Gilmore v. DC37, et. al, 33 OCB 18(BCB 1984) [Decision No. B-18-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

JEANETTE R. GILMORE,

Petitioner,

-and-

DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Respondent.

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DECISION NO. B-18-84

DOCKET NO. BCB-707-84

DECISION AND ORDER

The petitioner, Jeanette R. Gilmore, filed a verified improper practice petition on May 16, 1984,[1] in which she charged that respondent, District Council 37, AFSCME, AFL-CIO (hereinafter "D.C. 37" or "the Union") committed an improper practice in violation of §1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The respondent submitted a verified answer on May 21, 1984.

The petition was reviewed by the Executive Secretary of the Board of Collective Bargaining, pursuant to §7.4

[1] The petition was originally submitted on May 9, 1984, but was returned to petitioner because of the absence of proof of service. The petition was resubmitted on May 16, 1984, with proper proof of service on the respondent.

of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "OCB Rules"), and based upon such review a determination was issued on May 29, 1984,[2] dismissing the petition for failure to allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. On June 7, 1984, the petitioner filed a timely appeal from the Executive Secretary's determination. The Trial Examiner designated by the Office of Collective Bargaining wrote to the respondent on June 21, 1984 to advise the Union of its right to submit a response to the petitioner's appeal papers.[3] The Union filed a written response to the appeal on July 5, 1984. The petitioner submitted, *ex parte* further response on July 12, 1984. The Trial Examiner forwarded a copy of this response to the respondent on July 17, 1984.

Background

A. The Petition

The petitioner was employed as a provisional Eligibility Specialist III in the Human Resources Administration.

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[2] Decision No. B-10-84(ES).

[3] The OCB Rules do not require a respondent to submit any response to an appeal filed under S7.4. However, it is the Board's policy to give a respondent the opportunity to present its position on an appeal.

Her petition alleges that on January 24, 1984, she was summoned to the agency's Department of Personnel and was informed that her employment was being terminated at the close of business that day. She states that no explanation was given for her termination and the agency refuse to give her "... any legal referrals or counselling .[4]

The petitioner asserts that the respondent Union failed to represent her at the time she was informed of her termination. She contends that the Union's failure to represent her constitutes an improper practice.

B. The Executive Secretary's Determination

Upon receipt of the petition, the Executive Secretary reviewed the allegations thereof as required by §7.4 of the OCB Rules, and determined that the petition did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. In his written determination, the Executiv e Secretary stated:

> "Assuming the truth and accuracy of the allegations of the petition, the fact remains that the petitioner was a provisional employee at the time of her termination on January 24, 1984. The Board of Collective Bargaining has held that a union cannot be expected, nor is it empowered, to create or

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[4] The petitioner does not allege that the employer's actions constituted any improper practice.

> enlarge the rights of special classes of employees whose rights are delimited by law. Provisional employees are one such class whose rights are limited by law. Unlike permanent competitive employees, provisionals are not entitled to charges and a hearing prior to termination of employment. Therefore, in this case, as in a prior one determined by the Board,
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> I ... petitioner's impending termination was a matter beyond respondent's control and was not therefore, an event with respect to which the obligation of fair representation arises.'
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> "For the reason stated above, the petition herein is dismissed pursuant to §7.4 of the OCB Rule." (Footnotes omitted)

A copy of the Executive Secretary's determination was served upon the petitioner by certified mail.

C. The Appeal

In her letter of appeal, the petitioner does not challenge the basis of the Executive Secretary's determination. In fact, she acknowledges that "... provisional employees have limited rights by law." However, she asserts,

> "If this is so, I am appealing this determination because for four years, I was actively paying union dues and it is not fair for me to have paid union dues for this length of time if the union could not represent me in my time of need. Therefore, I am demanding that all union dues that I paid during my employment be refunded to me immediately."

In its response to the appeal, the Union submits that the question:

> "Whether petitioner is entitled to a refund of all or part of her union dues is strictly an internal union matter and her appeal, therefore, does not contain facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective Bargaining Law."

Discussion

It is undisputed that the petitioner was a provisional employee, and as such, had no entitlement to service of charges and a hearing which are the statutory right only of permanent competitive employees.[5] We take administrative notice of the fact that the applicable collective bargaining agreements do not create any additional rights with respect to the discharge of provisional employees in this bargaining unit. Therefore, as a provisional employee, the petitioner could be, and was, terminated at will. Under these circumstances, and consistent with our past decisions concerning special classes of employees whose employment rights are limited by law,[6] we conclude that no duty of fair representation was implicated in the petitioner's termination. We find most appropriate

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[5] See Civil Service Law §75.

[6] Decision Nos. B-13-82, B-16-79.

the Executive Secretary's quotation from a prior Board decision[7] in which we held:

> ... petitioner's impending termination was a matter beyond respondent's control and was not, therefore, an event with respect to which the obligation of fair representation arises."

For these reasons, we affirm the Executive Secretary's determination which dismissed the petition.

On this appeal, the petitioner has failed to assert any grounds for overturning the Executive Secretary's determination. Instead, she argues that if the Union was without power to represent her in her "time of need", i.e., in connection with her termination, it should not be permitted to keep the dues it collected from her during the four year term~ of her provisional employment.[8]

In response to this argument, we observe that the Union's duty of fair representation is not limited to cases of discharge or termination. The petitioner has not alleged any failure of representation in other areas

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[7] Decision No. B-13-82.

[8] We note that Civil Service Law §65 states that no provisional appointment shall continue for a period in excess of nine months. Nevertheless? it is undisputed that the petitioner's provisional appointment continued for four years. It is common knowledge that such pro visional appointments often are permitted to continue beyond the statutory maximum. The petitioner has not complained of this fact.

of the Union's duty, such as collective bargaining and contract administration. On this basis, we cannot agree that it was "unfair" for the Union to collect petitioner's dues solely because of its inability to oppose her termination where such opposition would have been inconsistent with applicable law and with the conditions of petitioner's hiring and employment. Moreover, we agree with the Union's contention that the question of petitioner's entitlement to a refund of union dues is an internal union matter which is outside the scope of the Board's jurisdiction under the NYCCBL.[9] Such a dispute does not constitute an improper practice within the meaning of the NYCCBL. Accordingly, we find the petitioner's appeal to be without merit.

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[9] See Decision Nos. B-1-81; B-18-79; B-1-79. We wish to point out, however, that while we hold a dispute over a refund of union dues to be an internal union matter which is outside of our jurisdictiont a dispute over are fund of agency shop fees clearly would be with in our jurisdiction pursuant to Civil Service Law §208(3)(b) . Decision No. B-44-82. However, even if petitioner were an agency shop fee payor rather than a dues paying member of the Union, in the circumstances of this case, the ,result would be the same. The Union's obligation both to members and to agency fee payors is to represent employees concerning rights they possess. The union's inability to represent a provisional employee concerning a matter (termination) in which the employee possess no rights, is not a breach of that obligation.

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 petitioner's appeal be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary be, and the same hereby is, confirmed.

DATED: New York, N.Y.
September 17, 1984

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
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