Sciarillo v. Dep't of Sanitation & Matula, 55 OCB 10 (BCB 1995) [Decision No. B-10-95 (IP)]

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

DRAFT
4/18/95

- between -

Michael Sciarillo,

Petitioner,

- and -

Decision No. B-10-95
Docket No. BCB-1640-94

New York City Department of Sanitation and John Matula,

Respondents.
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SECOND INTERIM DECISION AND ORDER

On March 11, 1994, Michael Sciarillo ("petitioner"), appearing pro se, filed a verified improper practice petition against the New York City Department of Sanitation ("the Department") and John Matula, a Superintendent in the Department. The petitioner alleges that the Department and its agent, John Matula, violated § 12-306(a) of the New York City Collective Bargaining Law ("NYCCBL")[1]

[1] Section 12-306a of the NYCCBL provides:

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

(continued...)

when they suspended him for defending his right to engage in protected union activity and because he was involved in a previous case before the Board of Collective Bargaining.

The Department, by the New York City Office of Labor Relations, filed a motion to dismiss on April 11, 1994. The petitioner, having obtained legal counsel, filed a reply in opposition to the City's motion to dismiss on June 15, 1994.

In Interim Decision No. B-15-94, presented to the Board of Collective Bargaining at its June 1994 meeting, we denied the City's motion to dismiss, finding that the petitioner had made an arguable claim of improper practice. The City members filed a

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(...continued)
matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Section 12-305 of the NYCCBL provides:

Rights of public employees and certified employee organizations. Public employees have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (1) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

dissent dated September 27, 1994. The interim decision, issued September 27, 1994, ordered the City to answer the petition by October 12, 1994. The City was granted an extension of time in which to answer, and filed its answer on November 7, 1994. The petitioner was granted an extension of time in which to file a reply, and filed a reply on November 21, 1994.

A pre-hearing conference was held on March 7, 1995, during which the parties raised and discussed the issue of whether the improper practice hearing should be deferred to a departmental disciplinary trial. By letter dated March 9, 1995, the City moved to defer. By letter dated March 13, 1995, the petitioner opposed the City's motion to defer.

Background

The petitioner has been employed by the Department as a Sanitation Worker since 1985, and is a shop steward at the Brooklyn South #12 Sanitation Garage. On January 8, 1994, he had an altercation with his supervisor, John Matula, in the presence of other Sanitation Workers in his bargaining unit. On January 26, 1994, he was served with charges of insubordination, improper language and threatening behavior and was suspended for nineteen working days.

The Department uses an internal trial room procedure for employees charged with violations or infractions of its rules and regulations. It is administered by the Department's Trial Office

under the direction of the Deputy Commissioner for Trials. A hearing on the disciplinary charges against the petitioner was scheduled and postponed several times in the first three months of 1994. A pre-trial conference was held on September 9, 1994, but no trial date has been set.

In his improper practice petition, the petitioner alleged that on January 8, 1994, in his capacity as shop steward, he was discussing placement of bargaining unit members by seniority in the work schedule. He claims that he was interrupted by Matula and told to leave the office. According to the petitioner, he responded that he was the elected shop steward and had a right to be in the office to check on the work schedule. The petitioner claims that a disagreement ensued, and that this was the basis of the disciplinary charges which resulted in a nineteen-day suspension.

The petitioner referred to a previous case before the Board of Collective Bargaining which was settled by the parties before a hearing took place.[2] The petitioner maintained that he "defended" the petitioner in the previous case, and that Matula's actions also were taken in retaliation against that protected activity. He also claimed that he was suspended because of acts taken in his capacity as shop steward. He asserted that the suspension and disciplinary charges were designed to interfere

[2] Docket No. BCB-1512-92.

with and restrain him in the exercise of his rights under the NYCCBL.

Positions of the Parties

City's Position

The City maintains that the Department's allegations of misconduct against the petitioner are elements of its defense to the petitioner's improper practice claims, and that both proceedings arise from identical facts. For this reason, the City argues, the resolution of the disciplinary charges is essential to the ultimate disposition of the petitioner's improper practice claims. It moves to defer the improper practice proceeding pending the outcome of what it characterizes as an "OATH proceeding" and requests that a decision in the instant improper practice case be held in abeyance pending the outcome of the "OATH proceeding."[3]

Petitioner's Position

The petitioner opposes the City's motion to defer. He argues that the claims and issues before "OATH" and the Board of Collective Bargaining are not identical. He maintains that he is

[3] We note that the Department's disciplinary trial procedures are conducted by the Department itself, and not by the Office of Administrative Trials and Hearings.

asserting claims of discrimination and retaliation, which will not be heard by "OATH."

Discussion

In considering the City's motion, we first note that deferral is discretionary.[4] When asked to defer a charge of improper practice, we examine the relevant facts and circumstances and the consequences of deferral.[5]

The City's motion to defer to a departmental disciplinary trial is unprecedented. We have, in the past, considered deferral of a charge of improper practice to an alternate, impartial forum agreed upon by the parties, such as arbitration. Here we are asked to defer, not to an impartial forum agreed upon by the parties, but to a Trial Room hearing unilaterally imposed by the employer. The City has cited no precedent for deferral under such circumstances, nor has our own inquiry disclosed any authority for such an action.

If the forum had been chosen by both parties or there was a mutual perception of impartiality, and if that impartial forum

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[4] Decision Nos. B-15-93; B-57-87; B-3-85; see also Addison Cent. School Dist. v. Addison Teachers Ass'n NEA/NY, 17 PERB 3076 (1984) at 3116, wherein PERB held, "[d]eferral is discretionary and is not usually applied when a violation of § 209-a.1(a) is alleged...."

[5] Decision Nos. B-15-93; B-57-87.

were authorized to hear and determine allegations of employer motivation or anti-union animus, we would consider deferral. This is not such a case.

Accordingly, we deny the City's motion and direct that an evidentiary hearing be held before a Trial Examiner no later than June 30, 1995, to establish a factual record from which we may determine whether the actions taken by Matula and the Department were retaliatory and/or violative of the petitioner's rights under § 12-306a (1), (2) and (3) of the NYCCBL.

SECOND INTERIM 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 motion to defer the instant improper practice case to a departmental disciplinary trial, filed by the Department of Sanitation and John Matula in Docket No. BCB-1640-94 be, and the same hereby is, denied; and it is further,

DIRECTED, that an evidentiary hearing be held before a Trial Examiner no later than June 30, 1995, to establish a factual record from which we may determine whether the actions taken by John Matula and the Department were retaliatory and/or violative of the petitioner's rights under § 12-306a (1), (2) and (3) of the NYCCBL.

Dated: New York, New York
May 30, 1995

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

RICHARD BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD WILSKER
MEMBER