L. 371, SSEU & Jones v. HHC, 71 OCB 26 (BCB 2003) [Decision No. B-26-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
and EUGENE JONES,

Petitioners,

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, GENERATIONS/NORTHERN
MANHATTAN HEALTH NETWORK, and HARLEM
HOSPITAL CENTER,

Respondents.

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Decision No. B-26-2003
Docket No. BCB-2337-03

DECISION AND ORDER

On April 11, 2003, Social Service Employees Union, Local 371 ("Union") and Eugene Jones filed a verified improper practice petition alleging that the Health and Hospitals Corporation, Generations/Northern Manhattan Health Network and Harlem Hospital Center ("HHC" or "Harlem Hospital") violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it retaliated against Jones for union activity by rescheduling a long-delayed Step I(a) disciplinary conference. HHC contends that the employee's union activity was not a motivating factor in its decision to reschedule the conference. Since Petitioners have not presented sufficient allegations of fact to state a *prima facie* case of retaliation, this Board dismisses the petition.

BACKGROUND

Eugene Jones is a Hospital Care Investigator at Harlem Hospital Center. In 1988 Jones was elected as a Union delegate, and in June 2000 he was elected chapter chairperson of all the delegates at HHC's Generations member hospitals and facilities.

On December 4, 2001, Jones was served with a Notice and Statement of Charges, alleging that, on November 8, 2001, he pushed a co-worker and cursed at her. A Step I(a) conference on those charges was scheduled for January 18, 2002, but was canceled. HHC contends that the Union requested the cancellation because the Union was displaced from its offices due to the events of September 11, 2001, and would not be able to send a representative. On March 18, 2002, Haydee Castillo, Assistant Personnel Director for Human Resources/Labor Relations at Harlem Hospital, sent a letter to the Union rescheduling the Step I(a) conference for April 17, 2002.[1] Again, the conference was canceled. HHC contends that the cancellation was at the request of the Union because a grievance representative was not available. A new date was not set.

On December 27, 2002, Jones and another Union delegate sent a letter to the Deputy Executive Director of Harlem Hospital to request an emergency meeting to discuss issues in connection with the movement of Union-represented employees to an undesirable work location and to obtain a definitive date for the training of certain employees in completing HHC forms. The letter was copied to the Executive Director and the Chief Financial Officer of Harlem Hospital and to a union representative. The record does not show that HHC responded to this

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[1] The letter reads, in pertinent part, "I am requesting that the hearing for Eugene Jones . . . be reinstated on the calendar . . . . Please assign this case to a Council Representative . . . ."

letter. The Union claims that, during this time, Jones was also actively involved in several grievances.

On January 21, 2003, Castillo sent a letter to the Union's Council Representative scheduling the Step I(a) conference for March 3, 2003. That date was later changed to April 21, 2003. HHC claims that the delay was at the Union's request, because no grievance representative was available. On April 7, 2003, the Union filed the instant improper practice petition together with a petition seeking injunctive relief in order to prevent HHC from going forward with the conference. The petition seeking injunctive relief was withdrawn on April 16, 2003. HHC agreed to hold the disciplinary process in abeyance pending the outcome of the instant matter.

As a remedy, the Union requests that HHC cease and desist from discriminating against Jones for engaging in protected activity as a delegate of the Union, and cease and desist from proceeding with disciplinary charges against Jones.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the prosecution of the disciplinary charges against Jones, and particularly the rescheduling of the disciplinary conference for April 21, 2003, was in retaliation for Jones' vigorous actions advocating for and enforcing the collective bargaining rights of Union-represented employees, and particularly for requesting an emergency meeting with the Deputy Executive Director of Harlem Hospital. The Union argues that after Jones sent the letter, HHC retaliated against Jones by rescheduling a long-dormant disciplinary conference that had

been on hold since April 17, 2002. Thus, HHC violated NYCCBL §§ 12-206(a)(1) and (3).[2]

HHC's Position

HHC argues that although it was aware that Jones filed a grievance on behalf of another employee on November 1, 2002, Jones' December 27, 2002, letter to the Deputy Executive Director of Harlem Hospital was not copied to anyone in Labor Relations, and no one in Labor Relations was aware of the letter. Therefore, the person responsible for scheduling the Step I(a) conference was not aware of Jones' union activity.

