Statman v. L.371, SSEU, 33 OCB 20 (BCB 1984) [Decision No. B-20-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - - X
SAUL STATMAN,

Petitioner, DECISION NO. B-20-84

-and- DOCKET NO. BCB-712-84

SSEU, Local 371,

Respondent.
- - - - - - - - - - - - - - - - - - — X

DECISION AND ORDER

This proceeding was commenced by the filing, on June 19, 1984, of an improper practice petition by Saul Statman ("Petitioner") " in which he asserts that Social Service Employees union, Local 371 ("SSEU" or it respondent") breached its duty to fairly represent him in violation of Section 1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL") On July 30, 1984, SSEU filed its answer. No reply was submitted.

Position of the Parties

Petitioner's Position

On April 9, 1984, petitioner, a Fair Hearing Representative with the Department of Social Services ("DSS") " at the Human Resources Administration ("HRA") was directed to "immediately clock out and leave the premises." on or about April 11, 1984, SSEU sent a

letter to Al Bowen, Deputy Director of Labor Relations, HRA, requesting that the suspension be deemed administrative leave with pay."

In his petition, Mr. Statman charges that

> [r}eceiving no response to this letter, no statement of charges, no scheduling of a hearing nor any pay for a six week period, SSEU waited six weeks before preparing a grievance, and failed to undertake other legal proceedings after my repeated requests for same. This six week delay necessitated my having to obtain private legal representation. In addition, SSEU failed to notify HRA of the requirement for reinstatement to payroll after suspension of thirty days without pay in accordance with Section 75 of the Civil Service Law.

Petitioner seeks, as a remedy, reimbursement for "all legal expenses incurred in this matter."

Respondent's Position

The facts, as alleged by respondent in its answer, are as follows: In a memorandum dated April 9, 1984, petitioner was instructed by Michael Hauer, Director of the Division of Fair Hearings, as follows:

> Upon receipt of this memo you are to immediately clock out and leave the premises.
>
> Before you will be permitted to return to work, you must see a Doctor of Psychiatry, and you must obtain a statement verifying your visit. You may use a private physician or a clinic.
>
> When you are ready to return with the doctor's note, you are to call

> Ms. Serena Gaynor, office of Personnel, 553-5123. She will advise you as to when and where to report.

On April 11, 1984, Elaine Paul, SSEU grievance representative, sent a letter to DSS indicating that "we consider Mr. Statman to be on paid administrative leave." Despite petitioner's assertions to the contrary, a reply was forthcoming by way of a telegram dated April 13, 1984, in which petitioner was advised that

> [aln appointment has been scheduled for you to be seen by the agency doctor on Tuesday April 17, 1984 at 2p.m. Please report to 311 Broadway Manhattan 5th floor. You are also requested to bring medical documentation from your private physician.

In a letter dated April 16, 1984, Gerald Weiss, an attorney privately retained by petitioner in connection with the April 9th incident, advised that Mr. Statman would be unable to keep the scheduled appointment date since it coincided with the first day of Passover. The appointment was rescheduled by DSS, but again Mr. Weiss advised, in a letter dated April 19, 1984, that Mr. Statman would be unavailable on the rescheduled hearing date. Mr. Weiss also requested that DSS "cite the authority and the source thereof enabling your agency to require Mr. Statman to bring the medical documentation that you have requested."

By memorandum dated April 23, 1984, Robert Brach, Deputy Director Office of Professional Services informed petitioner that

> [e]ffective immediately, you have been placed on involuntary suspension under Section 72 of the Civil Service Law.
>
> You are directed to leave the premises immediately. Further information will be mailed to you from the Office of Personnel Services.

On April 27, 1984, Mr. Statman was further advised, by Harold Smith, Deputy Assistant Commissioner, HRA, as of follows:

> In accordance with the memorandum given to you on April 23, 1984 at your location, you are hereby placed on involuntary leave of absence due to exceptional circumstances, of your behavior, effective close of business 4/23/84. You are not to report to work until further notice from this Agency.
>
> Pursuant to Section 72 of the Civil Service Law, you will be notified of the specifics in an "Attachment A", and will be advised of the requirements to effect a return to work.
>
> Please note that effective the date of this emergency involuntary leave, and during that period, you will only be entitled to draw upon all of your accumulated, unused sick leave, vacation, overtime, and other time allowances standing to your credit.

On June 18, 1984, a grievance was duly filed by the Union on behalf of petitioner alleging that the April

9th order directing petitioner to leave the premises constituted

> a violation, misinterpretation and/or misapplication of the SSEU Local 371 Contract including but not limited to Article VI Sec. 1 B and the rules and regulations, policies and procedures of the City of New York applicable to HRA including but not limited to the Revised Guidelines for Disability Proceedings of the Office of Administrative Trials and Hearings and Department of Personnel Policy and Procedure No. 735-82 ...

SSEU's defenses to this proceeding may be summarized as follows:

> 1. Nothing in the petition remotely constitutes a violation of the NYCCBL. Mr. Statman hastily engaged the services of a private attorney within 7 days of the April 9th incident, notwithstanding the fact that the services of Mirkin & Gordon, the Union's counsel, would have been available to petitioner in due course. Respondent further main tains that "absent evidence of bad faith by respon dent, or discriminatory, arbitrary or invidious action by it toward him, petitioner fails to state a violation of the [NYCICBL."
>
> 2. Since the union has duly filed a grievance which is presently pending, the instant proceeding is, at the very least, premature. Moreover, the Union, it is alleged, is currently considering resort to other forums in connection with the occurrences herein above described.

Discussion

The gravamen of the claim upon which the instant improper practice proceeding is based is that SSEU breached its duty of fair representation by waiting six weeks before invoking the grievance procedure on petitioner's behalf.

Section 1173-4.2b of the NYCCBL, the section pursuant to which this proceeding was commenced, provides as follows:

This section

> Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of rights grante in section 1173-4.1 of this chapter, or to cause, or attempt to cause, a public employer to do so;
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

This section has been construed, together with Section 1173-3.0 which defines "certified employee organization,[1] "as con-

[1] Section 1173-3.0 provides, in pertinent part:

> I. The term "certified employee organization" shall mean any public employee organization: (1) certified by the board of certification as the exclusive bargaining representative of a bargaining unit determined to be appropriate

ferring on employee organizations not only numerous rights, but correlative obligations and responsiblities., Thus, as the United States Supreme Court stressed in Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944), the legitimacy of exclusive representation depends necessarily on the full appreciation and actualization of "the duty, inseparable from the power of representation, to exercise that authority fairly." We have repeatedly held, consistent with Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967), that this duty is violated by conduct toward a member which is arbitrary, discriminatory or in bad faith.

Having reviewed the facts in this proceeding, to the extent pleaded by the parties, we' can cite no action on the part of SSEU from which we can reasonably infer that SSEU acted in bad faith or with hostility toward Mr. Statman.

(more)

(Footnote l/ continued)

> for such purpose; (2) recognized as such exclusive bargaining representative by a public employer other than a municipal agency; or (a) recognized by a municipal agency, or certified by the department of labor, as such exclusive bargaining representative prior to the effective date of this chapter, unless such recognition has been or is revoked or. such certificate has been or is terminated.

The fact that several weeks had lapsed prior to the filing of the grievance, which is presently pending, does not establish that respondent acted improperly, as contemplated by our law. This is especially true in light of the events which occurred in the six weeks which intervened between the April 9th incident and the filing of the grievance. In that period, the union wrote DSS letter concerning the suspension, petitioner retained private attorney, several exchanges of correspondence occurred, and at least two appointments were made at which petitioner failed to appear.

In these circumstances, therefore, the delay cannot be viewed as arbitrary or discriminatory. In Higgins V. Fire Alarm Dispatchers Benevolent Association, Docket No. BCB-562-82, petitioner charged respondent with having breached its duty of fair representation by, among other things, delaying the processing of his grievance. We found, in Decision No. B-21-82, that although the delay was, in part, attributable to the union, "[t]he responsibility is shared by each of the parties." We also held that the petitioner had not, in any event, alleged facts which would prove improper motivation ascribable to the union. That is, petitioner "has not demonstrated how Respondents' actions were based upon motives prohibited by NYCCBL Section 1173-4.2 or interfered with the rights granted by Section 1173-4.1.11

In the instant proceeding, the pleadings are equally devoid of allegations of fact which would support a finding that the union had not met its obligation to act fairly, impartially and non-arbitrarily toward its member, particularly in view of the fact that respondent did file a timely grievance on petitioner's behalf, which is presently pending. We would also note that petitioner's allegations are, we believe, based upon a misconception of the nature, quality, and degree of the Union's obligation to a unit employee in the matter of its duty of fair representation.[2] Any delays which may have occurred in the instant matter do not, in and of themselves, rise to the level of an improper practice.

For the reasons set forth above, we find that the petition fails to establish any improper practices, and we will direct that it be dismissed.

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

[2] Decision No. B-16-83.

ORDERED, that the improper practice petition of Saul Statman be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 17, 198

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

JOHN D. FEERICK
MEMBER