Schoenbrun, Young v. DC37, City, 33 OCB 8 (BCB 1984) [Decision No. B-8-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper
Practice Petition

-between- DECISION NO. B-8-84

DOCKET NO. BCB-675-83

ARNOLD SCHOENBRUN and JOHN W. YOUNG
(Fire Department Radio Repair
Mechanics),

Petitioners,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO;
and THE CITY OF NEW YORK (OFFICE OF
MUNICIPAL LABOR RELATIONS),

Respondents.

INTERIM DECISION AND ORDER

A verified improper practice petition was filed by petitioners Arnold Schoenbrun and John W. Young, Sr., on September 29, 1983.[1] The respondent City submitted its answer on October 11, 1983, and respondent District Council 37 (hereinafter "D.C. 37" or "the Union") submitted its answer on October 14, 1983.

On October 24, 1983, petitioner Schoenbrun wrote to request that the petitioner's time to reply to the respondents' answers be extended for three months, based upon the

[1] The petition was first submitted on September 19, 1983, but was returned to petitioners because proof of service was lacking. It was resubmitted, with proof of service, on the date indicated above.

allegation that a possible settlement in a pending action between the parties in federal district court might affect the continued prosecution of the improper practice charge. The Trial Examiner assigned by the Office of Collective Bargaining (hereinafter "OCB") wrote to the petitioners, requesting further information concerning the federal court action, and simultaneously wrote to the respondents, requesting their positions on the petitioners' application for a three month extension of time. In letters dated October 28 and 31, 1983, respondents D.C. 37 and the City, respectively, objected to the requested extension of time. On November 1, 1983, the petitioners submitted a copy of the Report and Recommendation of United States Magistrate Naomi Reice Buchwald, dated October 7, 1983, in a federal action[2] in which the petitioners and the respondents are parties. Petitioners asked that this decision be considered in support of the application for an extenstion of time.

By letter dated December 8, 1983, the Trial Examiner informed the parties that the petitioners' time to reply would be extended only until December 21, 1983. Petitioners were advised that OCB was unable to make an

[2]Stevens v. Goldin, Docket No. 82 Civ.3376 (SDNY), assigned to United States District Judge David N. Edelstein.

informed evaluation of the connection, if any, between the federal court action and the improper practice proceeding until the details of the improper practice charge were elucidated in the petitioners' reply.

Subsequently, the petitioners filed a reply on December 20, 1983. Because of the new and specific factual allegations contained therein, the Trial Examiner requested that the respondents submit a further written response to the petitioners' claims. Pursuant to this request, the City submitted a sur-reply and D.C. 37 submitted a pleading denominated as a second verified answer, both of which were received by OCB on February 24, 1984.

Background

The petitioners are employed as Radio Repair Mechanics in the New York City Fire Department. The compensation of employees serving in this title is the "prevailing rate of wages" as determined by the City Comptroller in accordance with §220 of the Labor Law. Radio Repair Mechanics are in a collective bargaining unit for which respondent D.C. 37 is the certified collective bargaining representative.[3] However, pursuant to §1173-4.3 (a) (1) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), there

[3] Decision No. 25-78.

exists no duty to bargain over wages and benefits the determination of which is provided for in §220.

Notwithstanding the provisions of §1173-4.3(a)(1), it appears that the Union voluntarily has negotiated with the City in an effort to reach "consent determinations" for certain groups of employees covered by §220. The Union in fact agreed to consent determinations for Radio Repair Mechanics in August 1978 and April 1982. A number of the employees in this title, including the petitioners herein, exercised their right, under §220, to reject the offered settlements and to require the Comptroller to investigate and render an independent determination of the prevailing rate of wages and supplemental benefits. In addition, apparently in response to the terms of the April, 1982, consent determination, some of the rejectors, including the petitioners, commenced an action in federal district court[4] alleging that the City and the Union have conspired to deprive them of due process and equal protection of the law by retaliating against them and attempting to coerce them and punish them because of their exercise of their rights under §220 of the Labor Law.

[4] Stevens v. Goldin, Docket No. 82 Civ.3376 (DNE) (SDNY).

Positions of the Parties

Petitioners' Position

The petitioners allege that the City has discriminated against them and against other plaintiffs in the federal lawsuit in retaliation for their refusal to accept the consent determinations and because of their use of the courts to enforce their rights under §220 of the Labor Law. Specifically, the petitioners allege that the City has frozen their wages at 1976 rates; has attempted to coerce them to sign a waiver of all wage claims against the City; has refused to pay overtime money and shift differentials which are paid to other employees in the title; and has subcontracted some of their work and reassigned other of their work to be performed by other job titles. Moreover, the petitioners allege that the City, in collusion with the Union, has refused to answer grievances filed by the petitioners within the time periods specified, if at all, under the grievance procedures contained in Executive Order No.83.

The petitioners further assert that District Council 37 has discriminated against them and has failed to fairly represent them because of their refusal to accept the offered wage determination settlement. Specifically, petitioners allege that the Union has refused to accept,

participate in, or ask the City to respond to any grievances filed by the radio repair mechanics in the Fire Department Radio Shop; has refused to take any pending grievances to arbitration, even when the grievants offered to pay all expenses in advance; has refused to file grievances concerning unsafe working conditions (including exposure to asbestos and high voltage) ; has refused to object to the City's actions in subcontracting work and reassigning other work to non-union personnel; has consistently raised dues based upon wage increases obtained for other employees, even though the Radio Repair Mechanic's wages have been frozen; and has assisted and condoned management actions in rescheduling shifts, days, and hours, in direct violation of the contract, in order to avoid the payment of overtime.

The petitioners also allege that when questioned about its failure to answer or schedule hearings on their grievances, the City's Office of Municipal Labor Relations told them to contact the Union and "not to bother them [the City])"; while, at the same time, the Union told them that since they had filed their own grievances, the Union would do nothing to help them.

The petitioners submit that incidents alleged in the petition and the reply all occurred after the federal

lawsuit was commenced, or are continuations of "harassment tactics" which existed before commencement of the federal action and which continue up to the present time.

Based upon the above, the petitioners contend that the respondents both have committed improper practices against the petitioners.

City's Position

Initially, the City views the improper practice petition as alleging, at best, a violation by the City of the grievance procedure contained in Executive order No.83. While conceding the availability and applicability of Executive Order No.83 to the petitioners' grievances, the City submits that a claimed violation of that Order does not constitute an improper practice within the meaning of the NYCCBL. Moreover, the City asserts that the petition fails to allege facts sufficient to show any violation of the Executive Order.

Responding to the allegations of the petitioners' reply, the City further alleges that these additional allegations fail to state a cause of action under the NYCCBL. The City observes that the reply contains allegations that the City has taken actions against the petitioners in retaliation for their filing of a court action against the City. The City denies that it has done this,

but submits that, even assuming, arguendo, that these allegations are true, they fail to constitute an improper practice. The City asserts that the filing of a court action is not a right protected under NYCCBL §1173-4.1.

Additionally, the City argues that the issue of whether the City has illegally retaliated against the petitioners is also the primary issue in the pending action in federal district court. The City submits that the petitioners should not be permitted to litigate the same issue in two forums. For these reasons, the City asks that the improper practice petition be dismissed.

Union's Position

The Union contends that the petitioners have failed to allege sufficient facts in support of their allegations against D.C. 37 to state a cause of action under the NYCCBL. The Union notes that Executive order No.83 gives petitioners the personal right to file grievances on their own behalf, without the assistance of the Union. D.C. 37 argues that the petitioners have failed to cite any authority which obligates the Union to process, handle, or take to arbitration matters which constitute grievances filed by the petitioners.

The Union also contends that the petitioners' claims are untimely under the four month statute of limitations

provided in §7.4 of the Revised Consolidated Rules of the OCB. The Union alleges that the petitioners' instant claims arise out of the same transactions or occurrences which are being litigated in the pending federal court action. Since that action was commenced on May 26, 1982, the petitioners' claims must have arisen on or prior to that date. Inasmuch as the improper practice petition was filed on September 29, 1983, a date far in excess of four months from May 26, 1982, the petitioners' claims should be dismissed as untimely.

Additionally, D.C. 37 asserts that in the federal action now pending before District Judge Edelstein, the named plaintiffs, including the petitioners herein, allege that the Union has failed to represent the plaintiffs and has conspired with the City regarding a wage offer covering Radio Repair Mechanics. D.C. 37 alleges that the petitioners' claims in this improper proceeding arise out of or involve the same issues raised in the federal action. Since the petitioners have chosen to litigate their rights in court, argues the Union, the Board should abstain from ruling on the same claims.

Finally, the Union concludes that the petition fails to alleges facts to demonstrate that D.C. 37 interfered with, restrained, or coerced petitioners in the exercise of their

rights granted under NYCCBL §1173-4.1, or that it caused or attempted to cause the public employer to do so, or that it refused to bargain collectively in good faith with the employer on matters within the scope of its collective bargaining obligations . For all of these reasons, D.C. 37 requests that the improper practice petition be dismissed.

Discussion

The respondent Union has submitted a copy of the summons and complaint filed in the federal district court in Stevens v. Goldin.[5] It appears from the caption of that action that petitioners Schoenbrun and Young are plaintiffs therein, while respondents D.C. 37 and the City are defendants therein. Additionally, petitioners have submitted a copy of Magistrate Buchwald's Report and Recommendation to District Judge Edelstein in that action.[6] We have reviewed these documents carefully, and have compared them to the pleadings submitted in this proceeding. We conclude that the claims raised by the petitioners herein are so, similar to those presented in the pending federal

[5] Docket No. 82 Civ.3376 (DNE)(SDNY).

[6] The defendants moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim. These motions were assigned to Magistrate Buchwald to hear and report. In her decision, Magistrate Buchwald recommended that the motions to dismiss be denied.

action, and involve certain issues common to both proceedings, so that it would be inappropriate to permit the simultaneous litigation of these claims and issues in two different forums.

This Board has exclusive, non-delegable jurisdiction over improper practices alleged to have been committed by parties subject to the NYCCBL.[7] However, in a case in which a party has chosen to litigate his or her rights in the courts, we may decline to exercise our jurisdiction over that party's improper practice petition based upon the same matter pending before the courts.[8] The petitioners herein, in their correspondence and pleadings, have acknowledged the existence of a nexus between this improper practice proceeding and the pending federal litigation. In fact, at one point, petitioner Schoenbrun requested that the submission of a reply in the instant proceeding be postponed for three months because of the issuance of the Magistrate's report in the federal action. Under these circumstances, we find that it would serve no useful purpose to permit the improper practice matter to

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[7] See NYCCBL §1173-5.0(a)4); Civil Service Law §205.5 (d)

[8] See, Decision Nos. B-7-83, B-21-83; Board of Education, City of Buffalo v. Buffalo Council of Supervisors and Administrators, 6 PERB ¶4534 (1973).

proceed at this time. To the contrary, to so permit would condone an unnecessary duplication of effort and would risk possible inconsistent determinations. Since the petitioners chose f irst to litigate their rights in the courts, we will decline to exercise jurisdiction at this time and will leave the petitioners to the courts for the adjudication of their rights.

However, we recognize that the allegations of the petition (and reply) herein are not identical to and coextensive with the allegations of the complaint in the court action. We note particularly that the petitioners' allegations of breaches of the duty of fair representation by the Union may extend beyond the scope of the federal complaint. For this reason, we will not dismiss the petition outright, but will hold this matter in abeyance pending the issuance of a final determination by the federal courts. At such time as a final determination is rendered, either party may apply to this Board to consider whether, and to what extent, the court's ruling may have resolved the issues raised in the improper practice proceeding.

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 improper practice petition be, and the same hereby is, held in abeyance pending the final determination of the courts in the case of Stevens v. Goldin, Docket No. 82 Civ. 3376 (DNE) (SDNY); and it is further

ORDERED, that upon the issuance of a final determination in the above court action, either party may apply to the Board to consider whether, and to what extent, the court's ruling may have resolved the issues raised in this improper practice proceeding.

DATED: New York, N.Y.
May 2, 1984

ARVID ANDERSON
CHAIRMAN

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