HHC also contends that there is no proof of any causal connection between the rescheduling of the disciplinary conference and any protected activity. The Union has merely alleged, in conclusory fashion, that the facility retaliated against Jones because he wrote a letter to the Deputy Executive Director of Harlem Hospital and because he was representing members in other grievances. The Union ignores the fact that disciplinary charges had been pending against him for some time and that the facility rescheduled the disciplinary conference three times at the Union's request. HHC asserts that all decisions made by the facility to bring disciplinary charges against Jones and to proceed with the disciplinary conference were based on

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[2] NYCCBL § 12-306(a) provides, in pertinent 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 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 . . . .

his actions on November 8, 2001.

HHC also contends that speculative and unsupported allegations based on conjecture and surmise are insufficient to sustain a charge of improper practice against an employer, and that the Union has failed to allege facts sufficient to find a violation of NYCCBL §12-306(a)(1) .

DISCUSSION

The issue in this case is whether HHC's rescheduling of Jones' Step I(a) disciplinary conference was a result of his union activity. This Board finds that Petitioner has not presented sufficient allegations of fact to state a *prima facie* case that HHC discriminated against him because of union activity.

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. *Salamanca* requires that a petitioner show that:

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

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-32-2000.

A prerequisite to analysis under this standard is a finding that the purported union

activity is the type protected by the NYCCBL and that the employer had knowledge of the protected activity. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 12. Here, Jones engaged in protected activity when he wrote the December 27, 2002, letter to the Deputy Executive Director of Harlem Hospital, requesting an emergency meeting to discuss work-related issues, but the Union has not shown that those responsible for reinstating the Step I(a) conference knew of the letter.

The Assistant Personnel Director for Human Resources/Labor Relations at Harlem Hospital Center was responsible for the rescheduling of the Step I(a) conference on January 21, 2003, but Jones' December 27, letter was addressed to the Deputy Executive Director, not anyone in the Labor Relations Department. Furthermore, the Union has not presented any evidence to rebut HHC's assertion that Human Resources/Labor Relations was not otherwise made aware of this letter. Thus, the Union has not fulfilled the first prong of the test.

Even if the Union were able to satisfy the first prong of the test, it could not satisfy the second. Proof of the second element must necessarily be circumstantial absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9; *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 13. At the same time, petitioner must offer more than speculative or conclusory allegations. Claiming an improper motive without showing a causal link between the management act at issue and the union activity does not state a violation of the NYCCBL. *See Civil Service Bar Ass'n*, Decision No. B-5-2003 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8.

Nothing in the record in the instant case demonstrates that the process HHC followed in deciding to reschedule Jones' Step I(a) conference was tainted by anti-union animus. This

conference concerning disciplinary charges that were filed in December 2001 had been scheduled for two prior dates, and, after cancellations, HHC initiated the rescheduling on at least one occasion prior to Jones' letter. No facts indicate that the third rescheduling had any causal connection to Jones' December 27 letter. *See United Probation Officers Ass'n*, Decision No. B-53-90. Furthermore, Jones had been regularly engaged in protected activity as a Union delegate since his election in June 2000. Thus, without additional facts, we do not find that anti-union animus motivated the final Step I(a) conference rescheduling. The Union can only point to the proximity in time between the December 27 letter and the rescheduling of the Step I(a) conference on January 21, 2003. In this case the proximity in time is insufficient to sustain a charge of improper motive. *Byrne*, Decision No. B-40-2000 at 11. Accordingly, we dismiss the 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, BCB-2337-03, filed by Social Service Employees Union, Local 371 and Eugene Jones be, and the same hereby is, dismissed.

Dated: September 25, 2003
New York, New York

MARLENE A. GOLD
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