L. 420, DC 37 v. HHC & Sea View Hospital, 69 OCB 11 (BCB 2002) [Decision No. B-11-2002 (IP)]

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

-between-

LOCAL 420, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND SEA VIEW HOSPITAL REHABILITATION CENTER AND HOME,

Respondents.
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Decision No. B-11-2002
Docket No. BCB-2220-01

DECISION AND ORDER

District Council 37 ("Union") filed a verified improper practice petition on June 8, 2001, against the New York City Health and Hospitals Corporation ("HHC") and Sea View Hospital alleging four violations of § 12-306a of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). First, the Union argues that when the hearing officer refused to permit more than one union representative to speak on Eric Cantres's behalf, HHC interfered with Cantres's § 12-305 rights to form, join or assist in Union activities. Second, the Union claims that HHC interfered with the Union's ability to represent Cantres adequately when the hearing officer ordered Cantres to leave the room because of an allegedly threatening statement he made. Third, the Union alleges that because Cantres contested disciplinary charges filed against him at an informal conference, HHC retaliated against him by

refusing to allow more than one union representative to speak at that conference on his behalf. Lastly, the Union asserts that HHC retaliated against Cantres by preferring additional charges against him because of a statement he made during the proceeding. For the reasons set forth below, the Union's petition is dismissed in part and granted in part.

BACKGROUND

On March 21, 2001, Jeanne Harvey, Sea View's Associate Director of Facility Affairs, conducted an informal conference to address disciplinary charges brought against Eric Cantres, an Institutional Aide at Sea View. Belford Whitted, Cantres's designated union representative, and Georgianna Neller, Chairperson for Local 420, were also present at the conference. Whitted spoke on behalf of Cantres for approximately one hour. After indicating that he had nothing more to add, Whitted requested that Neller be afforded an opportunity to speak for Cantres. Harvey reminded Whitted of their agreement to have only one union representative talk on behalf of a union member, and stated that Neller would not have the opportunity to present additional information.[1] Following Harvey's refusal, the parties do not dispute that Cantres said to Harvey, "You better not file any false paperwork on me." HHC claims that Harvey asked Cantres if he was threatening her and that he replied in the affirmative. Harvey asked Cantres to leave the room. Shortly thereafter, the meeting ended.

The record does not indicate the outcome of the proceeding, and there is no evidence that any further charges were brought against Cantres after the informal conference.

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[1] According to HHC, approximately one year earlier, Harvey and Whitted verbally agreed that in order to maintain proper decorum and use time efficiently during informal conferences, only one union representative would speak for the Local 420 member. The Union contends that Harvey and Whitted never made any agreement.

POSITIONS OF THE PARTIES

Petitioner's Position

According to the Union, Whitted and Harvey never agreed that only one union representative would speak on behalf of a union member at a scheduled informal conference. On March 21, 2001, Neller was present to observe the proceeding in her capacity as Chairperson of Local 420, and to act as an additional union representative for Cantres. The Union argues that in violation of NYCCBL §12-306a,[2] HHC retaliated against Cantres for exercising his rights by refusing to permit Neller to speak on his behalf. The Union also claims that HHC preferred additional charges against Cantres in retaliation for the statement he made at the end of the meeting; the Union provides no specific details to support this allegation.

The Union alleges that Harvey interfered with the Union's ability to represent Cantres adequately by removing him from the proceeding and argues that HHC interfered with Cantres's rights when the hearing officer permitted only one union representative to speak on his behalf.

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[2] 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;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (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. . . .
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> §12-305 Rights of public employees and certified employee organizations.
> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

Respondents Position

Respondents argue that the petition should be dismissed because the Union's allegations are insufficient to prove retaliation since no further charges have been brought against Cantres since March 21, 2001. Moreover, Harvey's refusal to allow two representatives to speak on behalf of one employee was not discriminatory, but motivated by her desire to maintain proper decorum, use time efficiently, and was consistent with Article VI, Section V, of the parties' collective bargaining agreement regarding informal conferences. That provision states: "The employee may be represented at such conference by *a representative* of the Union. *The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges* . . ." (emphasis added).

Respondents also argue that Harvey did not seek to interfere with Cantres's rights and did not interfere with the Union's ability to represent one of its members and, therefore, the Union has failed to demonstrate a violation of NYCCBL § 12-306a(1) and (2).

