Carolan, Lyons v. City, UFA, et. al, 43 OCB 56 (BCB 19890 [Decision No. B-56-89 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	
GERALD CAROLAN, JOSEPH LYONS,	DECISION NO. B-56-89(ES)
Petitioners,	DOCKET NO. BCB-1195-89
-and-	
THE UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, NICHOLAS MANCUSO, President and THE CITY OF NEW YORK, EDWARD I. KOCH, Mayor,	
Respondents.	

DETERMINATION OF EXECUTIVE SECRETARY

On August 15, 1989, Gerald Carolan and Joseph Lyons (hereinafter referred to as "petitioners"), delegates of the Uniformed Firefighters Association of Greater New York (hereinafter referred to as "the UFA" or "respondent Union"), by their attorneys, filed a verified improper practice petition in which it is alleged that the UFA and the City of New York (hereinafter referred to as "the City") committed improper practices within the meaning of section 1173-4.2 (recodified and renumbered as §12-306) of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1]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

(continued...)

Petitioners' complaint arises out of the recently concluded impasse arbitration proceeding between the UFA and the City which produced a successor to a collective bargaining agreement that expired on June 30, 1987. In that case, the impasse panel issued a decision that required the parties to select as the Panel's award one of two option packages described in the Panel's report.[2] Option 1, which was designed to preserve parity with the already concluded police union contract, included non-mandatory as well as mandatory subjects of collective bargaining and therefore was required to be accepted by the

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(...continued)

> employees in the exercise of their rights granted in section 12-305 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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.
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> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
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> (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;
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> (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.

[2]Section 12-311 of the NYCCBL sets forth the powers of an impasse panel and prescribes the procedures to be followed in impasse arbitration under the statute. Section 12-311(e) provides that the recommendations of an impasse panel become final and binding upon acceptance by all parties or ten days after the last objection by a party, unless within that time, an appeal is taken to the Board.

parties, if at all, as a voluntary settlement. Option 2 was limited to mandatory subjects of bargaining and was designated to become the Panel's "award" in the event that the UFA membership either rejected Option 1 or did not conclude its vote on the selection of an option within thirty days of receipt of the decision of the Panel.[3] The Option 1 contract was accepted by the UFA membership in a vote conducted by mail ballot and thereafter also was accepted by the City.

Essentially, petitioners complain that the balloting procedure followed by respondent Union did not comply with the "mandatory procedures for ratifying collective bargaining agreements" prescribed by Article XIV of the Union Constitution. Petitioners contend that the failure to submit the Option 1 contract to the delegates before submitting it to the general membership for ratification deprived petitioners of a "contractual right" under the Constitution. Petitioners also allege that respondents were aware that the terms of Option 1 were essentially the same as a negotiated agreement that had been twice rejected by the delegates prior to the submission of the dispute to an impasse panel; accordingly, they maintain, respondents acted "wilfully and wantonly" in excluding petitioners from the ratification process. Petitioners further allege that the acts of respondent Union denied the membership-at-large both the benefit of the delegates' knowledge and experience in the ratification process and advance notice of the terms and conditions of the proposed

[3]Matter of the Impasse between the Uniformed Firefighters Association of Greater New York and the City of New York, Case No. I-193-88 (Apr. 14, 1989) (Arbs.: Anderson, Gill, Rock).

agreement which is required by the Union Constitution. Petitioners conclude that both respondents, with full knowledge of the aforementioned violations, deliberately sought "to force the Option 1 contract on the [membership]".

As a remedy, petitioners request that the Board of Collective Bargaining ("the Board") find that respondents' actions constitute an improper practice, and either (a) direct respondents to cease the implementation of the Option 1 contract and to implement the Option 2 contract, or (b) direct the respondent Union to put the Option 1 contract to a vote of the delegate body and the membership, in accordance with the provisions of the Union Constitution.

Discussion

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, the undersigned has reviewed the petition and has determined that it must be dismissed because, on its face, it does not contain facts sufficient as a matter of law to constitute an improper labor practice in violation of the NYCCBL.

The allegations of the petition focus exclusively on the denial of rights which purportedly derive from the Union Constitution. To this extent, they involve an internal union matter which the Board has long held is not a matter within its improper practice jurisdiction.[4]

[4]Decision B-1-79. See also, Decision Nos. B-9-86; B-23-84; B-15-83; B-1-81; B-18-79. The Board has held that a breach of the judicially recognized duty of fair representation constitutes an improper practice within the meaning of NYCCBL §12-306b(1). Decision No. B-16-79.

The Board first considered this question in Velez v. Local 237, IBT (Decision No. B-1-79). There, it noted that neither the NYCCBL nor Article 14 of the New York State Civil Service Law ("the Taylor Law") contains reference to internal union matters either in its definition of the rights of public employees or in the list of prohibited public employee organization practices. By contrast, the Board noted, there are two statutes in the federal sector which specifically regulate the internal affairs of unions, the Landrum-Griffin amendments to the Labor-Management Relations Act (1959) and the Civil Service Reform Act of 1978. The Board also noted that the U.S. Supreme Court held, in NLRB v. Allis Chalmers Mfg. Co., 338 U.S. 175, 65 LRRM 2449 (1967), that the National Labor Relations Board (which implements a statute that is analogous to the NYCCBL) did not have jurisdiction over internal union matters and that, until passage of the Landrum-Griffin amendments, parties were left to their state court remedies when a complaint involved internal union conduct. Moreover, the Governor's Committee on Public Employee Relations, initially established by Governor Nelson A. Rockefeller in 1966 for the purpose of formulating recommendations concerning the conduct of labor-management relations in New York State (called "the Taylor Committee"), and re-established in February 1968 for the purpose of examining the experience under the Public Employees' Fair Employment Act (the Taylor Law) which was the product of its initial deliberations, issued an interim report, dated June 17, 1968, in which it specifically noted that the LMRDA does not apply to public employee organizations. The Committee recommended that questions relating to internal union government be reviewed to

ascertain whether the role of the State Public Employment Relations Board ("PERB") or other agencies should be expanded into these areas.[5] To date, there has been no amendment to the Taylor Law or the NYCCBL in the mentioned area. Furthermore, PERB and the Board of Collective Bargaining consistently have held that they lack jurisdiction over claims relating to the internal affairs of public employee organizations.[6]

For example, in Civil Service Employees Association, Inc. and Bogack[7], PERB affirmed its Hearing Officer's dismissal of a claim that the Civil Service Employees Association ("CSEA") violated section 209-a.2(a) of the Taylor Law when it denied membership to the petitioner because he had invited a rival employee organization to address CSEA members and to solicit their support for a challenge to CSEA's representation of the bargaining unit. Rejecting, inter alia, petitioner's argument that the union violated its Constitution and Bylaws, PERB concluded that:

> this Board is not the forum to regulate the internal affairs of an employee organization....[T]here is a distinction between actions taken by an employee organization to

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[5]Governer's Committee on Public Employee Relations, Interim Report (June 17, 1968) at p.21.

[6]See note 4 supra. Civil Service Employees Association and Bogack, 9 PERB ¶3064 (1976); United Federation of Teachers and Dembicer, 9 PERB ¶3018 (1976); Capalbo and Council 82, Security and Law Enforcement Employees, 21 PERB ¶4556 (Dir. 1988); Civil Service Employees Association, Inc. and Michael, 13 PERB ¶4522 (H.O. 1980); Lucheso and Deputy Sheriff's Benevolent Association of Onondaga County, 11 PERB ¶4589 (H.O. 1978).

[7]9 PERB ¶3064 (1976).

> discipline a member, and action taken against a member as an employee which would have an adverse effect upon the terms and conditions of his employment or upon the nature of the representation accorded him by CSEA as a member of the negotiating unit. 9 PERB ¶3064 at p. 3110.[8]

PERB also noted that petitioner could test the validity of his contention that CSEA's actions violated its Constitution and Bylaws in a plenary court action.

In Fortunato v. Correction Officers Benevolent Association, Inc., Decision No. B-23-84, the Board of Collective Bargaining dismissed an improper practice petition alleging that the procedure followed in amending the Union's Constitution and Bylaws to change the term of office of elected officers of the union from two years to four years failed to comply with specific requirements of those documents. The Board held that the fact that the petitioners were deprived of the opportunity to displace the incumbent officers for an additional two years as a result of the amendment did not implicate the duty of fair representation. In Shapiro v. Department of Sanitation and District Council of New York City United Brotherhood of Carpenters and Joiners of America, Decision No. B-9-86, the Board specifically considered a claimed failure to comply with a union's internal contract ratification procedure. It noted that the circumstances under which membership ratification is required are not defined in the NYCCBL, but constitute an internal union matter. Therefore, the Board held that

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[8]Accord, Civil Service Employees Association, Inc. and Liebler, 17 PERB ¶3072 (1984); United College Employees of Fashion Institute of Technology v. Beizer, 20 PERB ¶4558 (Dir. 1987); State of New York v. The Union of Federated Correction Officers and Council 82, AFSCME, 17 PERB ¶4075 (Dir. 1984).

the failure of a union to submit a settlement for membership ratification would not constitute a breach of the duty of fair representation.

The Board has long held that the duty of fair representation obligates a union to represent fairly the interests of all bargaining unit members with respect to the negotiation, administration and enforcement of collective bargaining agreements.[9] The duty of fair representation, however, is coextensive with a union's exclusive authority to deal with the employer with respect to certain matters which the individual employee therefore is precluded from addressing on his own behalf. The doctrine does not extend to or control the union's relationship with its members.

I note moreover that the NYCCBL does not provide a remedy for every perceived wrong. Its provisions and procedures are designed to safeguard the rights that are created by the statute, i.e., the right to organize, to form, join and assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from such activities. Even accepting petitioners' allegations herein as true, I must dismiss the petition as against the UFA as it fails to allege or to demonstrate how noncompliance with the contract ratification procedures prescribed by the Union Constitution deprived petitioners of any rights that are protected by the NYCCBL.

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[9] E.g., Decision Nos. B-23-84; B-14-83; B-16-79. See, International Brotherhood of Electrical Workers v. Foust, 442 U.S. 32 (1979).

Additionally, I note that although the City is a named respondent in this matter, petitioners have not cited any specific actions taken by the City or its agents which arguably implicate any of petitioners' rights under the NYCCBL. Absent an allegation that respondent City acted in a manner which was intended to or did, in fact, affect such rights, I find the petition to be insufficient on its face with respect to any claim against the City.

For the aforementioned reasons, the instant petition is dismissed in its entirety.[10]

Dated: New York, New York
October 5, 1989

Marjorie A. London
Executive Secretary
Board of Collective Bargaining

[10]I note that dismissal of this petition is without prejudice to any rights petitioners may have in another forum. I further note that petitioners have initiated two separate actions challenging the acts complained of in their improper practice petition. These cases are presently pending in the New York State Supreme Court.