Rothberger v. L.1180, CWA, 51 OCB 11 (BCB 1993) [Decision No. B-11-93 (IP)]

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

-between-

DECISION NO. B-11-93
DOCKET NO. BCB-1534-92

ELI ROTHBERGER,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180,

Respondent.
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DECISION AND ORDER

On October 27, 1992, Eli Rothberger ("Petitioner") filed a verified improper practice petition against Local 1180, Communication Workers of America ("the Union"), alleging that the Union had violated Section 12-306[1] of the New York City Collective Bargaining Law ("NYCCBL"). The Union submitted an answer on November 23, 1992 and Petitioner submitted a letter in reply on November 24, 1992. On December 7, 1992, the Union

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[1] NYCCBL §12-306 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:

(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.

submitted a letter further outlining its legal position, to which Petitioner responded on December 10, 1992.

Background

On October 22, 1992, the Union held a meeting at the Milford Plaza Hotel in Manhattan and distributed a package of materials entitled "Support Workshop for 'at Risk' City Employees." According to the materials, "at risk" employees include those provisional employees who, as the result of a Principle Administrative Associate ("PAA") list being certified, could be "bumped" to a lower level job, displaced, or terminated. The materials provide information on a variety of subjects of concern to employees being separated from City service.[2]

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[2] The table of contents included with the materials lists the following subjects:

Information for Employees Being Separated from City Service
- Civil Service Appointments
- Step-Up Provisionals
- Fringe Benefits

Payment for Time and Leave Credits
- Annual Leave and Compensatory Time
- Sick Leave
- Meal Allowance, Travel Allowances, etc.

Health Plan Benefits
- Health Plan Benefits Conversion Option
- COBRA

Unemployment Insurance

Pension Information

(continued...)

As Petitioner is employed by the City as a PAA, he is in the bargaining unit which is represented by the Union. However, he is not a member of the Union; instead, he pays an agency shop fee to the Union. On October 22nd, Petitioner went to the Milford Plaza Hotel intending to attend the meeting. While the Union provided him with a package of materials, they refused to allow him to attend the meeting because he is not a union member.[3]

Positions of the Parties

Petitioner's Position

Petitioner argues, in essence, that the Union breached its duty of fair representation when it excluded him for the meeting.

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[2](...continued)
Deferred Compensation Plan

Employee Training

Miscellaneous
Medicaid
Food Stamps
Employee Blood Program
Legal Counselling

[3] It is apparent from the Union's December 7th submission that it believes that the petitioner failed the PAA Civil Service exam and is in danger of being removed from his provisional position. However, the petitioner, in his December 10th reply letter, states the following:

> "I did not fail the Civil Service exam for the PAA title, because I did not take the exam. I am not in danger of being replaced by a permanent employee off the PAA list because I hold a Civil Service position on a different career ladder."

Petitioner contends that the Union is required to represent all members of the bargaining unit irrespective of their membership in the Union. Petitioner argues that since "the subject matter [of the meeting] was relevant to [his] status with the City of New York," he had the right to attend the meeting. He points out that the meeting in question did not relate to social or political activities.

Petitioner also argues that the package of materials that was provided did not serve as a substitute for attendance. Petitioner contends that the package, while informative, did not address certain issues of concern to him. Specifically, he states the following:

> "Civil service law under rule 6.1.9 allows permanent Competitive Class employees to be transferred to a similar competitive job without passing a competitive exam. I did not have a chance to find out if Local 1180 would like to retain us as members by negotiating on our behalf or at least advise us how to proceed."

Furthermore, Petitioner contends, by being denied access to the meeting, he was not given the opportunity to ask questions, seek clarification or otherwise "fully protect [his] rights."

Finally, addressing the case law cited by the Union, Petitioner argues that it is not on point since the complaining party in those cases sought to hold office, serve on committees or vote on whether to ratify a contract.[4]

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[4] In his December 10th submission, the petitioner also (continued...)

Union's Position

The Union argues that, based on decisions of the Public Employment Relations Board ("PERB"), it is not an improper practice for a union to exclude non-members from union membership meetings. The Union contends that PERB has repeatedly held that it lacks jurisdiction over internal union affairs that have no direct impact upon an employee's terms and conditions of employment. The Union asserts that the purpose of the October 22nd meeting was to provide information to members who may be displaced from their provisional positions. According to the Union, the meeting addressed post-employment matters, not current or future terms and conditions of employment.

Citing American Postal Workers Union, 300 NLRB No.5, 135 LRRM 1138 (1990), the Union further argues that the National Labor Relations Board ("NLRB") has held that it is proper to exclude non-member unit employees from union meetings where "neither grievance representation nor any other right fundamental

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[4](...continued)
refers the Board to page 20 of the November 6, 1992 issue of Public Employee Press (a newspaper published and distributed by another union, District Council 37, AFSCME, AFL-CIO), and argues that the Union "failed to publish [a] notice to all non-member agency fee payers as required." Page 20 features a "Notice to all non-member agency fee payers" which outlines the legal rights of agency fee payers. This argument is clearly not relevant to the instant dispute. It may have been relevant to an earlier improper practice petition filed by this petitioner and docketed as BCB-1526-92. In any event, the argument is moot since, on January 12, 1993, the Board dismissed that petition in Decision No. B-3-93.

to union representation is at issue." The Union points out that Petitioner has not alleged that the Union failed to represent him in a grievance.

