DC 37 v. City (OLR) & DOC, 71 OCB 27 (BCB 2003) [Decision No. B-27-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 2627,

Petitioner,

Decision No. B-27-2003
Docket No. BCB-2344-03

-and-

CITY OF NEW YORK OFFICE OF LABOR RELATIONS
and DEPARTMENT OF CORRECTION,

Respondents.

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DECISION AND ORDER

On May 23, 2003, District Council 37, AFSCME, Local 2627 ("DC 37" or "Union"), filed a verified improper practice petition against the City of New York Office of Labor Relations and the Department of Correction ("City" or "DOC"). The Union alleges that DOC denied a request by Florence Smith, a member of Local 2627, for an accommodation concerning her schedule but granted the scheduling requests of two colleagues who are members of other unions. DOC's action, the Union claims, interfered with and discriminated against members of Local 2627 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), and interfered with the administration of Local 2627 in violation of NYCCBL § 12-306(a)(2). The City maintains that DOC determined scheduling by factors having nothing to do with union activity or affiliation. Since the Union has not presented sufficient allegations of fact to state a *prima facie*

case of interference, discrimination, or domination, this Board dismisses the petition.

BACKGROUND

Florence Smith is one of 11 employees who work at the Help Desk in DOC's Information Technology ("IT") Division (formerly the Management Information System Division). Hired as a Computer Aide in March 1998, Smith was promoted to Computer Associate on August 2, 2001. Like all the employees at the Help Desk, Smith worked 12 hours a day, three days per week until February 2003.

In November 2002, Francesca Digirolamo was appointed as Director of User Services in the IT Division. At that time, DOC determined that the three-day work schedule did not provide adequate coverage and announced that DOC would implement a seven-hour shift, five days per week for employees in the Help Desk unit. Of the 11 employees, DOC needed one to work on Saturdays and one to continue working three days per week. Some employees could work evening tours. On November 21, 2002, Smith wrote to her supervisor to ask that she be allowed to maintain her three-day week. On November 25, 2002, Digirolamo sent an e-mail requesting all Help Desk employees to inform her about which hours would be most convenient for them and to mention school, family, or other issues so that she could attempt to accommodate each individual. She wrote that tours would be given using the seniority system. The new schedule was to take effect on December 15, 2002.

On December 9, 2002, DC 37 requested a meeting to discuss the schedule change. Smith wrote to her supervisor again on December 16 to assert that a three-day schedule was better for

her health and allowed her the opportunity to work around childcare, school, and religious duties. In response to the Union's request, labor and management met on December 19, 2002. Present at the meeting were Smith, Local 2627 president, Edward Hysyk, another member of Local 2627, and other members of DC 37, including employees represented by Locals 1549 and 371. At the meeting, DOC agreed to postpone the implementation of the new schedule until February 16, 2003, so that employees could make any necessary personal arrangements.

On December 23, 2002, Digirolamo informed the employees of their individual schedules. One employee, a Correction Officer who was a member of the Correction Officers Benevolent Association ("COBA") and had worked in the IT Division since December 1997, volunteered to work Tuesdays through Saturdays since she had a class on Mondays. She was given that slot since no other employee had sought to work on the weekend. All the other employees had asked to work for 12 hours three days per week. According to the City, Digirolamo assigned the only three-day per week slot to the employee with most seniority – she had been with the IT Division for 28 years. That employee, a Clerical Associate, was a member of Local 1549. Smith was assigned to work Monday through Friday, 7:00 a.m. to 3:00 p.m.

The record indicates that Smith's request to continue the three-day week was based on several factors. On January 27, Smith wrote to explain that her neurologist had recently directed that she exercise for her medical condition and that because of all her other duties, including religious, childcare, and personal and family medical responsibilities, a more challenging five-day work schedule would cause a hardship.

Following February 16, 2003, the day the new schedule was implemented, Smith

requested that she be granted early departure – 1:00 p.m. on Fridays – because of personal hardship. She was required to pick up her daughter from a Sabbath day school by 4:00 p.m. She also volunteered to work during the Friday night shift, from 11:00 p.m. to 7:00 a.m. The record does not indicate whether this latter request was denied, but, according to the City, Digirolamo warned Smith that she would have to be present on Friday afternoons. On Friday, February 21, 2003, Smith was permitted to leave early and used two hours of annual leave. On Friday, February 28, she used a family sick leave day. On Friday, March 7, she was marked Absent Without Leave. The instant petition was filed on May 23, 2003.

As a remedy, the Union asks the Board to order that management grant Smith the same accommodation afforded to members of other unions and cease and desist all discriminatory actions against members of Local 2627, particularly Smith.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that because DOC granted the desired schedules to two employees who are members of a local or union other than Smith's, DOC favored one union over another. Treating members of COBA and Local 1549 more favorably than a similarly situated member of Local 2627, the Union argues, is discriminatory and discourages union members of Local 2627 from participating in the activities of the local union and of DC 37, in violation of NYCCBL §§ 12-305, 12-306(a)(1) and (3).[1]

[1] NYCCBL § 12-306(a) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:

The Union urges that when considering the standard to determine the discrimination claim, the Board should look to *NLRB v. Great Dane Trailers, Inc.*, 338 U.S. 26 (1967), in which the Court stated that if "the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed . . . ." *Id*. at 34. The Union contends that this test is more relevant than the standard requiring a showing of anti-union animus, as enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), since one union's receiving preferential treatment over another is "inherently destructive." According to the Union, DOC's action signals that if an employee is a member of the "wrong" local or participates in the wrong activity, he or she will suffer adverse consequences.

The Union contends that DC 37 requested the labor-management meeting of December 19, 2002, to postpone the effective date of the new schedule and that both Smith's and Local 2627 president Hysyk's attendance was protected union activity. Smith made her needs known repeatedly both before and after that meeting. According to the Union, although there is no showing that the two employees from COBA and Local 1549 indicated hardships or extenuating circumstances concerning the schedule, both employees were granted the schedules that were most convenient to them. DOC knew that Smith engaged in union activity, and the City has

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> (1) to 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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> * * *
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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. . . .
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> 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 . . . .

offered no reason that two employees were accommodated but Smith suffered disparate treatment.

Finally, the Union asserts that by granting a privilege to employees of other bargaining units while refusing to accommodate Smith, DOC dominated or interfered with the administration of Local 2627, in violation of NYCCBL § 12-306(a)(2).[2]

City's Position

The City argues that Petitioner has alleged no facts demonstrating that Smith's membership in Local 2627 had any bearing on DOC's scheduling decisions. Inconvenience, the City contends, is not a basis for a claim of discrimination or of interference with the right of employees to join or assist public employee organizations. All Help Desk employees except one were required to change from a three- to a five-day week, and DOC created the schedules independent of union or local affiliation. Nothing in the record indicates that DOC was motivated by anti-union animus, and the Union has not established a causal connection between the alleged improper acts and Smith's union activity, as the *Salamanca* test requires.

According to the City, DOC determined that the tour of twelve hours per day, three days a week for all employees at the Help Desk did not provide adequate coverage and that of the 11 employees, one was needed to work on Saturdays and another, to remain in the old schedule. DOC asked each individual to request a schedule. Smith did not volunteer to work on Saturdays; another employee who did volunteer received that schedule. All other employees wished to work

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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:
(2) to dominate or interfere with the formation or administration of any public employee organization. . . .

three days per week and expressed hardships. Management decided that basing the assignment on seniority was an appropriate method and assigned that slot accordingly. Furthermore, not granting Smith an accommodation to leave early every Friday was based on a legitimate departmental need to have sufficient help at that time. The Union's allegations of favoritism, the City says, are based on speculation and surmise.

DISCUSSION

The issue in this case is whether DOC's assignment to Smith of the five-day instead of three-day per week schedule was a result of her union activity. This Board finds that Petitioner has not presented sufficient allegations of fact to state a *prima facie* case that DOC interfered with Smith's rights under the NYCCBL, discriminated against her because of union membership, or dominated the administration of Local 2627.

Concerning the standard of proof, this Board determines that the "inherently destructive" test, which is articulated in *NLRB v. Great Dane Trailers, Inc.*, 338 U.S. 26, and which the Union urges us to employ, is inapplicable here. In *Great Dane*, the Supreme Court decided that depending on the facts in a discrimination case, the trier of fact should use one of two tests. The Court wrote:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer

> has come forward with evidence of legitimate and substantial business justifications for the conduct.

