Fitzgerald v. SSEU, L.371, et. al, 45 OCB 65 (BCB 1990) [Decision No. B-65-90 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

THOMAS FITZGERALD,
Petitioner,

DECISION NO. B-65-90(ES)

DOCKET NO. BCB-1318-90

-and-

CHARLES ENSLEY, PRESIDENT, SSEU, LOCAL 371, and RALPH ZINZI, NEW YORK CITY OFFICE OF LABOR RELATIONS,
Respondents.
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DETERMINATION OF EXECUTIVE SECRETARY

On August 29, 1990, Thomas Fitzgerald ("petitioner") filed a verified improper practice petition against Charles Ensley, President of Local 371 of the Social Service Employees Union ("the Union") and Ralph Zinzi, Chief Review Officer of the New York City Office of Labor Relations ("OLR").[1] The petition alleges that OLR and the Union violated the New York City Collective Bargaining Law ("NYCCBL"), §§ 12-306a(4)[2] and

[1] Since August 29, 1990, petitioner has submitted to this office additional documents which he claims support his petition. Because the documents were filed without proof of service on the respondents named in the instant petition, they were not considered in reaching the decision herein. The documents, however, may arguably state a claim against representatives of petitioner's employer and, as such, may be filed in a separate petition together with proper proof of service.

[2] Section 12-306a of the NYCCBL provides, in relevant part:

It shall be an improper practice for a public employer or its agents...

(continued...)

12-306b(2)[3] respectively, when they failed to schedule timely Step III grievance hearings under the terms of the Citywide Agreement[4] and the collective bargaining agreement between the

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2(... continued)

(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.

[3] Section 12-306b of the NYCCBL provides, in relevant part:

It shall be an improper practice for a public employee organization or its agents...

(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.

[4] The Citywide Agreement is a collective bargaining agreement between the City of New York and District Council 37, APSCME, AFL-CIO, covering matters which 'must be uniform for the following employees:

a. Mayoral agency employees subject to the Career and Salary Plan.
b. Employees of the Health and Hospitals Corporation with the exception of Group 11 employees and interns and residents.
C. Employees of the Of f -Track Betting Corporation and the New York City Housing Authority pursuant and limited to the extent of their respective elections to be covered by the NYCCBL.
d. Employees of the Comptroller, the District Attorneys, the Borough Presidents, and Public Administrators, who are subject to the Career and Salary Plan, pursuant and limited to the terms of their respective elections to be covered by the NYCCBL, and any museum, library, zoological garden or similar cultural institution for employees whose salary is paid in whole from the City treasury, pursuant and limited to the election of said cultural institution to be covered by (the) Agreement.

Section VI of the Citywide Agreement provides as follows:
(continued...)

Union and the City of New York ("the unit contract").[5] As a remedy, petitioner requests that respondents "immediately provide a docket number and date for hearing."

Petitioner is a Caseworker employed by the New York City Human Resources Administration ("HRA" or "the Agency"). On May 7, 1990, he filed a grievance at Step I of the grievance procedure ("Grievance #90/05-0065") alleging that his supervisor, Calvin Richinsin, had violated Article VIII, § 11 of the unit contract[6] by using indecent, abusive and profane language, and threatening petitioner physically. In a ruling issued on June 5, 1990, petitioner's grievance was denied at Step I because

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4 (... continued)
If the Employer exceeds any time limit prescribed at any step in the grievance procedure, the grievant and/or the Union may invoke the next step of the procedure, except, however, that only the Union may invoke impartial arbitration under Step IV.

[5] Section 8 of the collective bargaining agreement between the Union and the City of New York provides as follows:

> If the Employer exceeds any time limit prescribed at any step in the Grievance Procedure, the grievant and/or the Union may invoke the next step of the procedure, except that only the Union may invoke impartial arbitration under STEP IV.

[6] Article VIII, § 11 of the contract between the City and the Union provides as follows:

> The parties agree that the relationship between Employer and employee shall be dignified and professional at all times. This means that the Employer and employees shall not use indecent, abusive, profane language and/or behavior. Claimed violations of this provision are limited to such language and/or behavior.

petitioner could not produce documentation or in any other way substantiate his claim.

Petitioner appealed the Step I decision by filing, on June 7, 1990, a grievance at Step II of the grievance procedure, in which he claimed that he had not received a timely ruling in response to his Step I grievance. In a decision dated July 26, 1990, Grievance #90/05-0065 was denied at Step II because "extensive review of the instant matter failed to uncover any evidence to document grievant's claim of unprofessional behavior by Mr. Richinsin."

On March 29, 1990, petitioner filed two grievances at Step I of the grievance procedure, Grievance #90/04-0011 and Grievance #90/04-0034. In Grievance #90/04-0011, petitioner alleged that Charles Storm, a Supervisor III in HRA, violated Article VIII, § 11[7] of the unit contract when he "used indecent, profane and abusive language to [petitioner]." The grievance was denied on April 17, 1990, finding that there was insufficient documentation to sustain the charges. Thereafter, on appeal to Step II of the grievance procedure, the grievance was denied on the ground that petitioner could not produce a witness to the alleged violation.[8] On June 12, 1990, petitioner filed a grievance at Step III of the

[7] Supra, note 6.

[8] The Step II decision was dated May 30, 1990, and was stamped as having been received on the afternoon of June 12, 1990.

grievance procedure, naming Ralph Zinzi, Chief Review Officer of OLR, as the respondent and alleging that petitioner had not received a timely response to his Step II Grievance #90/04-0011.

In Grievance #90/04-0034, petitioner alleged that Leonard Barrish, Director of the Disability Review Section of the Agency, violated Article VI, § 1B of the unit contract[9] by failing to follow HRA Procedure No. 83-4, which provides a system for documenting absences.[10] Grievance #90/04-0034 stems from a disagreement between petitioner and Mr. Barrish over what information should have been contained in a doctor's note submitted by petitioner in February, 1990. Petitioner claimed that Mr. Barrish violated a written rule or regulation of the Agency by asking for more information and by not returning the original copy of petitioner's note when he so requested. The

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[9] Article VI of the unit contract provides, in relevant part:

Section 1. The term "Grievance" shall mean:

(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment....

[10] Petitioner has not submitted a copy of HRA Procedure No. 83-4 for review. From the Agency's Step I ruling, however, I note that Procedure No. 83-4, entitled "Summary of New Provision and/or Modifications in the HRA Supervision of Attendance and Punctuality", provides, in relevant part:

[A medical note] must contain a statement that the employee was examined, and/or treated on a specific date. It must also give the general nature of the illness. It must indicate when the employee can return to work."

hearing officer found that Mr. Barrish had not violated Procedure No. 83-4, and denied the grievance.

Petitioner appealed the Step I decision to Step II of the grievance procedure. In a decision dated May 30, 1990, and stamped as having been received on June 12, 1990, Grievance #90/04-0034 was denied because there was "no proven violation of the contract, agency policy or procedure." On June 12, 1990, petitioner appealed from the Step II decision on the grounds that he had not received a timely response.

Pursuant to § 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining, a copy of which is annexed hereto, I have reviewed the petition and have determined that the improper practice claims asserted therein must be dismissed because they do not allege facts sufficient as a matter of law to constitute improper practices within the meaning of the 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, the right to bargain collectively through certified public organizations; the right to organize, form, join and assist public employee organizations; and the right to refrain from such activities.

With respect to the complaint that the Union violated

§ 12-306b(2),[11] petitioner has not alleged that the Union failed to bargain collectively on his behalf with the Agency. Even assuming that petitioner intended to allege a violation of § 12-306b(l),[12] which prohibits violations of the judicially recognized fair representation doctrine,[13] petitioner has not presented any facts which show that the Union treated him in an arbitrary, discriminatory or bad faith manner. The duty of fair representation requires only that a union act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[14] The union is not required to advance every alleged grievance, as long as the decision not to pursue a particular claim is made in good faith, and not in an arbitrary or discriminatory manner.[15]

In this case, petitioner claims that the Union committed an improper practice by failing to take his grievances to Step III of the grievance procedure provided in Article VI of the unit

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[11] Supra, note 3.

[12] NYCCBL § 12-306b, in relevant part, provides that it is 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

[13] See Decision Nos. B-24-86; B-14-83.

[14] Decision Nos. B-13-82; B-11-82.

[15] Decision Nos. B-27-90; B-72-88; B-58-88; B-30-88.

contract. Article VI, § 2 provides, in relevant part:

> STEP III - An appeal from an unsatisfactory determination at STEP II shall be presented by the employee and/or the Union to the Director of Municipal Labor Relations in writing within ten (10) working days of the receipt of the STEP II determination [emphasis added]

There is no provision in the grievance procedure that requires the Union to submit a Step III grievance on behalf of a member. Thus the petitioner's assertion that the Union refused to process his grievances, without a showing that in doing so the Union acted arbitrarily or discriminatorily, does not state a violation of the NYCCBL.

Petitioner has also failed to allege a violation of the NYCCBL with respect to the improper practice claim against Ralph Zinzi, Chief Review Officer of OLR. In his improper practice petition, petitioner alleges that OLR violated § 12-306a(4)[16] by failing to hold a timely hearing on his Step III grievances. The duty to bargain in good faith runs between the employer and the certified or designated representative of its employees. It is not a duty owed to individual members of the bargaining unit.[17] Thus, as an individual, petitioner lacks standing to advance this claim. With respect to petitioner's claim that OLR violated provisions of the Citywide Agreement and the unit contract, I

[16] Supra, note 2.

[17] Decision No. B-9-86.

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 § 205.5(a) of the Taylor Law.[18]

The events upon which this improper practice petition are based are not related to employee rights protected under the NYCCBL. For this reason, the petition must be dismissed. I note, however, that dismissal of the petition is without prejudice to any rights the petitioner may have in another forum, or any other improper practice claim that petitioner may allege on other grounds.

Dated: New York, New York
October 15, 1990

Loren Krause Luzmore
Executive Secretary
Board of Collective Bargaining

[18] Section 205.5(d) of the Taylor Law, which applies to the City of New York pursuant to § 212 of that law, provides in relevant part:

> 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 organization practice.

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 KAY BE APPLICABLE.

CONSULT THE COMPLETE TEXT.