L. 237, CSBA v. City & HPD, 67 OCB 46 (BCB 2001) [Decision No. B-46-2001 (IP)]

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

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Decision No. B-46-2001
Docket No. BCB-2132-01

Petitioner,

-and-

THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT,

Respondents.
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DECISION AND ORDER

On April 14, 2000, the Civil Service Bar Association, Local 237 ("CSBA" or "Union") filed a verified Improper Practice Petition alleging that the City of New York and the New York City Department of Housing Preservation and Development ("City" or "HPD") assigned a Union member to a menial position as punishment for being an effective advocate on behalf of the Union. The Union claims that the City'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"). Because the Board finds that Petitioner did not show that the City discriminated against petitioner for participating in protected activity, the petition is dismissed.

BACKGROUND

Abbott Gorin has been an employee of HPD's Housing Litigation Bureau since 1978. Gorin currently works in the title "Attorney at Law, Assignment Level III" ("Level III Attorney"). The Union contends that Gorin has been a persistent advocate of the collective bargaining rights of HPD attorneys since his employment with the agency. On June 28, 1999, Gorin filed a grievance with the Director of Personnel for HPD, protesting the assignment of a lower-level attorney to a position as Gorin's supervisor. The Union asserts that HPD consistently refused to respond to Gorin's grievance, but did not forget about it because Assistant Commissioner Elizabeth Bolden mentioned the grievance at a meeting with Gorin in December 1999. The Union alleges that at that meeting, which occurred shortly after Gorin criticized his supervisor for what Gorin believed to be perfunctory case preparation, Bolden told Gorin that she believed Gorin's complaints were connected to his grievance and were frivolous.

On February 22, 2000, Gorin was selected to work in the Housing Court/HPD Collaboration department dealing with *pro se* litigation as HPD's representative. Earlier in February, HPD offered the position to Gorin and framed the transfer as a positive development in Gorin's career. According to the Union, Gorin strenuously denied the characterization of the transfer as a positive development and indicated that he would accept the position only when directed to report in writing.

The Union asserts that in the new position, Gorin has not received any support: he lacks a desk and a word processor; access to a dedicated telephone line, a photocopier and the HPD computer network; and has no clerical support. The Union also contends that HPD has not provided Gorin with a clear statement of his duties and responsibilities and has not provided any guidance concerning potential conflicts of interest he may face in providing advice to tenants living

in properties managed by HPD. The City contends that Gorin was provided with information regarding his duties and responsibilities and, after an initial set-up period, Gorin was provided with the office necessities listed above.

POSITIONS OF THE PARTIES

Union's Position

According to the Union, the position to which Gorin was assigned is a sham and his reassignment is clearly intended as a punishment. The Union contends that the duties of the *pro se* liaison position are not Level III Attorney work because he is not expected to play any continued role in litigation brought by the *pro se* tenants he advises, and the issues he typically addresses are neither legally nor factually complicated. Additionally, Gorin was invited to appear on television to discuss housing issues. The producer of the show contacted HPD after Gorin failed to receive a response to his request for permission to appear, and was told that HPD would find a more suitable attorney to appear on the program.

HPD's refusal to answer Gorin's grievance and its punitive reassignment has acted to chill employee assertions of collective bargaining rights at HPD and is inherently destructive of employee rights. Since the Union has shown that the agents responsible for the transfer had knowledge of Gorin's grievance, that his working conditions are poor, and that there is no precedent to assign an attorney with Gorin's experience to this type of position, the Board can infer that HPD was improperly motivated to penalize Gorin.

City's Position

The City contends that the petition is untimely and must be dismissed since the relevant

events occurred more than four months ago. Also, the matters complained of here were raised as grievance claims and are proceeding through the contractual grievance process. Although Gorin complains that he did not receive a Step I or Step II response in a timely manner, the contract allows the grievance to be brought to the next step even if a response is not issued in a timely manner. Also, the City contends that this claim is more appropriately addressed, if at all, through the grievance process.

Petitioner has failed to state a prima facie case of improper practice under § 12-306a (1) and (3) of the NYCCBL. First, Petitioner has failed to show that he was engaged in union activity that falls within the protection of the NYCCBL. The union activity relied upon here – the right to file grievances – is a right provided by the contract and merely reflects a discretionary right in accordance with a contract provision. Second, Petitioner has indicated only through conjecture and surmise that the delayed response to Gorin's grievance, his new assignment, or the selection of supervisors was motivated by anti-union animus.

Finally, HPD's actions were motivated by legitimate business reasons and constitute a legitimate exercise of managerial prerogative. The City contends that since the new *pro se* liaison program is a pilot program that requires independent action, advanced legal skills, and the ability to give quality guidance to a *pro se* litigant, an experienced Level III Attorney was required to fill the position. The City also contends that HPD selected Gorin for the position because he possessed the necessary background to make the program a success. Although Gorin is apparently unhappy with the assignment, his discontent does not make the managerial decision an improper practice.

DISCUSSION

The four-month limitation period described in Title 61, § 1-07(d) of the Rules of the Office

of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) bars our consideration of untimely filed improper practice allegations. Many of the allegations in the petition occurred outside the four-month limitation period and will be considered only in the context of background information rather than as a specific violation of the NYCCBL.[1] The remaining allegation – that Gorin was placed in the *pro se* liaison position in retaliation for filing a grievance and being an effective union advocate — must be denied because it is supported only by speculative and conclusory assertions. However, we disagree with the City's contention that this claim is more appropriately addressed through the grievance process.

It is an improper practice under § 12-306a of the NYCCBL for a public employer or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in § 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 participation in the activities of, any public organization. . . .

When a petitioner alleges a violation of § 12-306a (1) and (3) of the NYCCBL, we apply the test promulgated by the Public Employment Relations Board ("PERB") in *City of Salamanca*, 18 PERB ¶ 3012 (1985) and adopted by this Board in *Bowman*, Decision No. B-51-87. This test provides that the petitioner has the burden of showing 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.

In order to satisfy this burden, the petitioner must set forth specific allegations of fact that

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[1] *Echevarria,* Decision No. B-28-89.

demonstrate at least an arguable basis for an improper practice claim.[2] Allegations of improper motivation must be based on statements of probative facts, rather than recitals of conjecture, speculation and surmise. [3] If a petitioner fails to establish either element, our inquiry ends, and the employer need not attempt to demonstrate that its actions were motivated by a reason not prohibited under the NYCCBL[4].

Contrary to the City's claims, filing a grievance has long been considered activity protected by the NYCCBL.[5] The City also knew of Gorin's grievance. Although petitioner presented sufficient evidence to fulfill the first prong of the test, we find that Petitioner's allegations are insufficient to support a claim of improper motivation.

Petitioner contends that HPD was aware of his dedicated union advocacy and his grievance, but those facts do not provide the necessary causal link between petitioner's protected activity and the actions of the respondent. In *Procida,* Decision No. B-2-87, we stated that the "mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity . . . , does not state a violation of the NYCCBL where no casual connection has been demonstrated."[6] Also, the fact that an employee has filed grievances is not a sufficient basis for a finding that an employer has acted with improper motive.[7] In the absence of any evidence other than the Union's conclusory

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[2] *Kelly,* Decision No. B-38-88.

[3] *Echevarria,* Decision No. B-28-89.

[4] *Id.*

[5] *See, e.g., Doctors Council*, Decision No. B-12-97.

[6] Decision No. B-2-87 at 13.

[7] *DeJusus,* Decision No. B-18-86.

allegations, this Board will dismiss the improper practice petition 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 filed herein be, and the same hereby is, denied in relation to the alleged violation of § 12-306a (1) and (3).

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER