Astuto v. COBA (Executive Board Mem.), 51 OCB 22 (BCB 1993) [Decision No. B-22-93 (IP)]

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

-between-

SIMON ASTUTO,
Petitioner,

-and-

COBA EXECUTIVE BOARD MEMBERS STAN ISRAEL, FRED WILSON, GRAHAM HAWKINS, HOWIE FIGUEROA, LENNY HOLMES, JEAN COOPER, PAT MARCUNE and BOB HOOPS,
Respondents.
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DECISION NO. B-22-93

DOCKET NO. BCB-1564-93

DECISION AND ORDER

On March 11, 1993, Simon Astuto, pro se, filed a verified improper practice petition against eight named members of the Executive Board of the Correction Officers' Benevolent Association ("COBA Board" or "the Board"). The petition alleges that the Board has coerced unit members and has not met its statutory obligation to bargain with the City of New York over the terms of a new collective bargaining agreement.

The Union, on behalf of its Board members, filed its answer on April 28, 1993. The Petitioner chose not to file a reply.

Background

The most recent collective bargaining agreement between COBA and the City covers the period July 1, 1987 to June 30, 1990. Its terms remain in effect pursuant to the status quo provisions of Section 12-311d. of the New York City Collective Bargaining Law ("NYCCBL").

NYCCBL Section 12-306c. establishes the requirement of good faith bargaining by both the public employer and the certified employee organization. This section provides, among other things, that the parties approach negotiations with sincere resolve to reach an agreement; that they meet at reasonable times and convenient places as frequently as may be

necessary; and that they avoid unnecessary delays.

In early Spring of 1993, the Petitioner and others challenged the COBA Board's spending practices and its allegedly delayed contract negotiations. In response, the Board ordered a referendum on the $1,500 spending cap imposed by the Associa-tion's by-laws and mailed a ballot to each unit member. The ballot's cover letter, dated February 25, 1993, stated that "to effectively negotiate the best possible contract for you . . . we are asking you to approve Association expenses in excess of $1,500." At about the same time, the Board circulated a series of flyers urging the members to support both the Board and the by-law change that would lift the spending cap. One flyer described the problem as follows:

> Our by-laws, originally written in 1939, restricts the Executive Board from spending more than $1,500. Obviously, we cannot conduct the day-to-day business of the union. Almost every

> expense for 11,000 members is over $1,500, from calendar books to contract negotiations.

The flyer announced that "very shortly you will receive a ballot in the mail which authorizes the Executive Board to make expenditures over $1,500." It urged the membership to vote "yes" so as "to bring back the best contract for you and your families."

A second flyer attacked what it described as "selfish political opportunists." Headlined "CONTRACT IN JEOPARDY, Political Opportunists Cause Dissension," the flyer stated that contract negotiations cannot go forward because "a small number of selfish political opportunists have created dissension. They are trying to impeach the Executive Board." Contending that Board was facing "the most difficult contract ever," the flyer claimed that the City "wants to pay us less than the Cops, take our uniform allowance, deny us our retroactive money, reduce our sick leave to 12 days a year and reschedule 20 tours to eliminate your overtime."

POSITIONS OF THE PARTIES

Petitioner's Position

According to the Petitioner, the flyers were designed to "extort" an increase in the COBA Board's spending authorization from unit members in exchange for representing them properly in collective bargaining. He alleges that the Board has not even requested negotiations with the City since July of 1990, and that it is now offering the excuse that it cannot bargain until the membership authorizes an increase in the Board's by-law-mandated spending cap of $1,500. In the Petitioner's view, members are faced with the choice of either granting their representatives "a blank check," or "waiting even longer" for a contract.

The actual reason behind the delay, according to the Petitioner, is that the Board purposely stalled negotiations to allow time for former union president Phil Seelig to be installed as its special counsel for contract

negotiations. He points out that this could not be accomplished until Mr. Seelig passed the New York State Bar Examination in August of 1992. According to the Petitioner, the Board "conspired" to stall contract negotiations "strictly for Phil Seelig's personal and financial gain."

The Petitioner concludes that by neglecting to meet with the City to negotiate a successor agreement, the Board allegedly has failed to meet its good faith bargaining obligation, as prescribed by Section 12-306c. of the NYCCBL. Among other things, he asks that the Board be "preclud[ed] . . . from requesting, participating, negotiating or in any other way engaging in contract negotiations with the City of New York, until such time as the employees and our employee organization meet and decide if in fact this present COBA executive board should be allowed to continue to represent employees. . .."

COBA's Position

The Union raises a series of issues in defense of the members of its Executive Board. First, it contends that the Petitioner lacks standing to bring a failure to bargain in good faith charge. According to the Union, the duty to bargain in good faith runs between the public employer and the certified representative of its employees. The duty assertedly is not owed to an individual member of the bargaining unit.[1]

Next, the Union claims that the matters about which the Petitioner is complaining concern internal union affairs. It notes that the Petitioner has not charged that COBA or its Executive Board failed to administer and enforce the current collective bargaining agreement. It also notes that he is not claiming that a particular dispute is not being litigated, or that the Union is refusing to go to arbitration, or that representation is not being provided

[1] Citing Decision Nos. B-29-86; B-9-86; B-5-86; and B-2-82.

in a disciplinary proceeding. Rather, the Union points out that the Petitioner's main complaints seem to be the COBA Board's alleged violation of the $1,500 spending limit, and its hiring of Mr. Seelig as special counsel. Both subjects, according to the Union, solely involve internal union matters that assertedly are not within the jurisdiction of the Board of Collective Bargaining.[2]

