Schiavone v. DC37, et. al, 43 OCB 54 (BCB 1989) [Decision No. B-54-89 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE
IMPROPER PRACTICE PROCEEDING

-between-

Decision No. B-54-89(ES)
Docket No. BCB-1185-89

ANTHONY SCHIAVONE,

Petitioner,

-and-

DISTRICT COUNCIL 37, THE OFFICE OF MUNICIPAL LABOR RELATIONS, AND THE NEW YORK CITY DEPARTMENT OF PARKS,

Respondents.
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DETERMINATION OF EXECUTIVE SECRETARY

On July 12, 1989, the Office of Collective Bargaining ("the OCB") received a verified improper practice petition dated July 6, 1989 from Anthony Schiavone ("the Petitioner" The OCB did not accept the petition for filing at that time because the Petitioner had failed to submit proof of service on the respondents as required by Section 7.6 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"). Thereafter, on July 24, 1989, the petition was resubmitted to the OCB together with proof of service, and was accepted for filing.

The Petitioner argues that the New York City Department of Parks and Recreation ("the DPR") committed an improper practice by scheduling his days off on Saturday and Sunday. He contends that, pursuant to a Letter Agreement between the City and District Council 37 ("D.C. 37") dated May 15, 1986 ("the Letter

Agreement"),[1] employees must be granted consecutive days off in a single work week when they so desire. He also asserts that according to an Inter-office Memorandum dated January 6, 1984 ("the Memorandum")[2] and an Operations Bulletin dated November 15, 1983 ("the Operations Bulletin"),[3] the Departmental work week runs from Sunday to Saturday. Based upon these documents, the Petitioner concludes that Saturday and Sunday are not consecutive days off within a single work week, and that the designation of those days as his days off is a violation of the Letter Agreement. As a remedy, the Petitioner seeks two consecutive days off in a single work week, and back pay for the days off which allegedly have been denied.

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[1]The Letter Agreement provides in relevant part as follows:

> 4. No Employee shall be required in any work week to take two (2) days of f which are not consecutive (i.e. there shall be no involuntary split days off).

[2]The Memorandum provides in relevant part as follows:

> As of Sunday January 22, the work week will be changed to Sunday to Saturday, per the city-wide contract, which specifies "calendar week". . . .

[3]The Operations Bulletin provides in relevant part as follows:

> Effective January 7, 1984, the Park's work week will begin on a Sunday and end on a Saturday . . . This schedule must be submitted for posting as requested and should reflect the 40 hour calendar week schedule only.

Section 7.4 of the OCB Rules, a copy of which is annexed hereto, provides in relevant part as follows:

> A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . . .

While the petition does not specify the dates of the acts complained of, to the extent that it seeks to redress the alleged denial of consecutive days off occurring more than four months prior to the filing of the petition, it must be rejected as time-barred. The Petitioner's allegations are timely only to the extent that they complain of an improper practice which continued during the four-month period prior to the filing of the petition.

However, even to the extent that the Petitioner's allegations may be timely, they must be dismissed because they do not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of Section 12-306 of the New York City Collective Bargaining Law ("the NYCCBL").[4] The NYCCBL

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[4] Section 12-306 of the NYCCBL provides in relevant part as follows:

> 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 12-305 of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;

(continued...)

does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees to organize, to form, join and assist public employee organizations and to refrain from such activities.

In the instant case, the Petitioner fails to allege that the rights granted to him under the NYCCBL were violated in any

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(...continued)

(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.

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 12-305 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.

way. Rather, he alleges the continuing violation of a provision of a collective bargaining agreement. Pursuant to Section

205.5(d) of the Taylor Law,[5] the resolution of a contractual dispute is beyond the jurisdiction of the Board of Collective Bargaining ("the Board") unless such dispute would otherwise constitute an improper practice under Section 12-306 of the NYCCBL. Since the petition does not state an independent improper practice claim within the meaning of Section 12-306, the Board may not consider the allegations of contract violation. The dismissal of the petition against the DPR is without prejudice to any rights the Petitioner may have in another forum.[6]

I note that the petition is devoid of any factual allegations against D.C. 37, which also is named as a respondent. Since the Petitioner does not allege that D.C..37 committed any acts which were intended to, or did, affect any of his rights protected by the NYCCBL, he has failed to state an improper practice claim against D.C. 37.

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[5]Section 205.5(d) of the Taylor Law provides in relevant part that:

> the board shall not have authority to enforce an agreement between a public employer and 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.

[6]The Petitioner has submitted documentation which indicates that he filed a grievance challenging the scheduling of his days off under the applicable collective bargaining agreement and that the grievance was denied at Step III.

For the foregoing reasons, the petition must be dismissed in its entirety.

Dated: New York, N.Y.
September 15, 1989

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 mere 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.