Discussion

It is clear that a union's decision to exclude non-members from a union meeting generally is a matter which concerns the internal affairs of the union. Neither the NYCCBL nor its State equivalent, the Taylor Law, regulate the internal affairs of unions. Accordingly, this Board, as well as PERB, has long held that it has no jurisdiction over complaints concerning internal union matters unless it can be shown that such matters affect the employee's terms and conditions of employment or the representation accorded by the union with respect to his or her employment.[5]

While neither this Board nor PERB has decided a case with a factual situation identical to the one presented herein, both have issued numerous decisions examining the topic of internal union affairs. This Board, for example, held that a union's alleged failure to seek membership ratification of a negotiated wage and benefit settlement constituted an internal union matter over which it had no jurisdiction absent a showing of an affect

[5] See e.g., Decision Nos. B-56-91; B-26-90; B-23-84; B-18-79.

on either the terms and conditions of the petitioner's employment or the nature of the union's representation.[6]

Similarly, PERB has repeatedly refused to entertain complaints about a union's denial of membership or expulsion of its members on the ground that it does not have jurisdiction over internal union matters which neither affect an employee's terms and conditions of employment nor violate any fundamental purposes or policies of the Taylor Law.[7] PERB has also held that a mere failure to respond to a request for information or advice which has no adverse impact upon a unit member's employment status does not establish an improper practice as it involves internal union affairs outside of PERB's jurisdiction.[8]

Furthermore, PERB recognizes that where a bargaining unit employee chooses not to join the union or discontinues his union membership, while his right to union representation will not be affected, the employee may forego the right to participate in union affairs, attend union meetings, serve on committees, vote

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[6] Decision No. B-9-86.

[7] See e.g., Sordoni v. Security and Law Enforcement Employee, Council 82, 24 PERB ¶4596 (1991); Rutman v. CSEA, 23 PERB ¶4602 (1990); Stanley v. CSEA, 23 PERB ¶3052 (1990); Capalbo v. Security and Law Enforcement Employee, Council 82, 21 PERB ¶4556 (1988).

[8] United College Employees of Fashion Institute of Technology, Local 3457 v. Beizer, 20 PERB ¶4558 (1987); Erie County Sheriff Department Local 2060, Council 82 v. Duda, 17 PERB ¶4604 (1984); United University Professors v. Barry, 17 PERB ¶3117 (1984).

on contract ratification, obtain pre-ratification information on the details of a proposed contract, vote for or hold office, attend social functions, and receive noncontractual, union-provided benefits.[9]

In the instant case, there has been no showing that the Union's exclusion of Petitioner from the October 22nd meeting in any way affected either the terms and conditions of Petitioner's employment or the nature of the representation afforded him. The mere conclusory statement that "the subject matter [of the meeting] was relevant to [Petitioner's] status with the City of New York," will not suffice. The purpose of the meeting in question was simply to provide information to employees who would be affected by the certification of the PAA list; it cannot be argued that the act of excluding Petitioner from that meeting affected the terms and conditions of Petitioner's employment. Neither can it be argued that Petitioner's representational rights were affected since no grievances were filed as a result of the meeting, and the petitioner was not denied the right to file a grievance.

Moreover, we observe that the act that placed the Petitioner's job "at risk," i.e., the certification of the PAA

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[9] Opinion of Counsel, 19 PERB ¶5007 (1986); Dutchess County BOCES v. Bates, 19 PERB ¶4525 (1986); United University Professions v. Iden, 16 PERB ¶3087 (1983); Newburgh City School District v. CSEA, 14 PERB ¶4582 (1981); Public Employees Federation v. Muragali, 14 PERB ¶3036 (1981).

list and the concomitant "bumping" of provisional PAAs, involves rights and procedures arising under the Civil Service Law and the Rules and Regulations of the Personnel Director. There is no allegation that there exists any basis under the collective bargaining agreement to challenge the City's actions. Under these circumstances, we find that a union meeting held to inform members of their rights under applicable law, in response to unilateral action lawfully taken by management, does not effect terms and conditions of employment or the representation afforded Petitioner in any way that would invoke the duty of fair representation.

Therefore, for all of the reasons stated above, we shall dismiss Petitioner's verified improper practice petition in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

ORDERED, that the improper practice petition filed herein by Eli Rothberger, be, and the same hereby is, dismissed.

DATED: New York, New York
March 24, 1993

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

George B. Daniels
MEMBER

Steven H. Wright
MEMBER