

Kane, 41 OCB 59 (BCB 1988) [Decision No. B-59-88 (IP)], aff'd, Kane v. MacDonald, No. 24115/88 (Sup. Ct. N.Y. Co. June 27, 1989), aff'd, 161 A.D.2d 305, 555 N.Y.S.2d 81 (1st Dep't 1990).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

ROBERT M. KANE, ESQ.,

Petitioner,

DECISION NO. B-59-88
DOCKET NO. BCB-1004-87

-and-

CITY OF NEW YORK DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT;
CIVIL SERVICE BAR ASSOCIATION, LOCAL
237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS and SOCIAL SERVICE EMPLOYEES
UNION, LOCAL 371, DISTRICT COUNCIL
37 AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES UNION,

Respondents.

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DECISION AND ORDER

Robert M. Kane ("the petitioner") filed an improper practice petition against the City of New York Department of Housing Preservation and Development ("HPD"), the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters ("the CSBA") and the Social Service Employees Union, Local 371, District Council 37, American Federation of State, County and Municipal Employees ("the SSEU") on October 27, 1987.

On November 21, 1987, the CSBA filed its answer to the petition. On November 27, 1987, petitioner filed a reply to the CSBA's answer as well as a document denominated "Petitioner's motion in Opposition to Respondent Civil Service Bar Association's Request to Dismiss."

On December 3, 1987, HPD filed its answer to the petition. On December 9, 1987, the petitioner filed a reply to HPD's answer.

On January 22, 1988, the SSEU filed a motion asking this Board for an order directing the petitioner to provide "a statement setting forth in detail the basis upon which [he] alleges that" the SSEU violated the New York City Collective Bargaining Law ("NYCCBL"). By letter dated January 28, 1988, the SSEU asked that its motion be treated as a motion to dismiss the petition. On February 2, 1988, the petitioner filed an answer to the SSEU's motion.

Background

The petitioner, a lawyer, has been employed by HPD since August 6, 1984. On July 1, 1985, he moved from the civil service title of "Attorney Trainee" to the title of "Community Coordinator." HPD claims that his "duties and responsibilities were also changed commensurate with the change in title. . .," although petitioner denies that this occurred.

The civil service title "Attorney Trainee" is in a bargaining unit (referred to by petitioner and herein as "the Attorney line") represented by the CSBA.¹ The civil service title "Community Coordinator" is in a bargaining unit (referred

¹Cert. CWR-44/67, as amended.

to by petitioner and herein as "the Social Service line") which is represented by the SSEU.²

Petitioner's claim arises out of HPD's alleged assignment of responsibilities and duties to lawyers employed in titles in the Social Service line which petitioner alleges are more properly assignable to lawyers on the Attorney line.

Positions of the Parties

Petitioner's Position

1. Claims Against HPD

Petitioner alleges that HPD, by placing employees who are attorneys in the Social Service line and having them perform legal work, has fragmented the CSBA's membership. Specifically, petitioner contends that this constitutes an improper practice because it "interferes with the formation of an Attorney's Collective Bargaining Unit [emphasis deleted]." Petitioner also alleges that HPD's actions "[show] bad faith towards and flagrant disregard of the current collective bargaining agreement with the CSBA [emphasis deleted]."

With respect to HPD's defense that his petition is untimely, petitioner argues that HPD's alleged conduct "has been a regularly recurring practice, and has taken place several times during the four month period prior to service of the petition."

²Cert. No. 37-78, as amended.

He also alleges that the four-month period:

has not begun to run because the resulting harm to petitioner and others in terms of salary underpayments and union diversion is a continuing harm, and continues to this date [emphasis deleted].

Thus, petitioner claims HPD is engaged in a continuing violation of the law.

Petitioner also argues that the four-month period prescribed by § 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("the OCB Rules") is not mandatory.³ Furthermore, he argues that HPD "can show no prejudice to itself over time by accepting legal services for less' [compensation than it might otherwise have paid attorneys on the Attorney line] [emphasis deleted]."

³Section 7.4 of the OCB Rules reads, in relevant part, as follows:

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.

Petitioner also rejects the HPD's suggestion that his allegations would more appropriately be resolved through his bargaining unit's contractual grievance procedure.

Finally, petitioner asks this Board to strike HPD's answer as untimely, because it was served more than ten days after HPD's receipt of the Executive Secretary's determination pursuant to § 7.4 of the OCB Rules.

2. Claims Against CSBA

Petitioner admits that the CSBA does not represent him but nonetheless alleges that the CSBA is a "necessary party" to this proceeding. He specifically contends:

Instead of arguing that attorneys who are performing full time legal work be placed in the CSBA and receive proper salary, CSBA, in its verified answer, suggests a reassignment to non-legal responsibilities, and thereby attempts to shed any responsibility to attorneys that it should be representing.

Petitioner is not aware of any efforts by CSBA to properly address this practice.

3. Claims Against SSEU

Petitioner alleges that the SSEU, like the CSBA, is a "necessary party to this proceeding, as the practice alleged involves two municipal unions and a city agency." He

specifically alleges:

Local 371 has among its members, and has been receiving union dues from other attorneys at H.P.D., who have been subject to the same improper labor practice. Several of these attorneys work in the legal department at 75 Maiden Lane, 9th Floor, which is designated as Payroll Site 1301.

Local 371 has been receiving members and dues that it would not otherwise receive were it not for this improper labor practice. Both these members and their dues are properly assignable to the CIVIL SERVICE BAR ASSOCIATION. [emphasis in original.]

4. Relief Requested

Petitioner asks this Board to award him \$5000.00 which he claims "represents the amount by which [he] has been underpaid while qualified for the Attorney Line." He also asks this Board to "place" him in the Attorney line.

Respondents' Positions

1. HPD

HPD alleges that petitioner's title was "changed" from Attorney Trainee to Community Coordinator and that his duties and responsibilities changed "commensurate with the change in title."

It argues that the petition is time-barred under § 7.4 of the OCB Rules because HPD's actions took place in July, 1985,

when petitioner became a Community Coordinator, considerably more than four months before he filed the instant petition.

HPD also argues that petitioner has failed to allege facts sufficient to state a claim against it under the NYCCBL.⁴

Finally, HPD characterizes petitioner's claim as involving questions of contract interpretation. It suggests that if petitioner believes the work assigned to him by HPD is not commensurate with his current title, he has the right to pursue his claim through the pertinent contractual grievance procedure.

⁴Section 12-306a of the NYCCBL, upon which HPD allege petitioner relies, reads as follows:

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 173-4.1 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.

2. CSBA

CSBA notes that the petitioner is employed in a title that is outside the bargaining unit for which CSBA is the certified representative. It contends that because it does not represent the petitioner, it could not have committed an improper practice with respect to him.

3. SSEU

The SSEU, in lieu of answering the petition, has moved to dismiss it. Relying on § 7.5c of the OCB Rules⁵, the SSEU claims that the petition is devoid of the specificity required by the OCB Rules.

⁵Section 7.5 of the OCB Rules reads as follows:

A petition filed pursuant to Rule 7.2, 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 agreement involved, and any other relevant and 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.

Specifically, it claims that the allegations of the petition are a "hopeless jumble of facts and conclusions." According to the SSEU, the only mention of SSEU Local 371 in the petition is that "Social Service employees belong to Local 371 of District Council 37 and not the Civil Service Bar Association." Based on such minimal accusations, it claims that it is impossible for it to ascertain how petitioner claims it has violated the NYCCBL.

Discussion

Claims Against HPD

As a threshold issue, petitioner asks this Board to strike HPD's answer, because it was filed more than ten days after HPD received notice of the Executive Secretary's determination that the petition was sufficient on its face to state an improper practice. HPD filed its answer on December 3, 1987; the Executive Secretary's determination was transmitted to HPD by letter dated November 10, 1987.

While we will not condone a violation of the pleading requirements set forth in the OCB Rules so flagrant it is destructive of the purpose of the Rules⁶, we are not confronted with such a violation in this case. Moreover, petitioner has not alleged that he has suffered any prejudice by HPD's filing its answer in an untimely manner. Accordingly, while we admonish HPD

⁶Decision No. B-8-77.

and its representatives to comply with our Rules in the future, we do not find its failure in this case to be so egregious as to warrant striking HPD's answer.⁷

HPD's first defense to petitioner's claims is that they are time-barred by § 7.4 of the OCB Rules, because his cause of action arose when he was moved to the "Community Coordinator" title, more than two years before he filed the instant petition. In response, petitioner argues that HPD continues to violate the NYCCBL by paying him less salary than he might otherwise receive if he had been placed in the Attorney line. He also claims that HPD hired attorneys into the Social Service line within the four month period before his filing of the instant petition.

With respect to petitioner's claims as to other lawyers on the Social Service line who have been assigned work which allegedly should be performed by lawyers on the Attorney line, we find that they are immaterial to our consideration of HPD's statute of limitations defense. Petitioner seeks relief only for himself, not for other employees similarly situated. Thus, petitioner's allegations with respect to HPD's treatment of other employees are not pertinent to our determination of whether petitioner's claims are time-barred.

Petitioner also alleges that the enforcement of the four-month statute of limitations is discretionary by this Board. It

⁷Decision Nos. B-9-76; B-5-74.

is not. Furthermore, respondent need not plead injury arising from petitioner's failure to commence an action within the four-month period in order to plead it successfully as a defense.⁸

We find that allegations in the petition of events which occurred more than four months before the filing of the instant petition are time-barred, although petitioner's claims are not entirely time barred. He has alleged acts which could constitute a continuing violation of the NYCCBL, a portion of which falls within the four month period set forth in § 7.4 of the OCB Rules.⁹ Thus, petitioner's claims for relief are time barred only to the extent he seeks damages incurred for wrongful acts which took place before the four-month period immediately preceding the filing of the instant petition.

Turning, however, to the merits of petitioner's claim, we find that petitioner has failed to allege a cause of action against HPD. It is clear that HPD has the right to create job titles and to classify employees within those titles.¹⁰ In the absence of any allegation of fact establishing improper motive, the classification or assignment of employees to a civil service title is not an improper practice. The record is devoid of any objective evidence that HPD's assignment of work which might have

⁸Decision No. B-26-80.

⁹Decision No. B-7-84.

¹⁰Decision No. B-4-79.

been performed by attorneys on the Attorney line to employees on the Social Service line was intended to or that it in fact interfered with petitioner's rights under the NYCCBL.¹¹ There is not the slightest indication of discrimination against petitioner relating to union activity nor any indication that HPD's treatment of him was inspired by either pro- or anti- union animus. While petitioner need not plead irrefutable evidence that HPD discriminated against him, he must make specific allegations of fact at least sufficient to demonstrate the need for a hearing.¹² He has failed to satisfy that burden. Thus, petitioner's mere conclusory allegations based on his surmise as to the effect of HPD's assignment of work allegedly performed by employees on the Attorney line to employees on the Social Service line on his rights are not enough to establish a case of improper practice.¹³

The NYCCBL does not empower this Board to consider and attempt to remedy every perceived wrong or inequity which may arise out of the employment relationship. It mandates only that we administer and enforce procedures designed to safeguard employee rights created by that statute.¹⁴ Petitioner has failed

¹¹See Decision Nos. B-2-84; B-30-81; B-27-81.

¹²See Decision Nos. B-30-81; B-38-80.

¹³See Decision No. B-12-85.

¹⁴Decision No. B-38-87.

to establish that HPD has infringed upon his rights under the NYCCBL. Indeed, the instant petition could be characterized simply as questioning the appropriateness of petitioner's classification as a "Community Coordinator," a matter over which this Board has no jurisdiction.

Moreover, to the extent petitioner's claim can be construed as questioning the propriety of the current collective bargaining unit as certified by the Board of Certification, his recourse is not in an improper practice proceeding but in a proceeding brought before the Board of Certification.¹⁵ Matters relating to the appropriate placement of employees in collective bargaining units are solely within its province.¹⁶ However, as we have held in the past, an individual has no right to inclusion in any particular bargaining unit, i.e. inclusion in a unit composed entirely of attorneys merely because an individual is an attorney, only a right to inclusion in the appropriate unit as determined by the Board of Certification.¹⁷

Finally, to the extent the petitioner objects to performing out of title work or alleges other breaches of a collective bargaining agreement, his recourse, if any, may be pursuant to the pertinent contractual grievance procedure. This Board is not

¹⁵NYCCBL section 12-309 b (1); Decision No. B-6-69.

¹⁶Decision No. B-12-85.

¹⁷Decision No. B-22-84.

empowered to exercise jurisdiction over an alleged violation of a collective bargaining agreement that would not otherwise constitute an improper practice.¹⁸

For all of the foregoing reasons, we hold that petitioner has failed to state a claim of improper practice against HPD and, accordingly, we dismiss his petition as to it.

Claims Against CSBA

The CSBA argues, and petitioner does not deny, that it does not represent petitioner. It is the certified representative of employees in another bargaining unit. The CSBA argues that because petitioner is not a member of the bargaining unit which it represents, it could not have committed an unfair labor practice with regard to him. Petitioner, in turn, argues that the CSBA attempts to "shed" any responsibility to attorneys that he alleges it should be representing by not objecting to HPD's assignment of bargaining unit work to employees on the Social Service line. Although petitioner does not cite §12-306b(1) of the NYCCBL¹⁹, we find that his accusation is that the CSBA has

¹⁸Civ. Serv. L., §205.5(d).

¹⁹Section 12-306b reads as follows:

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,

(continued...)

breached its duty of fair representation.

The duty of fair representation obligates a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.²⁰ Because petitioner is not a member of the bargaining unit for which the CSBA is the certified representative and, thus, is not covered by the collective bargaining agreement which CSBA is responsible for negotiating, administering and enforcing, the CSBA owed no duty of fair representation to the petitioner. Moreover, to the extent that petitioner implies that CSBA should have commenced an improper practice proceeding against HPD, it is well-established that the duty of fair representation does not require a union to initiate an improper practice proceeding on behalf of an individual.²¹

Moreover, because the pleadings contain only conclusory allegations and are devoid of any facts which would support a

(...continued)

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 employees organization is a certified or designated representative of public employees or such employer.

²⁰Decision Nos. B-30-88; B-13-81.

²¹Decision Nos. B-18-86; B-26-84.

finding that the CSBA has committed any improper practice, they do not state a claim against the CSBA. We, therefore, dismiss the petition with respect to the CSBA.

Claims Against SSEU

The SSEU has moved to dismiss the petition as to it on the grounds that the petition is so vague that it cannot be ascertained how petitioner claims SSEU has violated the NYCCBL.

The petition's sole reference to the SSEU is a statement that employees on the Social Service line belong to the SSEU and not the CSBA. In what he has labeled his "Motion in Opposition to Respondent Local 371's Motion to Dismiss," petitioner further alleges that were it not for attorneys being wrongly assigned to the Social Service line, which he claims is an improper practice, the SSEU would not receive dues from those attorneys.

On a motion to dismiss, we deem the facts alleged by petitioner to be true. The only question we must decide is whether those facts state a cause of action under the NYCCBL.

Section 7.5 of the OCB Rules requires that an improper practice petition must, among other things, set forth "[a] statement of the nature of the controversy, specifying the provision of the statute, executive order or collective agreements involved, and any other relevant and material documents, dates and facts," as well as "[s]uch additional matters as may be relevant and material." This rule is designed

to place a respondent on notice of the nature of the petitioner's claim so that it may frame a meaningful response.²² Although we construe the OCB Rules liberally²³, we cannot permit a pleading to stand if it fails to satisfy the minimum standard set forth in the OCB Rules.

The instant petition fails to satisfy the minimum level of specificity required by the OCB Rules. It contains not a single reference to dates, places or any action of the SSEU, other than its mere receipt of dues. It fails to specify which, if any, provision of the NYCCBL the SSEU allegedly has violated. The record, including the petition, is otherwise devoid of any evidence indicating that the SSEU has acted in an unfair, arbitrary or discriminatory manner with respect to the petitioner.²⁴ As we stated with respect to the CSBA, supra, if HPD had engaged in conduct which violated the NYCCBL, a union would not commit an improper practice merely by failing to commence an improper practice proceeding against HPD.²⁵ Neither would it commit an improper practice by failing to bring an action to reclassify employees into a different civil service line. The duty of fair representation reaches only to the

²²Decision No. B-12-85.

²³Decision Nos. B-12-85; B-8-77; B-9-76; B-5-74.

²⁴Decision Nos. B-44-88; B-20-84; B-13-82.

²⁵Decision No. B-18-86.

negotiation, administration and enforcement of a collective bargaining agreement and not to every aspect of the employment relationship.²⁶

In short, the petition states nothing more than a conclusory claim that the SSEU is a necessary party to the proceeding, and that, alone, cannot form the basis for an improper practice claim against a union.²⁷ Thus, we grant the SSEU's motion to dismiss the petition with respect to it.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

²⁶Decision Nos. B-18-86; B-26-84; B-23-84.

²⁷See Decision No. B-1-83.

ORDERED, that the improper practice petition filed by Robert M. Kane be, and the same hereby is, dismissed.

Dated: New York, New York
 November 29, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER