Colella v. City & FDNY, 67 OCB 49 (BCB 2001) [Decision No. B-49-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

BRIAN COLELLA,

Petitioner,

Decision No. B-49-2001
Docket No. BCB-2146-00

-and-

CITY OF NEW YORK AND NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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DECISION AND ORDER

On August 17, 2000, Brian Colella filed a verified improper practice petition against the New York City Fire Department ("FDNY" or "Department"). Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Department wrongfully disciplined him in retaliation for filing two grievances. Respondents argue that the Department initiated disciplinary action against Petitioner because of repeated instances of misconduct. For the reasons stated below, we dismiss the improper practice petition.

BACKGROUND

Brian Colella is an Electrician who has been an employee of the Department's Buildings Maintenance Division ("BMD") since July 1989. BMD Electricians perform work in Fire Department facilities throughout the City. Electricians pick up a Department vehicle each

morning at their "reporting location" and travel to their assigned work location. They are responsible for returning the vehicle at the end of each work day so that it is available for use the following day. Electricians receive their assignments either the night before or the morning of a scheduled work day. The Department contacts its electricians via pagers; each electrician is assigned a pager and is required to promptly respond to a page when it is received. Petitioner's reporting location was in Seaview.

According to the Department, on February 23, 2000, Frankie DelGaudio, Acting Supervisor of Electricians, contacted Petitioner at Seaview via pager to notify him of his new job assignment scheduled for February 24. Petitioner did not respond to the page and DelGaudio faxed Petitioner his new assignment accompanied by directions. On the morning of February 24, DelGuadio called Petitioner to confirm that he received the directions. Petitioner said he had not and DelGuadio faxed them again. Petitioner confirmed receipt of the fax with DelGaudio.

Later on February 24, 2000, Joseph Mastropietro, Director of BMD, went to Petitioner's newly assigned work site and found that Petitioner was not present. When Director Mastropietro paged Petitioner to discover his whereabouts, Petitioner said he had returned to Department Headquarters on 58th Street because he was "lost and riding around for a while." Mastropietro told Petitioner that his reporting location was changed to Long Island City ("LIC") (instead of Seaview BMD) effective immediately. Mastropietro explained that Petitioner's conduct would be closely monitored at the LIC site. As a result, Petitioner had to return his Department vehicle that day to Long Island City during working hours so that it would be available to him the next day. Petitioner's response to Mastropietro was "Why don't you come here and pick up my van yourself?" and "Why don't you be a man about it and come here and tell me face to face."

Mastropietro paged Petitioner again to reiterate his instructions, but Petitioner did not return his page. At 11 a.m. Petitioner informed Supervisor DelGaudio that he was going home sick. Journal entries for February 24 reveal that Petitioner did not sign out until 1 p.m. Petitioner's vehicle was never returned to LIC, his new reporting location, as per Mastropietro's instructions. By letter dated March 1, 2000, from Department Advocate of the Bureau of Investigations and Trials, Hal Brager, Petitioner was pre-disciplinarily suspended pursuant to § 75 of the Civil Service Law ("CSL") from March 1, 2000 until March 30, 2000. The suspension was based upon Petitioner's misconduct of February 24.

On March 1, 2000, Petitioner reported to work at Long Island City and was told by Supervisor Anthony Bianchino that he was not permitted on Department property because he was suspended. Petitioner left with his unauthorized Department vehicle and drove to his previous reporting location in Seaview where he was again instructed to leave the premises. Petitioner left and served his suspension time. Petitioner was absent on March 31, 2000, when he was supposed to resume working. He submitted a doctor's note that was later charged as a fraudulent document.

