

**Central Brooklyn Coordinating Council, Inc. and
America Fajardo-Wyatt.** Case 29–CA–22180

January 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On May 13, 1999, Administrative Law Judge Raymond P. Green issued the attached decision in this proceeding. The Charging Party¹ filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by accelerating the date of discharge of eight caseworkers and three case aids because of their union activity. As fully set forth by the judge, the Respondent discharged the 11 employees on July 28, 1998. While the judge found these discharges unlawful, he concluded that these employees would have been discharged shortly thereafter for nondiscriminatory reasons.² No party excepts to these findings.

The Charging Party excepts only in regard to the judge's recommended remedy. In his remedy, the judge provided, inter alia, in regard to backpay, that:

backpay be from the date of discharge (July 28, 1998) to the date the employer made a commitment to hire a replacement for any particular discriminatee. (If the facts show that the employer had already agreed to hire a replacement for a particular caseworker before July 28, 1998, then no backpay would be owed that caseworker.) If no replacement was hired for a given discriminatee because that particular job, because of financial considerations, was left vacant and not filled. Then no backpay should be granted.

¹ The counsel for the Petitioner (District Council 1707 of the Community & Social Agency Employees Union) in a related representation case is also counsel for Charging Party America Fajardo-Wyatt. The counsel for the Charging Party inadvertently attributed the exceptions to the Petitioner. We find that the exceptions are those of the Charging Party.

² The complaint named 11 discriminatees, 8 caseworkers, and 3 case aids. The judge found that New York State law required all caseworkers to possess a 4-year degree from an accredited college or university. The Respondent, in order to retain funding had to comply with this law. The eight caseworkers all lacked this credential, and so the Respondent would have discharged them subsequently in order to retain funding. As to the three case aids, there was no requirement that they possess degrees; rather, the judge found that the Respondent would have terminated them subsequently for financial reasons.

The Charging Party contends, inter alia, that the judge unduly limited the backpay award for the discriminatees. The Charging Party contends that backpay should extend from the date of discharge until the date that a replacement actually commenced work or the date that Respondent's program (that employed the discriminatees) was eliminated in January 1999.

We find that the backpay period for the caseworkers should run from the date of unlawful discharge until the date the discriminatees would have otherwise been discharged, absent their protected activity.³ *Keeshin Charter Service*, 250 NLRB 780, 781 (1980). In *Keeshin* the employer unlawfully accelerated the discharge of one of its drivers. The judge concluded that the employer would later have discharged the driver because he was uninsurable, i.e., regardless of the employee's union activities. The Board found that backpay should be tolled on the date the employer otherwise would have terminated the driver.

As to the case aids, backpay will run from the date of their discharge until the date they would have been discharged for economic reasons.

AMENDED REMEDY

Substitute the following for the third paragraph.

"Backpay shall be computed in the manner described above. Any backpay found owing shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons Home for the Retarded*, 283 NLRB 1173 (1987)."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Central Brooklyn Coordinating Council, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make whole America Fajardo-Wyatt, Clarissa England, Elaine Clarke, Darlene Oxendine, Carla McClain, Debra Dancy, Dennis Barnes, Omubo Charles, Richard Johnson, Jeanette Ackerman, and Lois Johnson for any loss of earnings and other benefits suffered as a result of the discrimination against him or her in the manner set forth in this decision."

2. Substitute the attached notice for that of the administrative law judge.

³ The judge found that the caseworkers would have been terminated shortly after July 28, 1998, irrespective of the employees' union activity. The judge found the three case aids would have been terminated for economic reasons shortly after July 28, 1998, irrespective of union activity.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in concerted activity for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Americo Fajardo-Wyatt, Clarissa England, Elaine Clarke, Darlene Oxendine, Carla McClain, Debra Dancy, Dennis Barnes, Omubo Charles, Richard Johnson, Jeanette Ackerman, and Lois Johnson for any loss of earnings and other benefits suffered as a result of the discrimination against him or her, less any net interim earnings, plus interest.

CENTRAL BROOKLYN COORDINATING COUNCIL

Henry Powell Esq., for the General Counsel.
Roger C. Fortune, pro se, on behalf of the Respondent.
Harvey S. Mars Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 16 and 17, 1999. The charge was filed on July 30, 1998, and the complaint was issued on November 23, 1998. In substance, the complaint alleges as follows:

That on or about July 28, 1998, the Respondent discharged the following named employees because they joined or assisted District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO.

