

Lehman v. HHC, Blanchette, et. al, 29 OCB 23 (BCB 1982) [Decision No. B-23-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

RONALD LEHMAN,

DECISION NO. B-23-82

Petitioner,

DOCKET NO. BCB-538-81

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION; LINDA BLANCHETTE, Patient
Accounts Manager, NICHOLAS AGUIRRE,
Assistant Patient Accounts Manager;
MR. ATLAS, Assistant to the Personnel
Director; MR. NAGROV, Chief of Security

Respondent(s)

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INTERIM DECISION
AND ORDER

Petitioner Ronald Lehman, an agent and grievance representative of Social Service Employees' Union, Local 371 (hereinafter "Local 371" or "the Union"), filed a verified improper practice petition with the office of Collective Bargaining on October 20, 1981¹, in which he charged that the New York City Health and Hospitals Corporation (hereinafter "HHC") and its agents have committed and continue to commit an improper practice in the following manner:

¹ The improper practice petition was signed and sworn to on August 19, 1981, but was not received by OCB until October 20, 1981. No explanation has been offered for the petitioner's delay in filing the petition.

"Since on or about July 1, 1981, the above-named respondents have interfered with, restrained and coerced public employees in the exercise of their rights granted in Section 1173-4.1 of the New York City Collective Bargaining Law, by unlawfully refusing to grant the above-named petitioner, an agent and representative of the SSEU LOCAL 371, access to Metropolitan Hospital to represent employees employed at said Hospital and represented for purposes of collective bargaining by Local 371 regarding their grievances against said Hospital."

The petitioner requests that the Board direct the respondents to cease and desist from engaging in this or similar activity in the future.

HHC, by its attorney, submitted a motion to dismiss and supporting affirmation on November 16, 1981. This motion sought dismissal of the petition for failure to state an improper practice under the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The petitioner's attorney submitted an affirmation in opposition to the motion on December 14, 1981. HHC filed a reply affirmation on December 31, 1981. The petitioner's attorney submitted a supplemental affirmation in opposition to the motion on January 5, 1982. HHC filed a letter in response to the supplemental

affirmation on January 12, 1982.²

Nature of the Dispute

For purposes of this motion to dismiss, it is not disputed that the petitioner is a representative of Local 371, that members of a bargaining unit represented by Local 371 are employed by HHC at Metropolitan Hospital, and that the petitioner's access to Metropolitan Hospital has been denied and/or restricted. The dispute raised by the motion to dismiss focuses on the meaning and legal sufficiency of the petitioner's allegations of activity claimed to constitute an improper practice. Specifically HHC disputes whether a claim of "unlawful" and/or "discriminatory" denial of a union representative's access to a work location for purposes of handling employees' grievances, is sufficient to state an improper practice under the NYCCBL.

² HHC's letter, received by OCB on January 12, 1982, observes that "... the Corporation is unaware of any provision in the OCB rules allowing a Supplemental Affirmation...." We note that §13.11 of the OCB Rules provides for the filing only of moving papers and answering affidavits. Neither a reply affirmation nor a supplemental affirmation in response to a reply affirmation is authorized. However, in the circumstances of this case, we find that all of the papers submitted help to clarify the record herein, and we have considered them all in reaching our determination.

Positions of the Parties

HHC'S Position

The affirmation in support of HHC's motion to dismiss asserts that the petition is so lacking in allegations of fact as to deny the respondents notice of the petitioner's claim and an opportunity to respond. HHC claims that the petition does not identify the dates on which the improper practice is alleged to have occurred, and does not allege where and in what manner the respondents denied petitioner access to Metropolitan Hospital. HHC also contends that, assuming arguendo that petitioner was denied for nondiscriminatory business reasons an unqualified right of access to the institution, the petition fails to allege or explain how the denial of access to one union representative in any way interferes with, restrains or coerces Metropolitan Hospital employees in the exercise of their rights granted under the NYCCBL.

In response to the allegation in the petitioner's attorney's affirmation in opposition to the motion to dismiss that petitioner was denied access for "illegal discriminatory reasons", HHC argues that such allegation was not raised in the petition and is, in any event, not supported by any statement of facts concerning such discriminatory denial of access. HHC further alleges that

the petition fails to include any allegation or evidence of an unlawful motive by the respondents, which, contends HHC, is a necessary element of a claim of discriminatory conduct.

HHC notes that the petition does not allege that Metropolitan Hospital employees have been denied representation by any or all agents and officials of Local 371, or that all Local 371 representatives have been denied access to Metropolitan Hospital. It is argued by HHC that the petitioner has failed to allege how denial of access to petitioner in any way relates to his position as a union official or to rights of employees under the NYCCBL. Moreover, it is claimed by HHC that the supplemental affirmation submitted by petitioner's attorney demonstrates that other representatives of Local 371 are given free access to Metropolitan Hospital and that, consequently, employees represented by Local 371 are not being interfered with, restrained or coerced in the exercise of their protected rights.

For the above reasons, HHC moves that the improper practice petition be dismissed as a matter of law.

Petitioner's Position

The petitioner contends that the allegations of the petition are sufficiently specific to put the respondent

on notice of the nature of the improper practice alleged, and to enable them to respond thereto. The petitioner notes that the petition specifies the time frame involved - "Since on or about July 1, 1981.... " - and the acts claimed to constitute an improper practice - the unlawful denial of petitioner's access to Metropolitan Hospital for the purpose of representing members of Local 371.

The petitioner argues that the unlawful denial of a union representative's access to Metropolitan Hospital would, as a matter of law, interfere with, restrain, and coerce employees from exercising their rights to engage in protected activity under the NYCCBL, i.e., to be represented in their grievances by the Union.

The petitioner takes issue with HHC's contention that one may assume, arguendo, that petitioner was denied access for non-discriminatory business reasons. The petitioner asserts that the petition alleges the opposite that petitioner was denied access for discriminatory reasons. It is alleged by the petitioner that his petition claimed that the denial of access was discriminatory by stating that it was "unlawful". He argues that the discriminatory denial of access to one union representative is as much a violation of the NYCCBL as the discriminatory denial of

access to all union representatives would be, and that employees' rights are violated by the former just as they would be by the latter.

In his supplemental affirmation, petitioner's attorney alleges that Metropolitan Hospital applies to the petitioner standards of admission which are different from and more restrictive than those applied to other representatives of Local 371 and of other local unions. The names and union affiliations of other union representatives who are granted access to Metropolitan Hospital are specified in the affirmation. The petitioner contends that he is being treated in a discriminatory and illegal manner with respect to access to that institution for the purpose of restraining and preventing employees of Local 371 from utilizing his services to represent them in connection with grievances under the collective bargaining agreement.

For the above reasons, the petitioner requests that the Board deny HHC's motion to dismiss.

Discussion

The respondents' motion to dismiss presents, initially, an issue raised with growing frequency before this Board: the question of whether the allegations of a petition are sufficient to satisfy the requirements of this

Board's Rules. Section 7.3 of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "OCB Rules") requires that an improper practice petition be verified and 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."

This Rule is designed and intended to require that a petitioner plead information sufficient to place the respondent on notice of the nature of the petitioner's claim and to enable the respondent to frame a response thereto. The Rule also serves the function of requiring the petitioner to indicate what provision of law is alleged to have been violated by the respondent's actions.

Section 7.3 of the OCB Rules is essentially a rule of notice pleading. It requires specificity sufficient only to satisfy a respondent's right to due process and to permit the Board to determine its jurisdiction. It is long-established Board policy that the OCB Rules are to be construed liberally.³ Accordingly, we have not construed

³ Decision Nos. B-5-74, B-9-76, B-8-77.

§7.3 to require technical or detailed pleading of a petitioner's cause of action. It is in this context that we consider that part of HHC's motion based on the claimed insufficiency of the petition.

It is clear to us that the petition herein satisfies the requirements of S.7.3. Contrary to HHC's contention, the petition does indicate the time frame involved: "Since on or about July 1, 1981 ..." It is apparent that the petition alleges a continuing course of conduct by the respondents, constituting a continuing violation of the NYCCBL. The petitioner claims that he has been denied access to Metropolitan Hospital since on or about July 1, 1981. In this case of an alleged continuing violation of law, the petitioner is not required to enumerate, in his petition, each and every date on which he sought and was denied access to the institution. It is enough that the respondent is given notice of the date of commencement of the course of conduct complained of, and the allegation that it has continued.

Similarly, we are not persuaded by HHC's contention that the petition fails to allege in what manner the respondents denied the petitioner access to Metropolitan Hospital. Certainly, such information would be relevant to the petitioner's claim, but we do not find that his failure to

provide this information affects the legal sufficiency of the petition. After issue is joined by service of the respondent's answer, if the denial of access is disputed, then the burden will be on the petitioner to establish the details of such denial. But, such details of the manner in which the alleged denial of access was effectuated need not be pleaded in the petition. We find that enough has been alleged to place the respondents on notice of the nature (not details) of the claim; the OCB Rules do not require more than this.

Addressing the substance of the petitioner's claim, HHC argues that the alleged denial of access, even if true, does not constitute an improper practice under the NYCCBL. In considering this argument, in the context of the numerous pleadings submitted in this case, we find that it is important to bear in mind the question of whose rights under the NYCCBL are claimed to have been violated. The petition alleges that the respondents,

"have interfered with, restrained and coerced public employees in the exercise of their rights granted in Section 1173-4.1 of the [NYCCBL]...."

Thus, it is the rights of the employees (at Metropolitan Hospital), not the rights of the petitioner, which are at issue in this proceeding. As we read the pleadings herein, the named petitioner is a party to this case only in his

capacity as representative of the employees involved, and not on his own behalf. For this reason, HHC's observation that petitioner is not an employee of HHC, though true, is irrelevant.

The petition, as expanded and clarified by subsequent pleadings, alleges that the petitioner, a union grievance representative, was denied access to Metropolitan Hospital,

"...for the purpose of restraining and preventing employees of Local 371 from utilizing his services to represent them in connection with grievances between them and respondent Hospital."

We hold that a denial of access for the purpose alleged above, if true, would constitute a prima facie interference with employees' protected rights, in violation of §11734.2(a) (1) of the NYCCBL. It is the right of employees, through their certified collective bargaining representative, to designate representatives to assist employees in processing their grievances under the collective bargaining agreement. An attempt by an employer to decide which union representatives it chooses to deal with in connection with contractual grievances would be inimical to the rights of employees and to the entire collective bargaining process. HHC's response that other representatives of Local 371 are permitted free access to the institution in question, does

not answer the petitioner's claim. If Local 371 has designated the petitioner as a representative to handle employees' grievances, it is not within HHC's power to decree that it will allow other Union representatives to handle employees' grievances, but not the petitioner.

The above discussion should not be taken as any prejudgement by this Board of the merits of the petitioner's claim. The respondents' motion papers speak of,

"Assuming arguendo that petitioner was denied for non-discriminatory business reasons an unqualified right of access to the institution"

We may not indulge in such an assumption because, on this motion to dismiss, we must deem the petition's claim of denial of access for unlawful reasons to be true. However, if a legitimate business reason exists and is the reason for the denial of petitioner's access, that fact may be pleaded in the respondent's answer. After issue is Joined and a full record is presented to this Board, we will be in a position to consider the merits of both parties' contentions. At the present time, all we are deciding is that the petition is sufficient to state a claim of an improper practice under the NYCCBL.

In view of the focus of the petition upon the rights of bargaining, unit employees, and the named petitioner's non-employee status, we reject the petitioner's further

argument that HHC's denial of his access is discriminatory, in violation of the NYCCBL. Section 1173-4.2(a)(3) of the NYCCBL renders illegal discrimination against an employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. The petitioner has failed to allege that any employee has been discriminated against for the above purpose. The alleged discrimination against a non-employee grievance representative for purposes of interfering with employees' rights to utilize his services in processing grievances may be violative of §1173-4.2(a)(1), but the petitioner has failed to indicate how it is violative of §1173-4.2(a)(3). Therefore, we find this part of the petitioner's argument to be without merit.

For the reasons stated above, we will deny the motion to dismiss and direct that the respondents serve and file an answer within 10 days after receipt of this decision.

O R D E R

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 motion to dismiss filed by the New York City Health and Hospitals Corporation be, and the same hereby is, denied; and it is further

ORDERED, that the respondents serve and file their answer to the petition within 10 days after receipt of this decision.

DATED: New York, N.Y.
June 17, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER