Mullin v. PBA, Caruso(Pres. of PBA), 45 OCB 26 (BCB 1990) [Decision No. B-26-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between- DECISION NO. B-26-90

WILLIAM F. MULLIN DOCKET NO. BCB-1164-89

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION
and PHIL CARUSO, PRESIDENT,

Respondent.
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DECISION AND ORDER

On May 10, 1989, William F. Mullin ("the Petitioner") filed a verified improper practice petition against the Patrolmen's Benevolent Association ("the PBA" or "the Union") and against Phil Caruso, PBA President ("the Respondents"). The petition alleges that the President abused his position by improperly causing the City of New York to use the dues check-off mechanism to collect an "illegal" monetary assessment, in violation of an Executive Order. It further charges that the Respondents committed a criminal violation in that allegedly the monies assessed were a product of extortion. The petition seeks a full page retraction in the PBA magazine, monetary damages, and the return of all funds collected through the assessment.

The PBA did not answer, but, instead, submitted a motion to dismiss the petition together with a supporting affirmation on August 2, 1989, in which dismissal was sought on the ground that the petition failed to state a cause of action upon which relief may be granted under the New York City Collective Bargaining Law ("NYCCBL"). On August 15, 1989, the PBA filed a supplemental submission in support of its motion to dismiss.

The Petitioner filed an answering affidavit opposing the Respondent's motion to dismiss on September 13, 1989.

BACKGROUND

In a "Delegate Newsletter" dated June 14, 1988, the PBA President announced that the federal government had granted a site in Washington, D.C. for construction of a National Law Enforcement Memorial. The President went on to explain that although the site was donated, private funding was necessary for the design and construction of the actual monument. He reported that the New York City PBA had been named an honorary member of the project's advisory committee, and he called upon every PBA member "to make a personal contribution of at least $20" toward the completion of the memorial.

By letter dated October 19, 1988, to all Union delegates and members, the President announced that each member would be "assessed" the sum of $20 to help pay for the memorial. The letter reads, in pertinent part, as follows:

> In connection with the PBA's major effort to raise funds for a law enforcement memorial in Washington, D.C., a goal of at least $20 per member had been set earlier this year. . . .
>
> However, the fund-raising effort within our own ranks has produced nothing more than a mere trickle of donations, mainly because of the difficult logistics involved in such an undertaking. This is certainly not a fit-ting response from an organization that will have the greatest representation of names of those New York City police officers who made the supreme sacrifice, our own heros who will be permanently and proudly commemorated on a memorial in Judiciary Square in Washington.
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> Accordingly, at the last regular PBA delegates' meeting a motion was made and passed unanimously by the delegate body to assess by payroll deduction the sum of $20 from each member, a move that is permissible under . . . the PBA Constitution and By Laws. This was done in order to insure and expedite an appropriate financial contribution on our part to this most noteworthy project.
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> * * *
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> The $20 will be deducted in $5 incre-ments over four successive pay periods: October 27, November 10, November 24, and December 8.
>
> . . . any member who desires not to make a donation can request a refund, which we will be glad to make.

By letter to Phil Caruso dated December 13, 1988, the Petitioner requested that "the $20.00 deducted from my pay as a contribution towards the Police Monument be returned to me."

In a "PBA Delegate Newsletter" dated March 10, 1989, to all PBA members, Police Officer Frank Santaromita reported that:

> Out of over 15,000 New York City Police Officers, only 11 refused to donate any money at all to this worthy venture. Their names will be published in the next magazine.

