Frink v. HHC, Harlem Hosp. Ctr., Perez & Ochoa, 71 OCB 21 (BCB 2003) [Decision No. B-21-2003 (IP)]

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

-between-

Decision No. B-21-2003
Docket No. BCB-2315-02

ANGELA V. FRINK,

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and HARLEM HOSPITAL CENTER, LYDIA PEREZ, and OSWALD OCHOA,

Respondents.
----------x

DECISION AND ORDER

On December 11, 2002, Angela V. Frink, *pro se*, filed a verified improper practice petition against the New York City Health and Hospitals Corporation, the Harlem Hospital Center ("HHC" or "Center"), Lydia Perez, and Oswald Ochoa. Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), HHC denied her request for union representation during a meeting with management and retaliated against her for her protected union activity. HHC argues that Petitioner failed to state a *prima facie* case and to allege facts to support a charge of improper practice. This Board finds that because Petitioner's claim that she was denied union representation is based on contractual provisions, it is not properly before us. The Board also dismisses the retaliation claims because Petitioner has not

shown that HHC retaliated against her for engaging in union activities.

BACKGROUND

Frink is a Special Officer who has been employed by HHC since October 20, 1991. She is assigned to work at the Harlem Hospital Center. Special Officers at the Center are represented by City Employees Union, Local 237 ("Union").[1]

According to Frink, from September 2001 to January 2002, there were no on-site shop stewards at the Center, and Special Officers employed there were concerned that disciplinary/counseling meetings were being conducted without union representation. She states that she was involved in circulating a petition to elect on-site shop stewards and that she signed the petition. After the petition was forwarded to the Union on January 7, 2002, two shop stewards were elected to represent the interests of the officers at the Center.

On April 10, 2002, Frink was given a warning notice concerning her "Uniform Grooming" and was advised to appear before Sergeant Lee on April 24, 2002. The notice informed her that a union representative could be present. HHC had attempted to schedule a counseling session four times since February 2002 but had been unable to do so due to the lack of available union representation. On April 24, 2002, the counseling session was held with Lee, Petitioner, and a union representative. Lee discussed Frink's uniform appearance and observed that it had improved. An internal memorandum prepared by Lee regarding the meeting noted that Frink agreed to continue to improve her uniform appearance.

On September 2, 2002, Frink was called to speak to Director of Hospital Police, Lydia

[1] The Union is not a party in the instant proceeding.

Perez, who is responsible for reviewing and signing all timesheets at the Center. Frink states that she did not know why she was being called. Frink met with Perez and Lieutenant Oswald Ochoa on September 4, 2002, in Perez's office. According to HHC, Perez asked Frink if she wanted union representation. Frink inquired whether she was being counseled and was informed that the meeting was informal. Frink does not deny that she agreed to proceed without union representation.

Perez questioned Frink about a discrepancy regarding her timesheet. Frink explained that she had been in court and showed them her memo book. It is undisputed that the issue was resolved. According to Frink, as she was getting up to leave, Perez summoned her back to discuss another issue. When Frink asked whether it was a counseling issue, Perez and Ochoa ignored her and Ochoa whispered into Perez's ear. Perez then spoke to Frink about her uniform appearance. Frink claims that at this time she requested union representation, but the request was ignored. Frink does not describe what happened after her request but claims that she refused to sign papers that were presented to her. Nothing in the record indicates the subject matter of these papers. According to HHC, this part of the meeting was not a counseling session about Petitioner's uniform but an informal meeting in which Perez informed Frink of the uniform policy and the purpose of the uniform allowance. HHC claims that the Center does not perform counseling sessions with employees without giving them the opportunity to have union representation, and Petitioner, aware of this practice, has availed herself of this opportunity in the past.

Frink requested that the meeting be documented, and Perez wrote the following in her

memo book:

> 1738 met with P/O Frink to discuss uniform appearance – uniform not to par – Noted deficiency are [sic] tie clip needed clean shirt stains on shirt, pants faded Notations made on profile counseling held with no corrections. Officer instructed must report to duty on next tour of duty in proper uniform or she will be sent home.

According to Frink, upon leaving the meeting, she requested the central operations unit, via phone and radio, to keep an official log of the meeting. According to HHC, Frink stated over her portable radio that she was threatened by the department director and her lieutenant.

After the radio incident, Frink was asked to report to her supervisor. HHC claims that Frink stated that she was on a meal break and refused to report to her supervisor, an allegation Frink denies. The record does not indicate whether Frink reported to her supervisor. Frink was subsequently brought up on charges for misuse of her radio and insubordination for failure to report immediately to her supervisor's office regarding this misuse.

According to Petitioner, on September 16, 2002, she filed a grievance "with both respondents" (who are not identified), and the Union regarding the alleged denial of union representation and the charges against her. She claims that the respondents never gave a formal reply, and the Union gave a reply but about entirely different issues. Petitioner provides a document dated September 16, 2002, which appears to be addressed to the Union and describes the incidents of September 4, 2002. Petitioner does not indicate that this is the grievance that she allegedly filed. HHC states that it has no record that a grievance was ever filed. Nothing in the record reveals the manner in which Petitioner may have filed her grievance or that any grievance was ever processed.

On October 8, 2002, a Step 1(a) disciplinary conference was held regarding the charges against Frink for misuse of a radio unit and insubordination. Present at the conference were Ochoa, Gregory Bullock, Assistant Director for Hospital Police, and two representatives from the Union: Noreen Hollingsworth, Business Agent for Local 237, and Deborah Edwards, Shop Steward. According to Frink, Bullock asked to have Edwards removed from the meeting because she was not officially on duty, and the Hearing Officer agreed. Frink also claims that her memo booklet was confiscated because both Bullock and the Hearing Officer thought it looked altered. Frink claims that the booklet was taken because it contained evidence to sustain an improper practice. Following a hearing, the Hearing Officer recommended the penalty of a fifteen workday suspension.

On October 24, 2002, Frink received her performance evaluation, dated October 1, 2002, from Perez and Ochoa. She refused to sign it. Frink was given an overall evaluation of "Needs Improvement (Below Standard)." The justification for this evaluation states, in part: "P.O. Frink has made unauthorized announcements over her portable radio. The officer was sent home by Hosp Administrator for not following proper guidelines as it pertains to corporate issue communication device this action cause [sic] unnecessary overtime. . . ." Ochoa also made a notation stating that Petitioner had abandoned a prisoner while she was on watch on August 27, 2002. Frink alleges that on October 29, 2002, she sent a complaint regarding the evaluation to Ochoa and Perez, and after receiving no response, forwarded it to HHC's "investigation unit," where the matter is currently under investigation.

Frink requests the Board to grant her improper practice petition and "to have an

independent arbitrator to ensure that . . . citywide collective bargaining agreements are adhered to."

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that in violation of NYCCBL § 12-306(a)(1) and (3),[2] HHC retaliated against her for her Union activity and that in violation of the parties' citywide collective bargaining agreement ("Agreement"), she was denied Union representation during the September 4, 2002, meeting.[3] The meeting turned into a counseling session when Perez began to discuss

---

[2] NYCCBL § 12-306(a) provides in relevant part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(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. . . .

NYCCBL § 12-305 states in part:
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. . . .

[3] Petitioner cites to Section 19 of the Agreement, which states in relevant part:

When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:

> a. Employees who are summoned to the appropriate office of their agency shall be notified, whenever feasible, in writing at least two (2) work days in advance of the day on which the interview or hearing is to be held, and a statement of the reason for the summons shall be

(continued...)

Petitioner's uniform appearance and was "disciplinary and accusatory in nature." Petitioner's request for union representation was ignored.

Furthermore, HHC retaliated against Petitioner for her union activity. Frink states that after her involvement in the petition for and election of on-site shop stewards, Special Officers who voiced their concerns regarding union representation at disciplinary/counseling meetings were harassed, threatened with losing their titles, or transferred by management. Petitioner claims that she became concerned when she was summoned to the September 4, 2002, meeting because she is one of the officers that management has targeted. The charges against her for misuse of her radio unit and insubordination, resulting in removal from duty and loss of pay, were to retaliate against her for her union activity and to prevent her from "exercising her rights under collective bargaining law."

