PBA v. Police Commissioner, NYPD & City, 71 OCB 25 (BCB 2003) [Decision No. B-25-2003 (IP)]

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

-between-

Decision No. B-25-2003
Docket No. BCB-2128-00

PATROLMEN'S BENEVOLENT ASSOCIATION, on behalf of itself and Walter J. Liddy, Michael Quinn, and James Howard,

Petitioners,

-and-

HOWARD SAFIR, as POLICE COMMISSIONER OF THE CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

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

DECISION AND ORDER

On March 24, 2000, the Patrolmen's Benevolent Association ("PBA" or "Union"), on behalf of PBA Financial Secretary Walter J. Liddy and Police Officers Michael Quinn and James Howard, filed a petition for injunctive relief and an improper practice petition against Howard Safir as Police Commissioner of the City of New York, the Police Department of the City of New York ("NYPD" or "Department"), and the City of New York ("City").[1] The petition alleges

[1] On April 7, 2000, the Impartial Members of the Board of Collective Bargaining issued a letter to the parties regarding the Union's injunctive relief petition. The letter stated that as new Labor Members had not yet been appointed to the Board, the Impartial Members believed it inappropriate to convene a meeting of the Board without Labor representation. The failure to act by April 7, 2000, resulted in the injunctive relief petition's being deemed denied pursuant to N.Y. Civil Service Law § 209-a(5)(b).

that the City violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by preventing Liddy from counseling Officers Quinn and Howard during an investigatory interview and retaliating against Liddy for union activity by publicly and falsely naming him as the subject of an investigation. The City argues that the Board does not have jurisdiction over this matter because it involves a contractual issue and that NYPD was not motivated by union activity.

In an effort to resolve the improper practice charges, the parties entered into protracted settlement discussions, which ended unsuccessfully. At that point, the Union requested that the Board determine this matter. This Board finds that NYPD retaliated against Liddy for engaging in protected union activity, but that NYPD did not dominate or interfere with the Union.

BACKGROUND

Manhattan South is a geographic area containing 14 NYPD precincts and other commands which comprise approximately 4,000 police officers. Manhattan South includes the Midtown South Precinct ("MTS"), which, according to the Union, has over 400 police officers. In 1996, the Manhattan District Attorney's Office began investigating whether police officers assigned to MTS engaged in criminal activity in the operation of a brothel, and NYPD concurrently conducted an administrative investigation. As part of the criminal investigation, certain MTS police officers appeared before a grand jury as witnesses. In July 1998, a number of MTS officers were placed on modified duty as part of the administrative investigation. The exact number is contested. The Union asserts that 15 police officers were placed on modified duty, not including those who were eventually arrested or who eventually pled guilty, and NYPD contends

that prior to the arrests and guilty pleas, 20 police officers were placed on modified duty. Eventually, two MTS police officers pled guilty to criminal charges, and in April 1999 two others were arrested. As of April 2000, none of the police officers remaining on modified duty had been charged with either criminal or administrative violations.

In December 1999, MTS Police Officers Quinn and Howard received a notice to appear at the Internal Affairs Bureau ("IAB") offices as part of the administrative investigation. At IAB, Quinn and Howard appeared with Liddy, Financial Secretary for the Patrol Borough of Manhattan South, and attorney Carl Varella and requested that Liddy and Varella represent them. It is unclear from the record if Varella was acting as Quinn's and Howard's personal attorney or as a Union attorney assigned to represent them. An IAB Sergeant informed Quinn and Howard that Liddy could not attend the interrogation because he was a "potential witness." Since the onset of the investigations three years earlier, Liddy had not been questioned for either the criminal or administrative investigation, called as a grand jury witness in the criminal proceedings, or placed on modified duty by NYPD, as had other MTS officers.

The IAB Sergeant then informed Quinn and Howard that they could bring another Union representative to the interrogation and ordered Liddy out of the room. The City contends that Quinn and Howard chose to attend the interrogations without Liddy and were interrogated separately in Varella's presence. According to the Union, Liddy told the Sergeant that he was violating both Liddy's rights and the Police Officers' rights because Liddy was prevented from counseling and advising the Officers. The Union also claims that the Sergeant's offer of alternate representation consisted of this statement to Liddy: "You are not getting in the room. I will send the cops home and they will come back on Christmas Eve with another trustee."

On February 4, 2000, a Union attorney wrote a letter to the Chief of IAB, to object to NYPD's refusal to allow Liddy to act as Union representative during the interrogation and to allow Quinn and Howard to choose their own representative, a right provided in Patrol Guide 118-9 ("PG 118-9").[2] The Union attorney then stated that the IAB Sargent's designation of Liddy as "possible witness" indicated an attempt to exclude a PBA official from performing as a representative.

