Taylor, 11 OCB2d 4 (BCB 2018)

(IP) (Docket No. BCB-4247-17)

Summary of Decision*:** Petitioner claimed that DHS violated NYCCBL § 12-306(a)(1), (2), and (3) when it interfered with and deprived her of union representation in connection with a disciplinary action that resulted in her resignation. The City argued that DHS did not violate Petitioner's right to union representation because she did not request representation during an investigatory interview. The Board found that the City did not violate the NYCCBL because at the time Petitioner allegedly requested union representation, any investigation had ceased and, therefore, the City was no longer required to provide it. Accordingly, the petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CAMILLE TAYLOR,

Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On November 27, 2017, Camille Taylor ("Petitioner") filed a verified improper practice petition against the New York City Department of Homeless Services ("DHS") and the City of New York ("City"). Petitioner asserts that DHS interfered with and deprived her of the ability to be represented and assisted by her union in connection with a disciplinary action that resulted in her resignation, in violation of § 12-306(a)(1), (2), and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The

City argues that DHS did not violate Petitioner's right to union representation under the NYCCBL because she did not request representation during an investigatory interview. This Board finds that the City did not violate the NYCCBL because at the time Petitioner allegedly requested union representation any investigation had ceased and, therefore, the City was no longer required to provide it. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner was hired at DHS as a Special Officer ("SO") on August 8, 2016. As a provisional SO, she performed security work at DHS's Boulevard facility, located in Harlem. Petitioner was a member of and represented by City Employees Union, Local 237, International Brotherhood of Teamsters ("Union").

On May 16, 2017, Petitioner and another SO were assigned to search individuals as they entered the Boulevard facility and passed through a metal detector, when an incident occurred in which a client became disruptive. While the facts and circumstances surrounding the incident are largely disputed by the parties, it is apparent that a physical altercation occurred between Petitioner's SO partner and a client attempting to enter the facility. At some point during the altercation, a DHS Sergeant and a DHS Detective who were in the area appeared at the work location. Petitioner's SO partner and the client then exited the building and ended up crossing over the sidewalk and into the street. The Sergeant and Detective followed them outside. Petitioner contends that since there were three employees already handling the situation, and consistent with her training, she remained at her post to make sure that no one would improperly gain access to the facility. She claims, and the City denies, that once the client had been detained

and was escorted into the building, she went outside to clear the people who were watching the events and then promptly returned to her post.

The following day, DHS Captain Warfield appeared at Petitioner's work site and issued her a Code of Conduct Violation ("Violation"), which alleged that Petitioner had violated various sections of the DHS Peace Officer Guide. (City Ex. 2) Under the section titled "Narrative," the Violation stated:

> On May 16, 2017 you were observed on CCTV conducting yourself in a manner which was disapproving of the agency. [SO] Taylor you failed to notify your supervisor when client became non-compliant with search procedures. [SO] Taylor you were observed on CCTV sitting on a desk that is designated for client[s'] belongings. Then you were observed on CCTV not searching the client property before coming inside the facility. You were observed on CCTV not assisting your fellow Officers in lieu of an arrest with client. I advised you that you are in direct violation.

(*Id*.) The Violation also provides: "I further understand that my acceptance of this copy does not indicate that I agree with the statements herein and that I have the right to submit a reply in writing for my files if I chose (*sic*) to." (*Id*.) Petitioner signed the document, which also required her to affirm that she understood a copy was being placed in her personnel files. Petitioner contends that she was never questioned about the incident prior to being presented with the Violation and states that, when she asked Captain Warfield about the charges, she told her that she did not have time to discuss the matter. Petitioner further contends that she was only asked to write a report about the incident after she was given the charges, which she did.[1]

[1] The City admits that Petitioner wrote a report about the May 16 incident, but otherwise denies her contentions regarding what occurred when she was presented with the Violation.

On May 18, 2017, Petitioner was approached at her work site by a DHS Captain who escorted her to DHS's offices on Beaver Street to meet with DHS Inspector Howard.[2] According to Petitioner, Inspector Howard asked her about the May 16 incident, and she explained to him what happened. Howard then told her that "DHS had decided that [she] had to either resign or be terminated." (Pet. ¶ 21) Petitioner claims that when she asked what she had done wrong, he refused to answer her. She also asked him whether he had seen the CCTV video of the incident, and he stated that he had not. Petitioner alleges that at this point she asked Inspector Howard whether a Union representative could be present but that he refused to allow her to contact anyone.

