Cunningham v. DOP, 49 OCB 31 (BCB 1992) [Decision No. B-31-92 (ES)]

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

-between-

Albert Cunningham,

Petitioner,

-and-

New York City Department of Probation,

Respondent.
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Decision No. B-31-92 (ES)

Docket No. BCB-1497-92

DETERMINATION OF EXECUTIVE SECRETARY

On June 11, 1992, Albert Cunningham ("petitioner") filed a verified improper practice petition against the New York City Department of Probation ("respondent" or "Department") in which he alleges as follows:

> On 5/7/92 I received a notice and statement of charges from Alfred Siegel, Acting Comm[issioner]. I was ordered to attend an informal conference w[ith] union representative. On 5/22/92 I received a notice of Determination after informal conference. I did not agree with said recommendation and upon being served with these documents I requested to go for an appeal for a formal conference. I notified Kurt V. Sydow immediately and also on 5/22/92 I notified my union rep[resentative] to go forward with Step Two. Union rep[resentative] relayed she was awaiting date for formal hearing on 5/25/92. On 6/2/92 I received a letter of termination for failure to appeal Step I informal conference decision.

As a remedy, petitioner seeks reinstatement to his former position with "all back monies due," all time and leave reinstated and a formal letter of apology placed in his personnel file.

Pursuant to Title 61, Section 1-07(d) of the Rules of the City of New York (formerly referred to as Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that it does not allege facts sufficient as a matter of law to constitute a claim of improper practice against the Department within the meaning of Section 12-306a 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, form, join, and assist public employee organizations; and the right to refrain from such activities.

In the instant case, petitioner has failed to state any facts which show that the Department committed any acts which may constitute an improper public employer practice. However, for the reasons stated below, the petition herein will not be dismissed at this time, but will be consolidated with a related petition filed by the petitioner against his Union.

In July 1990, the New York State Legislature passed a bill concerning claimed breaches of the duty of fair representation ("DFR").[2] This

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[1] Section 12-306a of the NYCCBL provides as follows:

> **Improper public employer 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.

[2] The duty of fair representation 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. A union breaches its duty of fair representation if it fails to act fairly, impartially and in a non-arbitrary manner in negotiating, administering and enforcing the collective

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legislation effected several changes, including an addition to Section 209-a of the Civil Service Law (also referred to as the Taylor Law), Section 209-a.3, which provides that:

> 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. (emphasis added).

To effectuate Section 209-a.3, Section 205.5(d) of the Taylor Law also was amended to authorize the New York State Public Employment Relations Board ("PERB"), in certain circumstances, to direct the employee organization and the employer to process the employee's claim in accordance with their grievance procedure.[3] Further, Section 205.5(d) authorizes PERB to retain

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[2](...continued)
bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). See also, Decision Nos. B-21-92; B-34-91; B-72-88;
B-53-87; B-13-82.

[3] Section 205 of the Civil Service Law provides, in relevant part:

> 5. In addition to the powers and functions provided in other sections of this article, the board shall have the following powers and functions:
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> * * *
>
> (d) to establish procedures for the prevention of improper employer and employee organization practices as provided in section two hundred nine-a of this article, 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; provided, however, that except as appropriate to effectuate the policies of subdivision three of section two hundred nine-a of this article, the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such

(continued...)

jurisdiction over the matter to apportion any damages assessed as a result of the grievance procedure between the employee organization and the employer. Pursuant to the terms of Section 212 of the Taylor Law[4], Sections 209a.3 and 205.5(d) are applicable to the NYCCBL and its constituent Board of Collective Bargaining.[5]

The above-referenced provisions of the Taylor Law are applicable in the instant case in that the petitioner, on June 18, 1992, filed a verified

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[3](...continued)
an agreement that would not otherwise constitute an improper employer or employee organization practice. 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 processing or failure to process a claim alleging that a public employer has breached its agreement with such employee organization, the board may direct the employee organization 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....

[4] Section 212 of the Taylor Law provides, in relevant part, as follows:

> 1. This article, except ... paragraph (d) of subdivision five of section two hundred five ... section two hundred nine-a ... shall be inapplicable to any government (other than that state or public authority) which, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this article with respect to the state.

[5] See Decision No. B-34-91.

improper labor practice petition against Local 1070, District Council 37, AFSCME, docketed as BCB-1501-92, in which he alleges that the Union breached its duty of fair representation, in violation of Section 12-306b of the NYCCBL[6]. Specifically, petitioner alleges that the Union failed to represent him in a timely manner in out-of-title grievances; failed to pursue harassment allegations and transfer requests; failed to provide proper representation in all management disputes; failed to provide a shop steward on the premises as required in the union contract, and "failure of representation in collective bargaining agreement for litigation and arbitration as cited in the union contract." As a remedy, petitioner requests review of the Union's handling of all grievances submitted to it, including review of the Union's handling of improper termination proceedings, and reinstatement to his former position at the Department.

If the petitioner had not filed a separate claim against the Department, under Section 209-a.3 of the Taylor Law he would be required to amend his petition against the Union to add the Department. Since the petitioner has filed a separate but related claim against the Department, it would seem to serve no useful purpose to dismiss the petition herein and simultaneously to direct that the Department be made a party to the petition against the Union.

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[6] 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;
>
> (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.

The more efficient course, in my view, is to consolidate these two proceedings, and to give the Department an opportunity to respond to those aspects of the duty of fair representation charge which involve its own actions as well as those of the Union. Accordingly, although I find that no legally sufficient independent claim of improper practice has been alleged against the Department, I shall not dismiss the petition. Instead, I hereby give notice that this office intends to consolidate this petition with the petition in the case docketed as BCB-1501-92 for further proceedings. The Department shall have ten days from its receipt of this decision in which to serve and file a verified answer responding to so much of the petition in BCB-1501-92 as may be relevant to its own actions.

Dated: New York, New York
July 7, 1992

Loren Krause Luzmore
Executive Secretary