Askew v. Rose (Dir. of Organ.), L.237, IBT, et. al, 29 OCB 39 (BCB 1982) [Decision No. B-39-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DAVID ASKEW,

Petitioner, DECISION NO. B-39-82

-and- DOCKET NO. BCB-545-81

BERT ROSE, Director of Organization, LOCAL 237, IBT and ALFRED JAMES, Business Agent, LOCAL 237, IBT,

Respondents.

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DETERMINATION AND ORDER

On November 18, 1981, David Askew (hereinafter "Petitioner") filed an improper practice petition which asserts that Bert Rose, as Director of Organization and Alfred James, as Business Agent of Local 237 (hereinafter "Respondents" or "the Union") acted improperly in failing to pursue the latter's grievance to arbitration.

The Union filed its answer to the petition on December 10, 1981, the delay being due to the fact that the petition, although served on Respondents by certified mail, was sent to an incorrect address and was never received. When the Office of Collective Bargaining (hereinafter "OCB") became aware of this fact, a copy of the petition and attachments was provided to Respondents who were afforded an additional ten days in which to serve and file an answer.

Subsequent to its receipt of the Union's answer, OCB learned that Petitioner had not received the answer. A copy

was provided him together with a reminder of his right, pursuant to OCB Rule 7.9, to file a reply.

Petitioner's reply, dated July 21, 1982, was received at OCB on August 10, 1982, having initially been incorrectly addressed and returned to Petitioner by the recipient.

BACKGROUND

Petitioner David Askew was employed by the New York City Health and Hospitals Corporation (hereinafter "HHC") as a Special Officer and was serving in this capacity at Lincoln Hospital when he was brought up on charges of excessive absenteeism.[1] Disciplinary proceedings were commenced and a penalty of termination of employment was imposed at Step IA and upheld at Steps II and III of the grievance procedure. It is undisputed that the Union represented Mr. Askew through Step III of the procedure.[2] However, the case was not pursued to arbitration. It is this fact which underlies the instant petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that, on the advice of Alfred James,

[1] Specifically, Mr. Askew was charged with absences totaling 105 days from January 1, 1979 through June 14, 1980, including 19 absences before or after a pass, i.e., an approved day off.

[2] The 1980-1981 collective bargaining agreement between the City of New York and HHC and Local 237, IBT, covering "Special officers, et al." includes a Grievance Procedure at Article VI thereof.

Local 237's Business Agent, he reluctantly waived his right to a hearing under Section 75 of the Civil Service Law,[3] electing instead to contest his termination by filing a grievance under the contract between the City and Union. Petitioner asserts that Bert Rose, Local 237's Director of Organization, who handled his case through Step III, told Petitioner that he, Mr. Rose, would get in touch with Petitioner concerning taking the case to arbitration and that Petitioner would get his job back. Mr. Askew claims that he heard nothing from Mr. Rose after this but, one month later, received a letter from 125 Worth Street[4]

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[3] Civil Service Law 975 prescribes procedures and penalties for the taking of disciplinary action against four described categories of employees. However, since the Petitioner herein was employed by the Health and Hospitals Corporation which has its own personnel system separate and distinct from that of the City of New York, he could have elected, as an alternative to the contractual grievance procedure, to pursue his claim under Section 7:5 (Discipline) of the Corporation's Personnel Rules and Regulations, but not under Section 75 of the Civil Service Law (see 1980-81 collective bargaining agreement between the City of New York and HHC and Local 237 covering Special Officers, et al., Article VI, Section 5). Section 7:5 of the HHC Rules and Regulations is analogous to Section 75 of the Civil Service Law, however. An appeal may be taken from a decision under Section 7:5 either to the court, in accordance with CPLR Article 78, or to HHC's Personnel Review Board (Rule 7:5:7).

[4] We take administrative notice of the fact that the Health and Hospitals Corporation, Petitioner's former employer, has its central office at 125 Worth Street, New York, New York.

informing him that the Union had abandoned-his case.

Petitioner attached a number of documents to his improper practice petition, which documents he offers without indicating their relevance to his claim. These include letters, some of which, because they bear dates subsequent to the Step IA decision imposing the penalty of termination, obviously were prepared for the disciplinary proceedings. They include attestations to Petitioner's fine character and satisfactory job performance. Also attached are letters from Petitioner's wife and her physician, substantiating Mrs. Askew's illness and hospitalization and the resulting need for Petitioner to be at home with the couple's six children. Other allegations also addressed to the merits of the Petitioner's grievance are made, including a suggestion that racial discrimination on the part of the employer made a fair decision unlikely in Petitioner's case. On the basis of these assertions and documents, Petitioner concludes that termination was too harsh a penalty, and that the Union, in failing to take the grievance to arbitration as it had represented that it would, committed an improper practice.

In his reply to the Union's answer, Petitioner asserts that the Union's attitude toward him, as reflected in that responsive pleading, was such that he stood no chance of getting his job back. Petitioner cites actions he felt compelled to take against Respondents, including registering complaints with

the Teamsters' main office in Washington, D.C. when Respondents allegedly failed to act on other grievances brought by Petitioner. This action, Petitioner maintains, as well as his charges that Local 237 did not adequately represent Special Officers at Lincoln Hospital, angered Respondents James and Rose and turned them against him. Attached to the reply also are a number of documents substantiating the illness of Petitioner's wife as well as injuries sustained by Petitioner himself, and copies of two grievances filed by Petitioner, one unrelated to the instant matter, the other appearing to be the Step I statement of the grievance which underlies the claim herein.

