminated her after she filed a grievance regarding DPR's failure to pay her for one day's work.

A controversy arising out of the same set of facts may involve related but separate and distinct rights and a particular dispute may encompass rights which are derived from both the NYCCBL and the applicable collective bargaining agreement.[7] Where the contractual arbitration procedure provides an appropriate means of resolving the dispute, this Board has elected to defer the matter to arbitration.[8] Permitting a dispute to proceed first to arbitration is consistent with the declared policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."[9] We have qualified our position on this matter by stating that:

> in the event that either the issue raised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, we shall, upon demand, reassert jurisdiction in this matter to hear and determine the

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[7] *See United Prob. Officers Ass'n v. City of New York and Dep't of Prob.*, Decision No. B-38-91 at 15.

[8] *Id*.

[9] NYCCBL § 12-302

allegations of improper practice.[10]

Deferral to arbitration is appropriate only if the matter in dispute is subject to arbitration.[11] We find that this matter should be evaluated in the arbitral forum. Therefore, we will not consider the merits of the improper practice claim at this time. We will not take any action in this proceeding until an arbitrator has issued an opinion and award, or until we receive notice from the parties that the underlying matter has been resolved and the instant petition withdrawn. However, we will retain jurisdiction over the pending improper practice petition until we are able to determine whether any prospective arbitration award has resolved the improper practice charge in a manner that is consistent with the policies and provisions of the NYCCBL.

As to the Union's claim that DPR terminated another union member, Samuel Hollins, because of protected activity, we note that Hollins currently has no request for arbitration pending. Therefore, it is appropriate that we address the merits of this claim. We have previously held that the mere assertion of discrimination or retaliation is not sufficient to prove that management committed an improper practice. Rather, a petitioner must establish that protected

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[10] *Local 375, Civil Serv. Technical Guild, and Jaber v. City of New York and Dep't of Transp.,* Decision No. B-11-99 at 9; *see also United Prob. Officers Ass'n*, Decision No. B-38-91 at 16.

[11] *See Sanitation Officers Ass'n, Local 444, Serv. Employees Int'l Union v. City of New York*, Decision No. B-10-85 at 18.

union activity was the motivating factor behind the alleged discriminatory act.[12] Allegations of improper motivation must be based upon statements of probative facts, rather than on conclusions based upon surmise, conjecture or suspicion.[13]

The Union has failed to identify any protected activity undertaken by Mr. Hollins. The Union refers to only one union meeting held at St. Mary's Center sometime during July 2000 and does not state that Mr. Hollins was present at the meeting. Moreover, the petition is devoid of any other factual allegations concerning Mr. Hollins and the circumstances of his termination. We find that the claim as to Mr. Hollins is entirely conclusory, and therefore, we dismiss the portion of the improper practice claim that relates to him.

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 so much of the improper practice petition submitted by District Council 37, Local 299, that concerns Pamela Dawkins-Blyden be, and the same is, deferred until such time as an arbitrator renders a determination, and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the City of New York; and it is further

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[12] *See Uniformed Firefighters Ass'n of Greater New York v. City of New York and New York City Fire Dep't*., Decision No. B-33-97 at 13.

[13] *See Lieutenants Benevolent Ass'n v. City of New York and New York City Police Dep't*., Decision No. B-49-98 at 6.

ORDERED, that so much of the improper practice petition submitted by District Council 37, Local 299, that concerns Samuel Hollins, be, and the same hereby is, dismissed.

Dated: June 14, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER