Walz v. L.461, DC37 & L. Perlmutter (as Pres.), 49 OCB 5 (BCB 1992) [Decision No. B-5-92 (IP)]

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

-between-

HERMANN WALZ,
Petitioner,

-and-

LOCAL 461, DISTRICT COUNCIL 37, AFSCME, AFL-CIO and LEO PERLMUTTER, PRESIDENT,
Respondents.
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DECISION NO. B-5-92

DOCKET NO. BCB-1422-91

DECISION AND ORDER

On September 30, 1991, Hermann Walz ("the Petitioner") filed a verified improper practice petition against Local 461, District Council 37 (New York City Lifeguards) and against its President, Leo Perlmutter (collectively referred to as "the Respondents"). The petition alleges that in failing to hold proper union elections and follow certain practices, the Respondents violated Sections 12-306a.(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] NYCCBL §12-306 (formerly §1173-4.2) 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:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 (formerly §1173-4.1) of this chapter;

* * *

(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;

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 the facts as alleged did not constitute an improper practice within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). Accordingly, in a determination dated January 23, 1992, the petition was dismissed.[2]

The Petitioner received the Executive Secretary's determination on January 28, 1992. By letter dated February 8, 1992, he appealed the determination to the Board of Collective Bargaining ("the Board").

The Petition

The Petitioner claims that the President of Local 461 has refused to hold a union election during the last eight years. He further contends that there has never been a union election open to the membership, and that the President cancelled a scheduled election two hours before it was due to be held, claiming in part that the cancellation was due to a subway accident. The petition alleges that the President does not return telephone calls, and that he has refused to release a copy of the Union constitution.

According to the Petitioner, the President of Local 461

[2] Decision No. B-1-92 (ES).

holds an elected office in District Council 37 Local 508 (New York City Lifeguard Supervisors).[3] In the Petitioner's view, holding office in a supervisory local places the President in direct conflict with the interests of the members of Local 461.

The petition seeks a four-part remedy: 1) that the local be directed to turn over a copy of its Constitution; 2) that its President, along with its other officers, resign; 3) that an election be held immediately; and 4) that evidence of any past union election open to the membership be disclosed.

The Executive Secretary's Determination

In Decision No. B-1-92 (ES), the Executive Secretary found that the petition did not allege facts sufficient as a matter of law to constitute an improper practice under the NYCCBL. She based her determination upon the Petitioner's failure to explain how his allegations related to anything other than internal union affairs. The Executive Secretary held that charges relating purely to internal union matters are not subject to the Board's jurisdiction, absent a showing of an effect upon the employee's terms and conditions of employment, or upon the nature of the representation accorded to the employee by the union with respect to his or her 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 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.

The Appeal

[3] Both City Lifeguards and Lifeguard supervisory titles have been certified for union representation by District Council 37 under a common bargaining certificate. [See Certification No. 25-80 (as amended).]

In his appeal, the Petitioner argues that his terms and conditions of employment were affected, because he and other members of his union were brought up on charges that resulted in the termination of his employment. According to the Petitioner, the disciplinary action that he suffered was a direct result of his call for a union election. He contends that the charges against him were never sustained by anything more than one person's "fabricated word." The Petitioner maintains that despite the statements of several supporting witnesses, "I was fired for signing out with my supervisors permission [sic]."

Discussion

The purpose of an appeal of a determination made by the Executive Secretary that an improper practice petition does not contain facts sufficient as a matter of law to constitute a violation of the statute, is to review the correctness of that ruling based upon the facts that were available to the Executive Secretary at the time that the determination was made. New facts attacking the basis for the determination may not be alleged in the appeal.[4]

After carefully reviewing the record that was before the Executive Secretary when she made her determination, we find that the Petitioner made no mention of a retaliatory discharge in his original filing. His petition contained four specifics: (1) The local never held an open election, and an election was cancelled two hours before it was due to be held; (2) The local President did not return telephone calls; (3) The Petitioner was denied a copy of the local Constitution; and (4) By holding office in a supervisory union, the President had a conflict of interest. From these allegations, there is no possible way that the Executive Secretary could have inferred a claim of allegedly retaliatory discharge. Therefore, in rendering our decision herein, we will not consider the Petitioner's statement in his appeal that his terms and conditions of employment were affected because he allegedly was terminated

[4] Decision Nos. B-47-91; B-28-91; B-54-90; B-62-89; B-29-88; B-55-87; and B-26-86.

because of his union activity.

