Muller v. Dep't of Parks & Rec., 25 OCB 35 (BCB 1980) [Decision No. B-35-80 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

HARRY J. MULLER, DECISION NO. B-35-80

Petitioner, DOCKET NO. BCB-386-80

-and

NEW YORK CITY DEPARTMENT OF
PARKS AND RECREATION,

Respondent

DECISION AND ORDER

This proceeding was commenced by the filing by Harry J. Muller of an improper practice petition on December 10, 1979 alleging that:

> ... Respondent's acting in bad faith caused an incident to occur which resulted in [Petitioner's] suspension for 3½ days commencing noon Tuesday November 27, 1979 through November 30, 1979 with knowledge that the election of union chapter president was scheduled for noon November 29, 1979. All of the above resulted in [Petitioners] being unable to campaign for re-election as the incumbent chapter president and were in violation of Chapter 54 NYC Charter....

The respondent Department of Parks and Recreation through the City's Office of Municipal Labor Relations (hereinafter "the city" or "OMLR" maintains that petitioner was not prevented from campaigning for union office and that he has failed to allege any facts which, if true, would establish a violation of the New York City Collective Bargaining Law.

BACKGROUND

On November 27, 1979, petitioner was suspended for three and one half days from his position as Assistant Landscape Architect with the New York City Department of Parks and Recreation pending the filing of charges and a hearing. On December 5, 1979, he was notified that three charges were preferred against him. These may be summarized as follows:

> Charge I - Failure to attend to duty, in that he failed to join the survey party in its work assignment, disrupted the activities of the Deputy Director and others in the Capital Projects Division, and delayed the work of the field survey team;
>
> Charge II - Failure to follow instructions of a supervisor, in that the failed to join the survey party after being instructed to do so;
>
> Charge III - Failure to maintain a high standard of courtesy and personal behavior, in that he disrupted the activities of the Deputy Director, spoke in a loud and abusive tone to his supervisor, and failed to follow the directions of same.

After an informal conference on December 20, 1979, a "Notice of Determination" was sent to petitioner indicating that the charges had been upheld and a penalty of two months suspension without pay had been recommended. Petitioner was further informed that he had the option, pursuant to Department procedures to: (a) accept the recommendation, (b) reject the recommendation and proceed to a hearing in accordance with section 75 of the Civil Service Law, or (c) reject the recommendation and proceed, through a union representative, in accordance with

the contractual grievance procedure, waiving the right to utilize procedures afforded by Civil Service Law. Apparently, petitioner chose the second option and, in a letter to Bronson Binger, Director of Capital Projects for the Department of Parks and Recreation, indicated his desire to and did file a written response to the charges preferred against him.

On December 10, 1979, petitioner, although a member and a former chapter president of Local 375, Civil Service Technical Guild, filed on his own behalf a verified improper practice petition which is the subject of the instant proceeding. Following this initial pleading, the City filed an answer, petitioner filed a reply and the City made a final response. The pleadings were examined by the Office of Collective Bargaining (hereinafter "OCB") which made a preliminary determination that insufficient facts had been pleaded to support a finding of improper practice as defined by the New York City Collective Bargaining Law section 1173-4.2(a).[1] On July 7, 1980, the OCB Trial Examiner wrote a

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[1] NYCCBL §1173-4.2(a) provides:

a. Improper public employer practices. 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 1173-4.1 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;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

letter to petitioner requesting that he provide specific facts which, if proven, would support an improper practice charge. in spite of several telephone conversations with petitioner in which the Trial Examiner attempted to explain the type of information required, petitioner did not respond to the July 7, 1980 letter nor to a subsequent letter, dated August 6, 1980, granting petitioner a final fifteen days in which to reply. In a telephone conversation on August 28, 1980, petitioner indicated to the Trial Examiner that he would submit no further written pleading but wished to amend his petition to allege violations by his employer of NYCCBL section 1173-4.2(a) (1) and (3).