Id. at 34. Our Board has found that two categories of conduct have been held to be inherently destructive of important employee rights – one creates "visible and continuing obstacles to the future exercise of employee rights" and jeopardizes the position of the union as bargaining agent, and the other "directly and unambiguously penalizes or deters protected activity." *Committee of Interns and Residents*, Decision No. B-26-93 at 41-42, *enforced sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (citations omitted) (in hospital, department chair's distributing copies of a resident's grievance, advising other residents of management's opinion of the grievance, and holding up the grievance papers during a rare appearance at residents' meeting to discuss goals of the program is inherently destructive). These inherently destructive actions relieve a union from having to prove an employer's improper motivation.

Petitioner in this case has presented no facts to demonstrate inherently destructive conduct. The Union has failed to show that DOC either created visible and continuing obstacles to future employee rights or directly and unambiguously penalized protected activity. Therefore, this Board will look to the second test of *Great Dane*, which was elaborated on by the National Labor Relations Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), restated by the Public Employment Relations Board in *City of Salamanca*, 18 PERB ¶ 3012, and adopted by this Board in *Bowman*, Decision No. B-51-87. Under this test, to establish interference and discrimination in violation of NYCCBL § 12-306(a)(1) and (3), a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a 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 Civil Service Bar Ass'n, Local 237,* Decision No. B-5-2003 at 9.

Seeking union assistance and participating in a labor-management meeting is protected union activity. *See Rivers*, Decision No. B-32-2000; *United Probation Officers Ass'n*, Decision No. B-53-90. If management has knowledge of that activity, a petitioner establishes the first prong of the test.

Here, the City acknowledges that DOC representatives participated with Smith and other employees in a labor-management meeting which the Union requested. Thus, Petitioner has satisfied the first element of the *Salamanca* test.

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 union activity and the management act at issue 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 by which DOC assigned schedules to the Help Desk employees was tainted by anti-union animus. No facts indicate that the assignment of schedules had any causal connection to the labor-management meeting. *See United Probation Officers Ass'n*, Decision No. B-53-90.

The Union does not challenge the decision itself to change schedules of the entire group of Help Desk employees. The issue is the manner of implementation. We are not persuaded that the different schedules of two employees were accommodations. Since one employee volunteered for a weekend time slot that no other employee, including Smith, wanted, DOC assigned that time to her not as an adjustment for one individual, but as an expedient way to fill that period. Similarly, DOC was forced to choose one person to fill the three-day week schedule, which all the other Help Desk employees preferred. By using seniority as a criterion to determine the assignments, DOC was not adapting or adjusting a situation for one person, but using an accepted, non-arbitrary method.

Nor has the Union shown that DOC favored one union over another. *See Correction Officers Benevolent Ass'n*, Decision No. B-17-94 at 15-16 (union's allegation of employer favoritism to dissidents is conclusory); *Correction Officers Benevolent Ass'n*, Decision No. B-7-86 at 4-5, *aff'd sub nom. Seelig v. Anderson*, No. 5063/86 (Sup. Ct. N.Y. Co. Sept. 18, 1986) (same). No facts indicate that DOC made any assignments based on union membership. Indeed, members of Local 1549, a DC 37 affiliate as is Local 2627, were at the labor-management meeting. Ultimately, DOC assigned the three-day week to a member of Local 1549 on the basis

of seniority, not on union affiliation. Furthermore, there has been no showing of intent to discriminate because of union activity in DOC's refusal to grant Smith an accommodation on Friday afternoons. In any event, DOC has demonstrated a legitimate business interest in assuring coverage at the Help Desk. *See Civil Service Bar Ass'n, Local 237,* Decision No. B-5-2003 at 12. Thus, we find that DOC did not discriminate against Smith or employees of Local 2627 or interfere with their Section 12-305 rights under the NYCCBL.

Finally, we find no merit in the Union's claim that DOC dominated or interfered with the administration of DC 37 in violation of NYCCBL § 12-306(a)(2). This Board has stated:

> A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges . . . .

District Council 37, Decision No. B-36-93 at 21. Petitioner here has not supported the claim that DOC's scheduling assignments in any way interfered with the Union's operations or favored one union over another by giving improper privileges. *See District Council 37, AFSCME*, Decision No. B-23-2002 at 18.

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-2344-03, filed by District Council 37, AFSCME, Local 2627, be, and the same hereby is, dismissed.

Dated: September 25, 2003
New York, New York

MARLENE GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
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