In a February 7, 2000, letter, NYPD officially notified Liddy that he would be interrogated as a witness in the administrative investigation and scheduled an interrogation date in late April 2000.[3] However, as of May 2000, Liddy had not been interrogated. On March 3, 2000, The Chief Leader published an article about a lawsuit filed by the PBA contesting Liddy's potential interrogation and quoted a named NYPD Chief as stating: "[Liddy] is being questioned as a "subject" in the [brothel] case," and that "[h]e was told from the get-go that he might be called and couldn't sit in on the interrogations." The Union contends that Liddy was never formally notified by NYPD about his designation as a "subject," but only learned of such designation when reporters from The Chief Leader asked him for a reaction to the statements.

The Union filed a grievance on behalf of Police Officers Quinn and Howard alleging that the parties' agreement was violated when Liddy was barred from attending their interrogation. In its April 11, 2000, Request for Arbitration, the Union identified Article XIX of the parties'

---

[2] PG 118-09, entitled "Interrogation of Members of the Service," states that an interrogating officer should "Permit representative of department line organization to be present at all times during interrogation."

[3] The notification bears the same name as the IAB Sergeant that refused Liddy's admission at Quinn's and Howard's questioning.

agreement and Patrol Guides 118-9 and 206-13 as the contract provision, rule or regulation violated.[4] The demand for arbitration was made under Article XXII, §§ 1(a)1, 2, and 3, which define the term "grievance."[5] The Request for Arbitration has been held because of the lack of a valid waiver as required by § 1-06(c) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1).

As a remedy, the Union requests that NYPD cease and desist from designating Liddy as a witness or subject in the administrative investigation or interrogating him in that same investigation, and cease and desist from interfering with Liddy's right to assist and represent members in the administrative investigation or other interrogations.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Board has jurisdiction over this claim because the crux of the matter is not a right arising out of the parties' collective bargaining agreement but is based on discrimination, retaliation, and interference with Liddy in response to the invocation of union rights, such as the right to have representation or file a grievance. Though some of the rights arise under the parties' agreement and PG 118-9, the Union argues that NYPD has committed an independent improper practice. Thus, the City has violated § 12-306(a)(1), (2), and (3) of the

[4] Article XIX of the parties' agreement is the Bill of Rights provision. It states that the Guidelines for Interrogation of Members of the Department in force at the execution date of the agreement will not be altered during the term of the agreement.

[5] Most pertinently, Article XXII, § 1(a)3, defines the term "grievance" as a claimed violation, misinterpretation or misapplication of the Guidelines For Interrogation of Members of the Police Department.

NYCCBL.[6]

The Union asserts that the City interfered with its members' right to representation because the abrupt manner in which NYPD notified Liddy of his status as "potential witness" forced Quinn and Howard into the hearing without permitting a "representative of [the] department line organization to be present at all times during the interrogation," as mandated by PG 118-09 and the parties' collective bargaining agreement. It also contends that a 1993 amendment to § 75(2) of the N.Y. Civil Service Law[7] and a PERB decision in 1997[8] gave *Weingarten* rights under *NLRB v. Weingarten*, 420 U.S. 251 (1975), to New York State public sector employees. The Union also argues that these employees have the right to be represented

---

[6] Section 12-306(a) provides that 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 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. . . .

Section 12-305 provides:

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 such activities.

[7] Section 75(2) of the N.Y. Civil Service Law reads, in part:

> An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right.

[8] *Lykes*, 30 PERB ¶ 4655 (1997), *rev'd on other grounds*, 31 PERB ¶ 3024 (1998).

by a union official of their choice.

According to the Union, because of Liddy's protected union activity, the City retaliated against Liddy by designating him first a "potential witness," then "witness," and later, "subject." The City cannot dispute that it knew of Liddy's union activity because he appeared at IAB's offices for the purpose of representing union members during a Departmental interrogation, and Liddy was excluded from the interrogation by the NYPD with full knowledge that he was acting as a union official. In addition, the February 4, 2000, grievance to the Chief of the IAB, the unit responsible for barring Liddy from representing union members, makes it clear that Liddy is a PBA Executive Board Member, and the act of petitioning an employer with a grievance is at the core of protected union activities.

The Union argues that a causal connection between Liddy's protected activity and NYPD's actions can be inferred from the totality of the circumstantial evidence. This evidence includes: (1) the City's lack of a good faith basis in naming Liddy as a "potential witness" in the first instance; (2) the City's failure to explain what changed from December 21, 1999, to February 7, 2000, to account for Liddy's change of status from "potential witness" to "witness" to "subject"; (3) the fact that over 400 other police officers were on duty at the time of the brothel incident, yet none of them, other than those placed on modified assignment, were named "potential witness," "witness," or "subject"; (4) the timing of Liddy's invocation of his and other Union members' rights in the February 4 letter and the Department's February 7 act of naming Liddy a witness and notifying Liddy that he would be interrogated; (5) the Department's false statement to the press about Liddy's status as a "subject" of the investigation and its failure to correct the falsehood publicly, despite being aware of the false and libelous nature of the

statement; (6) NYPD's 1998 transfer of Liddy for reasons unrelated to performance, which was reversed after a senior Union official complained and; (7) the fact that ultimately, NYPD never questioned Liddy as a witness.

City's Position

The City argues that the Board does not have jurisdiction over this matter because the issue raised is contractual. The crux of the Union's allegations concerns a violation of a Patrol Guide, and the Union has a contractual right to file grievances alleging violations of agency procedures under Article XXII of the parties' collective bargaining agreement. PG 118-9, regarding interrogation of members of the service, is a procedure that is subject to the arbitral forum. The City also claims that the Board does not have jurisdiction to interfere with NYPD's internal investigation or the designation of Liddy as a witness.

As for the Union's allegation that the City retaliated against Liddy for engaging in protected activity, the City asserts that the Union did not identify any behavior that falls within the protection of the NYCCBL. The right to representation during an investigatory interview by a union representative does not apply to New York City employees and does not stem from an independent statutory right entitling the activity to the protection of the NYCCBL. The City claims that Quinn and Howard were represented anyway, because Quinn and Howard were interrogated in the presence of Varella.

Even if the Union could show that Liddy engaged in protected activity, the Union has failed to present any facts that establish a causal connection between the actions taken by NYPD and any union activity. That an otherwise proper and legal action of the employer may incidentally have a detrimental effect upon the Union does not necessarily mean that the action

constitutes an improper practice. Improper motivation, essential to a finding of improper practice, is established only when it can be shown that the action was taken by management with intent to do the Union harm.

Furthermore, the City contends that it was motivated by a legitimate business reason, an obligation to protect the integrity of the investigation and ensure that the answers provided by the interviewed police officers are not influenced or compromised in any way by a representative who is also a part of that investigation. Because Liddy was a police officer working in MTS during the alleged improper activities, IAB could not compromise its investigation and allow Liddy to attend Quinn's or Howard's interview. The City asserts that despite the quotations in The Chief Leader, Liddy has not been officially designated a subject of the IAB investigation. The City also asserts that an obvious conflict arises when a union representative who is also a potential witness in criminal and departmental investigations represents employees who are also potential witnesses in the same investigations. Here, Liddy has not been prevented from performing any other duties as a Union official, including counseling any employee who is under criminal or administrative investigation in this case, or acting as a Union representative on any other issue.

Lastly, the City asserts that it did not violate § 12-306(a)(2). Petitioners did not make any allegation that the employer interfered with the Union's formation or operation or favored it in any way.

DISCUSSION

The first issue is whether this Board has jurisdiction over the alleged improper practice

claim. Pursuant to § 12-309(a) of the NYCCBL, this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306.[9] Furthermore, we may exercise jurisdiction over an alleged breach of an agreement when the acts constituting the breach also constitute an improper practice.[10] *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-4-2003 at 7. Here, we will not dismiss the Union's claims that NYPD violated § 12-306(a)(1), (2), and (3), of the NYCCBL by preventing Liddy from counseling Officers Quinn and Howard during an investigatory interview, retaliating against Liddy for engaging in protected Union activity, and interfering in the administration of the Union, as those claims may constitute independent improper practices or do not derive from the parties' agreement.

To determine whether alleged discrimination or retaliation violates § 12-306(a)(1) and (3) of the NYCCBL, this Board uses the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate 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.

---

[9] Under NYCCBL § 12-309(a)(4), the board of collective bargaining shall have the power and duty "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders. . . ."

[10] Section 205(5)(d) of the Civil Service Law, Article 14, provides that the Board shall not have 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."

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers,* Decision No. B-3-2000.

A prerequisite to analysis under this standard is a finding that the purported union activity is the type protected by the NYCCBL. *See, e.g., Committee of Interns and Residents*, Decision No. B-45-2001. Here, Liddy engaged in protected activity when he attempted to represent Quinn and Howard at their interrogation. Although the City claims that Liddy was not engaged in protected activity, it is undisputed that, in his discourse with the IAB Sergeant and attempt to gain entry into the interrogation, Liddy was acting on behalf of the Union in his official capacity, not acting on his own. His activity was also related to the employment relationship because he was preparing to represent two employees who were called in for questioning by their employer.

The first part of the *Salamanca* test also requires that the employer had knowledge of the protected activity. Here, the City admits that Liddy arrived with Quinn and Howard on the day of the interrogation and attempted to represent them. Thus, the Union has fulfilled the first prong of the *Salamanca* test.

