Whetstone v. DC37, et. al, 29 OCB 2 (BCB 1982) [Decision No. B-2-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice

-between-

LEONARD L. WHETSTONE,

Petitioner,

-and-

DECISION NO. B-2-82
DOCKET NO. BCB-524-82

EXECUTIVE BOARD, DISTRICT COUNCIL 37, AFSCME AFL-CIO; VICTOR GOTBAUM and JOSEPH BARRITEAU As officials of DISTRICT COUNCIL 37, AFSCME, AFL-CIO; EXECUTIVE BOARD, LOCAL 1219, REAL ESTATE MANAGERS DISTRICT COUNCIL 37, AFSCME, AFL-CIO; CHARLES HANLEY, REGGIE WING, FRED DELGADO As Officials of LOCAL 1219, REAL ESTATE MANAGERS, DISTRICT COUNCIL 37, AFSCME, AFL-CIO; NAT LINDENTHAL As An Employee of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; ANTHONY GLIEDMAN, BERNARD SCHWARTZ, DAVID RUBINOVITZ and ROBERT T. MONCRIEF As Officials in the NEW YORK CITY DEPARTMENT OF HOUSING AND DEVELOPMENT; and CHARLES J. POIDOMONI As Director of Operations of the NEW YORK CITY DIVISION OF FIRE PREVENTION,

Respondents.

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In the Matter of the Improper Practice

-between-

LEONARD L. WHETSTONEr MICHAEL DOYLE, ELAINE BENNETT and ENRIQUE PEREZ,

Petitioners,

DECISION NO. B-2-82

DOCKET NO. BCB-535-81

-and-

EXECUTIVE BOARD, DISTRICT COUNCIL 37, AFSCME, AFL-CIO; JOSEPH BARRITEAU As An Official of DISTRICT COUNCIL 37, AFSCME, AFL-CIO; FRED DELGADO and CHARLES HANLEY As Officials of LOCAL 1219, REAL ESTATE MANAGERS, DISTRICT COUNCIL 37, APSCME, AFL-CIO; ANTHONY GLIEDMAN, BERNARD SCHWARTZ, DAVID RUBINOVITZ and ROBERT MONCRIEF As Officials in the NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; and GAIL SMITH As A Principal Administrative Associate in the NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

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DECISION AND ORDER

The petition in Docket No. BCB-524-81 was filed on September 4, 1981. In it, Petitioner Leonard L. Whetstone, a Senior Real Estate Manager in the New York City Department of Housing and Preservation and Development ("HPD") alleges violations of Sections 1173-4.2(h)(1)(2) and (4), 1173-4.2 (b) (1) and (2), and 1173-4.2 (c) (1) (2) (3) (4) and (5) of the New York City Collective Bargaining Law ("NYCCBL") , Article XV (Adjustment of Disputes) of the City-wide collective bargaining

agreement (the "Contract") between the City of New York ("the City") and District Council 37, AFSCME, AFL-CIO ("DC 37"), as City-Wide representative pursuant to Section 1173-4.3(a)(2), the Taft Hartley Act, the Landrum Griffin Act and the Civil Rights Act of 1964. Petitioner Whetstone apparently served the above-named respondents in a piecemeal fashion and prior to filing his petition with the OCB for on August 24, 1981, August 25, 1981, August 26, 1981, August 31, 1981, and December 2, 1981, the City, by the Office of Municipal Labor Relations ("OMLR") filed separate Motions to Dismiss on behalf of Bernard Schwartz, HPD Personnel Officer; David Rubinovitz, Area Director, HPD Office of Property Management; Charles J. Poidomoni, Director of Operations, NYC Division of Fire Prevention; Anthony Gliedman, HPD Commissioner; and Robert Moncrief, HPD Director of Operations, respectively. Counsel for DC 37 filed a Verified Answer on August 28, 1981 on behalf of the DC 37 Executive Board; Victor Gotbaum, DC 37 Executive Director; Joseph Barriteau, DC 37 Council Representative; Charles Hanley, President, Local 1219, Real Estate Managers, DC 37, AFSCME, AFL-CIO ("Local 1219"), and the Local 1219 Executive Board. Similarly, counsel for the International of the American Federation of State, County and Municipal Employees ("AFSCME") filed an answer on August 31, 1981 on behalf of Nat Lindenthal, an, employee of the AFSCME International. Whetstone did not submit papers in opposition to

the aforesaid Motions nor did he file a Reply.

