John v. L.1305, DC37, 37 OCB 5 (BCB 1986) [Decision No. B-5-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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in the Matter of the Improper Practice proceeding

-between- DECISION NO. B-5-86

EDWARD W. JOHN, DOCKET NO. BCB-737-84

Petitioner,

-and-

LOCAL 1305, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

In the Matter of the Improper Practice Proceeding

-between-

EDWARD W. JOHN, DOCKET NO. BCB-738-84

Petitioner,

-and-

THE CITY OF NEW YORK, DEPARTMENT OF PARKS AND RECREATION,

Respondent.

DECISION AND ORDER

These proceedings were commenced by the filing, on September 18, 1984, of two verified improper practice petitions by Edward W. John ("the petitioner"). In the case docketed as BCB-737-84, the petitioner asserts that Local 1505, District Council 37, AFSCME, AFL-CIO

("the Union") failed to represent him fairly in violation of Section 1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL").[1] The Union filed

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[1] Section 1173-4.2 of the NYCCBL provides as follows:

§1173-4.2 Improper practice; 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 in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

b. 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 granted 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

(1/ continued)

a verified answer on October 16, 1984;[2] to which the petitioner did not reply.

In the case docketed as BCB-738-84, petitioner asserts that he was unjustly terminated by the New York City Department of Parks and Recreation ("the Parks

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is a certified or designated representative of public employees of such employer.

c. Good faith bargaining. The duty of public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(1) to approach the negotiations with a sincere resolve to reach an agreement;
(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

[2] The time in which to file an answer was extended at the request of the Union.

Department" or "the City") in violation of Section 1173-4.2 of the NYCCBL. On October 18, 1984, the City answered by filing a motion to dismiss, together with an affirmation in support of its motion.[3] No reply was submitted.

The above-described improper practice proceedings have been consolidated for decision herein since they involve the same petitioner, events and underlying factual circumstances.

Background

On or about July 17, 1984, the petitioner contacted Andrew Lettieri, Director of District Council 37's Blue Collar Division, in regard to "problems on the job". The petitioner claimed that someone was falsifying time blotters at his work location by signing his name. The petitioner also claimed that he was being required to drive an unsafe vehicle on the job. According to the Union, the petitioner told Mr. Lettieri that he thought he was going to be fired from his job because he had recently gotten into an accident with a Parks

[3] The time in which to file an answer was extended at the request of the City.

Department vehicle, which he was driving with an expired driver's license.

Mr. Lettieri informed the petitioner that he was a provisional employee and, as such, would have no right to a hearing if he was fired. Mr. Lettieri promised, however, that if the petitioner was fired he would request an informal conference with the Parks Department to discuss the matter. In addition, Mr. Lettieri advised the petitioner that his complaints about the falsification of time blotters should be reported to the Parks Department Inspector General, who is empowered to investigate such matters.

On July 18, 1984, the petitioner called Sylvia Hutchins, President of Local 1505, to tell her that he had been fired. Ms. Hutchins told the petitioner that he had no right to a hearing because he was a provisional employee; but that she would attempt to schedule an informal conference on his behalf with the Parks Department.

An informal conference, attended by the petitioner, Andrew Lettieri, Sylvia Hutchins, Julius Spiegel, Parks Department Brooklyn Borough Commissioner and Mary Nesbit and Ralph Graves, Parks Department Management

Personnel, was convened on August 2, 1984. The petitioner was told that the reasons for his termination were excessive absenteeism and lateness and driving a Parks Department vehicle with an expired driver's license. Commissioner Spiegel also addressed the petitioner's complaints regarding the falsification of time blotters and suggested that he report them to the Parks Department Inspector General. At the conclusion of the conference, Commissioner Spiegel reaffirmed the decision to terminate the petitioner's employment.

After the conference, Mr. Lettieri told the petitioner that there was nothing more the Union could do for him. Thereafter, Mr. Lettieri was contacted by the petitioner's attorney. Mr. Lettieri told him that he would help in any way he could; but the attorney never contacted Mr. Lettieri again.

Positions of the Parties

Petitioner's Position

The petitioner claims that the actions of both the union and the City constitute improper practices under the NYCCBL and requests that he be reinstated with back pay.

The petitioner contends that he was unjustly terminated by the Parks Department because he did not want to cooperate in the "wrongdoing and illegal activities" with which the employer was involved. According to the petitioner, time blotters were falsified, supervisors left job sites early while still on City time and dangerous and unsafe vehicles were driven on a daily basis by the Parks Department mobile crew of District #16, Brownsville Recreation Center. The petitioner further maintains that he advised the Union of the employer's "wrongdoing and illegal activities" but that the Union failed to "represent [him] in good faith, fail[ed] to approach negotiations with [a] sincere resolve to reach an agreement, [f]ail[ed] to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays."

Union's Position

The Union asserts that it did not violate any of the provisions of Section 1173-4.2 of the NYCCBL. The Union points out that the petitioner was a provisional employee and, as such, could be terminated at any time without recourse to a formal hearing. The Union maintains

that it did all it could for the petitioner by arranging an informal conference with the Parks Department to discuss the reasons for his termination.

The Union argues that the petitioner failed to state a cause of action under the NYCCBL and, therefore, the case docketed as BCB-737-84 should be dismissed in its entirety.

City's Position

The City argues that its motion to dismiss should be granted because the petitioner "failed to state any facts which are probative or allege that the City or any of its representatives have interfered with any of his statutory rights [under Section 1173-4.1 of the NYCCBL]".[4] The City asserts that the gravamen

[4] Section 1173-4.1 of the NYCCBL provides, in pertinent part:

> §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 such activities ....

of the petitioners claim is that he was terminated due to "whistleblowing type activities" which, it contends, are not protected and do not give rise to a cause of action under the NYCCBL.

Discussion

BCB-737-84

Petitioner's allegations, even constitute a basis for a finding of under the NYCCBL. in prior cases we recognized that an employee representative cannot be expected, nor is it empowered, to create or enlarge the rights of special classes of employees whose rights are delimited by law.[5] Provisional employees are one such class whose employment rights are limited by law. Unlike permanent competitive employees, provisional employees are not entitled to charges and a hearing prior to termination of employment.[6]

[5] B-16-719; B-13-82; B-18-84.

[6] 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 ...., or..."

In the instant case, it is undisputed that petitioner was a provisional employee. Therefore, we find that his impending termination was a matter beyond the Union's control and not within the purview of its duty of fair representation.[7] Furthermore, we note that contrary to the petitioner's contention that the Union failed to represent him fairly, it considered his complaints and advised him to report his complaints about the falsification of time blotters to the Parks Department Inspector General. In addition, it succeeded in arranging an informal conference with the employer at which time the petitioner was notified of the reasons for his termination, although no such notification is required by law. This meeting was attended on petitioner's behalf by the Director of the Union's Blue Collar Division and by the President of petitioner's Local Union.

Finally, we note that the petitioner's allegations, that the Union "failed to approach the negotiations with a sincere resolve to reach an agreement" and "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delay" refer to violations of Section 1173-4.2(c) of the NYCCBL

[7] B-13-82; B-10-84(ES).

which deals with the duty to bargain in good faith.[8] It is well settled that the duty to bargain in good faith runs between the public employer and the certified representative of its employees; it is not a duty owed to an individual member of the bargaining unit.[9] Thus, as an individual, the petitioner lacks standing to advance this claim.

For the reasons set forth above, we find that the petition in the case docketed as BCB-737-84 fails to establish an improper practice, and direct that it be dismissed.

BCB-738-84

It is well established that on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true. Therefore, the only question to be decided by the Board is whether, on its face, the petition states a cause of action under the NYCCBL.

In support of its motion to dismiss, the City claimed that the gravamen of the petitioner's claim is that he was terminated because of "whistleblowing

[8] See, Section 1173-4.2(c) of the NYCCBL, infra note 1.

[9] B-6-71; B-13-81; B-15-83; B-29-84.

type activities"; and that "such activities are not protected and do not give rise to a cause of action under the ... NYCCBL." We agree and find that whatever the merits of the petitioner's contention that he was terminated because he did not cooperate in the employer's "wrongdoing and illegal activities", it does not constitute a basis for a findinq of improper practice. We note that the Parks Department Brooklyn Borough Commissioner and the Union considered petitioner's complaints and advised him that he should report such activities to Parks Department Inspector General.

For the reasons set forth above, we find that the petition in the case docketed as BCB-738-84 fails to state a cause of action under the NYCCBL, and direct that the motion to dismiss be granted.

0 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