Petitioner does not specify the relief he seeks from this Board.

Respondents' Position

The Union asserts that its decision not to take the Petitioner's grievance to arbitration was based upon the evidence submitted at the lower steps of the grievance procedure, on which basis the hearing officers were unable to find justification for Petitioner's excessive lateness and absenteeism.[5] According

[5] This statement is the only indication that Petitioner was charged with excessive lateness as well as excessive absenteeism. We deem it unnecessary, however, in deciding the matter before us, to clarify the precise nature of the charges which formed the basis for the employer's decision to terminate the Petitioner.

to the Union, it was demonstrated at one hearing that Petitioner's behavior did not improve even after his wife's recovery. In addition, Respondents assert that Petitioner was progressively disciplined, having received a number of warnings, a ten-day suspension, and a one hundred dollar fine before the final penalty of termination was imposed.

The Union claims that it felt there would be no chance to overturn the decisions at the earlier steps of the procedure and, therefore, determined not to proceed to arbitration. Local 237 maintains that it has always served Mr. Askew and all its members fully ane equitably, and urges that the improper practice petition be dismissed.

DISCUSSION

Preliminarily, we note that the Petitioner herein does not specify the statutory provision which he deems to have been violated by the Respondents. We have reviewed the allegations set forth in the improper practice petition and in the reply, however, and have considered the documents appended to these pleadings. It is apparent to us that the gravamen of the Petitioner's claim is that the Union breached its duty of fair representation by failing to take the Petitioner's grievance to arbitration. That such a claim is within the jurisdiction of this Board, pursuant to Section 1173-4.2b of the New York City Col-

lective Bargaining Law (hereinafter "NYCCBL"), is undisputed.[6]

Broadly stated, the duty of fair representation obliges a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. The standard to which this Board has adhered was established by the United States Supreme Court in cases that arose in the private sector, although the duty of fair representation applies with equal force in the public sector.[7] The Supreme Court has held that a Union does not breach its duty of fair representation merely because it

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[6] Decisions Nos. B-16-79; B-13-81; B-11-82; B-18-82.
NYCCBL
Section 1173-4.2b provides as follows:

> Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
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> (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;
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> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

[7] Jackson v. Regional Transit Service, 388 NYS 2d 441, 54 A.D. 2d 305, 10 PERB ¶7501 (1976).

refuses to bring all employee grievances to arbitration. However, the decision to refuse to process a particular grievance must be made in good faith and not in an arbitrary or discriminatory manner.[8] A union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.[9]

In the matter before us, Petitioner asserts that, after the Step III hearing, the Union promised to take the Petitioner's grievance to arbitration and represented to Petitioner that he would succeed at arbitration and that he would get his job back. However, it is alleged, one month after the Step III hearing, during which time Petitioner maintains he was waiting to hear from Mr. Rose, he received notice from 125 Worth Street (HHC) that the Union had abandoned his case. Petitioner suggests that this abandonment was motivated by hostility toward him on account of complaints Petitioner filed against Respondents with the Union's Washington, D.C. office. He claims that the Union's attitude toward him is reflected in its answer to the improper practice petition in which, Petitioner asserts, "they sounded like they're the prosecutors."

In its answer to the improper practice petition, Local

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[8] Vaca v. Sipes, 386 U.S. 171, 190 (1967); Board Decisions Nos. B-13-81; B-12-82; B-13-82.

[9] Hines v. Anchor Motor Freight, Inc., 424 U.S. 554(1976).

237 offers as explanation for a decision not to proceed to arbitration on Petitioner's claim, that hearing officers at the earlier stages of the grievance procedure could find insufficient justification for Petitioner's excessive absences, that Petitioner already had been disciplined less severely for absenteeism, and that his behavior did not improve after the alleged cause for the numerous absences had been removed. The Union concluded, therefore, that there would be little chance of success at arbitration.

Under other circumstances, we would proceed to examine these allegations of fact in accordance with the standards described above to determine whether or not the Union acted consistently with these standards in processing the Petitioner's grievance. Here, however, we do not reach the merits of the case and are required to dismiss the petition on the ground that Petitioner failed to comply with the statute of limitations applicable to improper practice proceedings under our law.

Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules") provides that:

> 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 . . . .

While we have no precise information concerning the date of the Step III hearing or the date on which Petitioner received the letter from 125 Worth Street informing him of the Union's abandonment,[10] based upon the date of the Office of Municipal Labor Relations Review officer's Step III decision (April 14, 1981), it is apparent that the petition in this case, filed on November 18, 1981, was submitted at least six months after the cause of action arose.[11] Therefore, the claim is time-barred and we shall dismiss the improper practice petition.

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

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[10] The letter from 125 Worth Street is not a part of the record in the case.

[11] Since the Step III hearing was, perforce, held prior to the issuance, on April 14, 1981, of the Review officer's decision and, since Petitioner himself claims to have received notice of the Union's decision (or failure) one month later around the middle of May 1981, a petition filed on November 18, 1981 was untimely.

ORDERED, that the improper practice petition filed by David Askew be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 21, 1922

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
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EDWARD F. GRAY
MEMBER

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