CIR v. HHC & Metropolitan Hosp., 67 OCB 45 (BCB 2001) [Decision No. B-45-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of the Improper Practice Proceeding

-between-

COMMITTEE OF INTERNS AND RESIDENTS,
SEIU, AFL-CIO,

Decision No. B-45-2001
Docket No. BCB-2158-00

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and METROPOLITAN HOSPITAL,

Respondents.

----------x

DECISION AND ORDER

On November 3, 2000, the Committee of Interns and Residents ("CIR") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC" or "Corporation") and the Metropolitan Hospital Center ("Hospital"). CIR alleges that in violation of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Hospital failed to bargain over a mandatory subject of bargaining and retaliated against House Staff Officers ("HSOs") in July 2000 by unilaterally changing the type of form HSOs are required to sign in order to live in the Hospital dormitory, Draper Hall. Respondents argue that the change in form is not a mandatory subject of bargaining and that the change was not effected to retaliate against CIR's letter dated February

24, 2000, regarding the Hospital's attempted eviction of several HSOs from Draper Hall. This Board finds that CIR has failed to demonstrate that: (1) Respondents were required to bargain over the change in form used by Draper Hall; and (2) CIR's writing the letter to the Hospital was the type of activity protected by the NYCCBL. We therefore dismiss the petition.

BACKGROUND

The Hospital is a teaching hospital which makes available to students from the New York Podiatry Medical School, nurses, and HSOs, single rooms in Draper Hall. HSOs who choose to live in Draper Hall, have a reduced rate of pay. All individuals wishing to live in the dormitory are required to sign a form setting forth the terms and conditions of living there. In the past, the form that occupants were required to sign was called a "Room Lease."

In February 2000, the management of Draper Hall attempted to evict five HSOs for tampering with smoke detectors in violation of the Room Lease. On February 24, 2000, CIR wrote to the Hospital advising that, as a landlord, the Hospital must first initiate a court action to evict the HSOs. The Hospital's legal office agreed that the Room Lease had created a landlord/tenant relationship and that court action was required to initiate an eviction. The Hospital took no further steps to remove the HSOs from Draper Hall.

In July 2000, Draper Hall discontinued the use of the Room Lease and instituted a "Room Assignment" form, which expressly states that it is not a lease and does not confer any tenancy rights upon the occupant. CIR challenges the Hospital's unilateral adoption of the new form.

POSITIONS OF THE PARTIES

Petitioner's Position

CIR argues that Respondents' unilateral change of the Room Lease to a Room Assignment constitutes a refusal to bargain in good faith a change in the terms and conditions of employment in violation of NYCCBL §12-306a(4). CIR further claims that the change was undertaken in retaliation for CIR's successfully preventing the Hospital from evicting five HSOs from Draper Hall in violation of NYCCBL §§12-306a(1) and (3).[1]

Respondents' Position

Respondents argue that the petition must be dismissed because: (1) CIR never made a request to bargain over the change in form; (2) the new form does not involve a change in wages, hours, or conditions of employment and is therefore not a mandatory subject of bargaining; (3) the change falls within the management's rights clause of the NYCCBL;[2] (4) CIR has failed to make out a claim for retaliation; and (5) the change was motivated by legitimate business reasons

---

[1] NYCCBL§12-306a provides, in relevant part, that it shall be an improper practice for a public employer to:

> (1) interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
> (4) refuse to bargain collectively in good faith on matters within the scope of collective bargaining. . . .

[2] NYCCBL §12-307b grants the employer the right "to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees. . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. . . .

to correct the Hospital's inadvertent creation of a landlord/tenant relationship with its residents.

DISCUSSION

It is an improper practice under NYCCBL §12-306a(4) for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment.[3] The petitioner must demonstrate that the matter to be negotiated is a mandatory subject of bargaining.[4]

In *New York State Nurses Ass'n*., Decision No. B-2-73, we observed that "whether housing is a condition of employment is a question to be determined on the basis of the given circumstances of particular cases."[5] On the facts of that case, this Board held that housing was a mandatory subject of bargaining because, at a minimum, the Petitioner had demonstrated that there was a "regular and even traditional practice" of providing housing adjacent to the hospitals to the nurses.

In the instant case, we find that CIR has failed to allege any facts to support its claim that housing is a mandatory subject of bargaining. In fact, the record is devoid of any facts that describe or explain the relationship between the housing at Draper Hall and employment as a

---

[3] *See District Council 37*, Decision No. B-35-99 at 12.

[4] *See Doctors Council*, Decision No. B-21-2001 at 7.

[5] Decision No. B-2-73 at 12, citing *American Smelting and Refining Co. v. NLRB*, 406 F.2d 552, 70 LRRM 2409 (9th Cir.1969), *cert. denied*, 395 U.S. 935, 71 LRRM 2328 (1969).

HSO. The only evidence before us is that housing in Draper Hall is available to HSOs and a variety of other Hospital staff, the collective bargaining agreement specifies an amount by which the HSOs' annual pay will be reduced if they choose to live in Draper Hall,[6] and there was a change in the form which HSOs are required to sign in order to obtain a room assignment. We find that this evidence is insufficient to support Petitioner's claim that housing is a mandatory subject of bargaining. CIR's reliance on *CSEA*, 23 PERB ¶ 4525 (1990), and *American Smelting and Refining Co.*, 174 NLRB 764 (1969) is misplaced because these cases concern the unilateral increase in rents charged by an employer for employee housing. Accordingly, we find that the Hospital's unilateral change in the Room Assignment Form did not violate §12-306a(4) of the NYCCBL.

With regard to CIR's claim that the Hospital changed the form in retaliation for CIR's successfully preventing it from evicting the HSOs, this Board looks to the standard set forth by PERB in *City of Salamanca,* 18 PERB ¶ 3012 (1985), and adopted in *Bowman,* Decision No. B-51-87.[7] However, a prerequisite to analysis under this standard is a finding that the purported union activity is of the type protected by our law.[8] The mere fact that a union or its members

---

[6] Art. IV, § 5(b) of the parties collective bargaining agreement provides: "[i]n those instances where housing is provided by the Corporation to HSOs, the annual rates indicated [herein] shall be reduced . . . ."

[7] In cases in which the employer's motivation is at issue, a petitioner must show 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.

[8] *See District Council 37,* Decision No. B-30-99 at 15; *Archibald*, Decision No. B-38-96 at 17.

may have engaged in activity of any kind does not guarantee protection under the NYCCBL.[9] The NYCCBL protects only those activities pertaining to the employment relationship.[10] Failure to demonstrate evidence of protected activity removes a claim of retaliation from the Board's jurisdiction as a matter of law.[11]

In *Nelson*, Decision No. B-16-92, this Board found that a letter from a shop steward to a public employer concerning abusive treatment by a supervisor toward a co-worker did not constitute evidence of protected activity. We denied a claim of improper practice because the letter did not constitute union-sponsored or union-related activity but was only a memo that would become a grievance "when the union back[ed] it up." The union never filed a grievance.

Here, we must determine whether CIR's act of writing a letter on behalf of HSOs advising that, as a landlord, the Hospital must first initiate a court action to evict its occupants was protected under our statute. Clearly, the letter was written as a warning that legal action would be taken if the "Hospital chooses to ignore the law and uses self-help to evict house staff in violation of the clear language of the Unlawful Eviction statute." (Answer, Exhibit C.) CIR asserted a violation of a statute other than the NYCCBL and did not claim a violation of the collective bargaining agreement. CIR never filed a grievance, and when the Hospital determined that the Room Lease had indeed created a landlord/tenant relationship which required court action, no further steps were taken to remove the HSOs from Draper Hall. Because the letter was

---

[9] *District Council 37,* Decision No. B-30-99 at 15; *see also Unif. Firefighters' Ass'n*, Decision No. B-4-92 at 11.

[10] *Archibald,* Decision No. B-38-96 at 17.

[11] *District Council 37,* Decision No. B-30-99 at 15.

written to protect the HSOs' tenancy rights as created by the Room Lease and not the HSOs' employment rights, we find that the writing of the letter does not constitute protected activity within the purview of the NYCCBL. In this regard, we note that concerted activity that falls short of the exercise of rights enumerated in NYCCBL §12-305[12] does not support a claim of protected activity.[13]

For want of the required protected activity, we find no violation of NYCCBL § 12-306a(1) and (3) and need not reach the other issues which the *Salamanca* test would require us to address in claims of retaliation and improper motive.

---

[12] NYCCBL §12-305 sets forth the rights of public employees and certified employee organizations to form, join and organize public employee organizations, to bargain collectively, and the right to refrain from so doing.

[13] *See Local 1182, CWA*, Decision No. B-8-96 at 6-7, 10*; DeChabert*, Decision No. B-17-91 at 8-12; *see also Dutchess Cmty. Coll.*, 17 PERB ¶3093 (1984), *aff'd sub. nom. Rosen v. PERB*, 72 N.Y.2d 42, 530 N.Y.S.2d 534 (1988).

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 CIR in the matter docketed as BCB-2158-00 be, and the same hereby is, denied in its entirety.

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

I Dissent: BRUCE H. SIMON
MEMBER

I Dissent: CHARLES G. MOERDLER
MEMBER