

Hernandez v. L.237, IBT, et. al, 43 OCB 46 (BCB 1989) [Decision No. B-46-89 (ES)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DECISION NO. B-46-89 (ES)

FELIX HERNANDEZ,

Petitioner, DOCKET NO. BCB-1193-89

-and-

CITY EMPLOYEES UNION, LOCAL 237,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, AFL-CIO,

Respondent.

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DETERMINATION OF EXECUTIVE SECRETARY

On July 31, 1989, the Office of Collective Bargaining ("OCB") received a verified improper practice petition from Felix Hernandez (hereinafter referred to as "Petitioner"), which it did not accept for filing because Petitioner failed to submit proof of service of the petition on City Employees Union, Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter referred to as "Respondent" or "the Union"), as required by Section 7.6 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"). On August 11, 1989, the petition was resubmitted, together with proof of service, and was accepted for filing at that time.

The Petitioner states that he was employed in Mott Haven<sup>1</sup>

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<sup>1</sup>Petitioner has not indicated his job title or his employer. However, I take administrative notice that "the Green Book" (the Official Directory of the City of New York) lists Mott Haven as a facility of the New York City Housing Authority.

for four years. On February 22, 1989, he punched out at 1 p.m. his usual time. Sometime thereafter, he bumped into his supervisor, Mr. Houston, who advised him that there was a meeting which he was required to attend, even though he was off duty at the time. The Petitioner claims that in the course of the meeting, he and Mr. Houston-had a misunderstanding and Mr. Houston "got furious and pushed me and threatened to fire me." Thereafter, the Petitioner alleges, during the months of March and April, Mr. Houston "kept harassing to have me fired." On May 10, 1989, the Petitioner was given a memorandum which stated that, as of that date, his employment was terminated.

The Petitioner alleges that after he was terminated he called Local 237 of the Teamsters and requested their assistance. He was told by Mr. Nieves that he could not do anything on the Petitioner's behalf. The Petitioner has requested an investigation of this matter because he would like to return to his job.

Pursuant to Section 7.4)of the OCB Rules, a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that the improper practice claim asserted therein must be dismissed because it does 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"). The petition fails to allege that Respondent has

committed any acts in violation of Section 12-306b(1) of the NYCCBL,<sup>2</sup> which has been recognized as prohibiting violations of the judicially recognized fair representation doctrine.

The duty of fair representation has been defined as the obligation owed by a certified employee organization to represent bargaining unit members with respect to the negotiation, administration and enforcement of collective bargaining agreements.<sup>3</sup> In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance.<sup>4</sup> Rather, the duty of fair representation requires only that the union's decision not to advance a claim be made in good faith and not in

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<sup>2</sup>Section 12-306b of the NYCCBL provides in relevant part as follows:

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 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

<sup>3</sup>Decision Nos. B-24-86; B-14-83.

<sup>4</sup>Decision Nos. B-58-88; B-30-88; B-32-86; B-25-84; B-2-84; B-13-82.

an arbitrary or discriminatory manner.<sup>5</sup>

In the instant matter, the Petitioner has not alleged any facts which show that the Union treated him in an arbitrary, discriminatory or bad faith manner. He has not alleged that the union's unwillingness to assist him in the matter of his termination was improperly motivated or arbitrary, or that the treatment afforded him differed in any way from that received by other similarly situated employees. While a claim that a union failed to process an employee's grievance or otherwise to represent a bargaining unit member concerning an employment-related matter might state a breach of the duty of fair representation and an improper practice under Section 12-306b of the NYCCBL if supported by evidence of improper motive rising to the level of bad faith, the mere refusal to provide representation, without more, does not constitute a prima facie violation of the statute.<sup>6</sup> Simply stated, it is not enough to allege that a union failed to provide representation; it is necessary further to allege the existence of some improper motive for the union's failure to act. The Petitioner has not made such allegations in the present case.

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<sup>5</sup>Decision Nos. B-58-88; B-30-88; B-9-88; B-2-84; B-13-82.

<sup>6</sup>Decision No. B-9-88.

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Accordingly, the petition herein is dismissed pursuant to Section 7.4 of the OCB Rules.

DATED:     New York, N.Y.  
           September 12, 1989

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Marjorie A. London  
Executive Secretary  
Board of Collective  
Bargaining

REVISED CONSOLIDATED RULES OF THE  
OFFICE OF COLLECTIVE BARGAINING

§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 the 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 THE LAW AND RULES MAY BE APPLICABLE.

CONSULT THE COMPLETE TEXT.