The Union then denies that its Executive Board has neglected its bargaining obligation, pointing out that negotiations for the uniformed services always are a lengthy and tedious process. It insists, however, that COBA and its representatives have met informally with the City, and have been monitoring negotiations being conducted by the other uniformed services unions for some time. The Union claims that traditionally it has followed after these units in negotiations, and, by employing this strategy of "pattern" bargaining, COBA has always been able "to negotiate excellent contracts for its members." The Union further notes that its current strategy of delayed bargaining is consistent with its practice in the past. It assertedly did not negotiate the contract starting July 1, 1984, for example, until late in 1986, and the contract starting July 1, 1987 assertedly was not negotiated until late 1989. According to the Union, the membership fully approves of this bargaining strategy. The Union concludes by emphasizing the evident conflict between the relief that the Petitioner is seeking (preclude the COBA Board from requesting, participating, negotiating or in any other way engaging in contract negotiations), and his allegation that the Board violated NYCCBL § 12-306c. because it delayed contract negotiations. It points out that the requested relief, if granted, would only aggravate the perception that collective bargaining negotiations have been unduly delayed.

With respect to the flyers, the Union denies that they made threats or that they were coercive. According to the Union, they merely contained

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[2] Citing Decision Nos. B-23-84; B-15-83; and B-1-81.

"accurate honest statements" of what would occur if the Petitioner was successful in limiting the COBA Board's expenditures to $1,500. The Union contends that the Petitioner created a "media circus" over the spending cap vote, and that the flyers were necessary to counter his charges in the newspapers.

Finally, advancing its opinion of how this case came about, the Union suggests that the Petitioner's actual motive is one of personal gain. It notes that in 1985 and 1986, he brought three lawsuits against the COBA Board, each allegedly without merit; one was withdrawn, one was dismissed, and one was supposedly discontinued or abandoned. He then ran in the elections of 1987 and 1991 for union president, and, according to figures certified by the Honest Ballot Association, lost by wide margins both times. In the Union's view, after getting nowhere either in court or in his quest for the union presidency, the Petitioner is now trying to use this Board "to disable the COBA executive board so that it cannot negotiate an agreement [or] provide member services."

Discussion

Addressing the issue of standing first, we reject the COBA Board's position that individuals necessarily are precluded from charging a union with a failure to bargain in good faith. The gravamen of the Petitioner's complaint is that the Board breached its duty of fair representation by delaying negotiations for a successor collective bargaining agreement for an unreasonable length of time. The duty of fair representation runs between the Union and its members. To the extent that a union's status as collective bargaining representative extinguishes its members' access to available remedies such as direct negotiations with the employer, the union is compelled

to represent their interests fairly.[3] In other words, the duty of fair representation is an obligation that coexists with the exclusive power of representation. To satisfy this obligation, a union must refrain from arbitrary, discriminatory, or bad faith conduct in the negotiation, administration and enforcement of the collective bargaining agreement.[4] Thus, under the circumstances present in this case, the Petitioner clearly has standing to assert a claim that the Union had failed to bargain and that this constitutes a breach of the duty of fair representation.

We next turn to the question of whether the Respondent's decision to delay bargaining was so unreasonable as to constitute arbitrary or bad faith conduct. The Petitioner claims that the Board purposely stalled negotiations to allow time for former union president Phil Seelig to be installed as its special counsel for contract negotiations. The Union, however, provides a plausible explanation for its behavior: that it has been closely monitoring negotiations between the City and the other uniformed services unions, and that it has traditionally and successfully employed a strategy of delaying negotiations to gain the advantage of "pattern" bargaining. The Petitioner did not respond to this explanation, and we will not place ourselves in the position of questioning a union's bargaining tactics and strategy unless it has been shown, which it has not, that the conduct is arbitrary, discriminatory, or in bad faith.

The remainder of the Petitioner's claims concern the distribution of flyers and alleged excessive spending by the Board, contentions that relate wholly to internal union matters. We have long held that complaints concerning internal union affairs are not subject to our jurisdiction unless it can be shown that they affect the employee's terms and conditions of

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[3] Decision No. B-53-89.

[4] Decision No. B-53-89. Also see: Decision Nos. B-51-88; B-42-87; B-32-86; B-9-86; B-5-86; B-23-84; B-15-84; B-16-83; B-15-83; and B-13-81.

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] Other than conclusory allegations that the flyers were designed to "extort" an increase in the COBA Board's spending authorization from unit members in exchange for representing them properly in collective bargaining, there is nothing that can be characterized as a claim that the Petitioner's terms and conditions of employment were affected, or that his representation by COBA, vis-a-vis his employer, was deficient. The spending practices of the COBA Board and its distribution of flyers, even if intended to advance a partisan point of view, does not state a cause of action under the NYCCBL without a showing that their underlying purpose pertained to matters related to the Petitioner's status as an employee.

For all of the foregoing reasons, we shall dismiss the improper practice petition herein.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

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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 U.S. Supreme Court (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449 [1967]), and with that of the PERB (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-5-92; B-22-91; B-26-90; B-23-84; B-18-84; B-15-83; and B-18-79.

ORDERED, that the improper practice petition filed by Simon Astuto against eight named Board members of the Executive Board of the Correction Officers' Benevolent Association, docketed as BCB-1564-93 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
June 16, 1993

MALCOLM D. MACDONALD
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