Anzevino v. DEP, L.924, DC37, 47 OCB 34 (BCB 1991) [Decision No. B-34-91 (IP)]

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

-between-

ANTONIO J. ANZEVINO,

Petitioner,

-and-

THE CITY OF NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION and DISTRICT COUNCIL 37, AFSCME, AFL-CIO, Local 924,

Respondents.
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DECISION NO. B-34-91

DOCKET NO. BCB-1355-91

INTERIM DECISION AND ORDER

On January 11, 1991, Antonio J. Anzevino ("the Petitioner") filed a verified improper practice petition against the New York City Department of Environmental Protection, Bureau of Water Supply ("the Department") and against District Council 37, AFSCME, AFL-CIO, Local 924 ("District Council 37" or "the Union"), alleging that the Union made prejudicial errors in processing two of the Petitioner's grievances, thereby interfering with the statutory rights of employees under Section 12-306 of the New York City Collective Bargaining Law

("NYCCBL"),[1] and that the Department discriminated against the Petitioner with respect to overtime, job transfer assignments, and promotional opportunities.

District Council 37 filed its answer on February 27, 1991.

The Department, appearing by the City of New York Office of Labor Relations ("the City"), did not answer, but, instead, submitted a motion to dismiss the petition on February 19, 1991, on the ground that it failed to state a cause of action that this Board may consider. This Interim Decision and Order is limited strictly to the merits of the City's motion to dismiss the petition.

BACKGROUND

The Petitioner holds the Civil Service title of Laborer. He is designated as a "Laborer Group B."[2] The Petitioner works for the Department's

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[1] NYCCBL §12-306 provides, in pertinent part, as follows:

> **Improper practices; good faith bargaining.**
> **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 their rights granted in section 1173-4.1 (now re-numbered as 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 representa-tive of public employees of such employer.

NYCCBL §12-305 provides, in pertinent part, as follows:

> **Rights of public employees and certified employee organizations.** 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 such activities. * * * A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

[2] Laborer Groups A, B and C+ were created by a determination of the Office of the Comptroller for the City of New York. The groups are not Civil Service designations.

Bureau of Water Supply and he is assigned to the upstate Watershed Area's East of Hudson Division.

On October 12, 1990, the Petitioner filed two grievances with the Bureau of Water Supply. The first grievance alleged that the Bureau denied his request for reassignment either to the Mechanical Shop in Carmel, or to the Croton Lake Electrical Shop. In his second grievance, the Petitioner alleged that he had not received a fair share of overtime. During discussions with the Union during this period, District Council 37 informed the Petitioner "that it did not believe that there was a contractual basis for proceeding on these two complaints."

By letter dated October 13, 1990, the Petitioner asked one of Distict Council 37's Representatives to arrange a labor-management meeting. His proposed agenda included "Transfers, Overtime, both based on seniority and will include changes in Titles for positions in the upstate watershed."

In separate letters dated October 23, 1990, the Bureau's Assistant Chief of the Sources Division denied the overtime grievance and referred the reassignment grievance to the Department's Director of Labor Relations for consideration at Step II. By letter dated November 7, 1990, the Petitioner, in his own behalf, appealed both grievances to Step II. In his letter, the Petitioner also referred to his request for a labor-management meeting.

By letter dated November 28, 1990, the Director of Labor Relations notified the Bureau that he had scheduled a hearing on both grievances for December 10, 1990. The hearing would be held in the Valhalla Division Office, located in upstate New York.

The hearing was held as scheduled. The Petitioner, the Department's Director of Labor Relations, and a Union representative were present. The Petitioner spoke for himself and reiterated his allegations. The Union representative stated that the "Petitioner's [overtime] claim, without evidence of inequitable distribution of overtime, was insufficient to support a grievance."

On December 12, 1990, the Petitioner commenced this improper practice proceeding. In the petition, he made three specific objections to the manner in which District Council 37 represented him: (1) he objected to what he considered a statement against his interest made by the Union representative during the hearing on December 10; (2) he claimed that the Union did not process his grievances in a timely manner; and (3) he maintained that there was a conflict of interest in his union representation because the Union representative held the supervisory title of District Foreman. He further alleged that the management of the Department discriminated against him with respect to overtime, job transfer assignments, and promotional opportunities.

POSITION OF THE CITY

In its motion to dismiss the improper practice petition, the City contends that the Petitioner alleged no conduct by the Department that would have violated the rights "granted him under Section 12-306(a) of the [NYCCBL]."[3] According to the City, "[t]here is simply no allegation that the

[3] NYCCBL §12-306a. provides as follows:

> **Improper practices: good faith bargaining.**
>
> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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.

City encouraged or discouraged membership in, or participation in the activities of, any public employee organization, [n]or that the City interfered with, restrained, or coerced him in the exercise of his rights granted under § 12-305 of the NYCCBL."

In support of its position, the City contends that the Petitioner presented neither allegations of fact nor probative evidence showing how the action or decisions of the City were in retaliation for protected union activity. In other words, in the City's view, the "discrimination alleged is simply not linked to motives proscribed in the NYCCBL."

With respect to the Petitioner's conflict of interest claim, the City argues that that allegation also fails to state a cause of action under the NYCCBL. Noting the absence of any allegation that the employer or the Union encouraged or discouraged membership or participation in union activities, the City concludes that "[t]his pleading is simply devoid of any objective evidence which could even infer anti-union animus."

Finally, the City contends that the petition alleges no facts that might suggest how the employer interfered with union administration.

For these reasons, the City contends that petition, "on its face, does not state a cause of action," and it must be dismissed.

Discussion

The improper practice charged in this case stems from the Petitioner's belief that his Union violated the duty of fair representation that it owed to him by handling his grievances improperly. The main thrust of the City's motion to dismiss the petition, however, is based upon its assertion that the petition fails to allege facts that would constitute a §12-306a. violation (especially, the absence of any claim of employer retaliation for union activity). We find that most of the City's argument in support of its motion is not relevant to the complaint as lodged, for the Petitioner's charge is directed toward conduct by the Union, not the employer.

In the final numbered paragraph of its motion papers, the City suggests that even if the Union somehow did neglect an obligation to one of its members, the employer was blameless and thus should be excluded as a respondent. Based upon the current state of the law, this premise is faulty, for the following reasons:

During its regular 1990 session, the State Legislature passed a bill concerning claimed breaches of the duty of fair representation. The Governor signed the bill into law, effective July 11, 1990.[4] This legislation effected several changes, including an amendment to Section 209-a. of the Taylor Law ("Improper employer practices; improper organization practices; application").

Previously, the duty of fair representation was a common law doctrine developed by the federal judiciary and adopted by the State courts in a line of public sector employment cases.[5] The doctrine balances the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right. It is the duty of a union, under this doctrine, to act fairly toward all employees that it represents without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. A breach of the duty occurs when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[6]

Chapter 467 of the Laws of 1990 both codified the duty of fair representation doctrine and authorized the Public Employment Relations Board (PERB) to retain jurisdiction and apportion liability between the union and the employer according to the damage caused by the fault of each in cases where the union has been found to have breached its duty by processing

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[4] Laws of 1990, Ch. 467.

[5] See Interim Decision No. B-51-90, pp. 15-19 for a thorough review of the caselaw behind this doctrine.

[6] Decision No. B-5-91.

grievances improperly. New subdivision 3. of Section 209-a. of the Taylor Law reads as follows:

> The public employer shall be made a party to any charge filed under [the improper employee organization practices section] which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

This new section is an adjunct to the remedial power of the PERB's improper practice jurisdiction, set forth in Section 205.5(d) of the Taylor Law (as amended), which reads, in pertinent part, as follows:

> To establish procedures for the prevention of improper employer and employee organization practices as provided in [§209-a. of the Taylor Law], and to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article (but not to assess exemplary damages), including but not limited to the reinstatement of employees with or without back pay;
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> * * *
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> When the board has determined that a duly recognized or certified employee organization representing public employees has breached its duty of fair representation in the pro-cessing or failure to process a claim alleg-ing that a public employer has breached its agreement with such employee organization, the board may direct the employee organiza-tion and the public employer to process the contract claim in accordance with the parties' grievance procedure. The board may, in its discretion, retain jurisdiction to apportion between such employee organization and public employer any damages assessed as a result of such grievance procedure.

This remedial power, with respect to duty of fair representation jurisdiction, authorizes the PERB, as necessary, to apportion between the union and the employer any damages assessed through the grievance procedure in light of the DFR breach found.[7]

Pursuant to Section 212 of the Taylor Law ("the local option section"), which authorizes the existence of the NYCCBL and of the Office of Collective

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[7] See Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369, 2379 (1967).

Bargaining, the provisions of the 1990 Taylor Law amendments pertaining to the duty of fair representation are applicable to this Board.

The reason in general for the change in the law with respect to public employees in duty of fair representation cases is to have all parties appear at whichever step of the grievance procedure is appropriate when a breach of a collective bargaining agreement has been alleged, and, as is charged here, the aggrieved unit member has been prevented from effectively exhausting his contractual remedies by the Union's alleged improprieties in processing his grievance. It is true that the employer in such a situation may have done nothing to prevent the exhaustion of the contractual remedies to which it agreed in the collective bargaining agreement. But if the employer has breached the agreement, and if the breach could have been remedied through the grievance arbitration process, were it not for the Union's breach of its duty of fair representation to the employee, the employer should not be shielded from the natural consequences of its breach of the agreement by wrongful union conduct in the enforcement of the agreement.

The governing principle, then, in a case where it has been proved that the union breached its duty of fair representation, and that a grievance is meritorious, thus making the employer liable, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases, if any, in those damages caused by the union's failure to process the grievance properly should not be charged to the employer.

With regard to a motion to dismiss an improper practice petition such as the motion before us here, the moving party is deemed to concede the truth of the facts alleged by the Petitioner. In addition, the petition is entitled to every favorable inference, and it will be taken to allege whatever may be

implied from its statements by reasonable and fair intendment.[8]

Thus, for the purposes of deciding the City's motion we must accept the Petitioner's contention that his union breached its duty of fair representation by processing his grievances arbitrarily, discriminatorily, or in bad faith. In such case, under new subdivision 3. of Section 209-a. of the Taylor Law, an employer cannot gain exemption from a duty of fair representation charge involving grievance processing by claiming that it is without fault. We are satisfied that the Petitioner has presented sufficient unrebutted material allegations to withstand the City's motion to dismiss. Although incomplete, the Petitioner's claim as a whole manifests a cause of action cognizable under the NYCCBL, and sufficiently puts the City on notice of the charge to be met to enable it to formulate a meaningful response.

We note in this regard that the Petitioner's claim of discriminatory conduct by the employer relates to actions that are the subjects of grievances, the processing of which forms the basis for the Petitioner's claim against the Union. In other words, the alleged discrimination by the Department is being challenged on the grounds that it was violative of contractual rights and/or policies dealing with seniority and with the equitable distribution of overtime, and not on the grounds that it was improperly motivated within the meaning of the NYCCBL. In such a case, by law, joinder of the employer as a party is mandated by subdivision 3. of Section 209-a.

Moreover, in this case we note that the Department was fully aware of the nature of the Petitioner's claims that his contractual rights were being violated. In his "reassignment" grievance filing, which he submitted to the Department on October 12, 1990, he referred to an alleged contract violation directly: "I cite contractual agreement in accordance with the Comptroller's Determination which states, 'Laborers shall assist skilled craftsman.'" In

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[8] Decision Nos. B-32-90 and B-34-89.

his "overtime" grievance, filed on the same day, he alleged that the Department had violated a City policy: "I cite New York City's policy which grants overtime on a seniority basis, in title and in an equitable manner." The Department provided substantive responses to both of these grievances at the lower steps of the grievance procedure. At no time did it take the position that either matter was outside the scope of the contractual grievance procedure, nor did the Department contend that it could not understand the nature of the allegations being raised against it. In his letter to the Department dated November 7, 1990, requesting a labor-management committee meeting, and also requesting re-consideration of the grievances at the second step, the Petitioner reiterated his allegations that contractual violations had occurred: "I am taking this opportunity to forward two separate Step I grievances together with replies . . . . I am enclosing documentation to support my complaints leading to the filing of the grievance[s] in question." The Department responded by scheduling a Step II hearing "on the aforementioned grievances on Monday, December 10, 1990." Finally, in his request for re-consideration at Step III, the Petitioner made plain his dissatisfaction with the manner in which his grievances had been processed to that point: "It is with much regret that I must report that the grievances in question have not met with any successful response from my union, Local 924, District Council 37 and [the Department]."

In these circumstances, the Petitioner's allegations that his Union prosecuted his contractual grievances inadequately fit squarely within coverage contemplated by the new addition to Section 209-a. of the Taylor Law. Since the Department may be liable for a portion of any damages that may be determined to have accrued if the Union is found to have breached its duty,[9] the Department's task in answering the petition herein will be to attempt to demonstrate either or both of the following: (a) that the Union did not breach

[9] An apportionment of damages is provided for in Section 205.5(d) of the Taylor Law (as amended).

its duty of fair representation with regard to processing the Petitioner's grievances; and/or (b) that the grievances were not meritorious, so that the employer would not be liable, regardless of the Union's conduct.

We shall, therefore, order the City to serve and file its answer to the petition within seven days of receipt of this determination.

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 motion of the City of New York to dismiss the improper practice petition docketed as BCB-1355-91 be, and the same hereby is, denied; and it is further

ORDERED, that the City of New York shall serve and file an answer to the improper practice petition docketed as BCB-1355-91 within seven (7) days of receipt of this Interim Decision and Order.

DATED: New York, N.Y.
June 20, 1991

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

GEORGE B. DANIELS
MEMBER

ELSIE A. CRUM
MEMBER