

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

- - - - - x

In the Matter of  
Improper Practice Proceeding

-between-

JOSEPH FARINA,

DECISION NO. B-19-84

Petitioner,

DOCKET NO. BCB-639-83

-and-

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

Respondent.

- - - - - x

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, 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 73-4.2(a) (1) thereof.<sup>1</sup> On April 13, 1983, the

---

<sup>1</sup> §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;



office of Municipal Labor Relations ("OMLR") , 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.

On July 20, 1983, the Board of Collective Bargaining issued Interim Decision No. B-20-83 in which it denied respondent's motion to dismiss. This Board found that "petitioner's allegations, if deemed true, as they must be on a motion to dismiss, constitute a prima facie claim of an improper employer practice." Accordingly, the Board directed OMLR to submit its answer.

On August 8, 1983, respondent duly filed its answer, in response to which a reply was submitted on September 3, 1983.

Upon joinder of issue, a hearing was scheduled for November 20, 1983. At petitioner's request, the hearing was rescheduled and held on January 18, 1984, and continued on March 21, 1984. In the period which intervened, the parties engaged in settlement discussions. When settlement efforts failed, the hearings resumed. At the end of the hearing held on March 21, 1984, Mr. Farina requested that two additional witnesses be subpoenaed by the Office of Collective Bargaining ("OCB") on his

behalf. A subpoena was ultimately issued compelling the appearance of one of the two individuals on July 11, 1984. Despite repeated requests to petitioner that he supply OCB with the address of the other individual for subpoena purposes, the requested information was not forthcoming.

On July 11, 1984, at 11:00 a.m., one hour after the scheduled hearing was to have commenced, petitioner's failure to appear, and the presence of representatives of the City and the witness subpoenaed at petitioner's request were duly noted and the record herein was thereupon closed.

In a letter postmarked July 11, 1984, and received on July 13, 1984, petitioner first notified OCB of his unavailability for the scheduled hearing. In a subsequent letter, dated July 15, 1984, petitioner stated:

I trust that your office is in receipt of the two (2) recent letters that I had sent regarding my request for an adjournment in the above-reference matter which had been scheduled to reconvene on 7-11-84.

In a letter addressed to the trial examiner, dated July 30, 1984, with a copy to petitioner, OMLR advised that it would not be going forward with its case and requested that OCB dismiss the petition. In a letter of the same date, petitioner was notified by OCB that on July 11, 1984, the record in this proceeding had been closed, and that the matter was being referred to the Board of Collective Bargaining for its determination.

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 I Fair Employment Act, and Chapter 54 of the New York City Charter, §1173-4.2 (a) (1)-(3).

The allegations set forth in the petition, are as follows. on or about January 21, 1983, petitioner 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, Gittens 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 harass Mr. Farina and damage his reputation at the place of employment.

To buttress his charge of discrimination and harassment, petitioner described an earlier incident where respondent attempted to apply as to him an allegedly non-existent sick leave policy. 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 harassment.

This earlier grievance, it may be noted, was resolved by the parties when respondent voluntarily withdrew her original position.

#### Positions of the Parties

##### Petitioner's Position

Petitioner maintains that respondent's actions were retaliatory and discriminatory, and further that neither his meeting with her, nor the threat which precipitated the commencement of this proceeding, some of which he had re-

corded, related to his job performance. <sup>2</sup>

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.<sup>3</sup>

Throughout the course of this proceeding, petitioner sought to demonstrate that respondent's employment history with the City's Department of Social Services amply evidenced an anti-union animus. From each witness called upon to testify at the hearing, petitioner attempted to elicit testimony which he maintained would establish, in the aggregate, a pattern of unlawful conduct on the part of the respondent, in the past and in the present.

In conclusion, petitioner maintains that respondent, through intimidation, restrained and interfered with the exercise and enjoyment by employees of their rights pursuant to Section 1173-4.1 of the NYCCBL.<sup>4</sup>

---

<sup>2</sup> To Petitioner's affirmation in opposition to the motion to dismiss are appended several professional letters of recommendation.

<sup>3</sup> Paragraph 16 of the petition.

<sup>4</sup>

"§1173-4.1 Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities ...





Respondent's Position

Respondent's position, as set forth in its pleadings, maybe summarized as follows:

1. 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 manner.
2. 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.
2. 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.
4. 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."
5. 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.

6. 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.

Respondent also argued, in its motion to dismiss, that:

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.

In a subpoena duces tecum issued by OMLR on March 9, 1984, petitioner was asked to produce any and all tape recordings of his conversations with Gittens. Petitioner declined to do so on the basis that OMLR did not have the authority to issue a subpoena.

Discussion

On July 20, 1983, this Board issued an interim decision, B-20-83, in which we denied respondent's motion to dismiss the improper practice petition filed by petitioner herein. We did so on the basis that in our view a prima facie claim of an improper employer practice existed and that the facts as alleged in the petition stated a cause of action pursuant to Section 1173-4.2(a) of the NYCCBL.

In our earlier decision, we stated as follows

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 a 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. [Emphasis added]



It is also clear that the burden of proving an improper practice charge is on the party asserting it. Upon this premise, and on the basis of our finding in B-20-83, evidentiary hearings were held, principally on March 21, 1984. The hearings, however, far from establishing that an improper practice had in fact occurred, left petitioner's allegations wholly unsubstantiated.

On January 18, 1984, the first day of hearing, petitioner requested that subpoenas be issued by OCB compelling five individuals to appear and testify on his behalf. Petitioner also requested that a subpoena be issued to compel the production of Ms. Gittens' personnel file. In a letter to the petitioner dated February 17, 1984, the trial examiner requested the names and addresses of these individuals, as well as brief statements setting forth the nature and relevancy of the testimony sought to be obtained from them. By return mail, petitioner furnished the trial examiner with some of the requested information and advised that "[e]ach of the employees/ former employees listed in the annexed letter are capable of providing information and/or have direct knowledge ... "

On March 21, 1984, two of the five individuals appeared and gave testimony. Regarding the first, Mr. Farina had indicated in his February 28, 1984 letter the following:

[S]he is a woman who is dedicated employee and has been for many years. The reason [she] did not sign either the petition or the aforementioned grievance is because she "... is fearful of reprisal from Ms. Gittens."

Regarding the second witness, Mr. Farina had indicated as follows:

(He] had been present on several occasions when the charging party was subjected to various forms of intimidation, coercion and harassment immediately following the initiation of the grievance. Moreover [he] had personally witnessed threats from Ms. Gittens and had, on August 31, 1983, submitted a grievance thereby alleging that respondent did "... (intimidate staff] by threats of corporal punishment and physical beatings [which is] clearly in violation of Article VIII, Section 12 of the City of N.Y./SSEU contract ... "

At the hearing, the first witness stated that she has worked at the Clinton Center for the past three or four years. She insisted that she was not intimidated by, or fearful of, Ms. Gittens, despite petitioner's forceful suggestions to the contrary. She denied having any direct knowledge of the incidents underlying the petition herein, and further maintained, adamantly, that she had not signed or, in fact, even read the group grievance filed and circulated by petitioner simply because she did not wish to do so.

The second witness who had been subpoenaed indicated

that he had worked in the Department of Social Services for approximately 22 years, and that he had been assigned to the Clinton Center in the latter part of 1982 and remained there until September, 1983. He similarly admitted having no direct knowledge of the specific facts underlying the petition. He made, instead, repeated references to matters about which he had heard but had not witnessed, and frequently alluded to matters of "common knowledge" and "rumors".

The third witness to testify indicated that she had been a supervisor in the employment section at the Clinton Center in 1982 and 1983. It was also disclosed, on cross-examination, that she was "unofficially" engaged to be married to petitioner. When asked about the circumstances of the meeting between petitioner and respondent which followed the filing of the group grievance, she stated that she had no first-hand knowledge; only what she remembered being told about it. When asked by whom, she replied: "Mr. Farina." She then described the various means by which a director/supervisor could pressure and retaliate against employees, maintaining that respondent employed such means.

Despite the unorthodox and oftentimes blatantly improper manner by which petitioner sought to establish his case, every reasonable effort consistent with due process appears to have been made to assist and accommodate him in recognition of the fact that he was appearing pro se. In fact, two



additional witnesses would have testified but for petitioner's failure to timely furnish OCB with the address of one of the individuals and, further, his failure to appear at the hearing held on July 11, 1984.

Based on the record before us, it is clear that the charges herein have remained completely unsubstantiated. It is equally clear that a case cannot be established entirely on the basis of hearsay, common knowledge and rumors, or, impressions derived from and relating to incidents other than those underlying the petition. Furthermore, we note petitioner's refusal to produce the tapes allegedly containing the threats upon which this petition is based. The record established herein is devoid of any objective evidence to support petitioner's allegations or to show that the actions of respondent were intended to or did, in fact, interfere with or diminish petitioner's rights under Section 1173-4-1. Allegations of such improper motivation must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise.<sup>5</sup>

For the foregoing reasons, we find that petitioner has not met, to the satisfaction of the Board, the burden of proving the improper practice charge herein and the petition must, therefore, be dismissed.

ORDER

Pursuant to the powers vested in the Board of Col-  
Bargaining by the New York City Collective Bargaining  
is hereby

ORDERED, that the improper practice petition, filed  
instant case be, and the same hereby is, dismissed.

DATED: New York, New York  
September 17, 1984

ARVID ANDERSON  
CHAIRMAN

MILTON FRIEDMAN  
MEMBER

DANIEL G. COLLINS  
MEMBER

EDWARD F. GRAY  
MEMBER

CAROLYN GENTILE  
MEMBER

EDWARD SILVER  
MEMBER

JOHN D. FEERICK  
MEMBER