

Farina v. Gittens, 31 OCB 20 (BCB 1983) [Decision No. B-20-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the
Improper Practice Proceeding

-between-

DECISION NO. B-20-83

JOSEPH FARINA,

Petitioner,

DOCKET NO. BCB-639-82

-and-

FLORENCE GITTENS, Director of the
Clinton Center for Income Maintenance
of the City Department of Social
Services,

Respondent.

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Interim Decision and Order

On March 28, 1983, Joseph Farina ("Petitioner") filed an improper practice petition alleging that Florence Gittens ("respondent"), Director of the Clinton Center for Income Maintenance ("Clinton Center") of the City Department of Social Services ("the Department") engaged in deliberate attempts to interfere with the exercise by him of his rights under the New York City Collective Bargaining Law ("NYCCBL"), in violation of Section 1173-4.2(a) (1) thereof.¹

¹ §1173-4.2 Improper practices; good faith bargaining.

- 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, or participation in the activities of, any public employee

organization;

On April 13, 1983, the office of Municipal Labor Relations on behalf of respondent, filed a motion requesting that the petition be dismissed. An affidavit in opposition to the motion was filed on April 20, 1983, in response to which OMLR submitted a reply affirmation on April 25, 1983.

Background

The instant proceeding was initiated by Joseph Farina, pro se, following the occurrence of a series of incidents which he alleges constituted violations of the Civil Service Law, Article 14 §209(a)-(c), the Public Employees' Fair Employment Act, and Chapter 54 of the New York City Charter, §1173-4.2(a)(1)-(3).

The facts, as alleged in the petition, are as follows On or about January 21, 1983, Joseph Farina instituted a Level II group grievance signed by, and submitted on behalf of, 40 staff members at the Clinton Center. On or about that day, petitioner was summoned by Florence Gittens to her office where, in the presence of Office Manager McCarthy and Assistant Office Manager Kirshner, she threatened to fire him for filing the aforementioned grievance. Consequently, petitioner demanded the opportunity to review and copy the contents of his employee folder; his repeated requests were

denied. Only upon the submission of a much later request, pursuant to the New York State Freedom of Information Law, was the opportunity for inspection finally granted.

On or about February 17, 1983, respondent signed, issued and ordered the distribution and posting of a notice advising "all staff" that

Mr. Joseph Farina, eligibility specialist, owns a concealed recorder which he has admitted using in at least one instance without the knowledge of the staff member who was being recorded.

The notice was distributed to employees of the Clinton Center and was posted on bulletin boards throughout the Center where it could be viewed by employees as well as clients. Respondent's actions, it is alleged, evidenced both the "design and intent" to harrass Mr. Farina and damage his reputation at the place of employment.

To buttress his charge of discrimination and harrassment, petitioner describes an earlier incident where respondent attempted to apply as to him an allegedly nonexistent sick leave policy whereunder employees with four months' tenure would be subject to a different standard than that which governed employees with a substantially longer tenure. The resulting grievance which he-filed on January 7, 1983 stated that

[t]o institute such a discriminatory guideline as to impose a mandate requiring presentation of a doctor's note for one (1) day's sick time upon a worker who has not had previous sick leave but who has been employed for four months is both arbitrary and capricious and, in the absence of "patterned" sick leave abuse, constitutes a degree of harrassment.

To summarize, petitioner maintains that respondent's actions were retaliatory and discriminatory, and, further, that the threat which precipitated this improper practice proceeding did not emanate from an unsatisfactory performance record.²

Petitioner's examination of his personnel files revealed absolutely no basis for disciplinary actions whatsoever nor were there present any indication of petitioner's having been consulted for any reason regarding his performance on the job. In fact, petitioner's record did contain a "satisfactory" evaluation dated August 30, 1982.³

Motion to Dismiss

Respondent's position may be summarized as follows:

² To petitioner's affirmation in opposition to the motion to dismiss are appended several professional letters of recommendation.

³ Paragraph 16 of the petition.

1. The petition does not set forth any injury petitioner has suffered as a result of respondent's actions. Until such time that petitioner is actually fired or can point to some ascertainable injury, his petition will remain unsubstantiated and premature.

2. Even if it were not premature, the petition contains only conclusory statements failing, for example, to state the nature of the alleged meeting in respondent's office or the context in which statements were made. The Board requires that allegations of improper motivation be based upon a statement of probative facts, rather than recitals of conjecture, speculation and surmise. Furthermore, since the petition lacks relevant and material documents, dates and facts as required by Section 7.5 of the Revised Consolidated Rules of the office of Collective Bargaining, the respondent is deprived of a clear statement of the charges to be met in the formulation of its response.

3. The alleged meeting in Ms. Gittens' office was a work-related conference set up solely to discuss cases which had been handled by Mr. Farina in an unacceptable fashion.

4. The grievance which petitioner filed on behalf of the 40 staff members was improperly brought in that Mr. Farina was not an authorized agent for the group within the meaning of the NYCCBL. That is, as the language of Section 1173-8.0 shows, an employee may present a grievance on behalf of himself but may not do so on behalf of others unless he is the representative of the certified employee organization.

5. Notwithstanding the fact that the grievance was improperly filed, respondent acted in a spirit of cooperation and attempted, through informal discussions, to resolve any outstanding problems.

6. As to the earlier incident relating to the Department's sick-leave policy, that grievance was resolved by respondent voluntarily withdrawing her initial position. This shows that respondent "acted in a spirit of harmonious and cooperative labor relations to resolve work-related problems."

7. Petitioner has brought the instant petition for an improper purpose. Since Mr. Farina is a provisional employee whose employment is terminable at will, the petition was designed to eliminate that contingency through the anticipatory establishment of a case of improper motivation.

8. As to the alleged violations of the New York State Public Employees' Fair Employment Act, the Freedom of Information Law, and other State and Federal laws, these are matters which are improperly raised before the Board and are inappropriate for resolution in this forum.

Discussion

It is well settled that on a motion to dismiss, the facts alleged by petitioner must be deemed to be true. Thus, the only question to be decided by the Board is whether taking the facts as alleged in the petition, a cause of action has been stated. A respondent cannot assert facts contrary to those alleged by the petitioner in support of a motion to dismiss, since it is impossible in considering such a motion, to resolve questions of credibility and the weight to be given to inconsistent

versions of the facts. In the instant proceeding, OMLR's motion to dismiss is based on the premise that the facts, as alleged by it, demonstrate that there existed legitimate motivation - i.e., unacceptable performance by Mr. Farina for its actions independent of the improper motivation asserted in the petition. OMLR's allegations as to the nature and purpose of the meeting between Mr. Farina and Ms. Gittens derive from a version of the facts which differs sharply from the version alleged by petitioner. It is clear that without questioning the veracity of either party, and without determining the merit of the legal conclusions drawn by the parties from their respective versions of the facts, this Board cannot dispose of this proceeding prior to the holding of an evidentiary hearing to resolve the disputed factual questions.

As to the contention by OMLR that the alleged threat by Ms. Gittens would not, at any event, be an occurrence with respect to which an improper practice could be brought, we disagree. If, for example, it were true that Mr. Farina had been threatened merely because he exercised his rights under the NYCCBL, the fact that he has not yet been fired would neither render the dispute "premature" nor the incident non-justiciable.

With respect to the charge by OMLR that the petition is too vague and does not conform with the level of specificity

required by Section 7.5 of the Revised Consolidated Rules of the office of Collective Bargaining, we find that Mr. Farina has presented facts with ample clarity to give OMLR the necessary notice of those events of which he complains. The concept is well established in modern civil practice that the actual communication of notice of transactions or occurrences at issue is the proper measure of the adequacy of a pleading; this is true a fortiori in administrative proceedings which are less constrained by the general rules of procedure and evidence. Thus, as we held in Decision No. B-22-81, the test of pleading sufficiency is whether or not the employer is given notice of the proposed area of inquiry. We are satisfied that this test has been met by the pleadings in this proceeding.

We next address OMLR's allegation that the group grievance filed by Mr. Farina was improperly commenced. This allegation, whether or not true, does not warrant dismissal of the improper practice petition since it neither explains nor justifies, nor is it even relevant to the charge of harrassment and discrimination. Allegations of employee abuse of the contractual grievance arbitration provisions can neither excuse nor justify employer interference with the exercise by public employees of their rights under the NYCCBL.

Lastly, we note that OMLR is correct in stating that our authority does not extend to the administration of any statute other than the NYCCBL; the alleged violation of any other statute is, therefore, a matter which is misplaced in a petition addressed to this Board.

Based on the foregoing, we find that petitioner's allegations, if deemed true, as they must be on a motion to dismiss, constitute a prima facie claim of improper employer practice. Accordingly, respondent will be given a period of ten days from the date of its receipt of a certified copy of this decision in which to submit an answer to the petition. If within the stated period no answer has been filed with the office of Collective Bargaining, the motion to dismiss will be regarded as the answer, issue will be deemed joined and the matter will go forward accordingly.

ORDER

Pursuant to the powers vested in the, Board of Collective Bargaining by the New York City Collective Bar-

gaining Law, it is hereby

ORDERED, that OMLR's motion to dismiss the petition be, and the same hereby is, denied.

DATED: New York, N.Y.
July 20, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER