

Higgins, Jr. v. Fire Alarm Dispatchers Bene. Ass., et. al, 29 OCB 9 (BCB 1982) [Decision No. B-9-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

JOSEPH E. HIGGINS, JR.,

Petitioner,

Decision No. B-9-82

-and-

Docket No. BCB-562-82

FIRE ALARM DISPATCHERS BENEVOLENT
ASSOCIATION; FRANCIS X. HOLT, As
President; JOHN C. PEDALINO, As Vice
President,

Respondents.

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INTERIM DECISION AND ORDER

This proceeding was commenced on January 8, 1982, by the filling of a verified Improper Practice Petition by Mr. Joseph E. Higgins, Jr. (hereinafter "Petitioner"). Petitioner alleges that the Fire Alarm Dispatchers Association, by its President, Francis X. Holt, and Vice President, John C. Pedalino (Jointly referred to as "Respondents," or "the Union"), violated Section 1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL") by delaying the processing of his grievance and by failing to represent him at a Step II hearing. After receiving an extension of time in which to file an Answer, counsel for Respondents filed a Motion to Dismiss Higgins' Petition on February 26, 1981. Petitioner, claiming that he had not been timely served with a copy of the Motion, was granted an extension of time in which to respond. On March 18, 1982, Petitioner submitted a letter opposing the Motion.

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BACKGROUND

On May 10, 1980, Petitioner filed a grievance over an incident which occurred on April 19, 1980 involving the allocation of overtime. On May 28, 1980, the Union wrote to the New York City Fire Department (hereinafter "the Department") stating that the Department's Step I disposition of the matter was unacceptable. After delay allegedly due in part to contract negotiations, a Step II hearing was scheduled for July 13, 1981. The hearing, however, was postponed several times -- to July 21, 1981, August 21, 1981 and September 11, 1981.

According to the Petitioner, at approximately 4:30 p.m. on September 10, 1981, Union Vice President Pedalino telephoned and said that neither he nor Union President Holt would be able to attend the hearing the next day because Pedalino had been subpoenaed and Holt had "a busy agenda." Higgins then spoke to Holt who suggested that Higgins call the Department and cancel the meeting. Petitioner "strongly protested" a fourth cancellation, especially on such short notice, and in light of the fact that the matter had by then been pending for almost a year and a half.

On the morning of September 11, 1981, Petitioner called the Union and learned that Holt was in the office instead of at the hearing. Higgins appeared at the hearing without Union representation. The grievance was denied at Step II.

Respondents state that Petitioner himself scheduled the September 11, 1981 hearing date with the City. When informed of this date, President Holt immediately told Petitioner that he would be unable to attend but would arrange for another Union representative to appear. Holt arranged for Vice President Pedalino to represent Higgins at the hearing. After it became apparent that neither Holt nor Pedalino would be able to attend the hearing, both told Higgins that he should have it rescheduled and that one of them would represent him. Respondents state that Higgins "arbitrarily refused" to do so.

Respondents submit that, inter alia, the Petition fails to state a claim upon which relief can be granted in that Petitioner fails to allege "any facts which could form the basis of an improper employee practice pursuant to Section 1173-4.2(b)(1)."

DISCUSSION

The facts submitted by Respondents in their Motion to Dismiss raise serious questions. Although Respondents state that Holt told Petitioner of his September 11, 1981 unavailability as soon as Holt learned that the hearing had been rescheduled for that date. Respondents fail to state the date on which Holt was actually informed that the hearing would take place on September 11, 1981. Respondents allege on information and belief that Petitioner scheduled the September 11, 1981 hearing himself. Petitioner alleges and supplies documentation for the claim that he was directed to and did submit 5 dates on which he would be able to attend a hearing. one of those dates was

scheduled but later canceled by the Department's Office of Labor Relations which, in the same letter to both grievant and the Union, set the September 11, 1981 hearing date. In short, the respective allegations of the parties raise a significant issue of fact. Since Higgins states that he was first made aware of Holt's unavailability on September 10, 1981, Respondents have raised a further issue of fact.

A Motion to Dismiss concedes that truth of the allegations of the pleading to which it is addressed. It cannot be based upon allegations contesting the contents of the pleading-sought to be dismissed particularly where the contested pleading is as thoroughly documented as the Petition in this matter, and where the alternative account offered by the moving party is based in .Large part upon information and belief. The only question presented on the Motion to Dismiss is whether a cause of action has been stated. It is not the function of this Board, in considering a Motion to Dismiss, to resolve questions as to the credibility and weight to be given to each of two or more inconsistent versions of a disputed factual incident.

Respondents' argument that Petitioner has failed to state a prima facie cause of action is unconvincing. The Step II hearing on Higgins' grievance was delayed for over 16 months. On September 11, 1981, Respondents urged a fourth postponement. Under these circumstances, without additional facts, we cannot agree with Respondents' assertions and say that Petitioner "arbitrarily" refused to agree to yet another rescheduling of his case.

We find that the allegations of the Petition state a prima facie claim of an improper practice under NYCCBL §1173-4.2. Therefore, we will order Respondents to file an Answer to the Petition herein. In view of the delay already occasioned by the instant Motion based in large part upon allegations on information and belief, and considering that it is now almost two years since Petitioner sought the aid of his Union, we will order that Respondents' Answer be served and filed within five days of receipt of this Decision. Upon joinder of issue, we will be able to ascertain whether disputed material facts exist which warrant the holding of a hearing.

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 Union's Motion to Dismiss be, and the same hereby is, denied; and it is further

ORDERED, that the Union serve and file its Answer to the Petition within five days after receipt of this Decision and order.

DATED: New York, New York
March 23, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD J. CLEARY
MEMBER

JOHN D. FEERICK
MEMBER

FRANKLIN J. HAVELICK
MEMBER