Elcock v. L.237, IBT & L. Lundy, 49 OCB 6 (BCB 1992) [Decision No. B-6-92 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter Of
Horace R. Elcock,

Petitioner,

-and- Decision No. B-6-92 (ES)

Lois Lundy and Local 237, International Brotherhood of Teamsters, Docket No. BCB-1458-92

Respondents.
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DETERMINATION Of EXECUTIVE SECRETARY

On January 24, 1992, Horace R. Elcock ("petitioner") filed a verified improper practice petition alleging that Lois Lundy and Local 237, International Brotherhood of Teamsters ("the Union") violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] by failing to protect and defend his

[1]Section 12-306 of the NYCCBL provides, in relevant part, as follows:

> (b) **Improper public employee organization practices.** It shall be an improper practice for a public employee organization 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, 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.

rights as a member of the Union. As a remedy, petitioner asks that he be made whole by the Union in the amount of $185,000 for lost wages, medical bills, attorneys' fees, telephone bills and pain and suffering.

Petitioner's Allegations

Petitioner alleges that he was employed by the New York City Department of Corrections in the Nutritional Services Division as a Training Supervisor. On July 26, 1988, Inspectors Bizelle and Person of the Inspector General's Office came to his work site and told him that he was under investigation and would either have to submit to a urinalysis test for drugs or be suspended. When petitioner asked the nature of the charges, he was told that such information could only be divulged to an attorney.

Petitioner was escorted to the Health Management Division, where he submitted to producing a specimen for urinalysis under the visual surveillance of investigators. The evidence was placed in a manila envelope and the envelope was locked in a safe. At that time, petitioner saw a document in which "glassy eyes and nervousness" was given as the reason for the investigation.

On July 29, 1988, petitioner met with Lois Lundy, a business agent for the Union. Ms. Lundy told petitioner that it was her opinion that he had been "set up" by a Senior Cook at his work site, and that this was not the first instance in which the

Senior Cook had "taken revenge" in this manner.

On September 28, 1988, petitioner wrote a letter to Ms. Lundy stating, in relevant part:

> On August 30, 1988 ... I was suspended. [I] was told ... that, off the record, my suspension is a result of a urinalysis conducted ... on July 26, 1988 .... [D]uring the ' month of August 1988, 1 had ... cause to file letters of grievances ... Unfortunately for me, you were on vacation. In any event, upon your return from vacation, I spoke to you ... on September 9, 1988. ... You said you are aware of letters of grievances I had sent to your attention. However, you told me that my grievance against the Director of Administration is a completely different issue in relation to the urinalysis on July 26, 1988. Nevertheless, you assured me that you will do everything in your power to afford me a Departmental Hearing. You wanted to know the names of the investigators who conducted the urinalysis on July 26, 1988. 1 take it you have misplaced my written statement to you on July 29, 1988 ....
>
> According to standards initiated by the Department of Corrections, for an investigation to be conducted, there must be "Circumstances Warranting Disciplinary Action." Is there any probable cause to justify the actions of investigators Bizelle and Person? ... There is no question as to my performance and attendance prior to and after July 26, 1988. I, to my knowledge, have never been the subject of any investigation. My suspension is totally unwarranted and is causing me unnecessary stress and embarrassment.
>
> In summary, firstly, the actions of Investigators Bizelle and Person on July 26, 1988 were not prompted by "probable cause"; secondly, the actions of Rodney Benson, Director of Administration, are questionable; ... thirdly, my grievances directed toward [Benson] appear to have been totally ignored; and fourthly,, after a total of ... five work weeks after urinalysis I was abruptly put on suspension. No contact was made with respect to why I am on suspension ... [I]t has been twenty days since I was put on suspension.
>
> Ms. Lundy, would you kindly use your influential office to expedite the process for a Departmental Hearing?

On October 5, 1988, petitioner was told to report to the

Inspector General's office. He called the Union and spoke to Stanley Shapiro, who advised him not to go to the Inspector General's office until further notice from the Union. Not having heard from the Union, petitioner went to the Inspector General's office on October 6, 1988, where he was served with departmental charges and assigned to modified duty.

On November 2, 1988, petitioner was served with a statement of charges and notice that an informal conference would be held on November 15, 1988. On November 15, petitioner was informed verbally by the Director of Administration that his Step I hearing would be postponed indefinitely. On November 16, 1988, petitioner was made responsible for the daily operation of the Office of Requisition and Logistical Support Services in the absence of a Director of the Department. On January 9, 1989, petitioner was ordered to train a new Director of Requisition and Logistical Support Services; he refused. Petitioner submitted an out-of-title grievance to the Union on January 12, 1989.

On January 23, 1989, petitioner was informed by the Director of Administration that his Step I conference was scheduled for the next day. Ms. Lundy was present at the conference on January 24, 1989. Petitioner requested that he be told the reason why a urinalysis was conducted, and that he be given a copy of the test results. In response to petitioner's questions during the conference, Barbara Mayes, Executive Director of the Department, said, "I ask the questions, you give me the answers." A Notice

of Termination (Charges Upheld) was served on petitioner on March 2, 1989.

A Step II conference was held on April 25, 1989, at which Ms. Lundy was present. During the conference, petitioner requested, and received for the first time, a copy of the urinalysis results. Petitioner states:

> Lundy ... requested that she have a one-on-one conversation with me ... [and] said that I 'should take the laboratory test results to my doctor and have him cook up a prescription for me.' I told Lois Lundy that I thought her idea was ludicrous, I did not have to prove anything. I told her to scrutinize the laboratory test results, as there are major discrepancies. I indicated that the copy did not have my name [on it] and the laboratory received the urine on July 25, 1988 (this could not be possible, as I gave the urine sample on July 26, 1988.)
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> When asked about these discrepancies ... Richard Yates [Acting Director of Labor Relations) said the testing was actually done on July 26, 1988 .... He said the time stamping machine was not working on July 26, 1988, hence the discrepancy. I then asked why is it that in the handwritten portion of what is supposed to be the duplicate of Part A, someone had written the date as July 25, 1988. R. Yates said the results were positive and I have to prove different, matter closed. I was given until May 2, 1989 to produce any copies of prescriptions issued to me prior to July 26, 1988.

