

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- - - - - x

In the Matter of

ROSE A. MIGLIARO,

Petitioner,

DECISION NO. B-55-87

-and-

DOCKET NO. BCB-955-87

NEW YORK CITY OFF-TRACK
BETTING CORPORATION,

Respondent.

- - - - - x

DECISION AND ORDER

On May 11, 1987, Rose A. Migliaro ("petitioner") filed a verified improper practice petition alleging that the New York City Off-Track Betting Corporation ("OTB" or "respondent") "willingly and willfully" violated the collective bargaining agreement then effect between the OTB and Local 2021, District Council 37, AFSCME, AFL-CIO ("D.C. 37" or "the Union"), by involuntarily transferring her twice in less than one year. It also was alleged that the transfers discriminated against petitioner. Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), the petition was reviewed by the Executive Secretary who determined that the petition did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). Accordingly, in

a decision dated September 9, 1987, the petition was dismissed.¹

On September 28, 1987, pursuant to Section 7.4 of the OCB Rules, petitioner filed a timely written appeal from the Executive Secretary's determination. Respondent was informed that it had the right to respond to the appeal, but no response was received.

Executive Secretary's Determination

In Decision No. B-40-87 (ES) dismissing the improper practice petition, the Executive Secretary found that:

the rights asserted in the petition appear to exist, if at all, by virtue of a collective bargaining agreement between the respondent and D.C. 37. Section 205.5(d) of the Taylor Law [citation omitted], which is applicable to the Board of Collective Bargaining ("Board"), provides that the Board is without authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

The Executive Secretary further explained that:

the discrimination prohibited by the NYCCBL involves the exercise of union-

¹Decision No. B-40-87(ES).

related or other activity protected by the statute. The NYCCBL does not provide a remedy for every perceived wrong. It protects the rights of public employees to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified organizations of their own choosing and to refrain from any or all of such activities (citation omitted]. Since petitioner herein has not alleged that her participation in protected activity was a reason for her transfer, she has failed to state a cause of action under the law.

The Appeal

In her letter of appeal, petitioner asks whether a violation of the collective bargaining agreement between OTB and D.C. 37 is not a violation under Section 7.5 of the OCB Rules which contemplates that a controversy may involve contractual provisions.² In addition, petitioner

²Section 7.5 of the OCB Rules provides, in its entirety:

Petition-Contents. A petition filed pursuant to Rule 7.7, 7.3 or 7.4 shall be verified and shall contain:

- a. The name and address of the petitioner;
- b. The name and address of the other party (respondent);
- c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective bargaining agreement involved, and any other relevant and

(continued...)

asserts that respondent's failure, of which D.C. 37 allegedly was aware, to advise her that she could pursue her transfer grievance to arbitration violated her right to "a just collective bargaining."

Petitioner contends that the "discrimination" complained of is demonstrated by the fact that she was not given permanent employment status until some two years after she was first hired, on a per diem basis, by OTB while other similarly situated employees became permanent employees "after a month or so." Petitioner suggests that, since OTB is an "Equal Opportunity Employer", she may have been denied rights protected under the OCB Rules. Additionally, petitioner contends that the OCB was negligent in failing to file misconduct and unfair labor practice charges against OTB.

Finally, petitioner states that since filing the improper practice charge in this case, she has been subjected to "harassment" in that she was served with charges of

(...continued)

material documents, dates and facts.
If the controversy involves contractual provisions, such provisions shall be set forth;

- d. Such additional matters as may be relevant and material.

misconduct which falsely allege that she purchased a betting ticket at the OTB branch where she was working on May 3, 1987. Petitioner speculates that such treatment may be explained either by the fact that she has a personal problem with her ex-son-in-law, also an employee at OTB, or by the fact that, in October 1985, she testified on behalf of a fellow employee in a disciplinary matter and her testimony "put (two management representatives] in a bad light."

Petitioner asks that a full factual investigation be made before any further decision is rendered herein.

Discussion

After carefully reviewing the matters raised in petitioner's submissions to the OCB and after carefully considering the arguments on this appeal, we find that petitioner has failed to present any basis for overturning the Executive Secretary's determination. As the Executive Secretary explained, and as we have previously held, we do not have authority to enforce a collective bargaining agreement between a public employer and an employee organization.³ Alleged violations of labor agreements are generally to be redressed through

³See, Taylor Law §§205.5(d), 212.1. E.g., Decision Nos. B-29-87; B-37-87.

the grievance and arbitration procedures of such agreements. Moreover, Section 7.5 of the OCB Rules, cited by petitioner is merely a rule of notice pleading. It is designed to protect the due process rights of a respondent by requiring that a petitioner state its claim with sufficient specificity to give the respondent notice of the nature of its claim and to enable the respondent to formulate a response there-to.⁴ Where a controversy involves contractual provisions, Section 7.5 requires that those provisions be referred to in the petition. Contrary to petitioner's assertion, however, Rule 7.5 does not prescribe any substantive rights and does not provide an independent basis for the exercise of jurisdiction by this Board.

With respect to petitioner's contention that she was denied her collective bargaining rights because respondent failed to advise her that she could arbitrate the unsatisfactory outcome of her grievance, we do not find that any right to receive such information from the employer exists under the NYCCBL, nor has petitioner alleged that such advice was withheld in her case for reasons proscribed by the statute. Furthermore, in a companion case to the instant matter, docketed as BCB-954-87, wherein petitioner alleged

⁴E.g., Decision Nos. B-23-82; B-1-83; B-8-85.

that the Union failed to represent her with respect to the involuntary transfers, she did not allege that D.C. 37 had a duty, or failed in its duty, to advise her concerning her arbitration rights. The improper practice petition in that matter was dismissed in all respects and is not subject to amendment or reconsideration here.⁵ In any event, we note that petitioner has been returned to a branch assignment from the pool and that this was the remedy she sought in the grievance filed on January 6, 1987.⁶

Petitioner's remaining arguments on this appeal essentially involve the assertion of additional instances of alleged discriminatory treatment by respondent. We cannot consider such newly alleged facts, however, as the purpose of an appeal is to review the Executive Secretary's determination that the allegations of the petition were insufficient or untimely.⁷ New facts unrelated to the original complaint will not be considered on the appeal

⁵Decision No. B-42-87, request for reconsideration denied, Decision No. B-42A-87.

⁶Decision No. B-42-87 at 11.

⁷Decision No. B-26-86.

of a Rule 7.4 determination unless they provide evidence of improper motive that arguably could have informed the actions complained of.

In the instant matter, petitioner speculates that respondent's actions may have been motivated by the fact that petitioner had a personal problem with her former son-in-law, or perhaps by the fact that, over two years ago, she gave testimony on behalf of a fellow employee that was unfavorable to management. With respect to the latter suggestion, we note that such an allegation could be probative of retaliatory motive which would support a finding of improper practice. However, petitioner has failed to allege any facts which would demonstrate a connection between her giving testimony on behalf of a colleague - an event now quite remote in time - and the involuntary transfers that she complains of. We have consistently held that allegations of improper motive must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise.⁸ Since petitioner has not alleged that respondent intended to deprive her of any of the rights granted to public employees by section 1173-4.1 of the NYCCBL, or to encourage or discourage member-

⁸E.g., Decision Nos. B-20-81; B-24-81; B-30-81; B-12-85.

ship in, or participation in the activities of, a public employee organization, we must conclude that petitioner has not stated a cause of action under the statute.⁹

Finally, it should be noted that the OCB does not have authority, as petitioner suggests, to file misconduct and unfair labor practice charges.¹⁰ The function of the OCB, insofar as matters within the jurisdiction of this Board are concerned, is to process and prepare cases for determination by the Board. The OCB is a strictly impartial agency, no member of which may represent or act on behalf of a party to a controversy before the Board. Moreover, the Board's jurisdiction is limited to the interpretation and enforcement of the provisions of the NYCCBL. Thus, petitioner's suggestion that she may have been denied the benefit of equal opportunity laws does not raise any issue that is within our jurisdiction.

⁹Section 1173-4.2a of the NYCCBL makes it an improper practice for a public employer, inter alia, "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1..." or "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization."

¹⁰In this respect, the OCB is different from the National Labor Relations Board which does prosecute unfair labor practice charges against employers or unions subject to the jurisdiction of that agency.

Based upon the foregoing considerations and conclusions, we shall dismiss petitioner's appeal and confirm the determination of the Executive Secretary.

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 petitioner's appeal of Decision No. B-40-87(ES) be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-40-87(ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y.
November 19, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

JEROME E. JOSEPH
MEMBER