DISCUSSION

______The issue here concerns Harvey's refusal to allow more than one representative to speak on Cantres's behalf during the informal conference without her having established any "ground rules" prior to the start of the proceeding. We find under the facts as presented here that Harvey's action constitutes interference with the employee's rights under NYCCBL § 12-306a(1). In the present case, both Whitted and Neller appeared at the commencement of the conference without objection from HHC. The hearing officer did not, at the outset of the hearing, discuss the time provided for the union representatives or make reference to the number

of speakers permitted. After Whitted spoke for one hour, he requested that Neller be permitted to speak. HHC admits that at this point, Harvey prohibited Neller from providing any additional information on Cantres's behalf. HHC did not provide any evidence to show that permitting Neller to speak would have unnecessarily delayed or disrupted the informal conference proceeding. Furthermore, while HHC's papers allege that the hearing officer believed that the parties verbally agreed that only one union representative would speak on behalf of a union member, a fact the Union disputes, HHC has failed to submit any specific factual allegations or other evidence to support this claim. We realize that HHC has a legitimate interest in the orderly conduct of grievances at this step of the process. However, in this case, there was only one other person waiting to be heard and no indication that she would unduly delay the proceeding. Under these circumstances, HHC's refusal to permit Neller to speak at all interfered with Cantres's rights under § 12-306a(1).[3]

As for the Union's claim that HHC violated NYCCBL §12-306a(2), the record is devoid of any facts to suggest that Harvey interfered with the Union's ability to represent its client adequately when she ordered Cantres to leave the conference room. It is undisputed that Cantres was ordered to leave *after* Whitted had spoken on his client's behalf for one hour and that Cantres's leaving the room was in response to what Harvey perceived to be a threatening remark. Further, the meeting was promptly concluded after Cantres departed. Therefore, we do not find that Harvey's order was intended to, or that it did in fact, interfere with the Union's rights and duties under the NYCCBL.

[3] *Cf. Lehman*, Decision No. B-23-82 ("An attempt by an employer to decide which union representatives if chooses to deal with in connection with contractual grievances would be inimical to the rights of employees and to the entire collective bargaining process").

We will next address the Union's two allegations of retaliatory conduct. It is an improper practice under NYCCBL §12-306a(3) for a public employer or its agents: "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 a § 12-306a(3) violation exists, 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 first, that the employer's agent had knowledge of the employee's union activity and if so, that such activity was a motivating factor in the employer's action. 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. *See Ottey,* Decision No. B-19-01 at 11; *Procida*, Decision No. B-2-87 at 13. If a petitioner satisfies both elements of that test, the employer may attempt to 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.______

______The Union has alleged that Harvey retaliated against Cantres for exercising his rights under § 12-305 when she refused to allow Neller to speak on his behalf. Since the alleged activity occurred during Cantres's participation in the informal conference proceeding, a union activity, we find that there is sufficient evidence to establish the first prong of the *Salamanca* test. However, in regard to the second prong, nothing in the record indicates that Harvey prohibited Neller from speaking on Cantres's behalf in order to retaliate against Cantres for exercising his rights. Indeed, Whitted was afforded ample opportunity to present his case. We

are satisfied that Harvey's decision to have only one union representative speak on behalf of Cantres was not motivated by a desire to punish Cantres for exercising his right to an informal conference. Under these circumstances, Petitioner's conclusory allegations of retaliatory motive are insufficient to support a claim of improper motivation as required under the second prong of *Salamanca*.

Finally, Petitioner claims that after the March 21, 2001, informal conference, HHC preferred additional charges against Cantres in retaliation for the statement he made at the meeting: "You better not file any false paperwork on me." HHC denies that any further charges were filed. Since Petitioner has failed to provide any details to support this allegation, it is dismissed.

Therefore, the Union's improper practice petition is granted only to the extent that we find that HHC interfered with the rights of Eric Cantres by not permitting more than one representative to speak on his behalf.

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-2220-01 be, and the same hereby is, granted to the extent that HHC's refusal to allow more than one representative to speak on behalf of union member Cantres in the circumstances of this case constitutes an improper practice, and it is

FURTHER ORDERED, that HHC and Sea View Hospital cease and desist from interfering with Cantres's right to be represented by the Union.

Dated: March 20, 2002
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER