Burvick v. DC37, 51 OCB 10 (BCB 1993) [Decision No. B-10-93 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

--between--

DECISION NO. B-10-93 (ES)

Jacques Burvick,
Petitioner,

DOCKET NO. BCB-1560-93

--and--

District Council 37, AFSCME, AFL-CIO,

Respondent.

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In the Matter of the Improper Practice Proceeding

--between--

Jacques Burvick,
Petitioner,

DOCKET NO. BCB-1561-93

--and--

New York City Housing Authority,

Respondent.

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DETERMINATION OF EXECUTIVE SECRETARY

On February 26, 1993, Jacques Burvick ("the Petitioner"), an employee of the New York City Housing Authority ("the Authority"), filed two verified improper practice petitions with the Office of Collective Bargaining ("OCB"). In the first petition, docketed as BCB-1560-93, Petitioner alleged that District Council 37, AFSCME, ("the Union") violated Section 12-306b (formerly referred to as Section 1173-4.2) of the New York City Collective Bargaining Law ("NYCCBL").[1] In the second petition, docketed as BCB-1561-93, Petitioner

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

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

alleged that the Authority violated Section 12-306a (formerly referred to as Section 1173-4.2) of the NYCCBL.[2] As a remedy for the violations alleged in each petition, the Petitioner seeks reinstatement with back pay.

Petitioner's Allegations

Petitioner was hired in March 1990 by the New York City Housing Authority to work in the Systems Department. Sometime thereafter, he was transferred to the Homeless Command Center. In August 1991, Petitioner was promoted to the title Typist I and transferred to the Taft Houses. One month later, , he was transferred back to the Central Office where he was given a title of "C-1" working in the Department of Applications."

In his petitions, Petitioner alleges that on July 12, 1992 he was illegally terminated based on his attendance record. He claims that his

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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.

[2] 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 Section 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.

termination:

> is a clear case of harassment and discriminatory practices. I never had any form of union representation in this matter. At any point. Matter of fact the union never knew about the termination. Which should have been standard procedure. In all terminations, when you are carrying a civil service title.

Attached to each petition is an identical six-page, typewritten letter describing specific incidents and generalized descriptions of objectionable conduct toward the Petitioner by his supervisor and co-workers. The letter states, in pertinent part, as follows:

> I always felt I was doing more work than expected and because of that I was started to be treated unfairly. It seemed to me I was completing my work in more than a timely fashion. However I was being treated unfair despite the good work effort I made. Ms. Hardgross (Petitioner's immediate supervisor) would always find fault in my work. And her statements were never substantiated to accuse me of error. I was given unjustified disciplinary action without union representation. Ms. Hardgross would personally have other employees stand or sit next to me while I was doing my work. I asked her why she was doing that. And she stat[ed] that I was doing the work incorrectly. But she never showed me where I was making the mistakes. I was continuously being scrutinized on a daily basis, for several hours at a time in regards to my work.
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> Ms. Hardgross's bogus report, failed me on first and second probationary reports. On the third report she stated that my work was getting better. But failed me because of my attendance. Which was a false report. Their (sic) was nothing wrong with my attendance. I was following the guide lines of my probation with my attendance.
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> On many occasions I was directly asked if I was a homosexual and a drug user . . . I later found out that this pattern of blatant slander and discrimination was being purposely being put out to ostracize me from other people within the departments . . . purposely and maliciously done to me only. And the reasons at the time were unknown to me. I thought if anything it would be because of my ambition to learn and work coupled with my astute work ethics.

The letter states that Petitioner brought this conduct to the attention of his union shop steward.

> She (the shop steward) listened and after hearing the story, referred me back to my immediate supervisor . . . I then told the shop steward again that my supervisor was the main person who was the main driving force behind these problems . . . that the immediate supervisor was condoning all of this. And I asked the shop steward again why is she sending me to the person who's causing these problems in the first place . . . She still insisted that I take this matter up with Ms. Hardgross anyway because there was nothing that she, 'the union,' could do about it . . . that she couldn't get involved in it . . . ."

Petitioner refers to another supervisor in the letter by the name of "Carol Bennot," also spelled "Bennet"; and states that, "Ms. Bennet clearly showed that she was condoning this treatment of harassment towards me by others."

Discussion

Pursuant to Title 61, Section 1-13(l) of the Rules of the City of New York (formerly referred to as Section 13.12 of the Revised Consolidated Rules of the Office of Collective Bargaining ["the Rules"]), notice is hereby given that the instant petitions are consolidated for decision. Pursuant to Section 1-07(d) of the Rules (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 instant petitions and has determined that the claims alleged therein are untimely on their face because they occurred on or before Petitioner was terminated, on July 12, 1992, which is more than four months prior to the filing of the petitions herein. Section 1-07(d) provides, in pertinent part, as follows:

> 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 12-306 of the statute may be filed with the Board within four (4) months thereof....

Even if the acts or events complained of were not so untimely as to warrant summary dismissal, however, the undersigned has determined that the petitions still would be dismissed. The petition against the Authority does not allege facts sufficient as a matter of law to constitute a claim of improper practice Union within the meaning of Section 12-306a of the statute.

With regard to the claim against the Union, the petition fails to allege that the Union has committed any acts in violation of Section 12-306b of the NYCCBL, which has been held to prohibit violations of the judicially recognized duty of fair representation doctrine.

The Board of Collective Bargaining ("the Board") has determined that the

duty of fair representation 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.[3] 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.[4] In the instant case, the Petitioner has failed to allege any facts in support of a finding of arbitrary, discriminatory of bad faith conduct on the part of District Council 37.

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 in the 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, conversely, the right to refrain from such activities. The instant petitions do not allege that the actions of the Union or the Authority were intended to, or did, affect any of the rights specifically protected under the NYCCBL. Accordingly, the petitions must be dismissed. I note, however, that dismissal of the petitions is without prejudice to any rights the Petitioner may have in another forum.

Dated: New York, New York
November 19, 1993

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Loren Krause Luzmore
Executive Secretary
Board of Collective Bargaining

[3] Decision Nos. B-5-91; B-51-90.

[4] Decision Nos. B-56-90; B-27-90.