While in the meeting, Petitioner used her cell phone to send text messages to a supervisor.[3] In the texts, the supervisor urged Petitioner to contact the Union if she didn't feel comfortable. Petitioner responded, "OK. Keisha came by earlier. He jus[t] asked me how's it goin[g] at the [Boulevard]." (Rep., Ex. A) The supervisor then sent Petitioner the contact information for someone referred to as "Cotto."[4] (*Id*.) In the text messages that go back and forth between Petitioner and her supervisor, Petitioner stated: "They tryna (*sic*) terminate me"; "They saying the agency made this choice"; and "It['s] determined." (*Id*.) Petitioner contends that her request for a Union representative was denied and that she resigned after about 45 minutes in Inspector Howard's office. After Petitioner signed some paperwork, she was relieved of her badge, and arrangements were made for her to retrieve her belongings.

The City claims that prior to the May 18 meeting, the decision to terminate Petitioner for the May 16 incident had already been made and that Inspector Howard was not aware of the facts

[2] The parties' versions of facts regarding this meeting are largely in dispute.

[3] Petitioner submitted screen shots of the text messages.

[4] It is unclear from the pleadings who Keisha and Cotto are.

of the incident. Howard was instructed by his superior to present Petitioner with a termination letter, but to allow her to resign if she elected to do so. The City claims that during the May 18 meeting, Howard encouraged Petitioner to speak to her Union, but denies that she requested Union representation. The City alleges that "at no point did Inspector Howard prevent, deny, or discourage [Petitioner] from contacting her Union." (Ans. ¶ 67)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that she was improperly denied Union representation, in violation of NYCCBL § 12-306(a)(1), (2), and (3), both when she was issued disciplinary charges on May 17, 2017, and when she was "confronted" in Inspector Howard's office on May 18, 2017 about her termination.[5] (Rep. ¶ 1) Petitioner contends that DHS's actions affected her and her Union's ability to provide information and/or an explanation to DHS regarding the May 16, 2017 incident and to oppose her termination in a well-informed manner. As such, Petitioner argues that DHS's

[5] 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;
>
> (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[.]

actions were inherently destructive of and improperly interfered with her rights under NYCCBL § 12-305.[6]

Petitioner claims that on May 18, 2017, Inspector Howard questioned her about the May 16 incident and refused to allow her to call the Union for assistance when she requested to do so. She points to the text messages with her supervisor to support her claim that during the meeting she requested Union representation. Petitioner further contends that the City's assertion that Inspector Howard did not question her about the facts surrounding the incident is "patently untrue." (Rep ¶ 30) Moreover, since the discussion concerned a disciplinary matter, Petitioner argues she had a clear right to Union representation. As a remedy, Petitioner requests that she be reinstated with full back pay and benefits, that any discipline in her personnel records be expunged, and any and all other relief deemed necessary to remedy DHS's improper practice.

City's Position

The City contends that Petitioner failed to state a claim under NYCCBL § 12-306(a)(1) that her right to Union representation was violated. In order to state such a claim, Petitioner must establish that she requested representation during an investigatory interview that may reasonably lead to discipline. According to the City, Petitioner did not request union representation at any time during the May 18, 2017 meeting. Nonetheless, the City alleges that Inspector Howard encouraged her to speak with her Union. Furthermore, the City argues that the May 18 meeting was not an investigatory interview, nor was Petitioner questioned regarding the events that

[6] NYCCBL § 12-305 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 and shall have the right to refrain from any or all of such activities

occurred during the May 16 incident. Additionally, Petitioner could not have reasonably believed that the May 18 meeting would lead to discipline because she had been served with disciplinary charges one day earlier and, thus, already knew that she was being disciplined. The City contends that the decision to terminate Petitioner was made prior to May 18 and had Petitioner not resigned she would have been terminated.

The City additionally argues that Petitioner has failed to demonstrate that DHS's actions meet the requisite standard for behavior that is inherently destructive of important union rights. In particular, she did not demonstrate that DHS's conduct created visible and continuing obstacles to the exercise of employee rights, or that DHS directly and unambiguously penalized or deterred protected Union activity. Furthermore, the City contends that Petitioner did not allege a *prima facie* case of retaliation under NYCCBL § 12-306(a)(3), and even if she had, the City had a legitimate business reason for terminating her due to her failure to abide by the procedures set forth in the DHS Peace Officer Guide. Therefore, the City contends that the petition should be dismissed.

DISCUSSION

Petitioner claims that DHS violated NYCCBL § 12-306(a)(1), (2), and (3) by interfering with her right to Union representation in two separate instances; when she was issued disciplinary charges on May 17, 2017, and when she participated in a meeting with management prior to her resignation on May 18, 2017. Because a hearing was not held in this case, "we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Donnelly*, 7 OCB2d 23, at 13 (BCB 2014) (quoting *Morris*, 3 OCB2d 19, at 12 (BCB 2010)) (internal quotation marks omitted).

