

Martinez v. DC37, 37 OCB 49 (BCB 1986) [Decision No. B-49-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

JOSE A. MARTINEZ,

Petitioner,

DECISION NO. B-49-86

-and-

DOCKET NO. BCB-901-86

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

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DECISION AND ORDER

On September 9, 1986, the petitioner, Jose A. Martinez, submitted a verified improper practice petition alleging that District Council 37, AFSCME, AFL-CIO (herein "D.C. 37" or "respondent") breached its duty of fair representation and thereby violated Section 1173-4.2b of the New York City Collective Bargaining Law ("NYCCBL"). on September 18, 1986, D.C. 37 submitted a verified answer. Petitioner did not file a reply.

The petitioner was appointed as a non-competitive parttime office Aide in the New York City Financial Information Services Agency (FISA) on July 15, 1985. Petitioner was laid off, or terminated, on June 30, 1986.

Positions of the Parties

Petitioner's Position

The petitioner alleges that upon his layoff, he requested representation from D.C. 37. According to petitioner, D.C. 37 refused to represent or advise him made no attempt to inform him of his rights, and neglected to return his phone calls.

Respondent's Position

The respondent's position is that, as petitioner did not take a competitive civil service examination, he did not acquire permanent competitive civil service status, and was not a permanent employee covered by Section 75(1) of the Civil Service Law.¹ Thus, his layoff could not be appealed pursuant to Section 75(1) or grieved under Article VI, Section 1(E) of the applicable collective bargaining agree-

¹ Section 75 of the Civil Service Law provides that the only persons who "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges...are:

- (a) a person holding a position by permanent appointment in the competitive class

ment.² D.C. 37 further asserts that layoffs for budgetary reasons are not reviewable under either the contract or Civil Service Law.

According to the respondent, upon being informed of petitioner's layoff, it contacted FISA and was advised that petitioner had been laid off for budgetary reasons and that there were no other available positions. Respondent then advised petitioner that under the circumstances, his layoff could not be appealed or grieved..

The respondent takes the position that as the layoff was neither appealable nor grievable, D.C. 37 owed petitioner no duty; consequently the petitioner has failed to state a cause of action.

Discussion

In prior cases, we have recognized that there are certain classes of employees whose rights, under the Civil

² Article VI, Section 1 defines the term "grievance" to include, inter alia

- (E) A claimed wrongful disciplinary action taken against an employee covered by Section 75(1) or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation....

Service Law, are limited.³ Employees who are not permanent competitive employees constitute one such class. For example, such employees are not entitled to charges and a hearing prior to termination of employment. Nevertheless, such employees may have rights to which the duty of fair representation attaches, and we have held that a union has an obligation to represent employees, including provisional employees, in a manner which is not arbitrary or discriminatory.⁴ We have also recognized that even the limited rights of such employees under statute may be expanded by agreement of the parties.⁵

It is undisputed that petitioner was a part-time employee without permanent competitive status.⁶ He is not protected by Section 75 of the Civil Service Law. With respect to the Union's assertion that layoffs for budgetary reasons are not reviewable, we note that Article XVI, Section 4 of the applicable (1980-82) City-wide contract sets

³ Decision Nos. B-5-86; B-18-84.

⁴ Decision Nos. B-14-86; B-26-84; B-14-83; B-42-83; B-16-79.

⁵ Decision Nos. B-12-86; B-6-86; B-9-74.

⁶ This fact was alleged in the respondent's answer. Inasmuch as petitioner did not submit a reply to the allegation, it is deemed admitted. OCB Rules and Regulations, Section 7.9.

forth procedures for the layoff of non-competitive employees. However, although part-time employees are covered by the applicable clerical agreement, Article XVI of the City-wide agreement applies only to full-time per annum employees.⁷ Thus, the applicable collective bargaining agreements do not appear to create any additional rights with respect to the layoff of employees in petitioner's classification. Although the petitioner alleges that the Union "refused to represent him, failed to advise him of his rights, and neglected to return his phone calls,"e does not deny that he was informed by the Union that due to his part-time non-competitive status, his layoff could not be grieved or appealed.⁸ It appears that the Union did inform petitioner that under the circumstances herein, he had no further rights that the Union could pursue in his behalf.

⁷ Presumably respondent asserts that petitioner's layoff cannot be grieved under Article VI, Section 1(E) of the clerical agreement because that subsection applies to disciplinary action, which is not alleged herein. However we note that subsections (A) through (D) which define other types of grievance not applicable here, are not limited in their application and thus would be available, in an appropriate case, to an employee of petitioner's status.

⁸ This fact was alleged in the respondent's answer. Inasmuch as petitioner did not submit a reply to the allegation, it is deemed admitted. OCB Rules and Regulations, Section 7.9.

It cannot be said that the Union's actions in this case were arbitrary or discriminatory. Accordingly, we find that the petitioner's allegations do not constitute the basis for a finding of improper practice under the NYCCBL.

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 filed by Jose A. Martinez be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 25, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEER
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EDWARD F. GRAY
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