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that respondent's act of suspending him for three and a half days during which period the election of union chapter president was to take place violated NYCCBL section 1173-4.2(a)(1) and (3). Petitioner maintains that his supervisor provoked the incident which led to his suspension.

Petitioner further contends that he was "imposed upon to work in a capacity that was out of title" in that participation in field survey operations is a job duty of an Assistant Civil Engineer and not that of an Assistant Landscape Architect.

Finally, petitioner alleges that the documents he has provided relating to the charges brought against him and his responses thereto demonstrate that the City has sought to "dominate or interfere with the administration of [Union] Chapter 7, Civil Service Technical Guild" within the meaning of NYCCBL section 1173-4.2(a)(2).

Petitioner seeks as a remedy rescission of the suspension back pay, and an order voiding the union election of November 29, 1979. He also seeks to have a new election held.

City Position

The City asserts that petitioner was not prevented, because of his suspension or for any other reason, from campaigning for union office. He was not barred from the employer's premises. OMLR contends that petitioner has failed to show any relationship between the suspension and his campaign for union office or that the disciplinary action was taken to prevent him from. campaigning.

The City further specifically contends that petitioner has failed to allege any facts which, if true, could establish that the City attempted to "dominate or interfere with the formation or administration of any public employee organization" in violation of NYCCBL section 1173-4.2(a)(2). Asserting that petitioner has failed to state a claim upon which relief may be granted, the City requests that the improper practice petition be dismissed in its entirety.

DISCUSSION

By his written pleadings and oral conversations with the OCB Trial Examiner, petitioner has alleged by the City of NYCCBL section 1173-4.2 (a)(1),(2) and (3)These provisions of the collective bargaining law make it an improper practice for a public employer:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 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; ....

We conclude that petitioner has provided insufficient facts to support a finding by this Board that any of the cited subsections of section 1173-4.2(a) has been violated. Petitioner's charges consist entirely of surmise, speculation and conjecture and are totally unsupported by allegations of fact. Such charges, in the absence of allegations which, if proven, would sustain the charges, cannot provide a basis for a finding of improper practice, While petitioner need not present irrefutable evidence that the employer's action discriminated against him as an individual or was designed to or did, in fact, interfere with union administration, he must make specific allegations of fact at least sufficient to demonstrate the need for a hearing in the matter. No such allegations have been made here.

This Board has held in a case where an employee was discharged allegedly for union activity, that the petitioner must show that the employer's agent responsible for the discharge had knowledge of the employee's union activity, that the agent harbored anti-union animus, and that the employee's discharge would not have occurred when it did but for his union activity.[2]

[2] Local 246, S.E.I.U. v. City of New York (Fire Department), B-10-72.

In B-10-72, these requirements were not met and the petition was dismissed. Similarly, in the instant case, petitioner has failed to sustain his burden of proof. The fact that petitioner was suspended for three and a half days during which the election of union chapter president was held does not alone justify a finding of discrimination against petitioner "for the purpose of... discouraging... participation in the activities of [his] public employee organization" (NYCCBL §1173-4.2(a)(3)). Nor does such disciplinary action without more constitute interference with petitioner's exercise of rights granted in NYCCBL section 1173-4.1 (NYCCBL §1173-4.2(a)(2)).

Petitioner may reason that the fact that he was on suspension may have influenced his colleagues in their choice of a chapter president but no facts are alleged which would support that conclusion. Even if they were, there is no indication that petitioner was prevented by the employer from campaigning or from appearing on the employer's premises; nor is there any evidence that the employer opposed petitioner's candidacy or in any way sought to affect the outcome of the election.

The mere fact that petitioner was a candidate for union office did not confer upon him immunity from otherwise appropriate and proper disciplinary procedures nor in any way diminish the employer's right to take such action. In the absence of a showing of discriminatory intent on the part of the employer, we find that no violation of the NYCCBL has been stated and we shall dismiss the petition.

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 filed in the instant case be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 1 , 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

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