Whetstone is one of four individuals, Elaine Bennett, Michael Doyle, and Enrique Perez being the others (collectively referred to as "Petitioners"), who filed the petition in Docket No. BCB-535-81 on October 13, 1981. Petitioners allege violations of NYCCBL Sections 1173-4.2(a) (2) and (4) , (b) (1) and (2), and (c) (1) (2) (3) and (4) and Article XV of the Contract. OMLR filed a Motion to Dismiss on October 1, 1981 on behalf of respondents Rubinovitz, Schwartz, Moncrief, Gliedman and Gail Smith, a Principal Administrative Associate (PAA) at HPD. On November 2, 1981 DC 37 filed a Motion to Dismiss on behalf of respondents Delgado, Hanley, Barriteau and the DC 37 Executive Board. Petitioners did not respond to either Motion.

BACKGROUND

Case No. BCB-524-81

According to Whetstone, on October 27, 1980, HPD's Office of Property Management, by then Assistant Commissioner Charles J. Poidomoni, announced that several Senior Real Estate Managers were being relieved of their supervisory responsibilities, effective November 17, 1980. Whetstone was one of the managers so affected, as was an individual named Warren Geisendorfer. On February 17, 1981, Geisendorfer was reinstated to his supervisory position. Whetstone claims

that he has greater seniority than does Geisendorfer. Consequently, on February 24, 1981, Whetstone's union, Local 1219, filed a Step I grievance on Whetstone's behalf alleging that Whetstone's seniority rights were violated both at the time of the November, 1980 reassignment and the February, 1981 reinstatement. The Step I grievance was heard on February 25, 1981. Among those in attendance were Local 1219 secretary Fred Delgado and HPD Area Director David Rubinovitz. Rubinovitz denied the grievance. Both Delgado and Rubinovitz recommended that a Step III appeal be presented before Robert Moncrief, HPD Director of Operations.

Whetstone states that he attended the Step II meetings before Moncrief on March 12 and 16, 1981, as did Delgado and Rubinovitz. He was represented by the Union at the hearing by Local 1219 representatives Delgado and Wing. On March 20, 1981, following an unsatisfactory determination at Step II, Delgado wrote to 014LR Director Bruce McIver and requested to proceed to Step III of the grievance procedure.

Estelle Karpf, OMLR Chief Review Officer, responded to Delgado's request in a letter dated April 1, 1981. She stated she was advised by HPD Personnel Officer Bernard Schwartz that the matter had been rescheduled at Step II. Thus, the OMLR Step III review request was premature. Karpf also stated that should a Step III review be necessary following the Step II processing, then Local 1219 should again write to OMLR.

DC 37 explains that after requesting to proceed to Step III following an unsatisfactory determination at Step II, Local 1219 was informed that due to a misunderstanding, Step II had not been conducted before the proper person. HPD Assistant Personnel Director Schwartz is the designated representative for HPD Step II conferences. Since the Step II hearing before Moncrief did not conform to contractual requirements, the union representatives felt that OMLR had a legitimate basis for claiming that a Step III review was premature. DC 37 states that in order to expedite the processing of Whetstone's claim on the merits and to avoid the possibility of the employer raising procedural claims in the future, it made a "good faith business judgment" not to contest the refusal to hear the grievance at the third step. Instead, it decided to participate in a rescheduled Step II hearing on April 24, 1981. Union representatives contacted Whetstone to inform him of the newly scheduled hearing. Whetstone complained of the decision to return to Step II. Two attorneys from DC 37's Legal Division and a Division Director spoke to Whetstone and assure him that DC 37 would proceed to Step III if he was not satisfied with the determination at the rescheduled Step II hearing. Whetstone again insisted that he had already completed Step II and had a right to go directly to Step III. Whetstone

did not attend the Step II hearing-scheduled for April 24, 1981. In the mass of charges set forth in his petition, Whetstone appears to claim that these actions of the City and the Union constituted a violation of Article 15 of the City-Wide contract and, as such, constituted an improper practice in violation of NYCCBL Section 1173-4.2.

Whetstone states that on May 5, 1981, he wrote to AFSCME President Jerry Wurf in Washington, D.C. and informed him of the situation. Wurf replied in a letter dated May 12, 1981, stating that his Special Representative in New York, Nat Lindenthal, was asked to look into the matter and stood ready to assist Whetstone. The record is devoid of evidence of any interaction between Lindenthal and Whetstone.

