Saunders v. DOI, DC37, 39 OCB 59 (BCB 1987) [Decision No. B-59-87 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

GLENDORA SAUNDERS,

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF INVESTIGATION,

Respondent.

DECISION NO. B-59-87(ES)

DOCKET NO. BCB-970-87

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In the Matter of the Improper Practice Proceeding

-between-

GLENDORA SAUNDERS,

Petitioner,

-and-

DISTRICT COUNCIL 37

Respondent.

DOCKET NO. BCB-971-87

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DETERMINATION OF EXECUTIVE SECRETARY

On June 23, 1987, Ms. Glendora Saunders (herein referred to as "petitioner") filed two improper practice petitions with the Office of Collective Bargaining. In the first of these, docketed as BCB-970-87, petitioner alleges that respondent New York City Department of Investi-

gation (herein referred to as "the Department"), violated the citywide collective bargaining agreement in that it required petitioner to appear at a meeting in the Office of the Inspector General to discuss a confrontation between herself and an Assistant Commissioner, without providing her with a statement of the reasons for said meeting. The petition further alleges that a statement in the "Notice to Appear" to the effect that a failure to appear could result in formal disciplinary proceedings was "non-factual" and was designed to harass her. In addition, petitioner contends that she has been denied copies of the Assistant Commissioner's statement concerning the aforementioned confrontation, as well as the statements of cooperating witnesses.

In her second improper practice petition, Docket No. BCB-971-87, which relates to same events as are described in BCB-970-87, petitioner asserts that respondent District Council 37 (herein referred to as "D.C. 37" or "the Union"), by its Assistant General Counsel and grievance representative, (1) committed the tort of "neglect", (2) deviated from citywide procedures and policies, and (3) neglected to enforce the citywide collective bargaining agreement. Petitioner also alleges that the Union failed to respond to her questions con-

earning alleged deviations from citywide policies, practices and agreements.

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), a copy of which is annexed hereto, I have reviewed the instant petitions and have determined that they do not allege facts sufficient as a matter of law to constitute improper practices within the meaning of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1]Section 1173-4.2 of the NYCCBL provides in its entirety:

> §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.

(continued...)

In Docket No. BCB-970-87, petitioner's allegations

(...continued)

> 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.
>
> 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 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.

essentially involve matters of contract violation, which the Board of Collective Bargaining ("Board") has no jurisdiction to consider.[2] A question as to whether there was a failure to provide petitioner with a statement of reasons for the required meeting with the Inspector General's office in violation of the citywide agreement should be addressed via the grievance and arbitration procedures included in that agreement.

The petition also fails to state an improper practice in that it fails to demonstrate that the Department committed any act in violation of Section 1173-4.2a of the NYCCBL. The NYCCBL does not provide a remedy for every perceived wrong. As set forth in Section 1173-4.1, it protects the rights of public employees to form, join or assist public employee organizations, to bargain col-

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[2]Section 205.5(d) of the Taylor Law, which applies to the City of New York pursuant to Section 212 of that law, provides in relevant part:

> the board shall not have authority to enforce an agreement between an 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.

lectively through certified organizations of their own choosing and to refrain from any or all of such activities. Petitioner has not alleged that the Department's actions deprived her of any of these rights.

The allegation of harassment, based upon the statement that failure to appear at the Inspector General's office could result in formal disciplinary Proceedings, is conclusory and entirely unsupported by facts which would tend to prove a violation of the NYCCBL. Similarly, the alleged failure to provide petitioner with copies of written statements by the Assistant Commissioner and "cooperating witnesses" does not state an improper practice, as petitioner has not demonstrated that the denial of such information was intended to, or did, deprive her of any rights protected by the statute. In this connection, I note that Section 1173-4.2c(4) of the NYCCBL, cited in the petition, does define the duty of good faith bargaining to include the obligation "to furnish to the other party, on request, data normally maintained in the regular course of business...." It should be emphasized, however, that the duty of good faith bargaining runs between the public employer and the certified public employee organization and does not provide an individual employee

with a right to sue.

Turning to the allegations of union improper practice, in Docket No. BCB-971-87, I note that a union's obligation under the NYCCBL is to act fairly, impartially and non-arbitrarily in the negotiation, administration and enforcement of the collective bargaining agreement.[3] The instant petition is devoid of allegations that D.C. 37 treated petitioner differently from other unit members or in an arbitrary manner. Far from negecting petitioner, as is alleged, it appears from documents submitted by petitioner that the Union provided her with representation at the meeting in the Inspector General's office and, thereafter, intervened in her behalf, obtaining assurances that a warning letter placed in her personnel file would be removed if there were no recurrence of the incident complained of.

With respect to the allegation that D.C. 37 failed to enforce the collective bargaining agreement, it should be noted that D.C. 37 does not control access to the grievance procedure in the citywide agreement, and that petitioner could have initiated a claim pur-

[3]NYCCBL §1173-4.2b. See, e.g., Decision Nos. B-13-82; B-15-83; B-23-84.

suant to Article XV of that agreement on her own behalf.[4]

In any event, the mere refusal to advance a particular grievance is not a breach of the duty of fair representation, provided that the decision is not made in an arbitrary or discriminatory manner.[5]

As the petitioner has failed to allege that respondents' actions deprived her of any rights under. the NYCCBL, the petitions must be dismissed. This dismissal is, of course, without prejudice to any rights petitioner may have in another forum.

DATED: New York, N.Y.
December 28, 1987

William J. Mulry
Executive Secretary
Board of Collective
Bargaining

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[4]The most recent citywide agreement on file at the Office of Collective Bargaining is the 1980-82 agreement.

[5]See, Decision Nos. B-16-83 (union has great discretion in dealing with grievances); B-2-84 (union not obligated to advance every complaint made by bargaining unit member provided decision not arbitrary or discriminatory). Accord, Decision No. B-25-84.

§7.4 Improper Practices. 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 or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in section 1173-4.2 of the statute. If it is determined that the petition, on its face, does not contain facts sufficient. as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to be assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

§7.8 Answer-Service and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to Rule 7.4, that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) days.

OTHER SECTIONS OF TIM LAW AND RULES MAY BE APPLICABLE.
CONSULT THE COMPLETE TEXT.