Upon his return to work on April 1, Petitioner continued to report to Seaview, his old reporting location. On April 11, Supervisor Bianchino told Petitioner that his continued reporting to Seaview is unacceptable, and that he must report to Long Island City in the future. That same day, during work hours, Director Mastropietro and Supervisor Bianchino found Petitioner sitting in his Department vehicle working on his time sheets. By letters dated April 11 and April 12, Mastropietro wrote to Assistant Commissioner of the Bureau of Investigations and Trials, Lai Sun Yee, regarding the April 11 incident and recommended that Petitioner be

suspended. By letter dated May 2, Petitioner was pre-disciplinarily suspended for a second time from May 3 until June 1, 2000 based on his April 12 misconduct.[1]

By letter dated June 1, 2000, from the Department Advocate of Investigations and Trials, Petitioner was served with the following five formal disciplinary charges:

> 1. Failure to obey an order
> On February 24, 2000, Electrician Brian Colella, Buildings Unit, violated Chapter 1, Section 6, of the Civilian Code of Conduct in that, he refused an order from his supervisor to return his Department vehicle to the 58th street location.
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> 2. Conduct Unbecoming
> On February 24, 2000, at approximately 1030 hours, Electrician Brian Colella, Buildings Unit, violated Chapter 1, Section 6, of the Civilian Code of Conduct in that, he verbally threatened his supervisor while speaking to him on the telephone.
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> 3. Failure to obey an order
> On April 11, 2000, Electrician Brian Colella, Buildings Unit, violated Chapter 1, Section 6, of the Civilian Code of Conduct in that, he refused an order from his supervisor to regarding his new reporting time and location.
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> 4. Falsification of medical documentation
> On April 10, 2000, Electrician Brian Colella, Buildings Unit, violated Chapter 1, Section 6, of the Civilian Code of Conduct in that, he submitted a false physician's note for his absence on March 31, 2000.
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> 5. Theft of Department property
> On March 1, 2000, Electrician Brian Colella, Buildings Unit, violated Chapter 1, Section 6, of the Civilian Code of Conduct in that, without the authority or authorization to do so, he removed two locks from the rear and side doors of his Department vehicle.

Petitioner generally denies Respondent's allegations concerning his conduct. He asserts that he called Supervisor DelGuadio on February 24, and informed him that he could not find his

[1] The April 12 date was a typographical error that the Department subsequently corrected when it issued its June 1 formal disciplinary charges. Petitioner was actually suspended because of his misconduct of April 11.

assigned work site. DelGuadio instructed Petitioner to travel to 58th Street[2] and meet him in a nearby diner. Petitioner denies that he verbally threatened Director Mastropietro when he was told that he should report to LIC and that his behavior would be monitored. Furthermore, in regard to the fifth disciplinary charge of theft, Petitioner claims that many electricians remove locks from the rear and side doors of their Department vehicle and that management knows and consents to this practice.

POSITIONS OF THE PARTIES

Petitioner's Position

Respondents retaliated against Petitioner for filing grievances in violation of NYCCBL §12-306a(1) and (3).[3] Specifically, Petitioner asserts that he was twice suspended and later served with formal charges on June 1 because of two grievances he filed; one was filed on March 10, 2000, regarding the Department's failure to serve him with charges before his March 1 suspension, and the second was filed on April 10, and concerned his request for compensation for the three hours Petitioner was present at work on March 1.

Petitioner's Reply also refers to three other grievances filed several years earlier; he argues that although the events occurred outside the four month statute of limitations, the Board

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[2] The 58th Street location was a common central location where several Department Electricians would check in at various times during the workday.

[3] 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;
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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.

may consider them as background evidence to prove that the Department retaliated against Petitioner because he engaged in protected activity. The first grievance was a group grievance filed in 1993; the second, filed in June 1998, involved an allegation that Petitioner was being harassed by a shop steward and was dismissed; and the third grievance, filed in July 1998, concerned an overtime payment and was dismissed.

Petitioner asserts that Respondents created and falsified the reasons for his second suspension. According to Petitioner, the reason provided in the May 2nd letter Petitioner received was that disciplinary action would be taken because of his April 12 misconduct. While Petitioner was involved in an incident on April 11, he did not work on April 12.

Lastly, Petitioner claims that he was wrongfully disciplined in violation of Article V, §1(e) of the parties' collective bargaining agreement ("CBA").

Respondent's Position

Respondent argues that the petition should be dismissed because: (1) Petitioner's allegations are untimely; (2) Petitioner has failed to make out a claim for retaliation; (3) the disciplinary action taken against Petitioner was a reasonable and proper exercise of management rights; (4) the Board lacks jurisdiction over the alleged contract violation (wrongful discipline).

DISCUSSION

The Board may not consider any claimed violation of the NYCCBL that occurred more than four months prior to the filing of this improper practice petition.[4] In this case, Petitioner filed the improper practice petition on August 17, 2000. Therefore, only claims involving events that occurred after April 17, 2000, will be deemed to be timely. Allegations regarding events that

[4] NYCCBL § 12-306(e); OCB Rule § 1-07(d); *see Stepan*, Decision No. B-11-2000 at 5.

occurred prior to April 17, (i.e., Petitioner's first suspension on March 1, 2000) will be considered only in the context of background information rather than as a specific violation of the NYCCBL.[5]

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

> (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 an alleged discrimination or retaliation violates § 12-306a(3), this Board applies the test enunciated in *City of Salamanca,*18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must prove that the employer's agent had knowledge of the employee's union activity and that such activity was a motivating factor in the employer's action. The employer may refute the Petitioner's showing or demonstrate legitimate motives that would have caused the employer to take the action complained of even in the absence of the protected activity.

In light of the early grievances Petitioner filed (1993, June 1998, and July 1998), we find that there is sufficient evidence to establish the first prong of the *Salamanca* test in that the Department was or should have been aware of Petitioner's past union activity. However, as to the second prong of the test, merely alleging improper motive does not state a violation in the absence of allegations of fact establishing the requisite causal link between the underlying management act complained of and the protected union activity.[6] In the instant case, the record is devoid of allegations of fact that would even suggest that the Department was motivated to

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[5] *See Krumholz*, Decision No. B-21-93 at 11; *Dorham*, Decision No. B-25-84 at 4.

[6] *See Procida*, Decision No. B-2-87 at 13.

suspend Petitioner on March 1, 2000, and again on May 3, 2000, because of grievances he filed between 1993 and 1998. Under these circumstances, Petitioner has not established the necessary improper motivation as required under the second prong of *Salamanca*.

To the extent that Petitioner alleges that his suspensions were in retaliation for grievances that he filed in the year 2000, we find that as to his March 1 suspension, even if it were timely raised, the Department could not have known about the grievance he filed on March 10 since it was filed several days after the Department had already initiated disciplinary action and suspended Petitioner. Therefore, we would find that Petitioner has failed to demonstrate the first prong of the *Salamanca* test, as to his March 1 suspension.

Regarding Petitioner's last grievance filed on April 10, 2000, we do not find any probative allegations of fact to support Petitioner's claim that filing this grievance resulted in his second suspension of May 3. Instead, we find that the Department has submitted detailed factual allegations of repeated incidents involving Petitioner's failure to follow directions, which it viewed as acts of misconduct, and which we are satisfied constituted the basis on which the Petitioner was suspended. In fact, it appears that both of Petitioner's suspensions were direct consequences of what the Department believed was his repeated failure to follow directions, starting with the events of February 24, 2000. Thus, Petitioner has failed to show the necessary causal link between the April 10 grievance and his second suspension.

Lastly, this Board has no jurisdiction over Petitioner's claim that he was wrongfully disciplined in violation of Article V, §1(e) of the parties' CBA. His recourse for an alleged

contract violation lies in the parties' grievance and arbitration procedure.[7]

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 as BCB-2146-00 be, and the same hereby is, dismissed in its entirety.

Dated: December 18, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GABRIELLE SEMEL
MEMBER

EUGENE MITTELMAN
MEMBER

[7] *See Local 1182, Communications Workers of America*, Decision No. B-14-95 at 10; *James LaRiviere*, Decision No. B-36-87 at 9.