

Leahey v. PBA, Caruso (Pres. of PBA), 47 OCB 22 (BCB 1991) [Decision No. B-22-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CHARLES LEAHEY,

Petitioner,

DECISION NO. B-22-91

-and-

DOCKET NO. BCB-1362-91

PHIL CARUSO, PRESIDENT, PATROLMEN'S
BENEVOLENT ASSOCIATION and BOARD OF
TRUSTEES of the PATROLMEN'S
BENEVOLENT ASSOCIATION,

Respondents.

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DECISION AND ORDER

On January 28, 1991, Charles Leahey ("the Petitioner"), filed a verified improper practice petition against Phil Caruso, President of the Patrolmen's Benevolent Association ("PBA") and the Board of Trustees of the PBA (collectively referred to as "the Respondents").

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), the Executive Secretary of the Board of Collective Bargaining reviewed the petition and determined that it did 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"). Accordingly, in a determination dated March 12, 1991, the petition was dismissed.¹

By a letter dated March 18, 1991, the Petitioner appealed the Executive Secretary's Determination to the Board of Collective Bargaining ("the Board"). This letter, however, did not set forth a basis for review of the Determination. The Trial Examiner designated by the Office of Collective Bargaining wrote to the Petitioner on March 22, 1991, requesting that he

¹ Decision No. B-12-91(ES).

submit a statement which indicates "the reasons for the appeal."² In response, the Petitioner served and filed a letter dated March 28, 1991.

The Petition

The Petitioner alleges that:

\$2,000,000 was stolen from the cop's fund by [a] PBA attorney who is still employed by the PBA as a consultant. My union, the PBA, refuse[d] to supply me with their financial records and proof that other PBA Trustees were not looting the fund, and proof that stolen money was returned [emphasis in original].

In essence, the Petitioner argues that the Respondent's have breached the fiduciary duties and responsibilities of their union offices and, by failing to provide him with copies of the PBA's financial records, are "covering up [a] criminal act."

The Executive Secretary's Determination

In Decision No. B-12-91(ES), the Executive Secretary found that the petition fails to allege that the Respondents have committed any acts in violation of Section 12-306b of the NYCCBL.³ The Executive Secretary held

² Section 7.4 of the OCB Rules, in relevant part, provides:

Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition ..., 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 The statement shall set forth the reasons for the appeal.

³ Section 12-306b of the NYCCBL provides:

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;

that the charges relate to an internal union matter not subject to the Board's jurisdiction absent a showing of an affect on the nature of the representation accorded to employees by the PBA with respect to negotiating and maintaining terms and conditions of employment.

The Executive Secretary explained:

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 or assist public employee organizations, to bargain collectively through certified employee organizations, and the right to refrain from such activities. Inasmuch as the conduct complained of concerns an internal union matter, and in the absence of an allegation that the Respondents' actions (or inactions) were intended to, or did, affect any of the Petitioner's rights that are protected by the NYCCBL, I find that the petition fails to state a cause of action for which relief may be granted under the NYCCBL.

The Appeal

The Petitioner complains, as one element of his appeal, that he never received the Respondents' answer to the petition which, he maintains, should have been sent to him by the Respondents or by the Office of Collective Bargaining.

The Petitioner also disputes the Executive Secretary's finding that the petition fails to allege facts sufficient as a matter of law to constitute an improper practice. The Petitioner submits that the media has reported on the fact that a "PBA attorney looted money to gamble in Atlantic City." Furthermore, the Petitioner asserts, the Respondents' refusal to send him copies of the PBA's financial records is "a blatant violation of union mandate," and constitutes proof that they are engaging in an illegal coverup.

In response to the Trial Examiner's request that Petitioner set forth a basis for seeking reversal of the Determination of the Executive Secretary,

(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.

Petitioner contends that pursuant to Section 7.4 of the OCB Rules, the PBA may not "hide" its financial records from its members. Thereupon, the Petitioner reiterated essentially the same facts as were alleged in the petition and concluded, as grounds for the appeal, that the Determination should be reversed because:

There is no question that my union has a fiduciary duty to keep open books and supply all financial information to their members upon request!

Discussion

We address first the Petitioner's complaint that he did not receive a copy of the Respondents' answer to the petition that was filed in this matter. In this regard, we point out that a respondent is not required to file an answer to an improper practice petition if, in reviewing the allegations set forth in a petition, the Executive Secretary finds that they are either untimely or insufficient as a matter of law to constitute a violation of the NYCCBL.⁴ Accordingly, inasmuch as the Executive Secretary's Determination dismissed the instant petition on grounds of insufficiency, the Respondents' alleged failure to answer does not constitute basis for an appeal of the Determination.

The Petitioner claims next that the Executive Secretary erred in dismissing the petition for insufficiency. In this connection, Petitioner

⁴ See Section 7.8 of the OCB Rules, which provides, in relevant part:

Answer-Service and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations in improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to [Section] 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.

submits that the allegations concerning the misuse of PBA funds were both reported in the media and elaborated upon in the petition and the appeal from the Executive Secretary's Determination. Therefore, Petitioner asserts that he has raised a substantial issue which warrants the Board's investigation into the matter.

