Grier, 75 OCB 28 (BCB 2005)

[Decision No. B-28-2005] (Docket No. BCB-2434-04)

Summary of Decision: Petitioner alleged that, in violation of NYCCBL § 12-306(a)(1) and (3), OTB withdrew an offer to promote her and instead transferred her, in retaliation for asking managerial employees whether she would receive a retroactive wage increase due employees in her incumbent title. OTB argued that the employee's delay in accepting the promotion forced OTB to offer the job to another person and that her transfer resulted from agency-wide reorganization. The Board finds insufficient factual support for Petitioner's claim that OTB's actions towards her were wrongfully motivated under the NYCCBL and denies the instant petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ERNESTINE GRIER

Petitioner,

- and -

CITY OF NEW YORK
&
THE OFF-TRACK BETTING CORPORATION,

Respondents.

DECISION AND ORDER

On October 6, 2004, Ernestine Grier filed a verified improper practice petition against the City of New York and the Off-Track Betting Corporation ("OTB"), alleging that OTB offered to

promote her to a managerial title but instead hired another employee and transferred her to a less desirable position in retaliation for inquiries about a contractual wage increase due employees in her title.[1] Petitioner asserts OTB's actions violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). OTB denies any retaliatory motive and argues that the employee's delay in accepting the promotion forced it to offer the job to another person and to transfer her as a result of agency-wide reorganization. Following an evidentiary hearing, this Board finds insufficient factual support for Petitioner's claim that OTB's actions towards her were wrongfully motivated under the NYCCBL, and we deny the instant petition in its entirety.

BACKGROUND

Petitioner was hired in 1989 in the civil service title of Principal Administrative Associate ("PAA"), Level I, in OTB's Benefits Division ("Benefits"). Employees in the title at OTB are represented by Local 2021, District Council 37 ("Union"). In this title, Petitioner assisted the Administrative Manager in administering health benefits of OTB employees, such as filing and transmitting completed forms to the Office of Labor Relations for processing and billing for the management welfare fund, communicating with doctors and beneficiaries, resolving claims issues, and updating file information. Aside from contractual and longevity wage increases which raised Petitioner's earnings marginally higher during the time period relevant herein, Petitioner's annual salary for the PAA title was $37,266. Petitioner held the PAA position in Benefits for nine years,

[1] Although the petition names both the City of New York and OTB as Respondents, the record shows that OTB, a non-mayoral agency, is Petitioner's public employer. Therefore, this decision will refer to OTB as the sole Respondent.

working Monday through Friday, 9:30am to 5:30pm. Petitioner continues to hold the civil service title of PAA.

In mid-March 2004, OTB's Executive Director of Human Resources, Patricia McDonnell-Riggio, asked Petitioner if she would be interested in a promotion to Administrative Manager (Benefits) upon the retirement of the person who held that position. Petitioner replied in the affirmative. In that same conversation, McDonnell-Riggio told Petitioner that if she accepted the promotion, she would be working alone, *i.e.*, that the PAA title in that division would no longer be filled due to reorganization for budgetary reasons. McDonnell-Riggio also explained that she would need to seek approval of the OTB Vacancy Control Committee, also called the vacancy control board, ("VCB") for the appointment and a determination of her salary.

By memo dated March 31, 2004, McDonnell-Riggio submitted her request for Petitioner's appointment to the position of Administrative Manager (Benefits) at the rate of $44,000 a year. Over the next two months, Petitioner repeatedly asked McDonnell-Riggio whether the VCB had decided on her appointment.

During this period, Petitioner also inquired about pending negotiations over the successor collective bargaining agreement for the PAA title ("Agreement") and how much the retroactive wage increase would be. McDonnell-Riggio explained that she was unable to make any definitive statements about that until the successor Agreement was finalized. McDonnell-Riggio testified that she was not directly involved in collective bargaining on behalf of OTB and that she, herself, was awaiting information about the wage increases for the PAA title.

On Friday, May 21, 2004, the VCB met and approved Petitioner's appointment at the annual rate of $44,000. McDonnell-Riggio testified that she was a member of the VCB – along with OTB

Comptroller and the Chief of Staff Norman Dion, who was also her supervisor – and that the VCB relied on her recommendation of Petitioner for the promotion. McDonnell-Riggio testified that, in order to gain VCB's approval, she had to overcome Dion's reservation about Petitioner's qualifications for the promotion. Dion's reservation was based on an incident in which Petitioner failed to return Dion's calls concerning his own benefits matter. McDonnell-Riggio recused herself from taking part in the VCB's decision to approve Petitioner's promotion. According to McDonnell-Riggio, she immediately informed Petitioner that the VCB had approved Petitioner's appointment at the annual salary of$44,000 a year and formally offered Petitioner the position. Petitioner asked if the starting salary could be raised to$50,988, which was the retiring supervisor's salary. McDonnell-Riggio explained to Petitioner that the retiring supervisor received that level of salary due to her years in service. McDonnell-Riggio agreed to let Petitioner consider the offer for a few days and "get back to" her about it. Petitioner's testimony on this differed from that of McDonnell-Riggio in that Petitioner testified, at one point, that it "may have been" as late as June 8 when McDonnell-Riggio first told her that the salary would be $44,000 and, at another point, that it was a "different day." (Tr. 38, 31-32.) We find McDonnell-Riggio more credible because she was specific and consistent in her testimony.

At an unspecified time between the last week in May and the first week in June 2004, Petitioner asked McDonnell-Riggio if the $44,000 would include the retroactive pay due under the PAA Agreement or if she would get the retroactive pay in addition to the $44,000. Petitioner told McDonnell-Riggio that she felt entitled to the retroactive pay "since we [were] 'out of contract' since 2002." McDonnell-Riggio told Petitioner that she could not commit to anything because she did not know how the newly negotiated Agreement ultimately would read. Petitioner also asked

McDonnell-Riggio if she could get $48,000 for the promotion but McDonnell-Riggio replied that she could not ask the VCB to approve any higher figure.

McDonnell-Riggio testified that it was during this same two-week period that she and Petitioner had another conversation about the Administrative Manager position. McDonnell-Riggio testified on cross-examination:

> Q Could you tell us what that conversation was, tell us about that conversation.
> A Basically, she told me she could not accept the position, and I said I was sorry about that.
> Q Was there anything else said?
> A No.
> Q Did she say why she could not accept the position?
> A I don't recall if she had mentioned the salary again. I do not recall that.
> Q Did you in any way attempt to dissuade Ms. Grier from not accepting it and try to convince her to accept it?
> A No, I did not.
> Q Did you tell Ms. Grier that don't worry, when the increases come in on the managerial and the union, you will get those in addition to the 44,000?
> A No, I did not.

Petitioner testified that, although she still had questions about the retroactive pay, she never said she would not take the Administrative Manager job. On June 7, Petitioner asked Leonard Allen, her Union representative to meet with Dion to discuss the retroactive pay issue. Allen told her that Dion would call to arrange a meeting.

According to McDonnell-Riggio, after Petitioner expressed displeasure with the salary of the Administrative Manager position, she told Dion on or about June 9, 2004, that, since Petitioner had not accepted the position at the offered salary, McDonnell-Riggio's confidential secretary should be considered for the job. Dion agreed, and on or about that date, McDonnell-Riggio offered that person the position. The confidential secretary accepted the position that same day.

On June 11, Petitioner again asked McDonnell-Riggio about the wage issue and asked to

speak with Dion about it. She did not know the job had been offered to another employee. McDonnell-Riggio told Petitioner that a meeting with Dion was scheduled.

On June 14, 2004, McDonnell-Riggio gave Petitioner a memorandum informing her that she would be transferred out of Benefits to Branch Field Operations ("BFO") effective June 18, 2004.

On June 15, 2004, McDonnell-Riggio was called to a meeting concerning the collective bargaining negotiations. There she learned for the first time what the terms of the successor PAA Agreement would be.

On June 17, Petitioner met with Dion and McDonnell-Riggio. Petitioner described the conversation as follows:

> Well, when I came in, Mr. Dion asked me what was the problem, or something to that effect. And I told him that I had an issue with the money that they were giving me. The promotion was for $44,000. They – Ms. McDonnell was including my union raise in the promotion, which I didn't think was right because I had already worked for the union raise and it was owed me, it was due me. And he kept responding about, well, "I understand you don't want to come out of the union," which I kept objecting to because I told him that was never an issue, that I wouldn't come out of the union; that the promotion called for me to come out of the union. I wouldn't have stayed in that position in that office so long if I didn't want to come out of the union. And he kept saying over and over, "I understand you don't want to come out of the union." His father was in the union, and union issues – he just kept talking about it. He said there was no money. It was going to be that way, and that was the end of it. And I told him, "Well, you know, I want my position. I worked hard in that position, in the office for that position; it was due me." And he said the position was given to somebody else. They hired somebody else for the position. It was no longer available, and I was being transferred.

On June 18, 2004, Petitioner reported for work in her new location, where she continues to date. She answers phones, locates replacement personnel for individuals on sick leave, and arranges for repairs in OTB facilities. She is assigned to work Monday through Saturday, 8:15am to 4:15pm,

except Thursday, and is subject to Sunday and holiday assignments. Dion testified that the position is an important one within OTB. Although Petitioner stated that no supervisor called it a demotion, she felt that it was.

Petitioner filed the instant petition, seeking appointment to the Administrative Manager (Benefits) position at the salary level approved by the VCB and retroactive wages due under the Agreement.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that OTB targeted her for retaliation of the type prohibited by the §§ 12-306(a)(1) and (3) of the NYCCBL,[2] when, during discussions concerning her promotion to Administrative Manager, she inquired whether she would receive a retroactive wage increase due employees in the PAA title as a result of collective bargaining. She asserts that she repeatedly pressed McDonnell-Riggio for answers to her questions about wages because McDonnell-Riggio – who was knowledgeable about such matters – refused to break down the rates of pay she would be

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[2] Section 12-306(a) of the NYCCBL 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. . . .

Section 12-305 of the NYCCBL provides, in pertinent 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. . . .

entitled to receive under the PAA Agreement. Petitioner claimed that she ultimately was willing to accept $44,000 for the Administrative Manager position but she contends that her repeated questioning of McDonnell-Riggio about the contract pay caused OTB to transfer her rather than promote her after many years of commendable performance in the Benefits division.

Petitioner contends that the asserted legitimate business reason for her transfer was pretextual. She insists that she never turned down the job offer. The transfer occurred solely because Petitioner "spoke up about my union raise."

OTB's Position

OTB argues that it hired another person for the managerial promotion because Petitioner rejected the job at the rate of $44,000 and that it transferred her simply because a staff reorganization was required due to budgetary constraints. Petitioner had been informed previously that OTB could not afford to continue to staff the PAA title in Benefits at the time she was offered the managerial job, so it could not have had any connection to her inquiries about retroactive increases in the PAA title. OTB contends that no wrongful motive drove OTB's decisions in this case.

DISCUSSION

The issue in this case is whether OTB withdrew its offer to promote Petitioner and instead transferred her to another division in retaliation for her repeated inquiries whether she would receive retroactive pay under the terms of the Agreement covering her PAA title. This Board finds that Petitioner has failed to establish that OTB's actions were improperly motivated or that OTB committed an improper practice within the meaning of the NYCCBL.

To determine if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the

test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. 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 Sergeants' Benevolent Association*, Decision No. B-22-2005; *see also Rivers*, Decision No. B-32-2000.

A prerequisite to any determination of improper practice under NYCCBL § 12-306(a)(3) is a finding that the activity at issue is of a type protected by the NYCCBL. *Sergeants' Benevolent Ass'n*, Decision No. B-22-2005; *Del Rio*, Decision No. B-6-2005; *Grennock*, Decision No. B-19-2004. To be so protected, the activity must be related to the employment relationship. *See Kane*, Decision No. B-59-88, *aff'd sub nom. Kane v. MacDonald*, No. 24115/88, Sup. Ct. N.Y. Co. 1989, *aff'd* 555 N.Y.S.2d 81 (1st Dep't 1990).

In the instant matter, we have considered the testimony of three witnesses, including Petitioner, as well as documentary evidence and the allegations set forth in the pleadings. We find Petitioner has failed to establish retaliation constituting an improper practice within the meaning of the NYCCBL and dismiss the instant petition for the following reasons.

With respect to whether Petitioner was engaged in protected activity, we find that Petitioner's inquiries concerning the rate of pay for her work in the PAA title was protected activity under the

NYCCBL. We also find that OTB knew of Petitioner's protected activity because both McDonnell-Riggio and Dion testified that they knew that the PAA retroactive pay was a key concern to Petitioner. Thus, Petitioner has satisfied the first part of our test.

With respect to the second part of the test – whether Petitioner's questions about the retroactive pay was a motivating factor in OTB's decision to transfer her and to promote another employee – we find the record does not establish any causal link between the protected activity and the management action which is the subject of the complaint. Proof of the second element of the test must 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. But speculative or conclusory allegations will not establish the requisite causal link. *Ottey*, Decision No. B-19-2001 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8.

In this case, Petitioner argues that, as OTB's Executive Director for Human Resources, McDonnell-Riggio, was in a position to know how much the retroactive pay would be and when that pay would be forthcoming for unit members such as Petitioner, and that McDonnell-Riggio's claim that she did not know the answers to those questions until June 15 strains credulity. Even if we were to accept Petitioner's argument, she has not demonstrated a causal connection between McDonnell-Riggio's knowledge concerning the PAA retroactive wage increase and the decision to transfer Petitioner upon her continuing indecision to accept the offered promotion. It is undisputed that OTB's decisions to fill the Administrative Manager position and not to fill the PAA title in Benefits were made before Petitioner started asking, in March 2004, about the PAA retroactive wage increase. The record shows that Petitioner was told by McDonnell-Riggio at the time she was offered the promotion that the PAA title in Benefits would no longer be filled. Thus, Petitioner knew or should

have known – before she raised the question of retroactive pay – that the PAA position in Benefits would be eliminated and that her non-acceptance of the managerial position would result in her transfer out of that division. Moreover, we credit McDonnell-Riggio's testimony that Petitioner's two-month delay in deciding whether to accept the position at the offered salary left OTB with no other choice but to fill the vacancy on or about June 9, 2004. Thus, we find no evidence that McDonnell-Riggio's conduct towards Petitioner was motivated by anti-union animus.

Similarly, we find no evidence of anti-union animus in Dion's statement in the June 17 meeting that he understood why Petitioner would want to turn down the managerial job if she did not want to relinquish Union membership. We reiterate that OTB's decisions to fill the Administrative Manager position and not to fill the PAA title in Benefits were made before Petitioner raised the contract questions; thus, we find no causal connection between Petitioner's questions and OTB's execution of its predetermined personnel decisions.

Accordingly, we find insufficient factual support for Petitioner's claim that OTB's decisions to transfer Petitioner and to offer the position to a different employee were wrongfully motivated. Therefore, we dismiss the instant 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-2434-04, filed by Ernestine Grier, be, and the same hereby is, dismissed in its entirety.

Dated: September 21, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
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ERNEST F. HART
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