

Gordon v. L.1182, CWA, Dep't of Sanitation, 45 OCB 30 (BCB 1990)
[Decision No. B-30-90 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

WINSTON GORDON

DECISION NO. B-30-90 (ES)

Petitioner,

DOCKET NO. BCB-1270-90

-and-

NEW YORK CITY DEPARTMENT OF
SANITATION and COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 1182,
Respondents

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DETERMINATION OF EXECUTIVE SECRETARY

On April 11, 1990, Winston Gordon ("Petitioner") filed a verified improper practice petition against the New York City Department of Sanitation ("Department") and the Communications Workers of America, Local 1182 ("CWA" or "the Union"), in which he alleged that on March 1, 1990, he was dismissed from employment without notice, reason for dismissal or documentation. Petitioner claims that he contacted the Union the next day and, without even investigating the matter, the Executive President of the Union stated that there was nothing he could do for petitioner.

Pursuant to §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 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 Section 12-

306 of the New York City Collective Bargaining Law ("NYCCBL").¹

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 set forth therein, i.e., the right to bargain collectively through certified public employee organizations; the right to organize, to form, join and assist public employee organizations; and the right to refrain from such activities. Petitioner does not allege that the Department's

¹The New York City Collective Bargaining Law §12-306 (formerly §1173-4.2) provides in pertinent part as follows:

a. **Improper employee 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 §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 §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 an employer.

actions were intended to affect the exercise of these rights.

Petitioner's allegations against the Department stem from the circumstances of his dismissal on March 1, 1990. However, contrary to the petitioner's contention, the Department'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.

The petitioner has also failed to allege facts sufficient to support a claim against the Union. Section 12-306b of the NYCCBL prohibits violations of the duty of fair representation owed by a certified employee organization to represent bargaining unit members with respect to the negotiation, administration and enforcement of collective bargaining agreements.² The duty of fair representation requires a union to treat its members in an even-handed manner, and to refrain from arbitrary, discriminatory or bad faith conduct.³ It is well-settled that a union does not breach the duty of fair representation merely by refusing to advance a particular claim. Rather, the duty of fair representation requires only that the Union's decision not to advance a claim be made in

² Decision No. B-14-83.

³ Decision Nos. B-34-86; B-14-83.

good faith and not in an arbitrary or discriminatory manner.⁴ Here, petitioner has not offered any evidence to show that the treatment afforded him by the Union was arbitrary or discriminatory, or differed in any respect from that received by his fellow employees. Thus, petitioner has failed to establish a prima facie violation of the duty of fair representation. Accordingly, his improper practice claim against the Union must also be dismissed.

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

Dated: New York, New York
June 26, 1990

Loren Krause Luzmore
Executive Secretary
Board of Collective Bargaining

⁴ Decision Nos. B-9-88; B-25-84; B-2-84; B-16-83.

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.