Whetstone claims that he has been the target of retaliatory measures as the result of the "nonprocessing" of the above grievance. He filed additional grievances over these actions. He alleges that all but one of these grievances have been totally ignored by both union and management representatives.[1] Whetstone specifically cites the following:

[1] The one "additional" grievance that Whetstone states receive attention relates to the March 6, 1981 Smith memo (infra). Said memo is the basis for the improper practice charge in BCB-535-81.

a) Four hours of annual leave time were deducted from Whetstone's balance in accordance with instructions from Director Rubinovitz in a memo dated May 28, 1981. In the memo, Rubinovitz stated that whetstone had been involved in union activity on May 27, 1981, for which he did not receive prior release time authorization. whetstone filed a Step I grievance concerning the matter on June 5. 1981.

b) A grievance filed on June 3, 1981, concerning the "complete breakdown in clerical support services."

c) On June 9, 1981, Whetstone was notified that effective June 15, 1981, he was being transferred from the HPD Tremont Office to the Bronxchester Office. On June 10, 1981, Whetstone filed a Step I grievance alleging that the transfer was an "administrative fiasco to avoid a satisfactory disposition of my grievances" andthat his seniority rights had been violated. Attached thereto was a petition containing 35 signatures protesting the transfer.

d) On June 11, 1981, Whetstone submitted a Step I grievance concerning his evaluation. Whetstone states that he was made aware of the evaluation in question by Moncrief on March 12, 1981, at the Step II meeting on the February 1701981, transfer grievance. He claimsthat the evaluation presented at the meeting was not the same as the one originally given to him on August 11, 1980 and that his rebuttal of September 4, 1980 had been removed from his file.

According to Petitioners, on March 6. 1981, PAA Gail Smith wrote a departmental memo to Area Director Rubinovitz

concerning the processing of returned rent bill transmittals. In it, Smith criticized Petitioners Whetstone, Doyle, Bennett and Perez as well as Real Estate Manager James Burton for allegedly, ignoring proper procedures and recommended that disciplinary measures be taken to correct the situation. Petitioners and Burton filed a Step I grievance on March 11, 1981, alleging the memorandum to be slanderous and a defamation of character. As a remedy, Petitioners sought a retraction of the memo in question and personal apologies on the floor of the office site from both Smith and Rubinovitz.

In a written communique to Local 1219 concerning the grievance, dated March 18, 1981, Rubinovitz stated that as a Principal Administrative Associate, Smith had no authority to decide whether an issue merited disciplinary action. Rubinovitz went on to apologize to the employees named and assured them that only supervisors and the Area Director would decide disciplinary issues. Furthermore, Rubinovitz denied that the memo was slanderous or a defamation of character.

A Step I grievance meeting was held on March 19, 1981. Delgado, Rubinovitz and the Petitioners were among those in attendance. Following an unsatisfactory determination at Step I, Delgado wrote to Personnel Officer Schwartz on March 20, 1981, seeking to invoke Step II of the grievance procedure. In his letter, Delgado called for a "correction and retraction

of the whole content so stated in the memorandum." He also took issue with Rubinovitz's finding of lack of slander and defamation of character.

Petitioners claim that HPD ignored their appeal. Similarly, Petitioners maintain that they asked their union to "invoke the next step" but that this request was also ignored.

POSITIONS OF THE PARTIES

D.C. 37's Position

DC 37, for itself and its affiliate, Local 1219, moves to dismiss the petition in BCB-524-81 on several grounds. Specifically, DC 37 maintains that Whetstone fails to plead any factual allegations which show arbitrary discriminatory or bad faith conduct on the part of DC 37; furthermore, that Whetstone does not allege any facts which show that he was harmed by DC 37's decision to attend the rescheduled Step II hearing; and that documentary evidence in the form of correspondence demonstrates that the Union continued to process the grievance in question pursuant to applicable procedures up to the third step.[2] Finally, DC 37 contends that Whetstone was apprized of the rescheduling of Step II in early April, 1981 but that he did not file his petition until September 4, 1981. Therefore,

[2] The correspondence referred to consists of a letter dated March 20, 1981, from Delgado to McIver requesting a Step III hearing and a letter dated April 21, 1981, from DC 37 Council Representative Barriteau to Schwartz confirming the rescheduled Step II hearing.

the petition may not be maintained since Whetstone did not commence his action until after the tolling of the four month statute of limitations period.

DC 37 would apply the heretofore discussed statute of limitations and failure to state a cause of action arguments to the facts alleged in BCB-535-81. Furthermore, DC 37 urges that the cases represented by Docket Nos. BCB-524-81 and BCB-535-81 be consolidated. It argues that the petitions in these cases involve the manner in which the same grievance filed on behalf of Petitioners was processed; therefore, identical facts and issues are raised in both petitions.

APSCME's Position

In its Answer to the Petition in BCB-524-81, AFSCME argues for dismissal on several grounds. In the first place, the AFSCME International is not a party to any collective bargaining agreement which covers a unit in which Whetstone is employed. Therefore, Lindenthal cannot be considered an "agent" of the public employee organization nor on any other basis to owe Petitioner any duty of representation or otherwise to act on his behalf.

Secondly, it is not alleged that Lindenthal played any role in the events set forth by Whetstone. Even assuming, arquendo, that Whetstone was the victim of an improper

practice, Lindenthal was not a party to whatever actions gave rise to a violation of the NYCCBL.

Third, APSCME states that although it is difficult to determine exactly what Whetstone is complaining about, the most recent event over which he is dissatisfied occurred on March 160 1981. Thus, Whetstone is time-barred from having the instant matters considered by the OCB in that the petition was not filed within the four month statute of limitations period.

The City's Position

OMLR argues that the charges and allegations contained in the instant petitions fail to state a claim upon which relief can be granted in that Petitioners fail to allege any facts which form the basis of an improper employer practice pursuant to NYCCBL Sections 1173-4.2(a)(2) and (4). Furthermore, there has been no violation of Sections 1173-4.2(c)(1). (2)(3) and (4) since the City is under no obligation to enter into negotiations with Petitioners. Additionally, the City urges that alleged violations of the City-Wide contract are inappropriate subjects for an improper practice petition.

The City would also have us consolidate cases BCB-524-81 and BCB-535-81, arguing that the same issues based on identical facts are raised in both petitions.

DISCUSSION

After a careful examination of the facts in the above-captioned matters, we find that the allegations contained in BCB-535-81 are part and parcel of the allegations contained in BCB-524-81. Both cases are based upon overlapping factual allegations and common questions of law. Therefore, in order to avoid unnecessary delay and to best effectuate the policies of the NYCCBL, cases BCB-524-81 and BCB-535-81 are hereby consolidated for the purposes of decision.

We are mindful of the fact that Petitioners have not had the advantage of legal counsel in preparing and presenting their petitions and other submissions in these matters. We have accordingly been at pains to make allowances for the numerous deficiencies in Petitioners' presentation of their allegations and their patent lack of understanding of the nature of proceedings such as these. To begin with, it may be noted that our authority does not extend to the interpretation and administration of any statute other than the NYCCBL and that Petitioners' allegations of violations of legislation such as the Landrum Griffin Act and the Civil Rights Act are totally misplaced in a petition addressed to this Board. Similarly, allegations that HPD violated contractual grievance procedures are inappropriate to the improper practice proceedings herein and have no bearing on the

resolution of the matters before us. This being the case, we do not reach the question, raised by DC 37, whether Petitioner's reliance on City-wide contract provisions is appropriate.

We find that Petitioners' allegations of violation of 1173-4.2(c) are also inappropriate. Subdivision (c) pertains to the duty of a public employer and the certified or designated employee organization to bargain collectively in good faith. Under Section 1173-4.2(c), as it applies to the parties herein, the City is obligated to bargain collectively with DC 37 and vice versa. Petitioners have no standing as individuals to allege that this obligation, running between the Union and the City, has been violated. Therefore, we dismiss all allegations in the instant matter pertaining to Section 1173-4.2(c).

The AFSCME International argues that it is not properly a party to the proceedings at hand in that its representative, Nat Lindenthal, played no part in any of the events which form the basis of the present petitions. Given that the APSCME International, Wurf and/or Lindenthal gave no assistance to Petitioners, there is not the slightest evidence or allegation that these persons had any obligation of any kind to Petitioners. There obviously can be no breach of a nonexistent obligation. We therefore dismiss all charges against the AFSCME International.

Similarly, we find that PAA Gail Smith is not properly a party to the matters before us. As stated above, Smith was the person who wrote the departmental memorandum of March 6, 1981 which formed the basis for one of the grievances described by Whetstone in BCB-524-81 and the improper practice petition in BCB-531-81. it is true that in the memo, Smith criticized Petitioners and recommended that disciplinary action be taken against them. However, as stated by HPD Area Director Rubinovitz in his March 18, 1981, commnunique to Local 1219, Smith holds a clerical title. She does not have the power to decide disciplinary issues concerning real estate managers. She is clearly not in a position of authority vis-a-vis Petitioners. Even if she were, Petitioners' allegations would establish no wrongdoing on her part nor any violation of their rights. Thus, if Smith were a duly constituted representative of management as Petitioners apparently suppose her to be, they would have no right to object to intra-management communications regarding the work performances of Petitioners; nor could they seek a gag order from this Board enjoining such communication. The charges of violation of Section 1173-4.2 against Smith are dismissed.

Decisions concerning the processing of the grievance which formed the basis for Whetstone's improper practice petition in BCB-524-81 were made in March and April, 1981; Whetstone did not file his petition until September 5, 1981.

Similarly, the acts complained of in BCB-535-81 occurred in March, 1981. However, that petition was not filed until October 13, 1981.

Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining prescribes a four month statute of limitations for the commencement of improper practice proceedings.[3] An analogous rule is set forth in Section 204.1(a)(1) of the Rules and Regulations of the New York State Public Employment Relations Board.[4] Thus, in both cases, the triggering events complained of by Petitioners occurred well beyond the statutory four month.

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[3] Section 7.4 of the Revised Consolidated Rules provides as follows:

> Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in 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 by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order.

[4] PERB Rule 204.1(a)(1) provides:

(2) Piling of Charge.

> (1) An original and four copies of a charge that any public employer organization or its agents, has engaged in or is engaging in an improper practice may be filed with the Director within four months thereof by one or more public employees or any employee organization acting in their behalf, or by a public employer.

period in which an improper practice charge may be filed. These allegations are therefore time-barred and are considered only in the context of background information rather than as specific violations of the NYCCBL presently being pleaded (Decision No. B-20-81).

Whetstone states that as a result of his "inability" to have his "first" grievance (i.e., the March, 1981 grievance relating to seniority) heard "properly," he has been the victim of retaliatory measures. These actions formed the bases of four grievances filed by Whetstone in May and June, 1981; they are not the subject of separate improper practice petitions.

Whetstone's brief in BCB-524-81 cited various documents relating to these four grievances and copies of the documents were said to be attached to the brief. Both DC 37 and the City, in their answering papers, stated that they were not served with copies of the documents. Although apprized of his right to file a Reply by the Trial Examiner, Whetstone declined. The allegations of the City and D,C, 37 are thus unrefuted.

As stated in Rule 7.5 of the Revised Consolidated Rules of the office of Collective Bargaining[5] a petition must

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[5] Rule 7.5 states in full:

§7.5 Petition-Contents. A petition filed pursuant to Rule 7.2. 7.3 or 7.4 shall be verified and shall contain:

a. The name and address of the petitioner;

b. The name and address of the other party (respondent);

c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;

d. Such additional matters as may be relevant and material.

contain "relevant and material documents, dates and facts," A petition which fails to comply to this standard deprives the other party of a clear statement of the charges to be met and materially hampers the preparation of a defense. The materials in question were not included in the petition but constituted exhibits or appendices to a brief. Even allowing for Petitioners' lack of legal expertise and assuming that the additional materials might have been deemed to constitute amendments to the petition, they may not be accepted or considered ex parte.

Whetstone did not take advantage of the opportunity to correct his pleadings. He may not now come before us and seek what amounts to ex parte relief. We therefore will not consider those allegations that relate to the May and June, 1981 grievances. We thus dismiss the remaining portions of Whetstone's claim.

In dismissing the present petitions, we find that in neither case did Petitioners establish a prima facie cause of action. Whetstone complains of "retaliatory" measures. However, he fails to demonstrate how the actions of either City or Union representatives were based upon motives prohibited by Section 1173-4.2 and interfered with the rights to organize and to bargain collectively (or to refrain from doing so) granted by Section 1173-4.1 of the NYCCBL. Allegations of such improper motivation must be based upon statements of probative facts rather than recitals of conjecturer speculation and surmise (Decision No. B-30-81). The record herein is devoid of any

objective evidence that Respondents' actions were intended to or that they did, in fact, interfere with or diminish Petitioners' rights under Section 1173-4.1. Thus, in the absence of a showing of discriminatory intent, we find that no violation of the NYCCBL has been stated.

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 petitions filed in the cases docketed as BCB-524-81 and BCB-535-81 be, and the same hereby are, dismissed.

DATED: New York, N.Y.
January 11, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
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JOHN D. FEERICK
MEMBER