In the absence of an outright admission of improper motive, proof of the second element of the *Salamanca* test must be circumstantial. *Communications Workers of America, Local 1182,* Decision No. B-26-96. If a petitioner demonstrates a sufficient causal connection between the act complained of and the protected activity, improper motive may be inferred. *Social Service Employees Union, Local 371*, Decision No. B-16-2001. Although proximity in time,

without more, is insufficient to support an inference of improper motivation, timing may be considered together with other relevant evidence. *Communications Workers of America, Local 1182,* Decision No. B-26-96.

We find that the Union has met its burden of showing that the NYPD acted in a discriminatory and retaliatory manner when it publicly designated Liddy as a witness and then subject of the investigation. Here, Liddy was officially notified that he would be interrogated as a "witness" as part of the administrative investigation nearly three full years after the commencement of investigations into the operation of a brothel, with no indication that any circumstances had changed until he attempted to represent Union members in an interrogation. He was notified of his status as a "witness" shortly after the incident at IAB and only three days after the Union's attorney wrote a letter to NYPD on Liddy's behalf complaining about that incident. Prior to his attempt to gain entry into the interrogation, there is no evidence in the record that Liddy was questioned by investigators, called as a grand jury witness, placed on modified duty, or otherwise given any indication that he was suspected of wrongdoing. Also, it appears Liddy was notified that he was to be interrogated by the same IAB Sergeant who prevented him from attending Quinn's and Howard's interrogation and who was specifically named in the Union attorney's letter.

Furthermore, although the City admits that Liddy was never formally named as a subject of the investigation, NYPD did not correct the statements in The Chief Leader publicly naming him as a subject. Coupled with the fact that prior to his attempt to represent Quinn and Howard, Liddy had been given no indication, formal or otherwise, that he was a "potential witness," "witness," or "subject" in the investigation, we thus find that NYPD was improperly motivated in

so naming him and preventing him from conducting Union activity.

The employer may attempt to refute petitioner's showing by demonstrating that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers,* Decision No. B-3-2000. We find no evidence that NYPD would have named Liddy as a "potential witness," "witness," or "subject" in the absence of his protected activity. The City has not established that the NYPD's decision to so name him was motivated by any reason other than Liddy's attempts, and the complaints about his attempts, to represent Quinn and Howard. Nor are we persuaded by the City's argument that Liddy was a potential witness in the same investigation as the employees he was to represent. The City's sole assertion in this respect is that Liddy was a potential witness because he was on duty as a police officer working in MTS at the same time other officers were engaged in criminal activity relating to the brothel. It strains credulity that Liddy would be named a potential witness merely because he happened to be on duty at a precinct comprised of numerous other officers who were also on duty at the same time that a few of them committed crimes. The City's argument is particularly unpersuasive since the investigation began in 1996, other officers were called before a grand jury and/or placed on modified duty as early as July 1998, but until December 1999, Liddy had not been given any indication that he was under suspicion. Accordingly, we grant the Union's petition and order NYPD to cease and desist from retaliating against Liddy for engaging in protected union activity.

Section 12-306(a)(2) of the NYCCBL makes it unlawful for a public employer to "dominate or interfere with the formation or administration of any public employee organization." We have held that an employer's meddling in the internal affairs of a union can

constitute a violation of § 12-306(a)(2). *Local 237, IBT,* Decision No. B-12-2001 (manager repeatedly met with groups of employees to discuss interpretation of contract provision and union by-laws). The present case does not involve the formation or domination of a union. Nor is it about giving privileges to a favored union. Therefore, we dismiss that portion of the petition pertaining to a violation of § 12-306(a)(2).

Finally, the Union does not state a claim regarding NYPD's alleged *Weingarten* violation.[11] Although the Union asserts that a Union official was not present at Quinn's and Howard's investigation, it fails to address whether Varella was present as a Union attorney or if he was present as Quinn's and Howard's personal attorney. Moreover, even if the Union stated an arguable claim of denial of representation, the Union has not requested a remedy for that violation other than that which is already being ordered.

[11] A Weingarten right is a right to union representation during an investigatory interview which may result in disciplinary action pursuant to *NLRB v. Weingarten*, 420 U.S. 251 (1975). The existence of this right under the NYCCBL was recently recognized by this Board in *Assistant Deputy Wardens,* Decision No. B-9-2003.

ORDER

ORDERED, that the improper practice petition filed by the Patrolmen's Benevolent Association be, and the same hereby is, granted to the extent that it alleges a violation of Section 12-306(a)(1) and (3) of the NYCCBL; and it is further,

ORDERED, that the improper practice petition filed by the Patrolmen's Benevolent Association be, and the same hereby is, dismissed in all other respects; and it is further,

ORDERED, that NYPD cease and desist from retaliating against Liddy for engaging in protected union activity such as the representation of Union members.

Dated: September 25, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER