Archibald& Corr. Officers Dem. Alliance v. City&COBA, 55 OCB 12 (BCB 1995) [Decision No. B-12-95(INJ)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE APPLICATION
FOR INJUNCTIVE RELIEF

-between-

EMANUEL ARCHIBALD and THE
CORRECTION OFFICERS DEMOCRATIC
ALLIANCE,

DECISION NO. B-12-95(INJ)

Petitioners,

DOCKET NO. BCB-1757-95(INJ)

-and-

MICHAEL JACOBSON, COMMISSIONER OF
CORRECTION, CITY OF NEW YORK AND
CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondents.
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DECISION AND ORDER

On June 8, 1995, Emanuel Archibald and the Correction Officers Democratic Alliance (the "petitioners" or "CODA"), filed a verified improper practice petition and a verified petition for injunctive relief against Michael Jacobson, Commissioner of Correction, the City of New York (the "Department" or "City") and the Correction Officers Benevolent Association ("COBA").

The petition alleges that the Department intentionally interfered with the petitioners' right to participate in union activities in violation of Section 202 of the Taylor Law and, therefore, its actions constitute an improper practice under Sections 209-a.1(a) and (c) of the Taylor Law and Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL"). The

petitioners maintain that the actions of the Department also abridge their rights under the United States Constitution.

The petition further alleges that COBA committed improper public employee organization practices by illegally interrupting petitioners' campaign and by breaching the duty of fair representation owed to petitioners, in violation of Sections 203, 209-a.2(a) and 209-a.2(c) of the Taylor Law, and Section 12-306b of the NYCCBL.

On June 12, 1995, the City and COBA filed verified answers to the request for injunctive relief. The respondents oppose the CODA's request for injunctive relief, maintaining that the petition fails to satisfy the two-pronged test required by the law and our rules.

BACKGROUND

This dispute arises out of a campaign for the election of officers of COBA. The petitioners are members of one of the five slates of candidates who have been competing with the incumbent COBA officers for nomination and election to positions in the Union. The ballots for this internal union election were sent out to the Union's members in May of 1995 and are to be returned before June 20, 1995, on which date they are to be counted.

The Department of Correction, because of the need to maintain security and order in its jail facilities on Rikers Island, has provided, by a written Code of Conduct, for limitations on the

access and activity of Correction Officers on Rikers Island. Unless specifically authorized, Correction Officers are not permitted in Department facilities when they are off-duty, and are not free to travel while on-duty to jails or buildings other than those to which they are assigned. However, the Department, by written memorandum and operating procedures, has provided for relaxation of its regulations for a limited time during the period immediately before a union election. During this time, candidates are permitted greater latitude to move about the Island, to visit facilities, and to distribute materials. The Department's rules provide, however, that inflammatory or disruptive conduct or material are not permitted. In the present case, the Department, by Teletype Order issued on May 17, 1995, directed that electioneering or campaign activity by nominated candidates for COBA office would be permitted on Department property, in accordance with specified procedures, commencing on May 22, 1995, approximately one month before the scheduled June 20 election.

On the evening of May 11, 1995, petitioner Archibald, while off-duty, appeared at the Employee Control Building at Rikers Island. He had in his possession two-sided campaign flyers supporting the CODA slate. It is disputed whether he actually distributed flyers to employees, as the Department alleges, or merely had brought them to give to an unidentified other member of his slate for future distribution, as the petitioners contend. In any event, he was confronted by a Captain, who took the flyers from

his possession. It is also disputed whether petitioner Archibald objected to the confiscation of the flyers. One side of the flyers in question states, in pertinent part,

> Why has "Law and Order" Mayor Giuliani declared war on New York City Correction Officers?
>
> Because ...
>
> **NIGGERS DON'T VOTE!**
>
> Don't be a nigger (a low class ignorant person of any race, creed or color)
>
> Exercise your Right!
>
> VOTE VOTE VOTE
>
> Your job depends on it!

The other side of the flyer presents the members of the CODA slate.

Petitioner Archibald and another member of his slate, Donald Winkfield, were ordered to appear before the Department's Deputy Commissioner of Investigations on May 12, 1995. It is disputed whether they requested the presence of a COBA delegate at such appearance. No delegate attended, but the petitioners were represented by their own attorney. While the full content of the investigatory meeting is in dispute, it is clear that it related, at least in substantial part, to the previous night's incident concerning the flyers, which the Department believed were inflammatory. At the conclusion of the meeting, petitioner Archibald was served with charges and specifications relating to his possession and distribution of the flyers. He was immediately suspended for ten days, and his badge and revolver were

confiscated. Donald Winkfield, who was thought to have generated the flyers, was released without charges.

Petitioner Archibald and members of the CODA slate attended a COBA membership meeting held on May 16, 1995. At that time, they were nominated to run in the Union election.

Petitioner Archibald's suspension ended on May 22, 1995, the same day that campaign activity on Department property was permitted to commence in accordance with the various Departmental memoranda, procedures, and orders. On that date, petitioner Archibald submitted a proposed campaign schedule for the period through May 27, 1995, which was substantially approved by the Department in a memorandum dated May 23, 1995. Thereafter, on May 25, 1995, petitioner Archibald, who previously had worked steady tours (a privilege granted to a few long-term employees), was reassigned to "the wheel" (a schedule of rotating tours, provided for in the Administrative Code). He was advised that his reassignment was ordered as a response to a letter he had written to Mayor Giuliani protesting the treatment of a fellow employee. The Department characterizes the letter as intemperate and threatening; the petitioners characterize it as an effort to protect an employee who was mistreated because he dared to advise his superior that a staffing level created what he believed was an unsafe condition.

It is disputed whether petitioner Archibald asked the President of COBA to file a grievance challenging his change of

tour. He did talk to a COBA delegate, the identity of whom is in dispute, and was given a grievance form to fill out. It is disputed whether he asked the delegate to draft the grievance for him. In any event, petitioner Archibald did not fill out and return the grievance form.

On May 26, 1995, while the petitioners were at the Employee Control Building to campaign in accordance with a previously approved schedule, representatives of COBA appeared and announced settlement of a new collective bargaining agreement and the terms thereof.

On May 27, 1995, petitioner Archibald submitted a proposed campaign schedule for the remaining period through June 17, 1995. This schedule was substantially approved by the Department in a memorandum dated May 30, 1995.

DISCUSSION

In its application for injunctive relief, CODA asks the Board to determine that (1) there is reasonable cause to believe that an improper practice has occurred, and (2) it appears that immediate and irreparable harm has resulted. CODA further requests that the Board issue an order granting injunctive relief.

Section 209-a.5 of the Civil Service Law ("CSL") does not empower this Board to issue preliminary injunctions; that power continues to reside in the courts. What the law does is to give the courts jurisdiction to consider applications for injunctive

relief in improper practice cases where there has been a finding by this Board that the statutory standard has been satisfied.

Both Section 209-a.5 of the CSL and Section 1-07(l)-(u) of the OCB Rules set forth what is essentially a two-part standard that a petitioner must meet in order to be authorized by this Board to seek injunctive relief in the courts. The standard, which we first explained in Decision No. B-1-95(INJ), requires that a petitioner show that:

> (1) there is reasonable cause to believe that an improper practice has occurred,[1] and
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> (2) it appears that immediate and irreparable injury, loss or damage will result thereby, (i) rendering a resulting judgment on the merits ineffectual, and (ii) necessitating maintenance of, or return to, the status quo to provide meaningful relief.[2]

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[1] In evaluating the first prong of this test, we will carefully examine the improper practice claim to insure that it has a likelihood of success. That does not mean that the improper practice charge must be definitively proven at this early stage of the process of adjudication; nor does it mean that we must, at this stage, resolve all factual disputes that may be material to the merits of the charge. What it does mean is that upon a review of the record before us, we must be able to find reasonable cause to believe that an improper practice under the NYCCBL has occurred. In making this determination, we will consider whether documentary evidence or other convincing proof has rebutted mere allegations in a pleading; but we will not permit a bona fide dispute as to material facts to negate the sufficiency of a prima facie claim of improper practice. See Decision No. B-1-95(INJ).

[2] In evaluating the second prong of the above test, our inquiry will focus on examining whether, on the record before us, claims of irreparable harm are supported by apparently bona fide allegations of probative fact, or are doubtful or merely conclusory, or are otherwise legally insufficient. We will also examine whether there appears to be a causal connection between the alleged irreparable harm and the specific acts which are alleged to

(continued...)

With these principles in mind, we turn to the allegations before us.

Allegations against the City

Where an employer is accused of unlawful discrimination under Section 12-306a of the NYCCBL, the petitioner must demonstrate that the act complained of was improperly motivated. In cases involving a claim of improperly motivated management action, the test we have applied since our adoption in Decision No. B-51-87 of the standard set forth by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985), provides that initially the petitioner must show that:

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

If the employer does not refute the petitioner's showing on one or both of these elements, then the employer must establish that its actions were motivated by another reason which is not violative of the NYCCBL.

In the instant matter, the petitioners contend that the Department's actions "were intentionally taken to interfere with petitioners' right to participate in union activities," in

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[2](...continued)
constitute an improper practice under the NYCCBL. Id.

violation of Section 12-306a of the NYCCBL. After reviewing carefully the record before us, we find that there is not a sufficient basis to warrant a grant of injunctive relief under the standard set forth in Section 209-a.5 of the CSL.

For purposes of the request for injunctive relief, we read the allegation concerning the confiscation of campaign flyers and the resultant suspension of Archibald as stating at least, in part, a prima facie claim of improper practice. There is no dispute that the Department was aware of Archibald's union activity and that it acted in response to that activity.[3]

Nevertheless, we find that the respondent City has set forth sufficient allegations establishing an arguably meritorious business justification for its actions so as to cast doubt on whether reasonable cause exists to believe an improper practice has been committed. In this connection, we note that Archibald was off-duty and in civilian clothes at the time of the incident, that he was in violation of Department policy by being in the Employee Control Building while off-duty, that the flyers were brought onto Department property outside of the officially designated on-

[3] In this connection, it is noteworthy that the lifting of Archibald's suspension on May 22 coincided with the start of the official campaign period. Thus, the suspension did not interfere with Archibald's campaigning off Department premises and was over as of the first day that campaigning was permitted on Department property.

premises campaign period, and that they contained potentially inflammatory statements.[4]

As for the change in Archibald's work schedule from a steady late tour to his return to the rotating tours of "the wheel," there is no dispute that this change was intended to punish the petitioner for the April 15th letter that he had written to Mayor Giuliani, concerning the alleged "mistreatment of a fellow CODA slate candidate," Anthony Rivera. However, it is questionable whether the submission of this letter is protected activity under the NYCCBL. As a prerequisite for finding a violation of the NYCCBL, we must find that the union activity which is the target of the alleged improper practice enjoys protection under the NYCCBL.[5]

In this connection, we note that neither Archibald nor Rivera filed a grievance relating to alleged mistreatment of Rivera. On the contrary, Archibald's letter, which demanded an apology and put the Mayor on "official notification" that absent an apology "legal action will be taken," clearly was not written with a view towards and could not have been construed by the employer as a formal grievance filing. In Decision No. B-16-92, we dismissed an improper practice claim based on the petitioner's failure to prove

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[4] In Decision No. B-8-95, we dismissed a claim of improper practice in which the petitioner alleged that he was threatened with disciplinary charges for being an "outspoken" advocate of the rights of employees of the Department of Correction. We were not persuaded that the warnings were retaliatory in nature in that they were in response to "certain specific conduct by the Petitioner... which was prohibited by Departmental rules."

[5] See Decision Nos. B-17-94; B-2-93; B-16-92; B-4-92.

that a written statement he submitted in support of a co-worker who had been verbally abused by a supervisor was in furtherance of a grievance and, thus, was protected activity. It is not enough that the letter was supportive of a fellow employee; for, as we have previously noted, the NYCCBL and the Taylor Law, unlike federal private sector law, does not grant protected status to conduct for the purpose of "mutual aid and protection."[6]

In any event, even if sending the April 15th letter constituted protected activity, we find that the consequences of the City's actions, in this case Archibald's return to "the wheel" on May 25, do not give rise to irreparable harm. In support of this conclusion, we note that the petitioners' allegation that the change in assignment "totally disrupt[ed] petitioners' planned campaign schedule" lacks any supporting facts or instances. A specific showing of harm is required; mere speculation is insufficient.

The record demonstrates that at the time of the schedule change, the petitioner had not submitted a proposed campaign schedule for any electioneering activities beyond May 27; thus, there was an overlap of only two days during which the change in Archibald's work assignment could have conflicted with any prescheduled campaigning. As for those two days, other than the conclusory allegation that the reassignment interfered with his campaign schedule, Archibald made no showing that his planned

[6] See e.g., Decision No. B-17-91.

activities were disrupted. Moreover, nothing prevented Archibald from scheduling campaign activity during the remainder of the official campaign period consistent with his new work schedule. In fact, the record shows that on May 27, he submitted a new proposed campaign schedule for the period through June 17, and that his proposal was substantially approved by the Department on May 30.

In further support of our conclusion that there is no showing of irreparable harm, we have considered the following factors: (1) the schedule change resulted in no change in the number of hours that Archibald was free to engage in campaign activity while off-duty; (2) Archibald may benefit from being on rotating tours for the remainder of the campaign period inasmuch as his exposure to bargaining unit members, most of whom also work rotating tours, will be increased; (3) Archibald could have attempted to mitigate the alleged harm by filing a grievance on his own behalf but chose not to; and (4) petitioners waited two weeks after the schedule change before filing the instant charge, thus tending to undermine their claim of immediate harm.

All that petitioners offer in support of their allegation of irreparable harm is the wholly conclusory statement that CODA's status as "front runner" has declined to that of "underdog." Claims of irreparable harm must be supported by "bona fide

allegations of probative fact;" allegations that are merely conclusory or are based on conjecture are legally insufficient.[7]

We also reject as vague and conclusory, CODA's allegation that the Department engaged in discriminatory and disparate enforcement of its rules concerning the distribution of campaign literature. In contrast, the respondent City makes specific representations of evenhanded enforcement of its rules and has presented us with specific factual allegations of incidents in which members of other slates were disciplined for[8] or prevented from violating these rules.[9]

Allegations against COBA

The petitioners contend that COBA violated Section 12-306b of the NYCCBL by breaching its duty of fair representation and by "illegally" interfering with CODA's campaign. Respondent COBA argues that petitioners' allegations do not satisfy either element required to justify authorization to seek injunctive relief because

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[7] Decision No. B-1-95(INJ).

[8] Correction Officer Carlos LaBoy, a candidate on yet another slate, was advised that he could not campaign at a time that was reserved by another candidate. When LaBoy disobeyed this directive, he was charged and suspended for violating the Department's campaign rules. See City's Answer at ¶30.

[9] Correction Officer Saglum Beni, a candidate for vice president on a different slate, was also seen distributing materials on Department property before the official campaign period, was told to leave the premises to conduct his campaigning, and promptly did so. See City's Answer at ¶27.

they "are fabrications, unsupported by facts, full of misleading statements and lacking dates, times, names and places."

Section 12-306b of the NYCCBL, which has been recognized as prohibiting violations of the judicially recognized fair representation doctrine, requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[10] In the area of contract administration, including the processing of grievances, arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[11]

Concerning the petitioners' allegation that COBA breached its duty of fair representation in failing to provide a delegate to represent Archibald on May 12, 1995, we note that there is a factual dispute as to whether a delegate was requested in the first place. In this regard, we note that petitioners provide no indication of date or time, how the request was made or of whom the request was made.

Similarly, with respect to petitioners' claim that COBA failed to file a grievance on challenging the change of Archibald's tour, although there is some dispute as to whether COBA was asked to file a grievance or a law suit, it is undisputed that Archibald was

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[10] Decision Nos. B-21-92; B-56-90; B-30-88; B-13-81; B-16-79.

[11] Decision Nos. B-21-92; B-56-90; B-27-90; B-72-88; B-58-88; B-50-88; B-30-88.

given a blank grievance form by a COBA delegate. It is also undisputed that Archibald did not fill out and return the grievance form to the delegate for filing.

In Decision No. B-1-95(INJ), we said that we would "not permit a bona fide dispute as to material facts to negate the sufficiency of a prima facie claim of improper practice". However, even if these claims were meritorious, they would not support a request for injunctive relief because we find that the record fails to support a conclusion that any irreparable harm resulted from these events. Rather, the following observations all militate against a finding of irreparable harm: (1) Archibald was represented by his own attorney during the investigatory meeting on May 12; (2) Archibald's suspension was lifted on the day the officially designated on-premises campaign period began and, therefore, his access to Department property for purposes of campaign activity had not been adversely affected by his suspension; (3) Archibald's campaign schedule could not have been "totally disrupted" by being put back on "the wheel" inasmuch as his proposed campaign schedule beyond May 27 was submitted for Departmental approval after he learned of the change of his tour; (4) the change in tour did not preclude Archibald's access to fellow employees and to Department property for purposes of campaigning; and (5) Archibald failed to file a grievance concerning the tour change or, alternatively, fill out the grievance form and return it to the COBA delegate for filing.

We further find that petitioners' claim of irreparable harm, i.e., a change in the status of CODA slate's from front runner to underdog, is conclusory, as is petitioners' claim that Archibald is now perceived by the members of the bargaining unit as an unviable candidate. Thus, even if the disputed facts were sufficient to establish reasonable cause to believe that an improper public employee organization practice has been committed, the petitioners have failed to allege facts sufficient to support their claim that immediate and irreparable harm will result.

As for the allegation that COBA intentionally interfered with and "illegally interrupted" CODA's campaign on May 26, 1995 by distributing counter campaign material, we note that this concerns a dispute between two competing factions in an internal union election. We have long held that complaints concerning internal union matters are beyond the scope of the Board's jurisdiction.[12] Therefore, such a complaint cannot constitute reasonable cause to believe that an improper practice has occurred. In any event, we cannot say that it is improper for the certified bargaining representative to disclose to its members the fact that it has concluded a new collective bargaining agreement and what the terms of that agreement are.

The allegations of the petition which sets forth claims that the petitioners' Constitutional rights have been violated are

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[12] Decision Nos. B-21-94; B-22-93; B-11-93; B-5-92; B-22-91; B-26-90; B-23-84; B-18-84; B-15-83; B-18-79.

beyond the scope of our jurisdiction and cannot be considered the basis for a claim of improper practice under the NYCCBL. To the extent the petitioners believe that they have a cognizable claim under the United States Constitution, their recourse lies in some other forum.

For the reasons stated above, we conclude that the petitioners' request for injunctive relief must be denied. This denial is without prejudice to the determination of the underlying improper practice petition in due course upon a full record.

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 petition for injunctive relief of the Emanuel Archibald and the Correction Officers Democratic Alliance be, and the same hereby is, dismissed.

Dated: New York, New York
June 15, 1995

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

ANTHONY P. COLES
MEMBER

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MEMBER

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