In the January/February 1989 edition of New York's Finest, a bi-monthly publication of the Patrolmen's Benevolent Association of the City of New York, Inc., there appeared a feature entitled "PBA President Addresses Objectors to Memorial Deduction." The feature, displayed in the form of a letter, reads, in part, as follows:

> Dear Officer:
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> Now that the $20 payroll deduction has been received by the PBA for the Law Enforce-ment Officers' Memorial Fund, I can respond to your premature request for a refund of the monies deducted.
>
> Of the more than 20,000 members, you happen to be one of nine members who have requested a refund, ostensibly because you disapprove of the involuntary manner in which the $20 contribution was effected. We have examined our records and find that you obvi-ously did not make a "voluntary" contribu-tion, a factor that would appear to indicate that you have no feelings for those police officers here and elsewhere who have made the supreme sacrifice.
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> * * *
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> I am very happy to return your $20 be-cause you are not worthy to be a part of our memorial project. You are a disgrace to the entire police service, and you have no valid reason to remain within the ranks of the PBA. If you harbor such misgivings about PBA activities, why not resign forthwith?
>
> Please do so. We don't want you and we don't need you.

The letter was signed by Phil Caruso, and the names of each of the nine officers, including the Petitioner, were printed immediately below the text. The Petitioner contends that as a result of the publication of his name, he has been exposed to "hatred, contempt and ridicule."

POSITIONS OF THE PARTIES

Respondents' Position

The Respondents argue that the allegations raised in this improper

practice petition do not establish a violation under the New York City Collective Bargaining Law. They note that the Petitioner's demand for relief is based upon the Grand Larceny section of the state Penal Law, and upon Executive Order No. 107, a mayoral order entitled "Procedures for Orderly Payroll Check-off of Union Dues and Agency Shop Fees."[1] In their view, neither of these provisions are enforceable in the improper practice forum.

The Respondents point out that the improper practice charge stems from the fact that the Petitioner's name was published in the PBA's magazine as being one of the nine members who demanded refunds of their police memorial fund assessments. They argue that the action complained of does not fall within the ambit of any of the actions prohibited, as improper employee organization practices, by Section 12-306b.(1) of the NYCCBL.[2] The Respondents argue further that the relief that the Petitioner is demanding, a full page retraction in the PBA magazine, $50,000 in monetary damages, and the

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[1] Mayor's Executive Order No. 107 of December 29, 1986 provides that "[n]o assessments of any kind or nature will be collected through the check-off".

[2] Section 12-306b.(1) defines the types of employee organization practices which constitute improper public employee organization practices. It 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 §12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

Section 12-305 of the NYCCBL provides, in relevant part:

> 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.

return all funds collected for the memorial, cannot be granted under the NYCCBL. Rather, they assert, the charges that the Petitioner has made can be determined only in the civil and/or criminal courts, and not by this Board.

In justifying their actions, the Respondents claim that the refund on demand scheme was legally voted by the Union leadership in accordance with its internal rules. In addition, the Respondents maintain that the membership was advised that the contribution was purely voluntary; that members needed only to request a refund if they did not wish to contribute; and that the Petitioner's money, in fact, was refunded. They contend, therefore, that this voluntary contribution plan did not violate Executive Order No. 107.

The Respondents conclude that the petition contains insufficient facts to afford the Petitioner any redress in the improper practice forum, and they request that the petition be dismissed in its entirety.

Petitioner's Position

The Petitioner replies that the Executive Secretary made a determination that his petition "is not, on its face, so untimely or insufficient as to warrant summary dismissal." He argues that her determination thus shows that if dues monies were, in fact, collected in the manner described in the petition, then his claim must be actionable under the NYCCBL.

The Petitioner reiterates that the Respondents violated Executive Order No. 107 by "collecting monies under the ruse of dues" when actually the monies were an assessment. He notes that while the Respondents assert that "individual participation was voluntary," they submitted no evidence in support of their claim. To the contrary, their acknowledgment that "voluntary contributions began to taper off" allegedly indicated that the membership no longer wished to contribute voluntarily to the fund.

The Petitioner points out that Executive Order No. 107 requires that authorization cards be signed prior to implementation of a dues check-off, and that it prohibits assessments of any kind or nature from being collected

through the check-off mechanism. The Petitioner claims that he did not sign an authorization card for the deduction and that the PBA since has refused to give him a copy of its bimonthly statement for the period in question, despite his allegedly having made two written requests for the document.

The Petitioner stresses that he is not angered at the PBA's participation in the memorial project. To the contrary, he states that he supports it. He contends, however, that he is opposed to forced participation in the project by means of an involuntary dues check-off mechanism.

In support of his claim for damages, the Petitioner submits that he has been a member of the New York City Police Department for the past sixteen years and has "served the people of this city honorably, faithfully and courageously." He states that he has never violated the By-Laws and Constitution of the PBA. The Petitioner maintains that the President had no right to accuse him of being "a disgrace to the entire police service, and [of having] no valid reason to remain within the ranks of the PBA." He further asserts that the President could not declare that "we don't want you and we don't need you," without at least an authorization vote of the delegate body, if not of the general membership. The Petitioner claims that the President's accusations were malicious, and caused him to suffer "hatred, contempt [and] ridicule," and harmed his "business, calling, career, reputation, and personal relationships." He disputes the President's contention that all the statements in the Respondent's "open letter" to the membership are true.

Upon this basis, the Petitioner asks this Board to "come to a decision it deems to be just and proper."

DISCUSSION

It is well-settled that, when making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by

the Petitioner.[3] More than that, the petition is entitled to every favorable inference, and it will be deemed to allege whatever may be implied from its statements by reasonable and fair intendment.[4] In the instant proceeding, the Respondents' motion to dismiss is based upon the premise that the petition does not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL.

In considering the Respondent's motion to dismiss, we must deem the Respondents to admit the petition's allegations that they may not have adhered to the requirements of Executive Order No. 107, and that they may have coerced members into contributing to the memorial fund through fear of having their names printed in the PBA magazine.

Even if these allegations are deemed to be true, however, they do not constitute a prima facie claim of improper practice within the meaning of §12-306b.(1) of the NYCCBL, sufficient to withstand the Respondents' motion to dismiss.

In this case, the Petitioner alleges that the PBA's decision to exact from each of its members a twenty dollar "contribution" toward a police officer memorial violated the New York State Penal Law. He also alleges that by prevailing upon the employer to use the dues check-off as a means of collecting this sum, the Union violated an Executive Order of the Mayor. The Petitioner does not allege, however, that these acts violated any provision of the NYCCBL.

The Petitioner's contentions thus relate to a purely internal union decision. We have long held that complaints concerning internal union matters are not subject to our jurisdiction unless it can be shown that they affect

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[3] Decision Nos. B-7-89; B-38-87; B-36-87; B-7-86; B-12-85; B-20-83; B-17-83; and B-25-81.

[4] Decision No. B-34-89. See also, Westhill Exports, Ltd. v. Pope, 12 N.Y.2d 491, 240 N.Y.S.2d 961 (1963), and Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1964).

the employee's terms and conditions of employment or the nature of the representation accorded to the employee by the union with respect to his employment.[5] Here, no evidence of any effect on the Petitioner's terms and conditions of employment or on the PBA's representation of him vis-a-vis the employer has been offered. It should be noted that unlike the federal laws protecting the rights of union members in the private sector, neither the NYCCBL nor the Taylor Law regulate the internal affairs of unions. Thus, any cause of action for challenging internal union conduct that does not have any of the effects stated above is beyond the jurisdiction of this Board and of the Public Employment Relations Board.

Furthermore, to the extent that the instant petition alleges violations of the Penal Law and an Executive Order, it must be dismissed as a matter of law because our jurisdiction is limited to disputes that arise under the NYCCBL. It does not extend to claims arising under other statutes or under orders of the Mayor.[6]

The Petitioner also alleges that he was harassed and humiliated by the publication in a PBA Delegate Newsletter of a threat to publish the names of members who refused to contribute to the Police Officers Memorial Fund in the next issue of the PBA magazine, and by the publication of his name in that magazine together with a letter from the Union president that he finds

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[5] See Decision Nos. B-23-84; B-15-83; B-18-79; and B-1-79. These holdings are consistent with the view of the U.S. Supreme Court (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449 [1967]), and with that of the PERB (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]; and Lucheso and Deputy Sheriff's Benevolent Association of Onondaga County, 11 PERB ¶4589 [H.O. 1978]).

[6] Decision Nos. B-39-88; B-55-87; B-20-83; B-1-83; and B-2-82.

objectionable. However these acts may be characterized, in the absence of any showing that they were intended to, or did, affect the terms and conditions of petitioner's employment or the nature of the representation accorded him by the PBA concerning his employment, they do not form the basis for a finding of improper practice.

Finally, with regard to determinations made by the Executive Secretary, both parties may misapprehend the role and authority of that office. In support of their position that the improper practice petition should be dismissed, the Respondents cite a decision of the Executive Secretary[7] as "controlling in the instant controversy." The Petitioner, on the other hand, contends that since the Executive Secretary determined that his petition was not insufficient on its face, his claim must be actionable under the NYCCBL.

On November 30, 1983, this Board adopted an amendment to the Revised Consolidated Rules of the Office of Collective Bargaining providing for preliminary screening of improper practice petitions by the Executive Secretary of the OCB. Before it was adopted, the amendment had been subject to lengthy deliberation by this Board, which was then followed by a public hearing. A key modification in the final version addressed the concern that an initial determination by the Executive Secretary not to dismiss a charge should not be deemed to foreclose a respondent from challenging a claim on grounds of sufficiency or timeliness in its answer. The minutes of the meeting of the Board on July 13, 1982, reflect this discussion:

> City Member Feerick questioned whether a petition which passed the initial review by the

[7] In Decision No. B-41-89 (ES), the Executive Secretary determined that an improper practice charge filed by a different petitioner alleging that the PBA violated the NYCCBL by instituting an "involuntary check-off deduction of $20.00 for charitable contribution" failed to state a cause of action under the statute. Her determination held that "petitioner's allegations concern internal union matters, which are not within the purview of the NYCCBL.

> Director[8] could nevertheless be chal-lenged as to its sufficiency or timeliness. It was agreed that such grounds for challenge should be permitted to the respondent. To this end, [Deputy Chairman] MacDonald pro-posed the addition of a sentence negating any

[8] Initial review by the Director subsequently became modified to provide that initial review would be performed by the Executive Secretary.

> presumption of sufficiency or timeliness when a petition has survived initial screening by the [Executive Secretary].
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> * * *
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> [Chairman] Anderson indicated that the rules would be recast to conform with the suggestions made at the meeting. . . .

Thereafter, the draft rule was amended to include the following clause which became part of the final rule which was adopted by this Board:

> . . . provided, however, that such determina-tion shall not constitute a bar to the asser-tion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency . . . .

Thus, it is clear that the legislative intent behind Rule 7.4, as amended, was to permit a responding party to challenge a claim as being untimely, or for failing to state a cause of action under the NYCCBL, the initial determination of the Executive Secretary notwithstanding.

On the other hand, the 1983 amendment to the Rules never contemplated that the dismissal of a charge by the Executive Secretary should have a precedential effect, or should in any manner be binding upon this Board. This was made clear by the Board's deliberations concerning the legality of delegating authority to the Executive Secretary. After careful examination, the Board decided that the provision in the proposed rule for appealing an adverse initial determination by the Executive Secretary to the full Board constituted an adequate procedural safeguard against any possible abuse of discretion. Conversely, this safeguard logically operates to bar determinations of the Executive Secretary from ever being binding upon this Board, or from being accorded any precedential weight.

For all the above reasons, and in the absence of an allegation that the Respondents' actions were intended to, or did, affect any of Petitioner's rights that are protected by the NYCCBL, we shall grant the Respondent's motion to dismiss the Petitioner's improper practice charges. We note, however, that dismissal of the petition is without prejudice to any rights

that the Petitioner may have in other forums.

ORDER

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

ORDERED, that the Respondents' motion to dismiss the improper practice petition be, and the same hereby is, granted.

DATED: New York, N.Y.
May 24, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

DEAN L. SILVERBERG
MEMBER

THOMAS J. GIBLIN
MEMBER