Flowers, Jr. v. Gotbaum, Maher, et. al, 23 OCB 18 (BCB 1979) [Decision No. B-18-79 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of

JAMES K. FLOWERS, JR.,

Petitioner, DECISION NO. B-18-79

-and-

VICTOR GOTBAUM, EDWARD J. MAHER JOHN CALENDRILLO, and JAMES CULBERT, DOCKET NO. BCB-344-79

Respondents.

----------x

DECISION AND ORDER

On August 17, 1979, Petitioner filed an improper practice petition with the Board. Prior to filing with the Board, service of the petition was perfected on District Council 37. The City of New York was not made a party to the instant proceeding.

A number of documents attached to the petition clarify the nature of the dispute. Petitioner, an arterial worker under the CETA program for the City of New York Department of Transportation, states that he:

> "was denied my right to organize 'Gay CETA Workers Unite' and, further, was subjected to on-the-job harassment by fellow workers and my acting supervisor, James Culbert, as well as to telephone harassment at home by anonymous parties who identified themselves only as fellow workers and union members."

The relief demanded by Petitioner is:

> "1. Protection for lesbian and gay men on CETA jobs and at CETA demonstrations.
>
> "2. The establishment of procedures to make harassment and threats against

workers legally culpable.

"3. The right of gay CETA Workers Unite to organize on the job and to receive fair and equal treatment in union meetings and at union demonstrations."

The Answer of Respondents alleges that:

"1. The petition fails to state the nature of the controversy and fails to identify the provisions of the statute involved.... The petition is therefore fatally defective on its face and should be dismissed.

2. It is not incumbent upon the respondents to deduce the nature of the alleged cause of action from unverified documents appended to the petition nor should the Board ... consider said documents ....

3. Alternatively, $205 (5) (d) of the New York State Civil Service Law and §1173-4.2 of the New York City Collective Bargaining Law do not confer jurisdiction on the Board to hear complaints of the nature asserted by the petitioner.

4. If the Board does assert jurisdiction herein, the respondents deny the allegations of the petitioner, and affirmatively state that respondents' representation of the interests of the petitioner has been at all times full, fair, and to the best of their ability."

Respondent's first two points go to the sufficiency of the petition. Although Respondents object to the fact that documents have been appended to the petition, we find that this objection is without merit. The blank petition forms supplied by the Office of Collective Bargaining do not provide space for more than a short description of the nature of the controversy. This fact is acknowledged on the form itself

which provides that relevant and material documents shall be

attached. Petitioner was thus entirely reasonable in indicating in the space provided on his verified improper practice petition: "See accompanying document." The document referred to is signed by Petitioner and is clearly meant by him to be a part of his verified petition. Furthermore, this document provides a lengthy description of facts alleged by Petitioner to constitute the basis of his claim, includes a request for relief and also states that the petition is filed pursuant to NYCCBL §1173-4.2b(l).[1]

For the reasons stated above, we find that the petition herein is not defective on its face and we therefore turn to a consideration of Respondents' contention that the Board does not have jurisdiction to hear complaints of the nature asserted by petitioner.

We note that the Petition does not name the City of New York as a party and that there is no proof of service on the City. Further, the Petition specifies only that section of the NYCCBL which prohibits improper public employee organization practices. The Petition should therefore be

---

[1] That section provides:

"b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 1173-4.1 of this chapter, or to cause, or attempt to cause, a public employer to do so;"

read to exclude any claims against the public employer since it does not place any issue of improper employer practices before the Board. Thus, we are asked to decide whether the conduct alleged by Petitioner constitutes interference, restraint or coercion by the Union in derogation of Petitioner's rights to form, join or assist public employee organizations, to bargain collectively and to refrain from any or all such activity pursuant to NYCCBL §1173-4.1.

The detailed allegations of the petition can be summarized briefly as follows:

Petitioner has been active in organizing "Gay CETA Workers Unite" which has various intra - union objectives related to participation in Union meetings and CETA demonstrations, publicity in Union newspapers and the amendment of the Union constitution. Petitioner claims that his rights to engage in the union activity derives from the First and Fourteenth Amendments, the Bill of Rights of the AFSCME International Constitution and NYCCBL §1173-4.2b.

Petitioner alleges that he was harassed on the job by his fellow-workers because of his sexual preference. As a result, Petitioner states, he and others from the Coalition for Lesbian and Gay Rights went to DC 37 headquarters and met with a Union official, Respondent Maher herein. Upon being shown some offensive notes found in Petitioner's locker, Maher suggested that Petitioner "throw them in the garbage and said he would try to do something but could not guarantee anything."

The Petition further alleges that Maher said he would "try" to give Petitioner protection on the job, but made no response when asked about Petitioner's objectives relating to the Union constitution and newspaper.

On May 23, 1979, Petitioner alleges he was attacked by demonstrators at a CETA demonstration, and a "union representative" told him to leave because he was in danger. Following this fracas, Grievant spoke to Respondent Gotbaum herein who told him nothing would be done "about my harassment at the demonstration."

"A few days" before the July 10 CETA demonstration, Petitioner alleges that he telephoned Respondent Calendrillo at the DC 37 Blue Collar Division "to ask about the demonstration." Calendrillo allegedly told Petitioner not to attend the demonstration because "we cannot guarantee your safety." Petitioner did not attend the July 10 demonstration.

Petitioner further alleges that his acting supervisor harassed him on the job in July by "charging me with insubordination on my job." Petitioner contends that "no hearing has been granted me on any of these matters." Other documents submitted in support of the petition show that on June 29, 1979, James Culbert, Petitioner's supervisor, gave to Petitioner a "record of unsatisfactory performance" dated June 28, which stated that the objectionable behavior engaged in was:

> "belligerent attitude, failure to follow orders, insubordination, defacing City property"

and which recommended the following "improvement":

> you change your attitude, follow orders as directed, recommend #6 for the two days in question.

On August 3, 1979, Petitioner's attorney wrote to Commissioner David Love of the Department of Transportation stating that Petitioner's supervisor had submitted a report of unsatisfactory performance and demanding an immediate hearing.[2]

Finally, on August 21, 1979, Paul Goodman of the DC 37 Legal Department wrote to Petitioner's attorney stating that he had investigated the incident leading to the June 29, 1579 unsatisfactory report referred to in the August 3 letter to Commissioner Love. Mr. Goodman's letter related the details of an incident arising out of a disagreement between Petitioner and his supervisors relating to Petitioner's request for two days leave and the arrangements for replacing the employee who had made up for Petitioner's absence.

The letter states:

> "Mr. Flowers refused, however, to work the scheduled day tour and clocked in without authorization, for the night tour. Following a confrontation between Mr. Flowers and Mr. Culbert, the foreman, Mr. Flowers brought his time card to the headquarters

[2] There is no indication in the papers submitted to the Board that Commissioner Love responded to this letter. The letter indicates that a copy was sent to Respondent Gotbaum.

> of District Council 37 and met with Mr. Nat Triolo of our staff. Mr. Flowers told Mr. Triolo that the foreman had threatened to dock him two days and had crossed off the time card the unscheduled hours Mr. Flowers had worked.
>
> Mr. Triolo referred the matter to Mr. John Calendrillo, the Council Representative for the area. Mr. Calendrillo spoke with Mr. Bided, the district foreman, who was willing to forget the entire incident and not dock Mr. Flowers. Ms. Marlene Hochstadter, the CETA coordinator for highways, also agreed to this arrangement.
>
> Through out the matter, our representatives have tried to work with Mr. Flowers to arrange a satisfactory conclusion to this matter. The arrangement noted above, under the circumstances, represents a fair resolution for all parties concerned.
>
> If you have any further questions on this matter, please do not hesitate to contact Mr. Calendrillo ....”