Americo Fajardo-Wyatt	Clarissa England
Elaine Clarke	Darlene Oxendine
Carla McClain	Debra Dancy
Dennis Barnes	Omubo Charles
Richard Johnson	Jeanette Ackerman
Lois Johnson	

The Employer's position is that eight of the individuals were discharged because of a New York State requirement that they have certain credentials which they did not have. It also contends that three of the individuals, Dennis Barnes, Carla

McClain, and Darlene Oxendine were terminated due to fiscal restraints. In no instance does the Employer claim that any of these individuals were discharged because of poor work performance.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is concluded that District Council 1707, American Federation of State County and Municipal Employees, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Employer (also referred to as CBCC), is a not for profit corporation which provides a variety of social service functions under contract with agencies of New York. As of July 1998, the vast bulk of its services was related to foster care and adoption services provided for the Agency of Child Services (ACS). In this regard, employees were responsible inter alia, for recruiting foster care families, monitoring foster care homes, and attempting to place children with adoptive parents.

The Union filed a petition for an election on July 24, 1998, and pursuant to a Stipulated Election Agreement executed on August 10, 1998, an election was held on August 26, 1998. The ultimate result of the election was that the Union was certified on November 16, 1998, as the exclusive representative of the Employer's professional and nonprofessional employees.

As noted above, the alleged discriminatory discharges occurred on July 28, 1998, which is 4 days after the representation petition was filed. Thus, the element of timing, by itself is a strong factor in favor of the General Counsel's position.

Notwithstanding the timing of the discharges, it is necessary to go further into the past to see how these events transpired. The credited testimony of Vonda Lee Cunningham is relied on in this regard.

The Employer, CBCC, is a member of the Federation of Protestant Welfare Agencies. In 1997, ACS, which is the major funding agency for the Employer, was concerned about a number of management issues involving CBCC. As a consequence, in August 1997, the Employer was required, as a condition of renewing its contract, that it comply with a corrective action plan set forth in a memorandum of understanding. As part of that plan, the Employer was given only a 6-month renewal of its contract for foster care services. (Normally such contracts run for 2 years.)

In or about October 1997, Cunningham, as the representative of the Federation, was called in to lend assistance to the Employer in its efforts to comply with the corrective action program. She then became the monitor of CBCC's progress and the liaison between it and the Agency for Child Services.

At a meeting in October 1997, between representatives of ACS, CBCC, and Cunningham, most of the discussion dealt with fiscal and structural issues. However, it also was brought out that a review had been made of the Employer's personnel files by an ACS consultant and that she had found discrepancies. Among other things, the review showed that there was a lack of documentation that some of the employees doing case-

work had baccalaureate degrees which ACS required as a condition of doing such work. This, according to Cunningham is a requirement of state law and is a condition of the contact between CBCC and ACS.¹

All of the alleged caseworker discriminatees were hired and performed casework without either having Bachelor's degrees or without having a degree at an accredited institution. Notwithstanding their lack of credentials, the Employer does not contend that they did not do their work competently. And indeed, the testimony of John Luard, the director of human resources, was that he tried his best to retain these individuals.

According to Cunningham, after the October 1997 meeting, a further investigation was made of the personal files. On April 21, 1998, she received a report from National Executive Service Corps Consultants which identified two caseworkers who had degrees which required further evaluation because they were issued outside the U.S., identified three caseworkers who had degrees from nonaccredited organizations, and identified five caseworkers who did not have 4-year degrees. As to those employees not having the required degrees, the report recommended either that CBCC try to find them other jobs that didn't require degrees or alternatively, provide them with outplacement career consultation. (Obviously the latter option contemplated their discharge.)

On receiving the report, Cunningham notified Luard and asked him to notify the employees involved that their files did not contain documentation regarding degrees. This he did and determined that caseworkers either did not have 4-year degrees or, in one instance (Jeanette Ackerman), had a correspondence degree from what he considered to be a nonaccredited theology school. At a series of interviews Luard conducted in early May 1998, some of the employees indicated that although they did not have a degree, they would take courses. Luard gave non-committal responses to this. Other employees, not named as alleged discriminatees, came up with proof of degrees and were not affected.

Acting as an intermediary between the ACS and the employer, Cunningham asked representatives of ACS if there was any way that funding could be found to allow caseworkers who did not have the degrees to move to other jobs so that they could be retained. ACS refused, as this would add to the total staffing of CBCC because new caseworkers, with proper credentials, would have to be hired to do the casework previously done by this group. At the same time, Luard had the unfulfilled hope that perhaps ACS could be persuaded to grandfather these employees and let them remain as caseworkers based on their work experience and without having degrees.

In or about June 1998, in conversations with ACS representatives, Cunningham was told that CBCC had to resolve the credential problem or its expiring contract would not be renewed. Consequently, as the Employer did not have the money to retain these people in other capacities while needing to hire new caseworkers to take over the load, it eventually decided that it had to discharge noncredentialed caseworkers. Thus, a memorandum dated June 25, 1998, from Roger C. Fortune, vice president administration to Arlen I. Bailey, president, shows that he recommended the termination of eight staff members who did not meet ACS qualifications even though he noted that

¹ State law requires that social service caseworkers have a Bachelor's degree from an accredited institution of higher learning, albeit it does not require that the degree be in any particular field.

at least two were given high performance rating by ACS and that this cast doubt as to the efficacy of the qualification itself. Bailey's written comment on the memorandum states: "Approved. Letter of termination would go out once individuals are identified to replace the said staff if jobs are critical requiring coverage!"

There is, therefore, no doubt that as of June 25, 1998, before the representation petition was filed, a decision had been reached by the Respondent's president to discharge caseworkers not having the required degrees. Nevertheless, no time was set for the action and the Employer continued to dawdle until a meeting of the Employer's board was held on July 28, 1994.

On June 30, 1998, the contract with ACS expired and all funding from that source ceased to arrive. The result was that until a 6-month renewal contract was executed and registered in August 1998, no money was available for payroll. This is shown by a memorandum to the staff dated July 28, 1998, which states that the Respondent will not be able to meet the payroll as scheduled for July 29, 1998.

Thereafter, on July 20, 1998, ACS notified the Respondent that it would be renewing the contract for another 6 months. In the meantime, however, no money was received until August 1998. Accordingly, the Respondent, as of July 20, was operating at a deficit and did not have money to pay salaries to its staff. That it decided to lay off three of its case aids for economic reasons was clearly justified by the circumstances existing at the time.

At the July 28 meeting, a number of things were discussed, among them the status of the noncredentialed caseworkers. Luard described the discussion at this and a previous meeting in July as follows:

LUARD: I remember raising the issue and asking for more time to see if we could find avenues to absorb the people. And I was told to come back with a report the following week, at which point the next week, the decision was taken on that Tuesday to terminate the employees because they were, at that point, still free will employees.

JUDGE GREEN: You mean they weren't Unionized?

LUARD: We were not Unionized.

Notwithstanding the renewal of the contract, ACS ultimately terminated its relationship with CBCC in or about January 1999. The result was that about 100 bargaining unit employees (or most of the staff) lost their jobs.

III. ANALYSIS

Insofar as the caseworkers are concerned, State law required that they have a 4-year degree from an accredited college or university. The caseworkers who were discharged did not meet this qualification and therefore their continued employment put CBCC's contract with the Agency for Child Services in immediate jeopardy. There is no doubt that under pressure from the ACS through Cunningham of the Federation of Protestant Welfare Agencies, the Employer was compelled to deal with this situation, against its will, before its 6-month renewal contract expired.

The evidence shows that the Employer's president approved the discharge of eight caseworkers on June 20, 1998, well before the representation petition was filed. But no date was set for execution of that decision and things dragged on as before. What finally moved the Employer, on July 28, 1998, to execute this decision and a concomitant decision to lay off three other

case aids, was to my mind, the fact that the Union filed its representation petition on July 24, and as Luard testified, the workers were still “at will employees” as they were not yet represented by a union or covered by a union contract.

Therefore, although I have no doubt that all of alleged discriminatees (caseworkers and case aids), would have been laid off or discharged soon after July 28, 1998, for legitimate reasons unrelated to the advent of the Union or their union membership or activities, the execution of the previously decided decision to discharge these employees was, in my opinion, accelerated by the filing of the representation case. As such, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act in this regard, although I do not think that the standard remedy would be appropriate in this case.

CONCLUSIONS OF LAW

1. By discharging or laying off the employees named in the complaint in part because of their union membership or activities, the Employer has violated Section 8(a)(1) and (3) of the Act.

2. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Notwithstanding my conclusion that the Respondent accelerated the discharge of the employees named in the complaint, the evidence shows that they would have been discharged, in any event, soon thereafter for nondiscriminatory reasons. Accordingly, I shall not recommend that the Employer be compelled to offer them reinstatement.

Additionally, and for the same reason, the amount of backpay, if any, that would be owed to them would be very limited. In this regard, I shall recommend that backpay be from the date of discharge (July 28, 1998) to the date the Employer made a commitment to hire a replacement for any particular discriminatee. (If the facts show that the Employer had already agreed to hire a replacement for a particular caseworker before July 28, 1998, then no backpay would be owed to that caseworker.) If no replacement was hired for a given discriminatee because that particular job, because of financial considerations, was left vacant and not filled, then no backpay should be granted. Interest on any money owed is to be paid in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Central Brooklyn Coordinating Council, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their support or activities on behalf of, District Council 1707, American Federation of State, County and Municipal Employees, AFL–CIO or any other labor organization or because of any concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Americo Fajardo-Wyatt, Clarissa England, Elaine Clarke, Darlene Oxendine, Carla McClain, Debra Dancy Dennis Barnes, Omubo Charles Richard Johnson, Jeanette Ackerman, and Lois Johnson for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”