It is a violation of NYCCBL § 12-306(a)(1) "for an employer to refuse a public employee the right, *upon the employee's demand*, to representation by a representative of the [Union] at a meeting or interview with the employer where the employee reasonably believes that the interview could result in disciplinary measures."[7] *Holmes*, 4 OCB2d 14, at 15 (BCB 2011) (emphasis in original) (quoting *DC 37, L. 1549*, 3 OCB2d 2, at 21, 20-21 (BCB 2010)) (internal quotation marks omitted). However, this Board has consistently held that "the duty on the part of management to allow union representation does not arise until the right to such representation is invoked by the employee, even where the employee entertains a reasonable belief that disciplinary action may ensue as a result of the supervisory conference which he or she is called to attend." *Id.* (quoting *DC 37, CSTG, L. 375*, 79 OCB 1, at 9 (BCB 2007)) (internal quotation marks omitted).

In the instant case, Petitioner alleges that she was not provided with Union representation on May 17, 2017, when Captain Warfield presented her with disciplinary charges. However, Petitioner does not allege that she ever requested Union representation during this encounter. Such a "failure to request representation is fatal to a claim that *Weingarten* rights have been violated." *Id*. (quoting *DC 37, CSTG, L. 375*, 79 OCB 1, at 9) (internal quotation marks omitted). Moreover, Petitioner does not contend that Captain Warfield questioned her about the May 16 incident. Rather, she alleges that Captain Warfield refused to engage her in a conversation about the incident and claims that she was not given the opportunity to provide a written statement about the incident until after she received the disciplinary charges. As such, the May 17 encounter with Captain

[7] The right to union representation at such meetings was first enunciated under the National Labor Relations Act by the Supreme Court in *Nat. Labor Relations Bd. v. J. Weingarten, Inc.*, 420 US 251 (1975). Thus, cases decided under the Taylor Law and the NYCCBL that address this right generally refer to it as a *Weingarten* right.

Warfield does not constitute an investigatory interview. Consequently, under these circumstances, the portion of Petitioner's claim relating to the May 17, 2017 encounter must be denied.

The analysis differs, however, with respect to Petitioner's claims regarding the May 18, 2017 meeting with Inspector Howard. In that instance, Petitioner alleges that at the beginning of the meeting she was questioned regarding the May 16 incident. Assuming this to be true, this portion of the meeting could arguably be considered an investigatory interview during which Petitioner was entitled to Union representation had she requested it.

However, according to Petitioner's allegations, she did not make a request for Union representation prior to or during any portion of the meeting in which she was being questioned about the May 16 incident. Rather, Petitioner asserts that she made her request for Union representation *after* Inspector Howard told her that DHS had determined that she would either be terminated or could resign. Therefore, it is clear that any investigatory portion of the meeting had ceased at the time of her request to call a Union representative. *See Greyhound Lines, Inc.*, 239 NLRB 849, 852 (1978) (finding no violation of *Weingarten* where employee did not request a union representative until the investigatory portion of an interview had concluded).

Furthermore, Petitioner does not claim that any questioning or investigation occurred after her request was allegedly denied.[8] *Compare Local 376, DC 37*, 4 OCB2d 64, at 12 (BCB 2011) (finding a violation of NYCCBL § 12-306(a)(1) when an employee continued to be questioned after he made a request for union representation at a meeting that he reasonably believed could have resulted in discipline), *with Amoco Oil Co.*, 238 NLRB 551, 552 (1978) (finding no violation of an employee's *Weingarten* rights where, after a request for Union representation was made, the

[8] In fact, Petitioner claims that Inspector Howard would not discuss what she had allegedly done wrong and told her he had not seen the video of the incident.

supervisor conducting the meeting merely informed the employee of his suspension and made no attempt to "question him, engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview"). As such, we find that by the time Petitioner requested union representation, any investigatory conduct by DHS had concluded and it was no longer required to grant her request.

In light of the above, we find that DHS did not violate NYCCBL § 12-306(a)(1). We also dismiss Petitioner's claims under NYCCBL § 12-306(a)(2) and (3). While Petitioner cited to the standards used to evaluate claims under those sections of the NYCCBL, she did not plead any facts to demonstrate that DHS's conduct dominated or interfered with the internal affairs of the Union, or that it discriminated against Petitioner due to her Union activity. Consequently, the petition is dismissed.

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, docketed as BCB-4247-17, filed by Camille Taylor, against the City of New York and the New York City Department of Homeless Services, hereby is dismissed in its entirety.

Dated: February 15, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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