Following receipt of this letter by the Board, Petitioner’s attorney requested, and was granted, further time until September 14, 1979, to submit additional papers in response to the documents submitted by the Union. However, Petitioner’s attorney informed the Board on September 13, 1979, that Petitioner’s case was complete and that no further papers would be submitted.

Discussion

This Board has discussed the extent of its public employee improper practice jurisdiction pursuant to NYCCBL

§1173-4.2b in a recent case.[3] As set forth at length in that decision, the Board of Collective Bargaining has no jurisdiction over internal union affairs which do not affect the "nature of the representation accorded to the employee by the union" with respect to negotiating and maintaining terms and conditions of employment. Thus, we have no jurisdiction over any of the Petitioner's allegations herein that relate purely to intra-union matters and do not affect Petitioner's relationship with the public employer.

It is clear under this standard that we have no jurisdiction over any matters concerning Petitioner's desire to participate in Union affairs relating to Union publications and amendment of the Union constitution. Further, we have no jurisdiction over events relating to Petitioner's participation in internal union meetings unless it can be shown that those meetings were directly concerned with Petitioner's terms and conditions of employment in that they had an effect on the representation accorded to Petitioner vis-a-vis the public employer.[4]

Petitioner's allegations relating to his request for protection at CETA demonstrations do not make out an improper

---

[3] Velez and Local 237, IBT, Decision No. B-1-79. The legal precedents are discussed at length in that decision.

[4] As we said in B-1-79, remedies for internal union disputes are to be sought in the courts.

practice. The nature and purposes of these demonstrations is not set forth in Petitioner's papers, and it does not appear that they were related to the Union's representation of Petitioner in negotiations or grievance proceedings. We do not believe that a Union is required to offer police protection at crowded public demonstrations, nor, for that matter, is, the Union required to protect an employee physically on the job. Of course, Union officials may not initiate or take part in harassment of activist employees at the work location or at a public demonstration. In the instant case, however, Petitioner does not allege that the named Union Respondents personally harassed him or were in any way responsible for his problems with his co-workers arising out of his espousal of Gay Rights. Based on these facts as they were presented to us, we cannot find that the Union's failure to protect Petitioner physically was an improper practice with the meaning of NYCCBL §1173-4.2b.

From the papers placed before us in this proceeding, it appears that Petitioner makes out a prima facie improper public employee organization practice by alleging that the events surrounding the unsatisfactory performance report of June 28, 1979, constitute a failure on the Union's part to represent him fairly. The Union rebuts this aspect of the Petition by showing that it investigated the issuance of the report and secured the agreement of management to "forget the entire incident and not dock Mr. Flowers." The letter of August 21,

1979, to Petitioner's attorney invites further contact from Petitioner. This letter was dated after the Petition herein and well before September 14, 1979, the date for submission of any final papers deemed necessary by Petitioner. In light of the fact that Petitioner had an opportunity to object to the solution worked out by the Union as well as an extended period of time to place any further allegations of failure of fair representation before the Board, we find that Petitioner's silence is significant and constitutes an acceptance of and acquiescence in the representation of his interests by the Union herein.

Thus, we find, and Petitioner does not urge to the contrary, that the Respondent Union investigated Petitioner's complaint of supervisory harassment and secured the rescission of the threatened penalty and the promise that management would "forget the entire incident." Petitioner has not alleged to the Board that this relief was unsatisfactory or that he sought further action from the Union. We therefore conclude that the Union's representation of Petitioner in this instance was in good faith, was fair, and was in compliance with its duty of fair representation.[5] There being no violation of Law, we must dismiss the Petition.

O R D E R

Pursuant to the powers vested in the Board of Collective

[5] See generally Vaca v. Sipes, 386 US 171, 64 LRRM 2369 (1969); Jackson v. Regional Transit Service, 388 NYS 2d 441, 444. (App. Div., 4th Dept. 1976)

Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the Petition herein be, and the same hereby is, dismissed.

DATED: New York, New York.

October 31, 1979

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

EDWARD SILVER
MEMBER

EDWARD F. GRAY
MEMBER

VIRGIL B. DAY
MEMBER