Procida v. Comm. of HRA, Dep't of Soc. Services, 39 OCB 2 (BCB 1987) [Decision No. B-2-87 (IP)]

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

-between-

CHARLES PROCIDA,

Petitioner,

DECISION NO. B-2-87
DOCKET NO. BCB-892-86

-and-

THE COMMISSIONER OF THE HUMAN
RESOURCES ADMINISTRATION,
DEPARTMENT OF SOCIAL SERVICES,

Respondent.
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DECISION AND ORDER

On August 5, 1986, Charles A. Procida ("petitioner") filed a verified improper practice petition in which he alleged that agents of the Human Resources Administration of the New York City Department of Social Services ("HRA" or "the City"), by a series of improper actions, interfered with and coerced the petitioner in retaliation for the exercise of rights protected by Section 1173-4.1 of the New York City Collective Bargaining Law ("NYCCBL"),[1] in violation of Section 1173-

[1]Section 1173-4.1 of the NYCCBL provides in relevant part:

> 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

(continued...)

4.2a(l) of that law, and, further, discriminated against him for the purpose of discouraging participation in the activities of a public employee organization, in violation of NYCCBL Section 1173-4.2a(3).

On September 10, 1986, respondent HRA, represented by the New York City Office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss the petition and an affirmation in support of the motion.

Petitioner filed an answer to the City's motion on September 15, 1986, which he supplemented with a further submission dated October 10, 1986.[2]

(...continued)

> through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[2]The October 10, 1986 submission was accepted for filing over OMLR's objections that the material was not relevant or timely and that the City would be prejudiced by its inclusion in the record. The additional material consists of the decision of an administrative law judge of the New York State Department of Labor Unemployment Insurance Section, dated September 19, 1986, which finds petitioner eligible to receive unemployment insurance benefits. The OCB Trial Examiner advised counsel for OMLR that the acceptance of this additional material was in no way a determination of its relevance or probative value, but rather a reflection of the Board's policy to construe liberally the rules of pleading, particularly where a petitioner appears pro se. Although advised of its right to file a response to the additional material, OMLR has not done so.

The Petition

Petitioner is a permanent Staff Analyst employed in the Family and Adult Services Section of the HRA Office of Budget, Fiscal and Internal Audit. Petitioner asserts that he is "a very active member" of the organization of Staff Analysts ("OSA"), a public employee organization that is seeking to represent employees in the staff analyst series of titles for purposes of collective bargaining.[3] By his own account, petitioner has a long record, well-known to the respondent, of complaining about practices which, petitioner alleges, "tend to compromise the integrity and performance of the Analyst craft and which dilute and weaken the Analyst potential collective bargaining unit." Among the practices about which petitioner has complained are the alleged assignment of staff analysts to out-of-title and "out-of-craft" work (petitioner also refers to a practice of "scrambling titles")[4]

[3]On March 28, 1984, OSA's motion to intervene in the staff analyst representation case (Docket Nos. RU-521-75, RU-533-75, RU-702-79, RU-704-79, RU-707-79, RU-730-79) was granted by the Board of Certification. Proceedings in that case, which involves issues of alleged managerial and/or confidential status as well as of appropriate unit placement for employees deemed eligible for collective bargaining, are continuing.

[4]Petitioner uses the term "out-of-craft" and "out-of-title" to signify different types of improper work assignments. Only the latter form is recognized in, and is prohibited by, the Civil Service Law. N.Y. Civ. Serv. Law §61(2) (McKinney 1986).

and the use of provisional employees in the position of Associate Staff Analyst while there is a list of employees, in which petitioner is included, who have been certified as eligible for this position based upon a competitive examination, but who have not been appointed to the position.

Petitioner maintains that agents of respondent have harassed him and retaliated against him "probably" on account of his having complained about unfair labor practices to his supervisor and to other officials of HRA. The harassment and retaliation are alleged to have taken the following forms:

- on June 12, 1986, petitioner was locked out of the workplace for 19 days; HRA called it a "suspension" but did not file disciplinary charges until more than three weeks later, a fact which allegedly indicates the "frivolous and false" nature of the charges;[5]

- 42 days of salary were withheld from petitioner and an automatic promotion and pay increase to which he was entitled were denied;

[5]On July 7, 1986, petitioner was served with written charges of misconduct. Two specifications of misconduct were alleged:

(1) on May 29, 1986, petitioner refused to be briefed concerning a new work assignment and became physically and verbally abusive toward a supervisor;

(2) commencing on May 29, 1986, petitioner was absent for ten days without authorization or approval.

- petitioner has been assigned to out-of title work about which he has complained; his complaints have led to further retaliation.

In opposition to the City's motion to dismiss the improper practice petition, petitioner cites other instances that allegedly illustrate a pattern of unfair labor practices. These occurrences, concededly not actionable because they transpired more than four months prior to the filing of the present petition,[6] include:

- the withholding of personnel evaluation reports upon which merit raises are based, although provisional Staff Analysts allegedly were given evaluation reports and received merit awards;

- tampering with petitioner's time and leave records;

- reassigning petitioner to segregate him from other Staff Analysts.

Petitioner concludes that respondent is making an example of him in order to intimidate other Staff Analysts and to prevent employees from asserting their rights to self-organization.

As a remedy for the alleged violations of the NYCCBL, petitioner seeks an order turning over authority for his scheduled disciplinary hearing to an OCB-designated hearing

[6]Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") prescribes a four-month limitations period for the filing of an improper practice charge.

officer, and directing respondent to reimburse him for the salary withheld, promote him to Associate Staff Analyst with an appropriate increase in pay retroactive to June 12, 1986, and reassign him to a a work location where he is not segregated from other employees in the staff analyst craft.

Positions of the Parties

City's Position

The City asserts two grounds for its motion to dismiss the instant petition. First, OMLR contends that petitioner lacks standing to bring this claim. Referring to its application to exclude from collective bargaining employees in the staff analyst series of titles on the basis that they are managerial and/or confidential, OMLR argues that petitioner's duties which include, inter alia, monitoring and analyzing fiscal programs, preparing budgets and recommending budget changes, warrant petitioner's exclusion from collective bargaining. If petitioner is ineligible for collective bargaining, it is argued, he cannot pursue the instant claim.

The City further contends that the petition should be dismissed because it fails to state a claim of improper practice. Specifically, OMLR alleges that petitioner has failed to assert the violation of any rights protected by Section 1173-4.1 of the NYCCBL or to point to any conduct by respondent that arguably interfered with petitioner's

exercise of his rights in violation of Section 1173-4.2a. According to OMLR, petitioner has only alleged "presumptions of retaliation."

The City maintains that the remedy for petitioner's complaints lies in an appeal of the pending disciplinary charges, which may properly be pursued in a proceeding under Section 75 of the Civil Service Law, but not in an improper practice proceeding under the NYCCBL.

Petitioner's Position

Petitioner contends that he is a "public employee" within the meaning of the NYCCBL notwithstanding respondent's application to have him excluded from such status. He asserts that he has never assumed any significant role in the budget-making process and, in fact, is not even performing budget-related duties because respondent has assigned him to perform out-of-title work. Petitioner further alleges that, even if he were a managerial or confidential employee, he would be entitled to the protections of NYCCBL Section 1173-4.1 which, he alleges, contains "an important inclusionary proviso for them." Accordingly, petitioner concludes that he has standing to pursue the instant claim.

Petitioner contends that the facts alleged herein spell out violations of his rights under NYCCBL Section 1173-4.1 and that the allegations of retaliatory conduct state prima facie violations of NYCCBL Section 1173-4.2a(l)

and (3). Therefore, he asserts, the petition should not be dismissed.

With respect to the City's assertion that the proper forum for petitioner's claim is a proceeding under Section 75 of the Civil Service La law, petitioner argues that such proceeding, presided over and controlled by the respondent, cannot be a vehicle for redressing his complaint that the disciplinary charges were a pretext and constitute retaliation for petitioner's self-organizing activity. Such allegations, petitioner asserts, can only be addressed in an improper labor practice proceeding.

Discussion

We deal first with the question of petitioner's standing to bring the instant claim for, if a petition is filed by one who lacks standing to sue, it must be dismissed even if it states a prima facie cause of action.

For purposes of this proceeding, standing is defined by Section 7.4 of the OCB Rules which provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf ... [emphasis added].

"Public employees" is a term defined by the statute to include:

> persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury,[7]

but not

> persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board....[8]

Although the City would have us conclude that the petitioner's duties warrant a finding that he is a managerial and/or confidential employee and is without standing to pursue the instant claim, we are without authority to determine questions of managerial and confidential status. Jurisdiction over such matters is vested in the Board of Certification.[9] To date, the Board of Certification has issued six decisions in which it has determined the employee status of many individuals in the staff analyst series of titles, but not that of the petitioner herein.[10] Until such time as the Board may determine that petitioner is managerial and/or con-

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[7]NYCCBL §1173-3.0h, - 3.0e.

[8]N.Y. Civ. Serv. Law §201.7a (McKinney 1986). See, NYCCBL §1173-4.1.

[9]Revised Consolidated Rules of the Office of Collective Bargaining, Part 2.

[10]Matter of Civil Service Technical Guild and City of New York, Decision Nos. 14-86; 8-86; 5-85; 21-84; 20-82; 39-80.

fidential within the meaning of the NYCCBL, therefore, petitioner retains his present status as a "public employee" and may initiate an Improper Practice proceeding pursuant to OCB Rule 7.4.[11] Accordingly, we shall deny the City's motion to dismiss the petition insofar as it is based upon an allegation that petitioner lacks standing.

We turn now to the second basis for the City's motion, which asserts that the petition fails to state a prima facie claim of improper practice. NYCCBL Section 1173-4.2a provides, in relevant part:

> 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; ...
>
> (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;....

With respect to petitioner's claim under Section 1173-4.2a(l), we note that this Board has not previously considered what constitutes protected activity within the meaning of

[11]Contrary to petitioners contention, managerial and confidental employees are not entitled to the rights granted in Section 1173-4.1 of the NYCCBL, which section expressly provides that neither managerial nor confidential employees shall be included in a bargaining unit or enjoy the rights attendant thereto.

Section 1173-4.1, insofar as that provision protects the right of public employees to form, join or assist a public employee organization that has not been certified as a collective bargaining representative of public employees. Here, the petitioner has alleged that he is an active member of the Organization of Staff Analysts whose petition to represent employees in the petitioner's title is pending before the Board of Certification. However, petitioner has not alleged that OSA authorized or was even aware of his actions. Petitioner also claims that he has complained about employer practices that "tend to compromise the integrity and performance of the Analyst craft and which dilute and weaken the Analyst potential collective bargaining unit." However, as evidence of these complaints, petitioner has submitted copies of letters to officials of HRA in which he referred to his out-of-title work assignments and to the agency's failure to promote him while allegedly retaining and continuing to hire provisional employees in the position of Associate Staff Analyst. These letters advance grievances that are personal to the petitioner and refer only incidentally to the fact that others are affected. Moreover, there is no indication that other Staff Analysts supported petitioner in, or were even aware of, his complaints. Without attempting to define or enumerate activities that we would deem to fall within the protection of Section 1173-4.1,

we hold that such activity must, at a minimum, be in furtherance of the collective welfare of employees as distinguished from the welfare of an individual. Since we find that the petitioner in the present case acted essentially on his own behalf, we cannot conclude that he was engaged in protected activity within the meaning of Section 1173-4.1. Accordingly, we shall grant the City's motion to dismiss the petition insofar as it alleges that the employer interfered with, restrained or coerced public employees in violation of NYCCBL Section 1173-4.2a(1).

Similarly, we must conclude that the petitioner has failed to state a prima facie claim of discrimination within the meaning of Section 1173-4.2a(3). Petitioner claims that disciplinary action, denial of a promotion, assignment to out-of-title work and other enumerated adverse actions taken by HRA were designed to discourage his participation in and support for the organizational activities of OSA. However, petitioner has not alleged any facts which, if proven, would establish either the fact of discrimination or the requisite nexus between the petitioner's activities and the actions of the employer. For example, while the petition complains of the filing of false and frivolous disciplinary charges, it alleges no facts which arguably would explain why the employer took such action when it did if such action was merely a

pretext for retaliation. For, as petitioner states, he has "consistently asserted his rights to self-organization and to influencing his public employee organization." Nor has petitioner alleged facts which would establish that the employer or its agents harbored anti-union animus.[12] We have repeatedly held that the mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity (which is not present here), does not state a violation where no causal connection has been demonstrated. Allegations of improper motivation must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise.[13]

Finally, we wish to comment upon a matter collateral to this decision, but one which the parties have raised in their pleadings, namely, the distinction between a pro-

[12]In a letter to Acting Inspector General Rogotsky, dated July 30, 1986, complaining of harassment by his supervisor, petitioner states "it is difficult to prove the exact motive or motives for the harassment." Petitioner speculates that "Mr. Bains ... appears to be acting under duress or fear for his job," and does not refer to anti-union motive.

[13]E.g., Decision Nos. B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

ceeding under Section 75 of the Civil Service Law and an improper practice proceeding under Section 1173-4.2a of the NYCCBL. Section 75 provides that certain enumerated classes of employees may only be disciplined after a hearing on stated charges. An appeal from a penalty imposed as a result of a proceeding under Section 75 may be taken to the Civil Service Commission or to the court pursuant to Article 78 of the CPLR.[14] These proceedings all relate to the issue of misconduct. An allegation that disciplinary action was taken for the improper purpose of retaliating against an employee who has engaged in protected union activity may not be raised in the proceedings prescribed by the Civil Service Law, but lies within the exclusive jurisdiction of this Board or its state analogue (PERB).[15] Such a proceeding, provided for in Section 1173-4.2a of the NYCCBL (and Section 209-a.1 of the Civil Service Law), relates solely to the issue of motivation. Thus, in the present case, the City is correct insofar as it asserts that the appeal of disciplinary charges Pending against petitioner may be pursued in a proceeding under CSL-Section 75. However, the petitioner properly asserts that NYCCBL Section

[14]N.Y. Civ. Serv. Law §76(l) (McKinney 1986).

[15]N.Y. Civ. Serv. Law §§205.5(d), 212.1 (McKinney 1986).

1173-4.2a affords the sole vehicle for redressing allegations of retaliation.[16]

For the reasons fully set forth above, we shall grant the City's motion to dismiss the improper practice petition because we find that the petition fails to state a prima facie claim of improper practice under Section 1173-4.2a(l) and (3) of the statute.

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 City's motion to dismiss the improper practice petition be, and the same hereby is, granted; and it is further

[16]See, Decision No. B-3-85 (Board refused to defer in an improper practice case to a decision of the Civil Service Commission as the issue before the Commission related to petitioner's poor work performance and misconduct while the issue before the Board related to anti-union animus).

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

DATED: New York
January 27, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER