White v. HHC, L.371, SSEU & DC37, 53 OCB 20 (BCB 1994) [Decision No. B-20-94 (IP)]

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

-between-

CHERYL WHITE,
Petitioner,
-and-

NYC HEALTH AND HOSPITALS CORP., S.S.E.U. LOCAL 371, and DISTRICT COUNCIL 37, AFSCME,
Respondents.
----------x

DECISION NO. B-20-94

DOCKET NO. BCB-1634-94

DECISION AND ORDER

On February 7, 1994, Cheryl White ("Petitioner"), by her attorney, filed a verified improper practice petition against both the New York City Health and Hospitals Corporation ("HHC"), and against District Council 37, AFL-CIO, AFSCME and its affiliate, Local 371 of the Social Service Employees Union (the "Union"). The petition alleged that the Petitioner was discharged from her employment at Queens Hospital Center in January, 1992 for having filed several grievances, and that the Union failed to represent her adequately throughout the grievance and arbitration process.

The Executive Secretary of the Board of Collective Bargaining reviewed the petition pursuant to RCNY Title 61, Section 1-07(d). In a determination dated June 9, 1994,[1] the Executive Secretary dismissed the petition as untimely because it did not allege that either the HHC or the Union committed an act in violation of the NYCCBL within four months of the petition's filing

[1] Decision No. B-11-94 (ES).

date.[2]

The Petitioner's attorney received the Executive Secretary's determination on June 14, 1994. By appeal from the determination of the Executive Secretary dated June 22, 1994 and filed June 23, 1994, he appealed the Executive Secretary's determination to the Board of Collective Bargaining. On August 2, 1994, both the Union and the HHC filed letter briefs in opposition to the appeal. On August 11, 1994, the Petitioner, by her attorney, filed a reply brief.

BACKGROUND

Facts Asserted in the Original Petition

In the original petition, the Petitioner stated that she was employed at Queens Hospital Center from February, 1991 to January, 1992. On July 30, 1991, she filed a grievance against her supervisor "for striking her in the face." The petition charged that after filing her grievance, Petitioner received "verbal and written threats of lay-offs." She then filed three other grievances and eventually was terminated. The petition contended that these actions violated the improper employer practice provisions contained in Section 12-306a.(3) of the New York City Collective Bargaining Law

---

[2] See, RCNY Section 1-07(d) which 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 (formerly 1173-4.2) of the statute may be filed with the Board within four (4) months thereof . . . If it is determined . . . 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 . . .

("NYCCBL").[3]

With respect to the Union's representation, the petition claimed that Petitioner's unit representative, S.S.E.U. Local 371, "failed to adequately represent her during grievance proceedings," and that it also failed to file an improper practice petition in her behalf. The petition alleged that although Petitioner was referred to District Council 37 for legal representation, the Union attorney "failed to adequately represent her through arbitration," and then "retaliated against her when she complained." The petition contended that this course of conduct violated the improper public employee

[3] NYCCBL §12-306a.(3) [formerly §1173-4.2a.(3)] 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:
> * * *
> (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;

organization practice provisions contained in Section 12-306b.(1) of the NYCCBL.[4]

The Executive Secretary's Determination

In Decision No. B-11-94 (ES), the Executive Secretary found that although the petition did not show the precise date that Queens Hospital Center terminated Petitioner's employment, from the sparse facts alleged, it appeared that her employment ended sometime during January, 1992. The determination held that since the improper practice petition was not filed until February 7, 1994, more than two years after her discharge, the allegations against the employer clearly were untimely under the provisions of RCNY Section 1-07(d).

With respect to the Petitioner's inadequate union representation claim, the Executive Secretary explained that in order for any of her allegations to state a timely cause of action under the NYCCBL, they would have had to occur after October 7, 1993, (i.e., within four months of the filing date of the improper practice petition). The Executive Secretary could find nothing in the Petitioner's recitation of the facts to suggest so recent a date of occurrence. Thus, her determination dismissed the allegations against the Union, also on the ground of timeliness.

The Appeal

---

[4] NYCCBL §12-306b.(1) [formerly §1173-4.2b.(1)] provides 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 (formerly §1173-4.1) of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> * * *

In her appeal, Petitioner expresses "surprise" that the original petition did not specify dates and elaborate upon the allegations sufficiently. She states that her appeal "does just that."

Exhibits attached to the appeal verify that the Petitioner filed four grievances between July 30, 1991, and December 3, 1991. The first alleged continuous "harassment, humiliation and discrimination" in her employment at Queens Hospital Center. The second grievance, dated November 1, 1991, complained of an improper employee evaluation. The third, dated December 3, 1991, contended that "employee did not fail to heed corrective action recommended as a result of prior counseling," and that "new issues were brought to the warning sessions that were not covered in the counseling." In the fourth grievance, also dated December 3, 1991, the Petitioner claims that she is "still experiencing racism, retaliation, harassment," that there is "favoritism for another on the job," and that money was deducted from her paycheck improperly.

Also appended to the Petitioner's appeal is a copy of an arbitration decision issued by Arbitrator Howard Edelman, dated October 4, 1993, concerning her termination of employment. In his opinion and award, Arbitrator Edelman held that while her status as a provisional employee with less than two years seniority did not render her dispute non-arbitrable, he concluded that he was without authority to order Petitioner's reinstatement or back pay. His award simply ordered the HHC to expunge from her personnel file the relevant performance evaluations. By letter dated October 6, 1993, Union attorney Leonard Polletta transmitted a copy of the arbitration award to the Petitioner together with a letter of resignation that he had drafted. The cover letter also recalled a telephone conversation earlier that day between the two of them, as follows:

> As I explained to you over the telephone this morning, although [Arbitrator Edelman] found your grievances to be arbitrable, he decided that his remedial authority was limited to ordering the [HHC] to expunge your work records of all offensive materials. I have a call in to HHC's attorney to insure full implementation of the

arbitrator's decision.

The final exhibit of significance attached to the appeal of the Executive Secretary's determination is a log, prepared by the Petitioner, in which she recounts her version of the substance of three conversations that she had with attorney Polletta. The first occurred on October 6, 1993, when she visited him in his office. After reading a copy of the arbitrator's decision, she pointed out inconsistencies in it. Attorney Polletta assertedly was terse with her and allegedly told her to lie on future employment applications.

The second conversation also occurred at a meeting in attorney Polletta's office that was held on October 18, 1993. The Petitioner reportedly asked attorney Polletta to reconsider taking management to court. He allegedly replied: "[I]t is a waste of time. . . . your case is closed, you need professional help, this case is your obsession."

Their final conversation reportedly occurred on October 21, 1993, and may have been held over the telephone. According to the log, the Petitioner and attorney Polletta discussed expungement of materials in her personnel file at the HHC, and the timing of the submission of her letter of resignation.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner maintains that the Executive Secretary's determination should be reversed because she "failed to adequately research the case at the administrative level." Moreover, according to the Petitioner, there are no new facts alleged in her appeal; all it assertedly does is explain the claims brought by the Petitioner. The Petitioner argues that she went through the established channels and that she exhausted her administrative remedies under the collective bargaining agreement. In her view, it is "now absurd and ludicrous for the employer to assert that the violations were not continuing."

The Petitioner explains that the crux of her charge is that attorney

Polletta did not represent her properly during the arbitration proceeding because he assertedly presented an incorrect and an inadequate case. Then, on October 18, 1993, when the Petitioner asked him to file an improper practice petition on her behalf, the attorney assertedly insulted her and refused to provide her with any more assistance. According to the Petitioner, these events amount to violations that were continuing, and thus were not untimely when she filed her improper practice petition on February 7, 1994. In addition, the Office of Collective Bargaining allegedly informed the Petitioner that she should submit her improper practice petition, and that she could supplement it later with exhibits.

HHC's Position

The Corporation contends that the Petitioner's appeal should be dismissed because it is a belated attempt to plead additional facts that were not contained in the original petition. In addition, the HHC disagrees that the issuance of the arbitration award is the measure from which the time to file an improper practice claim begins to run. In the Corporation's view, an improper practice proceeding is not the appropriate way to appeal an arbitration award, and the four month period does not start at the time such an award is issued. According to the HHC, the Petitioner's employment was terminated in January, 1992, and that is when time began to run.

Union's Position

In the Union's view, the Executive Secretary's determination was correct, based upon the facts that she had before her when she issued it. The Union argues that in deciding the instant appeal, the Board may only look at the record that was before the Executive Secretary when she issued the determination. The Union contends that the Petitioner should not now be allowed to "flesh out" her claims with additional information and dates, especially since those dates and that information were known to her when she

filed her petition.

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.[5]

After carefully reviewing the record that was before the Executive Secretary when she made her determination, we find that all the events to which the improper practice petition referred reasonably appeared to have taken place more than four months before the petition was filed. The petition indicated that the HHC terminated the Petitioner's employment in January, 1992, and that she filed four grievances sometime before that. These events clearly are well beyond the four month statutory time limitation. The Executive Secretary had no reason to believe that the alleged refusal of Local 371 to file an improper practice petition and to provide adequate representation during the grievance handling phase, and District Council 37's alleged inadequate representation during the arbitration phase, took place after October 7, 1993. Indeed, the documents appended to the Petitioner's appeal verify that that could not possibly have happened, since the arbitration award was issued October 4, 1993. Thus, only the allegation of retaliation by a District Council 37 attorney conceivably could have been timely, and its alleged occurrence took place at a time unspecified in the petition.

RCNY Title 61, Section 1-07(e) requires that an improper practice petition must, among other things, set forth "[a] statement of the nature of the controversy, specifying the provision of the statute, executive order or collective agreements involved, and any other relevant and material documents, dates and facts," as well as "[s]uch additional matters as may be relevant and material." This rule is designed to place the adverse parties on notice of the nature of a petitioner's claim so that it may frame a meaningful response.[6] A Petitioner must supply enough essential facts to make out at least a prima facie case when the petition is filed. Although we construe the

---

[5] Decision Nos. B-5-92; B-47-91; B-28-91; B-54-90; B-62-89; B-29-88; B-55-87; and B-26-86.

[6] Decision Nos. B-59-88 and B-12-85.

rule liberally,[7] we cannot permit a pleading to stand if it fails to satisfy the minimum standard set forth in RCNY Section 1-07(e).

In this case, the original petition did not contain a single reference to a date upon which an improper practice attributable to Local 371 or District Council 37 may have occurred. The Executive Secretary is not required to guess when an alleged improper practice may have taken place, and there is no way that the Executive Secretary could have deduced from the facts alleged in the petition that the claimed retaliation by attorney Polletta occurred as late as October 18, 1993. No reference was made to that date until the Petitioner filed her appeal.

In cases involving appeals of an Executive Secretary's determination where new facts are alleged in the appeal, we have followed a convention similar to that used by the courts in deciding motions seeking renewal. A motion for renewal is made to bring to the tribunal's attention new facts, which were in existence at the time of the original proceeding, but were then not known to the party seeking renewal, and thus not presented to it.[8] We similarly have held that unless there is good reason, we will not reconsider a case based on the mere failure of a party to present relevant evidence that was available to it at the time that it commenced its initial litigation of the matter.[9] In this case, the Petitioner has presented no justification for her initial omission of essential facts. Therefore, in rendering our decision herein, we will not consider the Petitioner's statement in her appeal that "On October 18, 1993 petitioner requested that the attorney file an improper practice petition on her behalf, the attorney insulted her and refused to

---

[7] Decision Nos. B-59-88; B-12-85; B-8-77; B-9-76; and B-5-74.

[8] See: Bieny v. Wynyard, 132 A.D.2d 190, 522 N.Y.S.2d 511, 524 (1st Dep't 1987) and Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588, 594 (1st Dep't 1979).

[9] Decision Nos. B-10-78 and B-37-91.

assist her anymore."

Based upon the record that was before the Executive Secretary when she made her determination, we agree entirely with her conclusion. Accordingly, we shall dismiss the Petitioner's appeal and confirm the determination of the Executive Secretary in Decision No. B-11-94 (ES).

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 Cheryl White in Docket No. BCB-1634-94 be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-11-94 (ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y.
October 26, 1994

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER