Lyons v. Koch, et. al, 31 OCB 26 (BCB 1983) [Decision No. B-26-83 (IP)]

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In the Matter of
Improper Practice Proceedings — DECISION NO. B-26-83

-between-

WILLIAM D. LYONS,

Petitioner, — DOCKET NO. BCB-658-83

-and-

MAYOR KOCH,
Respondent,
---------- x

-and-

PETER STEIN, LIFEGUARD COORDINATOR, DEPARTMENT OF PARKS, — DOCKET NO. BCB-659-83

Respondent,
---------- x

-and-

MR. STERN, COMMISSIONER, DEPARTMENT OF PARKS, — DOCKET NO. BCB-660-83

Respondent,
---------- x

-and-

ANTHONY CANCELLIERI, DIRECTOR OF PARKS PERSONNEL, DEPARTMENT OF PARKS, — DOCKET NO. BCB-662-83

Respondent,
---------- x

-and-

MIKE McDONALD, DEPARTMENT — DOCKET NO. BCB-663-83

OF PARKS,

Respondent,

---------- x

-and-

ROBBY LUCIA, ASSISTANT TO THE DEPARTMENT OF OPERATIONS, DOCKET NO. BCB-664-83

Respondent,

---------- x

-and-

PHIL CROW, ASSISTANT DIRECTOR OF PERSONNEL, DEPARTMENT OF PARKS, DOCKET NO. BCB-665-83

Respondent,

---------- x

-and-

GLANNIS CHERRY, PERSONNEL DEPARTMENT, DEPARTMENT OF PARKS, DOCKET NO. BCB-666-83

Respondent

---------- x

DECISION AND ORDER

William D. Lyons, petitioner herein, filed improper practice petitions in BCB-658-83, BCB-659-83, BCB-660-83 and BCB-662-83 on July 11, 1983, and in BCB-663-83, BCB-664-83, BCB-665-83 and BCB-666-83 on July 21, 1983. The underlying facts in each of the

eight petitions are essentially the same, and in each instance, petitioner charges the respective respondent with the violation of Section 1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL"). On July 25, 1983, the office of Municipal Labor Relations, on behalf of Mayor Koch, respondent in

BCB-658-83, filed a motion to dismiss that petition. In a letter dated August 3, 1983, OMLR asked that five of the petitions be consolidated. In a subsequent letter, dated August 19, 1983, OMLR requested that the three remaining petitions be consolidated as well. The latter correspondence additionally requested that the motion to dismiss filed in BCB-658-83 be considered applicable to all eight petitions. On October 12, 1983, Mr. Lyons filed a letter with the Office of Collective Bargaining wherein he indicated that he wished to withdraw the charges against Mayor Koch and Mr. Stern, Commissioner at the Parks Department.

Background

Petitioner served as a lifeguard with the New York City Department of Parks and Recreation (the "Department") for a number of years. Following a break in service which occurred during the 1981 season, petitioner's name was removed from the lifeguard seniority list. The City's 1980-82 collective bargaining agreement with its lifeguards provides, at Article V(A), that a break in service results in the loss of all prior seniority, with two exceptions: (1) time served as a member of the military service; and (2) temporary physical disability. According to petitioner, his absence was attributable to a temporary physical disability. Mr. Lyons contends that medical records, confirming the

circumstances of his leave, had been submitted to the Department but had either been lost or misplaced. Mr. Lyons charges that respondents have " ... since July 1982, continued to repress, discriminate and not recognize the fact the Drs. Lines [doctor's notes] were submitted and possibly lost or misplaced by the Parks [Department] resulting in my losing 17 yrs. seniority and not being hired in 1982 and 1983." Petitioner further alludes to a protest picket held by him in August 1982, and, in this connection, charges respondents with "discrimination, prejudicial and unfair hiring tactics and unfair labor practices." As a remedy, petitioner requests:

> Full reinstatement with back pay and a letter of apology and no more recrimination against me from either the Parks Dept., the Coordinator Chiefs or the Union #37;

and,

> [N]o further unfair tactics directed at individuals expressing their rights to know, to picket, and to express themselves.

Along with the pleadings filed by Mr. Lyons with the office of Collective Bargaining was included a copy of the complaint filed by him with the New York City Commission on

Human Rights wherein he alleged the same basic set of facts. In that complaint, Mr. Lyons further alleged that six younger lifeguards were hired for Rockaway Beach, and charged the Parks Department and District Council 37, AFSCME, AFL-CIO, with "age" discrimination.

Motion to Dismiss

Respondents maintain that the petitions fail to state a claim upon which relief can be granted in that no facts are alleged which could form the basis for an improper practice finding within the meaning of Section 1173-4.2 (a) of the NYCCBL. Specifically, OMLR states that this provision is

> [i] napplicable to the instant matter since the Petition fails to allege any facts showing (1) that Respondent interfered with, restrained, or coerced public employees in the rights granted to public employees and public employee organizations by the NYCCBL, (2) that Respondent dominated or interfered with the formation or administration of any public employee organization, (3) that Respondent discriminated against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization, or (4) that Respondent refused to bargain collectively

> in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Respondents also maintain that the petitions are vague and conclusory. The petitions, it is alleged, do not contain relevant and material documents, dates and facts as required by Section 7.5 of the Revised Consolidated Rules of the office of Collective Bargaining Law ("Rules"),[1] depriving respondents of a clear statement of the charges to be met.

The Request for Consolidation

We have considered OMLR's request for consolidation of the petitions herein and find that consolidation is war-

[1] §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.

ranted in these circumstances. The claimed violation of the New York City Collective Bargaining Law is clearly the same in each of the cases. Thus, although the facts may vary slightly, the respondents are all alleged to have been involved in one common scheme or "conspiracy" to oust petitioner from his lifeguard position and to thereby deprive him of the seniority he had earned in his 17 years of service with the Department of Parks.

It may be noted that there has been no allegation that the rights of petitioner would in any way be prejudiced by consolidation.

Discussion

It must be stressed, at the outset, that the acts alleged to have constituted the bases for the improper practice petitions herein did not occur within four months of the filing of the petitions herein as required by Section 7.4 of the Rules.

> §7.4 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.

Petitioner has alleged that he had attempted to return to his former position on June 25, 1982. He further alleges that in August 1982, on one of his many visits to the Department, he was "under guard evicted from the Arsenal Headquarters." Although petitioner contacted various public officials and agencies, it was not until July 11, 1983, that any claim was filed with the Office of Collective Bargaining.

Petitioner's failure to comply with the filing requirements relating to timeliness mandated by the New York City Collective Bargaining Law precludes us from reaching the merits of petitioner's claims.

We wish to add that our consideration of these claims is further precluded by Section 1173-4.2(a) of the NYCCBL which provides as follows:

> §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 in, or participation in the activities of, any public employee organization;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Each of the subdivisions of Section 1173-4.2(a) is intended to prohibit acts by a public employer or its agents which would have the effect, in one way or another, of interfering with, preventing or discouraging the full enjoyment by public employees of the rights granted them under Section 1173-4.1 of the New York City Collective

Bargaining Law. It is thus not the function of Section 1173-4.2(a) to proscribe all allegedly wrongful acts of a public employer but only such acts as would have adverse impact upon Section 1173-4.1 rights.

Petitioner's complaints, if proven, might constitute a basis for some form of redress in another forum. They do not relate in any way, however, to acts proscribed by Section 1173-4.2(a). Thus, even if proven, petitioner's allegations would not constitute a basis for a finding of an improper practice as that term is contemplated in Section 1173-4.2. The record herein is devoid of any allegations that the acts complained of were intended to interfere with, diminish or otherwise impair petitioner's exercise of his rights under Section 1173-4.1.

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 request for withdrawal of BCB-658-83 and BCB-660-83 be, and the same hereby is,

granted, and it is further

ORDERED, that the six remaining improper practice petitions filed herein be, and the same hereby are, dismissed.

DATED: New York, N.Y.
October 19, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER