

L.1549, DC37 v. City, HRA, 25 OCB 16 (BCB 1980) [Decision No. B-16-80 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper
Practice Proceeding

- between -

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO and LOCAL 1549,

Decision No-B-16-80

Petitioners,

Docket No. BCB-413-80

- and -

CITY OF NEW YORK, HUMAN
RESOURCES ADMINISTRATION,

Respondents.

DECISION AND ORDER

On April 18, 1980 the Office of Collective Bargaining received a Verified Improper Practice Petition (the "Petition") in which District Council 37, AFSCME, Local 1549 (the "Union") alleged that the grievant, Juanita Weston, a provisional employee, was demoted in retaliation for union activity.

The City, appearing by its Office of Municipal Labor Relations (the "City"), moved to dismiss the improper practice charge on the ground that the matter is time-barred by the applicable statute of limitations. The union opposed the City's motion denying that the matter is time-barred. The City in its reply reiterated its position.

BACKGROUND

On June 25, 1979 the grievant was demoted to office Aide from the provisional appointment of office Associate. On August 30, 1979, the contract grievance procedure was initiated by the filing of a grievance. Sometime during the course of the grievance proceedings the Union determined that "the matter was an improper practice allegation rather than a subject for grievance." (Union Opposition to Motion to Dismiss ¶4).

On April 18, 1980, the Union filed its Petition alleging that the demotion "was in retaliation for [the grievant's] activities as shop steward on behalf of Petitioner" and thus was in violation of Section 1173-4.2a(3) of Chapter 54 of the New York City Collective Bargaining Law ("NYCCBL"). The relief requested includes restoration of the grievant's Office Associate position and award of the difference in pay with interest between the two positions for the period since the demotion.

POSITION OF THE PARTIES

The City's Position

In its motion to-dismiss, the City cites §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (the "OCB Rules") for its argument that the filing of the improper practice charge some ten months after the demotion occurred is barred by the running of the statute of limitations. In relevant part §7.4 reads as follows:

"A petition alleging that a public employer or its agents has engaged or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof"

The City claims that the four month statute of limitations was not tolled here by the filing of the grievance on August 30, 1979. The City also maintains that it need not prove prejudice by the lapse of time since, as opposed to the defense of laches, the defense of the running of the applicable statute of limitations does not require such a showing. Here the four month period for the filing of the improper practice petition expired on or about October 25, 1979 and, therefore, the City claims that the petition should be dismissed as untimely.

The Union's Position

The Union avers in paragraph 3 of its opposition to the motion to dismiss that the filing of the grievance on August 30, 1979 "well within the required four (4) month time limit provided in the collective bargaining agreement as well as in Section 7.4" of the OCB Rules. In paragraph 6 of its opposition, the Union further states that "the complaint was timely raised in the first instance and that Petitioners [the Union] should not be found untimely by resort to the proper proceedings."

The Union also claims in paragraph 7 of its opposition that there was no prejudice to the City as the City "had timely notice of the matter (since the institution of the grievance)."

DISCUSSION

This case involves an issue of first impression for the Board namely whether the filing of a grievance tolls the four month statute of limitations on a subsequent improper practice claim based on the same allegations.

At the outset it should be noted that neither the grievant nor the Union is alleging lack of knowledge of the alleged anti-union animus at the time of the filing of the grievance. In fact, for all intents and purposes the Union has admitted in its opposition that it did know of the City's alleged improper motive on August 30, 1979. In previously quoted paragraph 7 of its opposition, the Union claims lack of prejudice to the City because the City "had timely notice of the matter since the institution of the grievance."

Section 7.4 of the OCB Rules in relevant part is the same as Section 204.1(a)(1) of the PERB Rules of Procedure. Therefore, PERB precedents interpreting its four-month period are useful in determining the issue here presented.

In Board of Education of the City School District of the City of New York, 12 PERB §3069 (1979), a teacher filed a grievance two months after an allegedly improper transfer. The grievance was processed through the grievance procedure and at about the time he requested arbitration, he also filed an improper practice charge, some nine months after the date of transfer.

In affirming the hearing officer's dismissal of the charge because it was not timely under PERB's rules in that the transfer occurred more than four months prior to the filing of the charge, the PERB panel stated:

"The initiation of a contract grievance complaining about employer conduct does not extend the period during which an improper practice charge may properly be brought as to that conduct."

In Suffolk County Water Authority, 12 PERB §4541 (1979), the Union tried to circumvent the four-month rule by amending its charge to indicate that it had grieved the dispute and had filed its charge within four months of the arbitrator's final decision. In rejecting this contention, the PERB director stated; "Pursuance of a contractual remedy does not toll the period in which an improper practice charge must be filed." Accord, New York City Transit Authority, 10 PERB §3077 (1977); see also, Kings Harbor Care Center, 13 PERB §4506 (1980).

As to the Union's allegation that there was no prejudice to the City by the delay in filing of the charge, neither §7.4 of the OCB Rules nor §204.1(a)(1) of the PERB Rules of Procedure require such a showing. In fact PERB has consistently applied its four month rule without any discussion of prejudice. See cases cited above and in addition, Sackets Harbor Central School District, 13 PERB §4521 (1980 - Hearing Officer); United Federation of Teachers, 13 PERB §4513 (1980).

On the foregoing authority, we hold that initiation of the contract grievance procedure does not toll the four-month period under §7.4 of the OCB Rules for the filing of an improper practice charge based on the same allegation. Therefore, we find that the Petition in this case is untimely under §7.4 of the OCB Rules and must be dismissed.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York Collective Bargaining Law, it is hereby

ORDERED, that the City's motion to dismiss the improper practice charge be, and the same hereby is, granted; and it is further

ORDERED, that the Union's improper practice charge be, and the same hereby is, dismissed.

Dated: May 20, 1980
New York, N.Y.

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD F. GRAY
MEMBER

