Shapiro v. Dep't of San., City, et. al, 37 OCB 9 (BCB 1986) [Decision No. B-9-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice

-between-

DECISION NO. B-9-86
DOCKET NO. BCB-784-85

MELVIN SHAPIRO,

Petitioner,

-and-

DEPARTMENT OF SANITATION, CITY OF NEW YORK AND DISTRICT COUNCIL OF NEW YORK CITY UNITED BROTHER-HOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondents.

DETERMINATION AND ORDER

On May 17, 1985, Melvin Shapiro ("petitioner") submitted a verified improper practice petition, dated April 26, 1985,[1] in which he asserted numerous charges against his employer, the City of New York ("City") and against the District Council of New York United Brotherhood of Carpenters and Joiners of America ("Council" or "Union") , relating to the terms of a consent determination entered into by the City and the Union

[1] The petition was first received at the office of Collective Bargaining on May 1, 1985, but was returned to petitioner because it was not accompanied by proof of service as is required by Section 7.6 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"). Upon resubmission together with proof of service on May 17, 1985, the petition was deemed sufficient on its face and was placed on the OCB docket.

pursuant to Section 220 of the Labor Law. The City, by its Office of Municipal Labor Relations ("OMLR") submitted a verified answer to the petition on May 28, 1985. The Council submitted a verified answer on July 15, 1985.[2] The petitioner did not file a reply.

Background

Petitioner is employed by the New York City Department of Sanitation as a carpenter. Carpenters are members of a collective bargaining unit for which the Council is the certified bargaining representative.[3] Compensation and other benefits for carpenters are determined by the New York City Comptroller ("Comptroller") in accordance with Section 220 of the Labor Law, which provides that wages of "laborers, workmen or mechanics" shall be at the "prevailing rate", and that supplements or benefits shall be in accordance with "prevailing practices in the locality."

Notwithstanding the provisions of Section 220 of the Labor Law, and the fact the City has no obligation under the

[2] The Council's answer, as first submitted on June 12, 1985, was not verified and was not accompanied by proof of service, as required by Sections 7.7 and 7.8 of the OCB Rules. A verified answer, together with proof of service, was received on July 15, 1985.

[3] Board of Certification Decision No. 50-68.

New York City Collective Bargaining Law ("NYCCBL") to bargain with respect to terms and conditions of employment for Section 220 employees,[4] it appears that, in the past, the City and the Union have negotiated voluntarily concerning wages and benefits for carpenters. Consistent with this practice, for the 1982-1984 period, the City offered the Council a contract which provided a general wage increase and benefits similar to those offered to its other civilian employees. The Council rejected this offer, however, and demanded the prevailing rate of pay for carpenters plus the fringe benefits provided in the civilian settlement. OMLR refused to pay wages at the (higher) prevailing rate unless the Union agreed to accept the (lower) prevailing rate of fringe benefits. The parties' negotiations reached an impasse.

Thereafter, the Council filed a formal Labor Law complaint under Section 220 and hearings before the Comptroller's Office commenced. Prior to the conclusion of the hearings, however, the Council, after consulting with its shop stewards and polling the membership, decided to reopen negotiations with OMLR. In December 1984, a negotiated settlement was achieved. The settlement provided for payment of wages at the prevailing rate with substantially reduced fringe benefits.

[4] NYCCBL §1173-4.3a(1).

By letter dated December 4, 1984, the Council reported the terms of the settlement to its membership. On January 2, 1985, a copy of the Comptroller's determination, incorporating the settlement terms, was transmitted to all civil service carpenters.[5]

Positions of the Parties

Petitioner's Position

The improper practice petition includes the following statement of the nature of the controversy:

> December 20, 1984, 1 received a letter from the Carpenters Union listing the agreement reached with the City of New York. Later, January 20, 1985, the determination arrived at my home. In it were more losses than in the letter. After time ran out, February 11, 1985, 1 was made aware that there was still more losses.

Petitioner asserts that the acts complained of Violate Sections 1173-4.2a(l), a(3), a(4), b(l), c(4) and C(5) of the NYCCBL.

Appended to the petition is a list of "grievances"

[5] The facts recited in this background section are essentially as alleged by the Council in its answer to the improper practice petition. As petitioner did not file a reply, or otherwise deny the Union's statements, the facts as alleged by the Union in its answer are deemed admitted. OCB Rules §7.9.

alleged to state violations of the aforementioned and other sections of the statute. Specifically, petitioner complains that, as a result of the settlement negotiated by the City and the Council for the 1982-1984 period, he personally incurred losses in accrued benefits. He claims a loss of seniority "and its benefits", losses in earned vacation, and losses in sick leave benefits, including a hazardous work sick leave benefit enjoyed exclusively by employees of the Department of Sanitation. Petitioner also asserts that he was denied premium pay for overtime worked.

With regard to the bargaining and its implementation, petitioner complains that the City engaged in improper delaying tactics; he also asserts that the requirement for prevailing rate employees to execute a release in order to receive a retroactive adjustment in pay under the terms of the Comptroller's determination is coercive.

With respect to the Council, petitioner alleges that the following omissions constitute improper practices: failure to provide petitioner with requested information concerning the negotiations; failure to bargain for proper goals, in that the membership was not seeking higher wages but "a return to normal"; and failure to obtain membership ratification of the settlement.[6]

As a remedy for the alleged violations of the statute, petitioner seeks the return of lost benefits in order to put him

[6] Section 1173-4.2 of the NYCCBL provides in its entirety as follows:

*MORE

"on a par or better than the worker in outside industry."

(6 continued):

---

§1173-4.2 Improper-practices; 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 is a certified or designated representative of public employees of such employer.

*MORE

City's Position

The City contends that the gravamen of the petitioner's

claim is his dissatisfaction with the terms of a Comptroller's determination for his title. Dissatisfaction with a Comptroller's determination is not, OMLR argues, a basis for an improper practice petition. For this reason, it is alleged, the Board lacks jurisdiction over the claims asserted in the petition which, accordingly, must be dismissed.

(6/ continued):

c. Good faith bargaining. The duty of a 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 negotiations 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.

OMLR also argues that the allegations of the petition are so general and lacking in specificity that the City is unable adequately to respond or prepare its defense. The City notes that Section 7.5 of the OCB Rules requires that an improper practice petition contain, inter alia:

> c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts....
>
> d. Such additional matters as may be relevant and material.

Asserting that the petitioner has failed to supply "dates, names and any specifics with respect to the City," OMLR maintains that the petition should be dismissed as failing to state a cause of action.

OMLR argues further that petitioner has failed to state a prima facie case of improper practice as he has not alleged any facts which demonstrate that the City has interfered with, restrained or coerced him in the exercise of his rights under the NYCCBL, in violation of Section 1173-4.2a(1), or that it discriminated against him, in violation of Section 1173-4.2a(3). With respect to alleged violations of NYCCBL Sections 1173-4.2a(4), c(4) and c(5), the City asserts that the petition fails to state a claim because the statutory duty to bargain runs between the public employer and the certified representative of its

public employees. OMLR argues that it has no duty, nor any right, to bargain with an individual employee.

For the all of the aforementioned reasons, the City requests that the petition be dismissed in its entirety.

Union's Position

The Council observes that the essence of petitioner's claim is that the Union negotiated a contract (consent determination) on behalf of carpenters, to the terms and conditions of which the petitioner objects. The Council emphasizes that "the City employs over 600 carpenters and only Mr. Shapiro has seen fit to complain about the settlement." because petitioner (a) lacks standing to challenge the outcome of negotiations between the City and the Council, and (b) has failed to state a claim of improper practice.

Detailing the history of the settlement to which the petitioner objects, the Council cites thirty-four occasions during the negotiations on which it either met with, or communicated with, its shop stewards, and eleven occasions on which meetings for shop stewards and/or the membership were held. The Council emphasizes that the reduction in fringe benefits that resulted from the settlement was approved by the membership, which voted to make obtaining the higher prevailing wage rate the prominent issue in the

negotiations.

Addressing petitioner's specific complaints, the Council denies that petitioner has been adversely affected by the contract negotiated on his behalf. Not only does the wage increase compensate him for the loss of benefits but, the Union notes, those losses did not even take place until January 1, 1985, after the contract had expired. In a successor agreement, presently being negotiated, the Council hopes to recoup losses suffered by the membership under the 1982-84 determination.

With respect to the allegation that a special arrangement for carpenters in the Department of Sanitation has been breached, the Union asserts that it had no prior knowledge of this arrangement, but avers that it has now discussed the matter with the City and that a memorandum issued on June 18, 1985, copy of which is appended to the Union's answer, reflects the resolution of that matter.

The Council asserts that the claims relating to denial of premium pay for overtime should be taken up with the Department. The Union notes further that petitioner has never sought to grieve this issue.

With respect to the requirement that petitioner execute a release in order to receive a retroactive pay adjustment, the Union argues that this is a statutory requirement and

that, in any event, since the amount of the adjustment computed by the City exceeds the amount to which petitioner claims to be entitled, petitioner has no reason to complain.

For the reasons set forth above, the Council maintains that the charges of improper practice should be dismissed.

Discussion

A threshold issue is presented concerning our jurisdiction to consider the allegations raised by petitioner herein because they relate to the terms of a Comptroller's determination under Section 220 of the State Labor Law. The Labor Law expressly provides that review of a Comptroller's determination may be sought by an aggrieved party in accordance with Article 78 of the CPLR.[7] This Board does not have authority to review the terms of a Comptroller's determination. We conclude therefore that we lack jurisdiction to consider the allegations of the petition insofar as they concern the merits of the carpenter settlement. Moreover, we find that we are without authority to award petitioner the remedy he seeks, i.e., an alteration in benefits received.[8]

---

[7] N.Y. Lab Law §220(8) (McKinney Supp. 1984-85).

[8] Even if petitioner's complaint were addressed to the terms of an executed collective bargaining agreement between his union and the City, the result would not be otherwise.

Notwithstanding the above, however, we do have jurisdiction to consider petitioner's claims insofar as they involve allegations of statutory violation. There is no dispute in the present case, that the Comptroller's determination to which petitioner objects incorporates the outcome of bilateral negotiations voluntarily undertaken by the City and Union as an alternative to the statutory procedure.[9] Nor is there any dispute that we have jurisdiction to determine and remedy improper practices alleged to have been committed during such negotiations. Accordingly, we shall turn our attention to the allegations of improper practice presented in this case.[10]

Petitioner alleges that the City's requirement that he execute a release prior to receiving payment of a retroactive wage adjustment is coercive. This claim is arguably within the purview of NYCCBL Section 1173-4.2a(l). However, the interference, restraint or coercion prohibited by Section

---

[9] During the period at issue in this case, the City had no obligation to bargain with respect to wages and benefits for employees covered by section 220 of the Labor Law. NYCCBL §1173-4.3a(l). Effective August 3, 1984, however, section 220 was amended to require the City of New York and public employee organizations to bargain in good faith to reach written wage agreements and supplements for section 220 employees. Pursuant to the amendment, a Labor Law complaint may still be filed with the Comptroller's Office, but only upon the failure of the parties to reach an agreement, and only at the instance of the employee organization. [19841 N.Y. Laws, Chap. 767 § 1.

[10] We find unpersuasive the City's argument that the petition should be dismissed for failing to comply with Section 7.5 of the OCB Rules.

1173-4.2a(l) refers to the exercise of rights granted in Section 1173-4.1. As petitioner has not demonstrated how the release requirement adversely affects him in the exercise of his rights to organize, assist, or participate in the activities of an employee organization, or to refrain from doing so, we are required to find that no violation of Section 1173-4.2a(l) has been stated.

As to the alleged violations by the City of NYCCBL Section 1173-4.2a(3), we also conclude that no violation has been stated. We note that petitioner claims to have suffered losses that other members of the bargaining unit did not incur. However, such a claim does not state a prima facie case of discrimination within the meaning of Section 1173-4.2a(3) where there is neither the allegation nor proof of a motive or intent to treat petitioner less favorably on account of his membership in or participation in the activities of a union.

Petitioner's allegations of improper practice by the Council involve the duty of fair representation, violation of which we have held to be a matter within our jurisdiction under NYCCBL Section 1173-4.2b(l).[11] In order to state a cognizable claim of breach of the duty of fair representation, the petitioner must demonstrate that the Union's conduct toward

[11] E.g., Decision Nos. B-23-84; B-14-83; B-26-81; B-16-79.

a member or members of a collective bargaining unit is arbitrary, discriminatory or in bad faith.[12] We have previously recognized that the doctrine of fair representation serves as a counterbalance to the doctrine of exclusive representation, which subordinates individual employee interests to the interests of the bargaining unit as a whole. Thus, we have found that the duty of fair representation is coextensive with the union's exclusive authority to deal with the employer with respect to the negotiation, administration and enforcement of a collective bargaining agreement.[13]

In the present case, petitioner contends that the Council violated its duty of representation in that, inter alia, (1) it failed to provide him with requested information concerning the negotiations; (2) it bargained for improper goals; and (3) it failed to obtain membership ratification of the negotiated settlement.

With respect to the first of these allegations, we find that petitioner has failed to state a cause of action under the NYCCBL. Not only has he not indicated the nature of the

---

[12] Vaca v. Sipes, 386 U.S. 171, 6 . 4 LRRM 2369 (1967); O'Riordan v. Local 852, Civil Serv. Employees Ass'n, 16 PERB ¶7511 (N.Y. Ct. App. 1983); Albino v. City of New York, 80 A.D. 2d 261, 438 N.Y.S. 2d 587 (2d Dep't, 1981).

[13] See, Decision Nos. B-26-84; B-23-84; B-14-83; B-16-79.

information sought or its relevance to the subject negotiations, but he has failed to allege that the Union had a duty to disclose information not already disclosed in the present case. The Council, on the other hand, has provided ample evidence that it regularly communicated with its shop stewards concerning the status of negotiations with the City, and that it communicated with all civil service carpenters regarding such matters by its letters dated October 5, 1982, July 27, 1984, December 4, 1984 and January 2, 1985.

While a union's failure to inform its members concerning matters affecting the terms and conditions of their employment may constitute a breach of the duty of fair representation, no violation will be found to lie in the absence of improper motivation, arbitrariness or grossly negligent conduct. As petitioner has not demonstrated either the existence of a duty or arbitrary conduct[14] by the Council, we shall dismiss this claim without further examination.

Similarly, with respect to the second claim against the

[14] Decision No. B-15-83. See, Local 860, Int'l Bhd. of Teamsters v. NLRB, 107 LLRM 2175 (D.C. Cir. 1981); Swatts v. United Steelworkers of America, 116 LRRM 2110 (S.D. Ind. 1984); Meany v, East Ramapo Cent. School Dist., 14 PERB §4540 (H.O. 1981).

Union, we find that no prima facie cause of action has been stated. Petitioner has failed to assert any facts that would support his bare allegation that the Union bargained for improper goals or that the majority of bargaining unit members desired a result other than the one achieved. To the contrary, it appears that the Council acted in accordance with the desires of the majority of employees in the unit. By its July 27, 1984 letter, addressed to all civil service carpenters, the Council specifically polled the membership concerning its preferences and priorities for the settlement of wage and benefit issues. The July 27 letter stated, in pertinent part:

> Before we proceed any further, we submit to you a ballot which will be returned to us in a sealed envelope .... The ballot is your direction to the Union as to whether or not it should continue the prevailing rate case [before the Comptroller] with the possible loss of substantial leave time to you, or whether the Union should seek to negotiate the 1982-1984 agreement with the general City-wide increase and retain the leave time.

The results of this poll are reflected in the Council's letter of December 4, 1984 to the membership:

> The response to our inquiry showed that a majority of the members employed by the City preferred to be paid the prevailing rate of wage.

In matters of contract negotiation, the exclusive bargaining representative is allowed considerable latitude. it has long been held that, absent a showing of intentional and hostile discrimination, a union does not breach its duty of fair representation simply because a negotiated bargain favors one group of employees over another or because all the employees in the unit are not satisfied with the outcome.[15] Moreover, it is well-settled that:

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. [16]

Petitioner has not demonstrated that the Union discriminated against him or against any minority interest in the unit when it reached a settlement that was more favorable to some employees than it was to him. It is apparent here that the Union attempted in its negotiations to make the best of a difficult situation. It is not our task, in deter-

---

[15] Ford Motor Co. V. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953); Plainview - Old Bethpage Congress of Teachers v. Plainview - Old Bethpage Cent. School Dist., 7 PERB §3058 (1974); Decision Nos. B-15-83; B-13-81

[16] Ford Motor Co., 31 LRRM at 2551.

mining a question of fair representation, to evaluate or to pass judgment upon the business decision of a union to pursue one set of negotiating proposals at the expense of other desirable ends.[17] In the present case, petitioner has failed to allege or to prove that the Council exercised its discretion with-anything s hort of "complete good faith and honesty of purpose." Accordingly, we shall dismiss his claim.

With respect to petitioner's third allegation against the Council, concerning the alleged failure to obtain membership ratification of the carpenter settlement, our conclusion is the same. The circumstances under which membership ratification is required are not defined by the NYCCBL, but constitute a matter internal to the union. we have previously held that the duty of fair representation does not extend to internal union affairs unless the matters complained of affect terms and conditions of employment or have an effect on the nature of the representation accorded employees by the union.[18] In the instant case, there has been no showing that the alleged failure to submit the carpenter settlement for membership ratification affected either the terms and conditions of petitioner's employment or the nature of the

[17] See, Decision No. B-26-81.

[18] Decision Nos. B-23-84; B-1-79.

Council's representation. Therefore, we find that this allegation, even if true, cannot constitute an improper practice under the NYCCBL.

Finally, we address petitioner's allegation that the respondents' actions violate NYCCBL Sections 1173-4.2a(4) and b(2). These sections make it an improper practice for a public employer or a public employee organization to refuse to bargain collectively in good faith. It is wellsettled that the duty to bargain in good faith runs between the public employer and the certified representative of its employees and, accordingly, that an individual member of the bargaining unit lacks standing to assert a breach of the duty.[19] For this reason, we are required to dismiss petitioner's claims insofar as they involve an alleged failure of the City or the Union to negotiate in good faith.[20]

As we have concluded that petitioner, apparently the

[19] E.g., Decision Nos. B-29-84; B-15-83; B-13-81; B-6-71. See, Goldrich v. United Fed'n of Teachers, 17 PERB §3015 (1984); Robinson v. State, 13 PERB §3063 (1980); Kalin v. East Ramapo Cent. School Dist., 12 PERB 9[3121 (1979).

[20] Our determination in this regard affects not only the alleged violations of NYCCBL Sections 1173-4.2a(4) and b(2), but also the allegations founded upon NYCCBL Sections 11734.2c(1), (2) and (4), which prescribe some of the elements of good faith bargaining.

only civil service carpenter who was heard to complain about the 1982-84 settlement, failed to establish any violation of the NYCCBL, the petition shall be dismissed in its entirety.

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

ORDERED, that the improper practice petition filed by Melvin Shapiro be, and the same hereby is, dismissed.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

DANIEL G. COLLINS
MEMBER