Adon v. L.1182, CWA, 45 OCB 14 (BCB 1990) [Decision No. B-14-90 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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IN THE MATTER OF THE IMPROPER PRACTICE PROCEEDING

-between-

JOSE ADON TORRES

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182,

Respondent.

Decision No. B-14-90(ES)
Docket No. BCB 1239-89

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IN THE MATTER OF THE IMPROPER PRACTICE PROCEEDING

-between-

JOSE ADON TORRES

Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF SANITATION AND THE NEW YORK CITY DEPARTMENT OF PERSONNEL

Respondents.

Decision No. B-14-90(ES)
Docket No. BCB 1242-90

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DETERMINATION OF EXECUTIVE SECRETARY

On December 28, 1989, Jose Torres ("the petitioner") formerly employed by the New York City Department of Sanitation, filed a verified improper practice petition alleging that Local 1182 of the Communications Workers of America ("the Union") violated Section 12-306 (a)(1) and (4), Section 12-306 (b)(2), Section 12-306(c)(2) and (4) of the New York City Collective

Bargaining Law (the "NYCCBL")[1] and certain provisions of the Union's Constitution[2] when it failed to represent him properly in

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[1] NYCCBL §12-306 [formerly Section 1173-4.2] provides 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;

(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.

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 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.

[2] Although the petitioner alleges that the Union violated page 1, §§(D) and (E); Article IX, §§(B), (C), (F) and (G);

the matter of his termination.

Thereafter, on January 11, 1990, the petitioner filed another verified improper practice petition against the New York City Department of Sanitation and the New York City Department of Personnel (collectively referred to hereinafter as "the City"), alleging that he was terminated without being served with disciplinary charges and without a due process hearing in violation of Article VI, Section (1)(A - E), Section 2, Step 2, parts (1) and (3) of the collective bargaining agreement between the City and the Union,[3] Section 75 of the Civil Service Law, and Sections 12-305[4] and 12-306 (a) and (c) (1-5) of the NYCCBL.[5]

Article XIII, §§4(D) and (E), §5, §9(T), and Article XIX, §4 of the Union's Constitution, a copy of that document was not attached to the petition.

[3] The petitioner did not submit a copy of the relevant contractual provisions.

[4] Section 12-305 [formerly Section 1173-4.1] of the NYCCBL provides in relevant part as follows:

> Public employees shall have the right to self organization, to form, join, or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

[5] Supra n. 1 at 2.

According to Exhibits accompanying the improper practice petition filed against the Union, the petitioner had been employed as a provisional sanitation enforcement agent for two years, and had served as a union delegate and a union vice president prior to being discharged on September 15, 1989. It appears that the petitioner was not appointed to a permanent position pursuant to the "one in three rule" because of his alleged absenteeism. Specifically, it seems that the petitioner's termination was recommended on the basis of two absences which took place on February 18, 1989 and June 30 1989.[6]

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("the OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petitions as mandated by Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("the OCB Rules"), and has determined that the claims asserted therein must be dismissed because they do not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of

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[6] An exhibit attached to the petition filed against the Union indicates that an Administrative Law Judge considering the petitioner's unemployment insurance claim found that the petitioner had submitted to his employer medical documentation for both of those days. Another exhibit indicates that in connection with his unemployment insurance claim, the petitioner alleged that at some point during his employment with the City, he was asked to resign his union position and to refrain from taking time off for union activity. The petitioner refused to comply with this request. In the present improper practice proceeding, the petitioner does not allege that his termination was effected in retaliation for his refusal to resign from his union position.

the NYCCBL.

To the extent the petitioner alleges violations of documents and provisions external to the NYCCBL, such allegations may not be considered in the improper practice forum. It is well settled that the alleged violation of laws external to the NYCCBL, such as Section 75 of the civil service Law, may not be raised in a proceeding before the Board of Collective Bargaining.[7] Moreover, the petitioner's contention that the City violated the collective bargaining agreement is expressly beyond the Board’s jurisdiction pursuant to Section 205.5(d) of the Taylor Law.[8] Finally, the alleged violations of the union Constitution relate essentially to an internal union matter and are not subject to the jurisdiction of the Board in situations where, as here, the petitioner has failed to show that they affect the terms and conditions of his employment or the nature of the representation accorded to him by the Union.[9]

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[7] Decision Nos. B-20-83; B-2-82.

[8] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides that:

> . . .the Board shall not have the 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 practice. . . .

See also, Decision Nos. B-53-89; B-20-89; B-1-83.

[9] See, Decision Nos. B-9-86; B-18-84; B-15-83; B-1-79.

I have further determined that the petitioner has failed to allege facts sufficient as a matter of law to support a cause of action under the provisions of the NYCCBL to which he referred. The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees 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 to refrain from such activities.

The petitioner's allegations against the City stem from the circumstances of his termination. However, contrary to the petitioner's contention, the City's action in this matter cannot be deemed to constitute an improper practice because the right to be served with disciplinary charges and the right to be afforded a due process hearing derive, if at all, from sources other than the NYCCBL. Therefore, the failure to grant those privileges to the petitioner cannot be deemed to constitute a violation of the NYCCBL.

Finally, I have determined that the petitioner has failed to allege facts sufficient to support his claim against the Union. Section 12-306b. of the NYCCBL has been recognized as prohibiting violations of the duty of fair representation owed by a certified employee organization to represent bargaining unit members with respect to negotiation, administration and enforcement of

collective bargaining agreements.[10] The doctrine of fair representation requires a union to treat all members of the bargaining unit in an evenhanded manner and to refrain from arbitrary, discriminatory and bad faith conduct.[11] It is well settled that the Union does not breach its duty of fair representation merely by refusing to advance a particular grievance. 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 an arbitrary or discriminatory manner.[12]

The petitioner has not specified the nature of his complaint against the Union. In any event, he has not offered any evidence to show that the treatment the Union afforded him was arbitrary or discriminatory or differed in any respect from that received by his fellow employees. Therefore, the petitioner has not established a prima facie violation of the duty of fair representation. Accordingly, his improper practice claim against the Union also must be dismissed.

[10] Decision No. B-14-83.

[11] See, Decision Nos. B-53-89; B-72-88; B-50-88; B-53-87.

[12] Decision Nos. B-58-88; B-9-88; B-25-84; B-2-84; B-16-83.

I note that the dismissal of all the aforementioned claims is without prejudice to any rights the petitioner may have in another forum.

Dated: April 11, 1990
New York, N.Y.

Loren Krause Luzmore
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 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 sufficient as a matter of law 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.

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§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) 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.