On June 7, 1989, the Department issued a Step II determination in which petitioner was found "guilty of positive test results obtained by urinalysis." Petitioner then contacted attorney Marttie Louis Thompson "to 'jolt' Lois Lundy (my Union Representative) into taking a more diligent stand on my behalf." In his letter dated June 19, 1989, petitioner informed Mr. Thompson that:

> To date, I have not received any correspondence as to

> the determination and recommendation on contacting Lois Lundy ... I was told that I am a 'pest' and 'I would be shocked if I knew how much she begs for my job.' I indicated to her that I am not pleased with her methods of representation and was told 'too bad, do what you've got to do.'

Mr. Thompson wrote to Ms. Lundy on June 19, 1989, stating:

> Mr. Elcock has asked me to communicate with you .... [H]e mentioned several points which I find very troubling.
>
> Mr. Elcock stated that he delivered the urine specimen to the Laboratory on 7/26/88. The Laboratory indicated that the urine was delivered on 7/25/88. Clearly, someone is in error here, and I do not believe that it is Mr. Elcock. I am of the opinion that there is a "Chain of Custody" problem, and unless the Department of Corrections can establish that the Chain was unbroken, I do not believe that they can establish a case against him.
>
> However, I have been informed that the Laboratory ended its business about one week after Mr. Elcock's specimen was tested, and there have been no confirmatory tests performed. If this is true, it makes the test results suspect. This matter is further complicated by the fact that Mr. Elcock did not receive the results of the specimen until April 25, 1989. 1 do not understand such an inordinate delay.
>
> I believe that if the Union takes a comprehensive and aggressive stand on behalf of Mr. Elcock, the Department of Corrections would clear his record.

Petitioner was terminated from employment on June 21, 1989. At the Union's office on June 22, 1989, in expectation of having his case proceed to arbitration, petitioner signed a waiver of his rights to have his case heard in other forums. The waiver was signed by Mr. Shapiro, the Union's representative, on the same date.

On January 2, 1990, petitioner met with Ms. Lundy and her supervisor, Frank Scarpinato, Jr. Mr. Scarpinato told petitioner that in order to "reopen his case," the Union would need the results of an independent urinalysis and a copy of a letter from petitioner's dentist stating the type of medication he was using in July, 1988. The dentist and the laboratory requested letters from the Union before releasing this information, which were not forthcoming. After receiving assurances from Mr. Scarpinato that Ms. Lundy would write the letters, petitioner wrote to Barry Feinstein, President of the Union, on May 28, 1990, stating, "as of [this] date, Ms. Lundy has refused to give me the letters, on occasion calling me a pest."

Petitioner asserts that from June, 1989 until June, 1990, he was given the impression by the Union that it was pursuing his case in arbitration; however, no Request for Arbitration was filed by the Union. In June, 1990, Nick Mancuso, the Union's Director of Negotiations and Research, attempted to move petitioner's case to a Step III hearing. The request was denied by the Office of Labor Relations by letter dated July 9, 1990, on the grounds that it was untimely filed.

In June, 1990, petitioner engaged the firm of Case & White to represent him on a contingency fee basis in an action brought against the Department to clear his name. On December 24, 1991, the parties to that case reached an out-of-court settlement in which petitioner was granted $24,000 in damages. After

attorneys' fees were paid, petitioner received $18,000. In his improper practice petition, petitioner states:

> I did not pursue a claim against Local 237 earlier because all of my energy was directed toward having my name cleared, as the label 'drug-user' effectively barred me from any kind of employment.... I, therefore, an respectfully requesting that the Statute of Limitations governing my claim be waived. I believe my claim needs to be heard to, hopefully, prevent similar occurrences of Improper Labor Practices by Local 237.

Discussion

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that the improper practice claim asserted therein must be dismissed because it is untimely on its face. Section 7.4 of the OCB Rules provides that an improper practice petition must be filed within four months of the alleged violation of the statute.

In the instant case, petitioner alleges that the violation began in August, 1988 when the Union did not fully and fairly advise him of his rights regarding the alleged improper drug urinalysis administered on July 26, 1988, and continued through June, 1990, when petitioner was led by the Union to believe that the it was pursuing a timely Request for Arbitration on his behalf. Nevertheless, even assuming that the alleged violation continued until June, 1990, the date when the Union took its

final action in petitioner's behalf, the petition still would be untimely by more than fifteen months. There is no provision in the NYCCBL or the Rules of the Office of Collective Bargaining, nor any precedent in the decisions of the Board of Collective Bargaining, which would permit a waiver of the statute of limitations when filing a claim of improper practice under Section 12-306 of the NYCCBL. Therefore, on that ground alone, the petition must be dismissed.

I note, however, that the dismissal of the petition herein is based solely on the fact that it was untimely filed; it does not in any way constitute a finding on the merits of petitioner's claim of a breach of the duty of fair representation by the Union. Further, I note that the dismissal of the petition is without prejudice to any rights that petitioner may have in another forum.

Dated: New York, New York
March 4, 1992

Loren Krause Luzmore
Executive Secretary
Board 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.

§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 TEE LAW AND RULES KAY BE APPLICABLE.

CONSULT TEE COMPLETE TEXT.