Petitioner claims that HHC inflicted "a pattern of harassment and intimidation" in retaliation for the grievance she filed on September 16, 2002. One example is the negative performance evaluation from Perez and Ochoa which "intended to attack . . . [h]er competency as

---

[3](...continued)

> attached, except where an emergency is present or where considerations of confidentiality is involved.
>
> b. Whenever such an employee is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer, and the Employee shall be informed of this right. Upon the request of the employee and at the discretion of the Inspector General, the Inspector General may agree to the employee being accompanied by a lawyer and a Union representative. Such permission shall not be unreasonably denied. If a statement is taken, the employee shall be entitled to a copy.

an officer, affect her civil service status, and limit her prospects of present and future [e]mployment."

Finally, Petitioner claims that the negative performance evaluation was also in retaliation for her filing a petition with the Office of Collective Bargaining ("OCB").

HHC's Position

HHC claims that the petition fails to allege facts sufficient to find a violation of § 12-306(a)(1) and (3) of the NYCCBL. First, Petitioner has not asserted specific allegations that HHC's actions interfered with, restrained or coerced her in the exercise of her rights. She was represented by her Union at the Step 1(a) hearing, and there is no allegation that HHC prevented her Union from representing her in any grievance she allegedly has filed.

Petitioner has also failed to state a *prima facie* case that HHC's actions were in retaliation for her union activity. There have been no facts alleged that HHC had knowledge of any union activity. Furthermore, Petitioner has offered no proof that HHC ever received Petitioner's alleged grievance. The document Petitioner claims is a copy of the grievance is not addressed to HHC, nor does it state that she is filing a grievance or a contract claim.

In addition, Petitioner has not alleged any facts that indicate that there is a causal connection between any protected union activity and the issuance of disciplinary charges or the issuance of the substandard evaluation. Petitioner was given disciplinary charges because the misuse of the radio unit placed the hospital in danger and because she refused a direct order from her supervisor. Furthermore, Petitioner has always received her evaluation in October because her date of appointment was October 20, 1997. The performance evaluation was based on her

performance for the year and had no relation to the incidents of September 4, 2002, or Petitioner's alleged filing of a grievance on September 16, 2002. Moreover, the decision to bring disciplinary charges against Petitioner and to issue a substandard performance evaluation is within management's statutory authority to direct its employees and to take disciplinary action.[4]

Finally, the petition should be dismissed because the Board lacks jurisdiction over contract violations. Since the gravamen of the instant Petition is a claimed violation of the Agreement, the appropriate forum is the grievance procedure under the Agreement. Indeed, Petitioner requests as a remedy that an arbitrator "ensure that these and other citywide collective bargaining agreements are adhered to."

DISCUSSION

As a preliminary matter, the petition against the individuals Perez and Ochoa is dismissed. Pursuant to NYCCBL § 12-306, it is an improper practice for a public employer or a public employee organization to engage in certain proscribed conduct. An individual cannot commit an improper practice in his or her personal capacity. However, a public employer or a

[4] HHC cites to § 12-307(b) of the NYCCBL which provides, in part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies . . . ; direct its employees; 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 operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work.

public employee organization may be held responsible for the acts of its agents. *Hassay*, Decision No. B-02-2003. Because the conduct about which Petitioner complains occurred when Perez and Ochoa were acting as agents of HHC, the public employer, not the named individuals, is the proper party to this proceeding. *Id.*

We now turn to Petitioner's claim that she was denied union representation. The Board has recognized that the right of a public employee to union representation during an investigatory interview which the employee reasonably believes may result in disciplinary action is encompassed within the statutory rights set forth in § 12-305 of the NYCCBL.[5] *See Assistant Deputy Wardens,* Decision No. B-9-2003. If an employee is denied this statutory right, the Board may find that an improper practice has been committed under NYCCBL § 12-306(a)(1).

In this case, Petitioner does not expressly claim this statutory violation; however, her papers raise an issue of denial of union representation at the September 4, 2002, meeting when the subject of the meeting shifted to Petitioner's uniform appearance. Even if we construed the petition as raising this issue as an improper practice, we find that the allegations are conclusory and insufficient to state a claim. The petition fails to provide sufficient facts concerning the context in which Petitioner's right to union representation was invoked in order to allow us to determine whether the statutory right to union representation accrued in the circumstances of that meeting. Therefore, we find no statutory violation concerning the denial of union representation

---

[5] NYCCBL § 12-305 provides, in relevant part:
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. . . .

at the September 4, 2002 meeting.

The Board is precluded by § 205.5(d) of the Taylor Law (Civil Service Law, Article 14)[6] from enforcing provisions of a contractual agreement. To the extent Petitioner expressly argues that the denial of representation at the September 4 meeting was a violation of § 19 of the citywide agreement, this claim is properly addressed through the parties' grievance process and not in an improper practice proceeding. *Patrolmen's Benevolent Ass'n,* Decision No. B-24-87 at 7. Similarly, Petitioner's claim that the Hearing Officer at the Step 1(a) disciplinary conference improperly removed one of two union representatives from the proceeding, is an issue that arises under the Agreement, and should be pursued through the parties' grievance procedure.

Petitioner also claims that the City retaliated against her for her protected union activity. To determine whether alleged discrimination or retaliation violates NYCCBL § 12-306(a)(1) and (3), this Board uses the standard enunciated in *City of Salamanca,* 18 PERB ¶ 3012 (1985), adopted by the Board in *Bowman,* Decision No. B-51-87. *Salamanca* requires that Petitioner show that:

> 1. the employer's agent responsible for the alleged discriminatory act had knowledge of the employee's protected activity; and
>
> 2. the employee's protected activity was the motivating factor in the employer's decision.

If petitioner alleges sufficient facts concerning these elements to make out a *prima facie* case, the

---

[6] § 205.5(d) provides in pertinent part:
. . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

employer may try to refute the evidence or attempt to establish that its actions were motivated by a legitimate business reason. *See Rivers,* Decision No. B-32-2000.

The mere assertion of retaliation is not sufficient to prove that management committed an improper practice. *Local 983, District Council 37,* Decision No. B-15-2001 at 6. Allegations of improper motivation must be based on statements of probative facts, rather than on conclusions based upon surmise, conjecture or suspicion. *Lieutenants Benevolent Ass'n,* Decision No. B-49-98 at 6.

Petitioner has not satisfied the first prong of the test. Here, the record does not show that management received a copy of the petition which sought the election of on-site shop stewards and which was sent to the Union. The record also does not show that HHC knew that Petitioner was involved in the petition's circulation. Even assuming that management had knowledge of Petitioner's involvement with the petition, we find no causal relation between this union activity and management's imposition of disciplinary charges for her misuse of the radio unit and insubordination.

There is also no evidence that HHC received the grievance allegedly filed by Petitioner, or that the grievance ever existed. Petitioner has not produced a copy of the grievance, and the only document she provided as evidence of the grievance is addressed to the Union and not HHC. Petitioner claims that she filed a grievance concerning both the meeting on September 4, 2002, and management's serving disciplinary charges against her. Based on Petitioner's own statement of the timing of the filing of the alleged grievance, we conclude that it could not have been the motivating factor in the challenged management actions because it was filed after the

incidents had occurred.

In addition, we find no merit to Petitioner's claim that her negative October 2002 performance evaluation was motivated by union animus. Petitioner has failed to show that the evaluation was a result of any union activity. She complains that Ochoa improperly noted that she abandoned a prisoner while on watch on August 27, 2002. We find that this issue has no relevance to this proceeding because the incident occurred prior to Petitioner's filing of her alleged grievance. Furthermore, since we have found that management's imposition of disciplinary charges for the misuse of the radio unit was not motivated by union animus, the inclusion of the incident by Ochoa in Petitioner's performance evaluation cannot constitute evidence of improper motivation. Finally, we find the claim, raised for the first time in the reply, that the performance evaluation was in retaliation for Petitioner's filing a petition with OCB, is without merit. The instant petition was filed on December 11, 2002, after she received the performance evaluation which was dated October 1, 2002, and thus could not have been the motivating factor. Therefore, we find that Petitioner's allegations are speculative and that the facts presented are insufficient to support a claim of improper motivation. Accordingly, the petition is denied 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 by Angela V. Frink and docketed as BCB-2315-02 be, and the same hereby is, dismissed.

Dated: July 29, 2003
New York, New York

MARLENE A . GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER