O’Neill v. DC37, et. al, 45 OCB 45 (BCB 1990) [Decision No. B-45-90 (ES)]

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

DECISION NO. B-45-90(ES)

-between-

DOCKET NO. BCB-1296-90

LANCE O'NEILL,

Petitioner,

-and-

DISTRICT COUNCIL 37, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AND
STANLEY HILL, EXECUTIVE DIRECTOR,
DISTRICT COUNCIL 37, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,

Respondents.
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DETERMINATION OF EXECUTIVE SECRETARY

On June 25, 1990, Lance O'Neill ("petitioner") filed a verified improper practice petition against District Council 37, American Federation of State, County and Municipal Employees ("AFSCME") and Stanley Hill, Executive Director of District Council 37, in which he states that he wrote to Mr. Hill in August of 1987 asking whether a provisional or probationary employee could be denied the right to a hearing and/or terminated on the spot. The petitioner received a reply to his letter, dated September 2, 1987, from Duncan Quarles, Assistant Division Director, District Council 37, Local 420 informing him that all non-competitive employees in Local 420 who work for the New York City Health and Hospitals Corporation ("HHC") are entitled to a due process hearing upon completion of three months of service. Provisional employees are entitled to due process upon completion of two years of service at HHC.

In his improper practice petition, Mr. O'Neill alleges:

> Contract violation of Rule 5:2:7 Appointment and Promotion. At my Personal Review Board Hearing in September 28, 1989, Mr. Howard Prippas stated that my title changed on July 1, 1983 to Respiratory Therapist, but salary not upgraded, only I.D. card shows title change.

As a remedy, petitioner seeks aid in returning to the Department of Respiratory Therapy as stipulated in Rule 5:2:7, and aid in getting Woodhull Hospital to give him a 7.5 Civil Service Hearing or in dropping their charges and/or identifying the person stalling his case.

On July 24, 1990 the petitioner submitted papers in support of his improper practice petition. In a note attached to these papers, petitioner claims that he is still being made to work out-of-title in the Department of Housekeeping even though his Leave Record Statement shows his title as Certified Respiratory Therapy Technician. Petitioner maintains that "management is doing this so that Mr. Soriano can mock and ridicule me on a daily basis ...." Additionally, petitioner claims that he is being punished for exposing HHC to the Ultracare Respiratory Agency.

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 petition as mandated by Section 7.4 of the OCB Rules and has determined that the claim asserted therein must be dismissed because it does not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). 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, form, join, and assist public employee organizations; and the right to refrain from such activities. Petitioner does not allege that respondents committed any acts in violation of Section 12-306b of the NYCCBL, which defines improper public employee organization practices.[1] 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 the negotiation, administration and enforcement of collective bargaining agreements.[2] 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.[3] 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

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[1] Section 12-306b of the NYCCBL provides:

> 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;
>
> (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] Decision No. B-14-83.

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

that the Union's decision not to advance a claim be made in good faith and not in an arbitrary or discriminatory manner.[4]

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.

Finally, to the extent petitioner alleges a "contract violation of Rule 5:2:7 Appointment and Promotion," I note that such an allegation may not be considered in the improper practice forum. Claimed violations of the collective bargaining agreement are expressly beyond the jurisdiction of the Board of Collective Bargaining pursuant to Section 205.5(d) of the Taylor Law.[5]

Accordingly, for all of the reasons stated above, the petition must be dismissed pursuant to Section 7.4 of the OCB Rules. Such dismissal is, of course, without prejudice to any rights petitioner may have in any other forum.

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

[5] 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 the 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 organization practice.

Dated: New York, New York
August 17, 1990

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Loren Krause Luzmore
Executive Secretary
Board of Collective Bargaining