Section 12-306b of the NYCCBL, which identifies acts that are prohibited to a public employee organization (such as the PBA), has been held to prohibit violations of the judicially recognized fair representation doctrine. This doctrine 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.⁵ It is well settled that a union breaches its duty of fair representation if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.⁶

In the instant matter, the gravamen of Petitioner's complaint is that the Respondents, as elected officials of the PBA, have breached a fiduciary duty and responsibility owed to its members. However, the Petitioner does not allege that the acts complained of involve any activities on the part of the Respondents relating to the negotiation, administration or enforcement of a collective bargaining agreement. Nor does the Petitioner provide evidence of any effect on the Petitioner's terms and conditions of employment or on the Respondents' representation of him vis-a-vis the employer. Therefore, in the absence of an allegation that the Respondents' actions were intended to, or did, affect any of the Petitioner's rights that are protected by the NYCCBL, the Executive Secretary correctly concluded that the facts alleged do not relate in any way to acts prescribed by the NYCCBL.

In Decision No. B-12-91(ES), the Executive Secretary explained that "[t]he NYCCBL does not provide a remedy for every perceived wrong or

⁵ Decision Nos. B-15-83; B-39-82; B-12-82.

⁶ Decision Nos. B-24-86; B-14-83; B-13-82; B-11-82.

inequity." In other words, it is not within the purview of this Board to protect public employees from any and all forms of wrongdoing. In the context of this case, the NYCCBL is limited in its purpose and function, which is to safeguard the rights of public employees that are created by the statute, i.e., the right to organize, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations, and the right to refrain from such activities.⁷ The threshold issue in the Executive Secretary's preliminary review of an improper practice charge leveled against a public employee organization is whether the petition, assuming that all of the allegations of fact are true, identifies acts which are prohibited because they would impair or diminish the enjoyment of these rights. Absent such a showing, the Executive Secretary cannot find that an allegation constitutes a claim of improper practice within the meaning of Section 12-306b of the NYCCBL.

In dismissing the instant petition, the Executive Secretary determined that even assuming, arguendo, that the alleged theft and coverup of PBA funds occurred, these facts do not amount to a violation of the NYCCBL. In other words, even if proven, a breach of the fiduciary duty owed by PBA officials to its members which has no bearing on the employment relationship does not constitute basis for a finding of an improper practice as that term is defined in Section 12-306b of the NYCCBL. It may constitute wrongdoing but, if so, it is nevertheless matter not within the jurisdiction of this Board. Thus, the Executive Secretary did not err in finding that the Petitioner's complaint fails to state a cause of action for which relief may be granted under the NYCCBL.

Finally, with respect to the Petitioner's complaint that the Respondent's refusal to provide him with the PBA's financial records "is a blatant violation of union mandate," we reiterate that the conduct complained of is an internal union matter not subject to the jurisdiction of this Board.

⁷ See Section 12-305 of the NYCCBL.

It is well settled that "unlike the federal laws protecting the rights of union members in the private sector, neither the NYCCBL nor the Taylor Law regulate internal affairs of unions."⁸

In support of this conclusion, we note a decision of the Public Employees Relations Board ("PERB") which is directly on point.⁹ In United College Employees, a PERB Hearing Officer held that a union's failure to provide information regarding union finances to a dues-paying member, concerning a matter unrelated to the union's representation of him in his status as an employee, was an internal union matter without the purview of the PERB.¹⁰

The matter before us concerns a similar request for information. The Respondents' alleged failure to respond to the Petitioner's request for this information, without a showing that the underlying purpose of the request pertains to matters related to his status as an employee, fails to raise an issue which implicates the Respondents' duty of fair representation. Therefore, regardless of whether the Petitioner has a right to the information he seeks, e.g., by virtue of the PBA's constitution or bylaws, a claim that

⁸ See Decision No. B-26-90. See also, Decision Nos. B-23-84; B-18-84; B-15-83; B-18-79; B-1-79.

In Decision No. B-1-79, we noted that the NYCCBL refers to intra union matters in two sections: Section 12-313 relating to the rules of the Municipal Labor Committee and Section 12-314 relating to unions which practice illegal discrimination based on race, color, creed or national origin. Therein, we held: "the specific mention of these two subjects in the Statute supports our finding that the Legislature did not intend the Board to have jurisdiction over subjects not specified in the Law."

⁹ See United College Employees of Fashion Institute of Technology, Local 3457, 10 PERB ¶4558 (1987).

¹⁰ The Hearing Officer's decision was not appealed to PERB and therefore was final and dispositive.

does not otherwise state a violation of the NYCCBL is beyond the scope of this Board's jurisdiction.¹¹

Accordingly, because the Petitioner has not alleged any basis for overturning the decision of the Executive Secretary in Decision No. B-12-91(ES), we shall deny the appeal and confirm the Determination of the Executive Secretary. We note, however, as did the Executive Secretary, that dismissal of the petition is without prejudice to any rights the Petitioner may have in any other forum.

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 appeal filed by Charles Leahey be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-12-91(ES) be, and the same hereby is, confirmed.

DATED: New York, New York
April 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GEORGE B. DANIELS

¹¹ An affirmative duty of disclosure has been imposed by PERB in only one circumstance. E.g., in United University Professions, Inc., 13 PERB ¶3090 (1980), aff'd 15 PERB ¶7001 (N.Y.App.Div.3d Dept. 1982), mot. for leave to appeal denied 15 PERB ¶7010 (N.Y.Ct.App. 1982), PERB determined that a union's failure to provide financial information to justify an amount of its rebate of agency fees violated a faculty member's statutory right to refrain from union activity. See also, Decision No. B-44-82.

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MEMBER

ELSIE A. CRUM
MEMBER