Based upon the record that was before the Executive Secretary when she made her determination, we agree entirely with her conclusion. Accepting the truth and accuracy of the allegations originally set forth by the Petitioner, the Respondents committed no act that would have violated the NYCCBL. We have long held that complaints concerning internal union matters are not subject to our jurisdiction unless it can be shown that they affect the employee's terms and conditions of employment or the nature of the representation accorded to the employee by the union with respect to his employment.[5] Unlike the federal laws protecting the rights of union members in the private sector, neither the NYCCBL nor the Taylor Law regulate the internal affairs of unions.[6] In his original petition, the Petitioner offered no evidence that his terms and conditions of employment were affected, or that his representation by District Council 37, vis-a-vis his employer, was deficient. The alleged failure of the Respondents to hold open local elections, and their alleged refusal to return telephone calls and to furnish a copy of the Constitution, without a showing that their underlying purpose pertained to matters related to the Petitioner's status as an employee, does not state a cause of action under the NYCCBL.

Likewise, the Petitioner's assertion that Local 461's President holds concurrent office in a supervisory branch local does not constitute an improper practice. As noted above at note 3., both Local 461 (City lifeguard)

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[5] See Decision Nos. B-23-84; B-15-83; B-18-79; and B-1-79. These holdings are consistent with the view of the state Public Employment Relations Board (Civil Service Employees Association and Bogack, 9 PERB ¶3064 [1976]; United Federation of Teachers and Dembicer, 9 PERB ¶3018 [1976]; Capalbo and Council 82, Security and Law Enforcement Employees, 21 PERB ¶4556 [Dir. 1988]; Civil Service Employees Association, Inc. and Michael, 13 PERB ¶4522 [H.O. 1980]; and Lucheso and Deputy Sheriff's Benevolent Association of Onondaga County, 11 PERB ¶4589 [H.O. 1978]).

[6] Decision Nos. B-22-91; B-26-90; B-23-84; B-18-84; B-15-83; and B-18-79.

and Local 508 (lifeguard supervisor) titles have been certified for union representation by District Council 37 under a common bargaining certificate. Section 12-309(1) of the NYCCBL expressly permits the creation of bargaining units that include both supervisory and non-supervisory employees. It sets no limits on the rights of employees in these units to act as union officers or officials. This being so, it cannot be intrinsically wrongful or illegal for a member to hold dual offices in the supervisory and non-supervisory branch locals of a joint bargaining unit.

The Respondents did not create the unit in question here. Like all bargaining units created pursuant to the provisions of the NYCCBL, the Board of Certification certified the bargaining unit to which the Petitioner belongs. If the Petitioner believes that this unit does not and cannot serve the interests of the employees that it represents, and if a substantial number of other unit employees share his views, the law affords them the means of redressing the situation by seeking a change in the composition of their collective bargaining unit.

For these reasons, we shall dismiss the Petitioner's appeal and confirm the determination of the Executive Secretary in Decision No. B-1-92 (ES). We note, as did the Executive Secretary, that dismissal of this petition is without prejudice to any rights the Petitioner may have in any other forum or proceeding.

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 of the Executive Secretary's determination in the matter of the improper practice petition of Hermann Walz in Docket No. BCB-1422-91 be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-1-92 (ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y. MALCOLM D. MACDONALD

February 26, 1992

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