Hale, Jr. v. Dep't of Parks & Rec., City, 37 OCB 8 (BCB 1986) [Decision No. B-8-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DECISION NO. B-8-86
DOCKET NO. BCB-836-85

CURTIS W. HALE, JR.,

Petitioner,

-and-

DEPARTMENT OF PARKS AND RECREATION
CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

This proceeding was commenced on December 11, 1985, with the filing of a verified improper practice petition by Curtis W. Hale, Jr. (herein "petitioner" or "Hale") against Lifeguard Coordinators Peter Stein and Leo Perlmutter, Department of Parks and Recreation, City of New York (herein "Parks Department" or "City"). On December 31, 1985, the City answered by filing a verified motion to dimiss, together with an affirmation in support of its motion. The petitioner filed a reply on February 6, 1986, in the form of a "Verified Answer ... Not to Dismiss," and the City submitted a surreply on February 24, 1986.

The Petition

Petitioner was, for many years, a lifeguard employed by the Parks Department. Lifeguards are represented by District Council 37, AFSCME (herein "DC 37") in a unit covered by the 1982-84 Seasonal Agreement between DC 37 and the City. The improper practice petition alleges that Hale was terminated by the Parks Department on the basis of false statements made by a supervisor, Perlmutter, and that petitioner was subjected to harassment, physical abuse, and racial slurs by agents of the Department. The petitioner, in a statement submitted with the petition, alleges a course of harassment and discriminatory treatment based upon unlawful considerations of race, including a July 1985 change in his schedule in retaliation for filing a complaint of racial discrimination against Perlmutter. Petitioner further alleges that he was discharged on September 13, 1985 as a result of his July 15, 1985 "entrapment" by Perlmutter, who, according to Hale, purposely gave Hale an order which he knew Hale would refuse to obey because the order was allegedly in violation of the contract between the City and DC 37, as well as in violation of the Parks

Department Rules and Regulations.[1] In addition, petitioner alleges that the City, in connection with the July 15 incident and his discharge, committed at least ten separate violations of the contract and departmental rules.

The petitioner alleges that the above conduct constitutes a violation of the NYCCBL.

In addition to filing the instant petition, EEOC charge and federal court action, Hale has also grieved the above matters. on December 6, 1985, DC 37 filed a request for arbitration of petitioner's grievance concerning his discharge.

The City's Position

The City, in its affirmation in support of the motion to dismiss, takes the position that: 1) the conduct alleged by the petitioner does not state a cause of action under Section 1173-4.2(a) of the NYCCBL;

[1] On July 24, 1985, the petitioner filed a charge with the Equal Employment Opportunity Commission based upon these same allegations (EEOC No-021-85-4931). It appears that this charge is still under consideration. Petitioner is also seeking to add these allegations to the complaint in his suit pending before the United States District Court for the Southern District of New York (Hale v. NYC Dept. of Parks, 83-Civ-509).

2) the Petitioner's execution of the waiver required in connection with the arbitration request prohibits the Board from considering the same underlying dispute in an improper practice proceeding; and 3) the petitioner's allegations are insufficiently specific to give the City notice of what is intended to be proved.

The Petitioner's Reply to the City's Motion to Dismiss

The petitioner submitted a document opposing the City's motion in which he alleges, for the first time, that he and other lifeguards, at an unspecified time, formed a "coalition" of Black and Hispanic lifeguards for the purpose of persuading District Council 37 to obtain equal employment opportunity rights for minority lifeguards and that in March, 1985 he informed the president of DC 37 of the formation of the coalition. In his reply, petitioner alleges that he was terminated because the coalition was becoming a "major threat" to Stein and Perlmutter, and that termination for this reason constitutes a violation of his right to self organization, and hence, of the NYCCBL. The City denies these allegations, reasserts its arguments set forth above, and asserts that petitioner's "verified answer ... not to dismiss" does not conform to OCB Rule 7-5.

Discussion

It is well settled that, on a motion to dismiss, the facts alleged by the petitioner must be deemed to be true. Thus, the threshold issue herein is whether the petition, assuming that all of its allegations of fact are true, states facts constituting an improper practice as that term is defined in NYCCBL Section 1173-4.2(a). We conclude that, whatever the merits of petitioner's complaints concerning the City's alleged actions, they do not constitute a basis for a finding of improper practice.

It is not the purpose of the improper practice provisions of the NYCCBL to protect employees from any and all forms of employer wrongdoing. The gravamen of the petition is that the City has engaged in "harassment" and "entrapment" of petitioner on the basis of racial considerations. The gravamen of the petitioner's reply is that Hale was terminated because of his participation in a coalition formed for the purpose of pressuring the union to obtain equal employment opportunity rights for minority employees. It is the limited purpose and function of Section 1173-4.2 to protect

the rights set forth in Section 1171-4.1.[2] Redress of rights other than those stated in Section 1173-4.1 must be sought elsewhere. This is true, a fortiori, in a case such as this where the petitioner complains of actions of his employer in connection with other statutory rights. The petitioner has, in fact, filed a charge with the Equal Employment Opportunity Commission, the agency charged with the enforcement of the individual's right not to be discriminated against on racial grounds. Petitioner may not seek, nor does this Board have jurisdiction to provide, an alternative avenue of enforcement by way of the improper practice proceeding.[3]

Moreover, with respect to the allegation that petitioner was discharged because of his participation in the coalition, we find that petitioner has failed to allege any facts showing a causal link between any activities of the coalition and his discharge.[4] The record in this regard is confined to conclusory allegations based upon petitioner's speculations and suspicions

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[2] Section 1173-4.1 provides, inter alia, that

> 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 ....

[3] Decision No. B-1-82.

[4] Decision No. B-20-81.

and is devoid of any probative evidence to show that the disciplinary action taken against petitioner was in retaliation for his dissatisfaction with the union's representation of minority lifeguards or because of any activities of the coalition. In the absence of any evidence that would indicate that Petitioner's termination came within the purview of any of the prohibited actions enumerated in Section 1173-4.2(a), the City cannot be held to be guilty of an improper practice in this matter. Accordingly, we find that no violation of the NYCCBL has been stated. In view of this finding, we deem it unnecessary to address the City's contentions with respect to waiver, specificity, and noncompliance with OCB Rules.

For the reasons set forth above, the city's motion to dismiss is granted.[5]

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

[5] The allegations of the improper practice petition filed by Hale against DC 37 in Docket No. BCB-817-85 are still under consideration.

ORDERED, that the motion to dismiss filed by the City in Docket No. BCB-836-85, and the same hereby is, granted.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
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EDWARD SILVER
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