Pruitt, Pro se v. NYC Dept. Of Transportation, Horton, Peart, & Ferguson, 55 OCB 11 (BCB 1995) [Decision No. B-11-95]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
--between--	
KIRK PRUITT, Pro Se, Petitioner,	DECISION NO. B-11-95 DOCKET NO. BCB-1641-94
--and--	
NEW YORK CITY DEPARTMENT OF TRANSPORTATION, POLLY HORTON, ANDREE PEART, and JOHN FERGUSON, Respondents.	

DECISION AND ORDER

Pursuant to Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] and Title 61, § 1-07, of the Rules of the City of New York

[1] NYCCBL § 12-306 provides, in relevant part, as follows:

> **a. 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 § 12-305 [formerly § 1173-4.1] 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.
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> **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 § 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

(continued...)

("OCB Rules"),[2] Kirk Pruitt ("Petitioner"), appearing pro se, filed a Verified Improper Practice Petition, on March 14, 1994, against (i) John Ferguson, collective bargaining representative for the Pavers and Road Builders District Council of the Laborers' International Union of North America, A.F.L.C.I.O. ("Respondent," "Ferguson" or "Union"),[3] (ii) the New York City Department of Transportation ("Respondent" or "Department"), (iii) Polly Horton, investigator for the Department of Transportation ("Respondent" or "Horton"), and (iv) Andree Peart, Deputy Director of Labor Relations for the Department of Transportation ("Respondent" or "Peart").

The Petition alleges that the Respondents violated § 12-306 of the NYCCBL; specific subsections are not cited. The Petition also alleges

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[1](...continued)
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 1-07 of the OCB Rules provides, in relevant part, as follows:

* * *

d. Improper practices.
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 § 12-306 of the statute may be filed with the board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in behalf or by a public employer together with a request to the board for a final determination of the matter and for an appropriate remedial order. . . .

[3] Petitioner charges Ferguson with improper practice in the latter's capacity as a union representative. Respondent Ferguson's Answer does not deny that he was acting as an agent for the union. Inasmuch as a claim of a breach of the duty of fair representation will not lie against an individual but rather against an employee organization, we construe the complaint against Ferguson as a complaint against the Union.

violation of the OCB Rules, the New York State Civil Service Law, § 75 ("CSL § 75"), Article VI of the collective bargaining agreement, the Department of Transportation Code of Conduct, and unspecified civil, human and Constitutional laws.

On March 25, 1994, the Union filed an Answer. The City filed an Answer on April 26, 1994. On May 9, a letter with attachments dated April 27, 1994, from Petitioner was filed. On May 17, OCB's Deputy Chairman and General Counsel advised Petitioner by telephone of Petitioner's right to reply to the aforesaid Answers. Petitioner requested additional time to reply. On June 6, Petitioner filed a letter Reply stating that he was "not at liberty to admit or deny any further attempts of the Respondents to prolong and delay justice" and "[n]either [was he] prepared to administer [his] . . . cause of action via mail."

Background

At the time the instant Petition was filed, Petitioner's title was covered by the 1990-91 Unit Agreement (Inspectors/ Highways and Sewers) between the City of New York and Laborers International Union of North America, Pavers and Road Builders District Council, ("Agreement"), the terms of which were continued pursuant to the status quo provisions of NYCCBL § 12-311(d). Article VI, § 5, of the Agreement provides that, following service of written disciplinary charges, an employee so charged is entitled to a Step A conference, at which time the employee may be accompanied by a representative of the Union.[4] The person designated by the agency to review the charges is required to issue a written determination within five days of the conference. If the employee is dissatisfied with the determination, the employer is directed to act pursuant to the disciplinary procedures set forth in CSL § 75.

[4] The Agreement is silent as to representation of a unit member during a period of suspension without pay pending investigation and before service of charges.

Alternatively, with the consent of the employee, the employee's union may proceed under the contractually provided grievance procedure which provides for binding arbitration.

The Petitioner began working for the Department of Transportation on April 25, 1988, in the title of Service Inspector. It is undisputed that, on March 16, 1993, he was at his place of work in the Compliance Inspection Unit at 295 Lafayette Street when he refused to accept an assignment checking for defective street signs with a colleague whom, he told his supervisor at that time, he believed to be a dangerous driver. Petitioner was advised by a supervisor that, if he would not accept the assignment, he should punch out for the day. He refused to punch out or give his timecard to a supervisor. When he attempted to use an office telephone, he was refused and was asked to leave. An altercation between the Petitioner and the Director of Compliance ensued, in the course of which a telephone was allegedly destroyed. It is unchallenged that Petitioner left when he was informed that the police had been called to remove him.

A memo dated March 17, 1993, from the Director of Compliance, suspended Petitioner without pay, effective March 16, pending an investigation of the incident. The Petitioner was restored to the payroll as of April 15, 1993, but was directed not to report to work until after the conclusion of disciplinary procedures. On April 20, 1993, by personal delivery, the Department proffered Charges and Specifications against Petitioner as a result of the events of March 16.

During the period of suspension without pay, but before the service of Charges and Specifications, the Petitioner alleges that he inquired of his Union representative, Ferguson, "what sort of representation I would receive during the indefinite suspension without pay to which his reply was, quote, 'Nothing.'" A Step A hearing on the Charges and Specifications was held on May 3, 1993. Petitioner and Union Representative Ferguson were present. It

is undisputed that Petitioner dismissed Ferguson as his representative at the hearing, that Petitioner left the hearing room without giving testimony, that Ferguson subsequently left the hearing room, and that the hearing proceeded in the absence of Petitioner.

It is also uncontested that, in a letter dated May 12, 1993, Ferguson informed Petitioner that, notwithstanding Petitioner's dismissal of Ferguson at the Step A hearing, "the union [was] still ready to represent [him] at the pending disciplinary hearing." The letter directed Petitioner to advise Ferguson by the close of business on May 21, 1993, as to whether Petitioner had reconsidered the matter, noting that his failure to respond by that date would be taken as continued repudiation of union representation in the matter. It is undisputed that Petitioner did not respond to Ferguson's letter.

On May 25, 1993, the Step A hearing officer issued a report recommending that Petitioner's employment be terminated and advising him that written acceptance of the determination must be made within five work days or the Department would proceed with a hearing in accordance with CSL § 75 at the Office of Administrative Trials and Hearings ("OATH"). On October 28, 1993, an OATH trial was held at which Petitioner failed to appear. He was not represented by counsel in that proceeding. The OATH intake sheet stated that Petitioner refused union representation. On November 17, 1993, the Commissioner of Transportation wrote Petitioner advising him that the Commissioner had accepted OATH's recommendation for termination of employment and advising Petitioner of the means by which he could appeal the Commissioner's determination. On March 14, 1994, Petitioner filed the instant Improper Practice Petition.

Positions of the Parties

Petitioner's Position

The Petition describes Petitioner's dissatisfaction with the

representation by the Respondent Union in general and by Representative Ferguson in particular. As to the Department, Petitioner asserts that he was "provoked and then attacked" by the Director of Compliance at his workplace after Petitioner registered concern for his safety upon being assigned to ride with a fellow employee whom he considered to be an unsafe driver. Petitioner asserts that subsequently, when he went to the office of Departmental Investigator Polly Horton to discuss his work reassignment pending a Step A hearing, he overheard Horton and Union Representative Ferguson "conspiring" by phone to "defraud" him at the hearing. Petitioner does not state how he had knowledge that Ferguson was a party to the phone discussion.

Petitioner asserts that, at the Step A hearing, he was the target of discrimination:

> Whereby the Hearing Officer (Andree Peart) sought to conduct a bipartisan hearing with no interest in my merits. By which the very policy she attempted to implicate dictates my acceptance of a (predetermined penalty). Petitioner was warned of penalty prior to proceedings. Also, Ms. Peart, Esq., did fervently attempt to deny me my Right to dismiss and forgo (Union) representation.
>
> Furthermore, the Hearing Officer would allow the Department Advocate/Investigator to testify in behalf of the absentee culprits. Said Investigator previously presumed my guilt and the other parties' innocence without a proper investigation. (Emphasis in original.)

An attachment to the Petition notes that the Commissioner of Transportation terminated Petitioner's employment on November 17, 1993. Petitioner asserts that this date was within the limitations period for the filing of the instant Improper Practice Petition.[5]

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[5] The other attachments to the Petition are (1) a typed statement consisting of four paragraphs, written in the first-person singular, describing events of March 16, 1993, (2) a memo dated March 17, 1993, to Petitioner from Pretlow, DOT Director of Compliance Inspections, suspending Petitioner, (3) a memo dated April 12, 1993, from Pretlow informing Petitioner of an appointment for work reassignment pending the Step I hearing, (4) a letter dated April 13, 1993, and served April 20, 1993, from DOT Advocate Zeigler to Petitioner notifying him of charges and advising of a

(continued...)

In a "Notice of Application for Affirmative Doctrine Equitable Estoppel" which was attached to Petitioner's letter of May 27, 1994, Petitioner asks that Respondents be estopped from asserting a timeliness defense. He bases his request on his contention that he was "lulled" into not protecting his rights, that he was induced to forbear from proceeding herein until the statute of limitations had run, that he has incurred injury from "acts" of the Respondents, that he has not had an opportunity to "ascertain non-partisan tribunal," that Respondents "did unreasonably interfere with [his] known cause of action," and, inter alia, that he relied on Respondents, although he does not specify the effect of his reliance. The application for estoppel refers to exhibits and "new evidence" which are not attached.

Department's Position

The Department denies the allegations described in the Petition but admits that, before the Step A hearing, Petitioner stated that he would not participate in the hearing and that he did not want his union representative to speak on his behalf. The Department's Answer alleges that Petitioner left the hearing without providing formal testimony but that an affidavit previously submitted by Petitioner was entered on his behalf at the hearing.

The Answer further states that the disciplinary matter which was the subject of the Step A hearing was addressed at an OATH hearing on October 28, 1993. Department Investigator Horton testified at the OATH proceeding. The Answer notes that Petitioner did not attend the OATH hearing and was not

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[5](...continued)
Step I hearing scheduled for May 3, 1993, (5) a letter dated May 24, 1993, from Step I Hearing Officer Peart to Petitioner memorializing the Step I proceeding and recommending employment termination, and (6) a letter dated November 17, 1993, from DOT Commissioner to Petitioner terminating employment and informing Petitioner of appeal procedures.

represented by counsel. The Answer states that the OATH recommendation that Petitioner's employment be terminated was based on testimony by Department Investigator Horton and on Petitioner's personnel record.

As its first affirmative defense, the Department argues that the Petition was untimely filed and that, for purposes of computing the limitations period, May 3, 1993, was the date of accrual of Petitioner's claim. That was the date of the Step A hearing. As its second affirmative defense, the Department contends that the Petition fails to allege facts showing that the Department took action for the purpose of frustrating the rights of Petitioner as a public employee or of his Union under the NYCCBL. The Department argues that "'the right to dismiss and forgo (Union) representation,'" which Petitioner asserts, "is not one of the rights guaranteed in NYCCBL § 12-306."

As its third affirmative defense, the Department maintains that Petitioner's recitation of discrimination against him by the Step A hearing officer fails to allege facts sufficient to support a claim of employer interference, restraint or coercion which the NYCCBL was intended to redress. Moreover, the Department argues that Petitioner has alleged no causal link between the alleged discriminatory conduct and any union activity, which is required to support a claim of improper practice under NYCCBL § 12-306(a)(1).

As its fourth affirmative defense, the Department claims that Petitioner has failed to allege facts regarding any domination or interference by the employer with the formation or administration of his Union, as is contemplated under § 12-306(a)(2). As a fifth affirmative defense, the Department also claims that insufficient facts have been alleged regarding any discrimination against the Petitioner for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization, as is contemplated under § 12-306(a)(3). The Answer states that no union activity has been alleged.

Finally, as a sixth affirmative defense, the Department states that the controversy herein is not redressable in a forum adjudicating claims of improper practice but rather in the contractually provided grievance procedure.

Union's Position

The Union's Answer denies the allegations of the Petition as they relate to Representative Ferguson. The Answer maintains that, at the Step A hearing, Petitioner advised Respondent Ferguson (who was there to represent Petitioner) -- in the presence of the hearing officer -- that he did not want Ferguson or anyone else from the Union to represent him. The Answer states, "Ferguson left the proceeding, as did the Petitioner shortly thereafter."

The Answer further asserts that, on May 12, 1993, Ferguson sent a letter to Petitioner memorializing Petitioner's dismissal of him as Petitioner's representative and informing Petitioner that "the Union was still ready to represent him" with respect to the disciplinary matter. Ferguson assertedly set May 21, 1993, as the deadline by which Petitioner was to contact Ferguson; failure to do so would be deemed by Ferguson as Petitioner's continued rejection of Union representation. The Answer cites the OATH intake sheet, dated September 8, 1993, with respect to Petitioner's disciplinary proceeding, noting that Petitioner had refused representation by the Union. It observes that, at the OATH trial, Petitioner failed to appear, and the charges against him were upheld, resulting in the termination of his employment.

As its first affirmative defense, the Answer asserts that the Petition is devoid of factual allegations and fails to state a claim under the NYCCBL of a breach of the duty of fair representation.

As its second affirmative defense, the Answer asserts that the claimed wrongful conduct occurred outside the limitations period prescribed in the rules for commencing an improper practice proceeding. The Answer describes

March 16, 1993, as the date to be used to calculate the accrual of the alleged claim, and it asserts that there are no allegations that Ferguson committed any violative act after the date Petitioner's employment was terminated.

As a third affirmative defense, Respondent Ferguson argues that Petitioner is estopped from asserting a claim of a breach of the duty of fair representation by virtue of Petitioner's refusal to accept Ferguson's or the Union's representation. As a fourth affirmative defense, Respondent Ferguson maintains that the duty of fair representation runs between the Union and its member and that, by naming Representative Ferguson solely and not the Union, Petitioner has named an improper party. As a fifth and final affirmative defense, Respondent Ferguson argues that the Petition contains no allegation that Ferguson acted arbitrarily, in bad faith, or in a discriminatory fashion.

Discussion

The allegations in the Petition raise the issue of whether the Union breached the duty of fair representation with respect to the handling of Petitioner's disciplinary grievance. The Petition also raises the question of whether an independent claim of improper practice has been stated against the public employer.

Two preliminary matters require attention at the outset. First, the Petition alleges violation of the New York State Civil Service Law, specifically § 75 (Removal and Other Disciplinary Proceedings), unspecified human, civil and Constitutional laws, as well as the Code of Conduct of the Respondent Department, OCB Rules, and breach of Article VI of the collective bargaining agreement. Second, Petitioner states that the accrual date on his claims was November 17, 1993, when his employment was terminated, and that his claims are not barred by the statute of limitations set forth in the OCB Rules.

As to the first preliminary matter, allegations that there may have been

violations of CSL § 75, human, civil and Constitutional laws, and of the Code of Conduct of the Respondent Department do not raise issues that are within the Board's jurisdiction. The Board lacks statutory authority to consider claims of denial of due process independently from a valid underlying improper practice charge.[6]

Moreover, the Board is prevented from enforcing the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[7] In addition, an allegation of a violation of the OCB Rules does not support a claim of improper practice. Thus, the claims with respect to these alleged violations are dismissed.

The second preliminary matter concerns the timeliness of the Petition. We have consistently held that the four-month limitations period prescribed in § 1-07(d) of our Rules will bar the consideration of an untimely filed improper practice petition.[8] A defective petition is not cured by the belated assertion of relevant evidence which was available to the petitioner upon the initial filing of the matter. It is true, however, that when a petition alleges a continuing course of conduct commenced more than four months prior to the date of filing the petition, the allegation may not be time-barred in its entirety. In such cases, a specific claim for relief is time-barred to the extent a petitioner seeks damages for wrongful acts which occurred more

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[6] Decision No. B-38-87.

[7] Decision Nos. B-8-94, B-21-93, B-46-92 and B-51-90; See, also, CSL § 205.5(d) which provides, in part:

> [T]he board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[8] Decision Nos. B-21-93, B-37-92 and B-30-91.

than four months before the petition was filed, but evidence of the wrongful acts may be admissible for purposes of background information when offered to establish an on-going and continuous course of violative conduct.[9]

In the instant proceeding, Petitioner's claim of a breach of the duty of fair representation against his Union representative accrued, arguably, on March 16, 1993. That is the date on which Petitioner spoke to Union Representative Ferguson as to union representation regarding the suspension. Based upon an accrual date of March 16, 1993, the statute of limitations expired four months from that date, i.e., on July 16, 1993.

If we were to find any supportable allegations in the Petition or Reply justifying a different accrual date, such as May 3, 1993, the date on which Representative Ferguson attended the Step A hearing on Petitioner's behalf, this date would be equally unavailing. A limitations period figured from May 3 would expire on September 3, 1993, more than six months before the instant Petition was filed.

If the limitations period were computed from May 21, the date by which it is uncontested that Representative Ferguson told Petitioner that he should contact Ferguson if Petitioner wanted union representation in his disciplinary grievance, the limitations period would still end more than five months before the Petition was filed.

Petitioner would have us apply an accrual date of November 17, 1993, the date that his employment was terminated under disciplinary procedures prescribed in the Civil Service Law. While November 17, 1993, did occur within four months of the filing date of the instant Petition on March 14, 1994, the events of November 17, 1993, as alleged in the instant Petition state no claim of improper practice under the NYCCBL against Respondent Ferguson or the Union. The employer's conduct -- termination of Petitioner's employment -- does not support a claim of a breach of the duty of fair

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[9] Decision Nos. B-21-93 and B-37-92.

representation against the Union or its representative.

Moreover, Petitioner has not alleged facts from which we might infer a continuing course of conduct commenced more than four months prior to the date of filing the Petition. Had such allegations been stated, any acts occurring more than four months before the Petition was filed which we determined to be violative of the NYCCBL would be admissible albeit only for purposes of background information. Such is not the case here. For the above reasons, we must dismiss the claims against the Union as untimely filed.

Even were the claim to have been filed in timely fashion, we would have to find no breach of the duty of fair representation by the Union and its agent. The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[10] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[11] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[12]

Here, Petitioner alleges that he inquired of Union Representative Ferguson "what sort of representation I would receive during the indefinite suspension without pay to which his reply was, quote, 'Nothing.'" The Answer does not deny that Ferguson made the statement, but the pleadings are silent as to why he may have responded thus. We note that the Collective Bargaining Agreement is silent also as to representation of a unit member during a period of suspension without pay pending investigation and before service of charges.

Nonetheless Petitioner admits that at the Step A hearing Ferguson

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[10] Decision Nos. B-8-94, B-44-93, B-29-93 and B-21-93.

[11] Decision Nos. B-24-94, B-21-93, B-35-92 and B-21-92.

[12] Decision Nos. B-24-94, B-21-93, B-35-92 and B-56-90.

appeared for the purpose of representing Petitioner in that proceeding and that Petitioner rejected representation by Ferguson or the Union in the disciplinary matter that was pending. Even after Petitioner dismissed Representative Ferguson, it is uncontested that Ferguson contacted Petitioner to extend additional Union assistance but that assistance was declined as well.

By Petitioner's rejection of union representation, and by his failure to plead any facts indicating that Ferguson's or the Union's conduct towards him was arbitrary, discriminatory or in bad faith, or that Ferguson or the Union ignored a meritorious claim or processed the grievance with respect to the disciplinary charge in a perfunctory manner, Petitioner has failed to sustain his burden of stating a claim as required under the NYCCBL for a breach of the duty of fair representation.

As to the public employer, if Petitioner means to state a claim arising out of the termination of his employment on November 17, 1993, such a claim would be timely since it falls within four months of the filing of the Petition. Any claims based on events prior to November 14, 1993, would be time-barred but could be considered as background information on a claim alleging a continuing course of conduct.

We find, however, that Petitioner has failed to state any independent claims of improper practice by the Department. The Petition fails to specify how the actions of any Department personnel are violative of any of the enumerated subdivisions of § 12-306a of the NYCCBL which defines improper public employer practices. The Petition alleges only that the Petitioner was "provoked" and "attacked" by the Director of Compliance because of his refusal to accept an assignment for fear of his personal safety and that he was refused the opportunity to use the office telephone to report the Director to his superior and to consult with the Union. Drawing every possible favorable inference from these allegations, we find that only the alleged attempt to

consult with the Union involves protected activity under the NYCCBL. However, as to that allegation, the Petition fails to allege any facts which would establish either that Respondents knew that he intended to call the Union, or that there was a causal connection between the alleged attempt to call the Union and the termination of his employment. In fact, the attachments to the Petition demonstrate that the dispute over the use of the telephone occurred after the Petitioner already had been ordered to "punch out" because of his refusal to accept an assignment. In this context, even assuming the truth and accuracy of the allegations of the Petition, it does not appear that the Petitioner was terminated for any of the proscribed reasons set forth in § 12-306a of the NYCCBL.

The NYCCBL does not give the Board jurisdiction to consider and attempt to remedy every perceived wrong or inequity which may arise out of the employment relationship. It mandates only that the Board administer and enforce procedures designed to safeguard those employee rights created by the NYCCBL, i.e., the right to organize, to form, to join, and assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from those activities.[13] Petitioner does not assert that the Department's actions were intended to or did affect any of these protected rights.

Accordingly, the instant Improper Practice Petition is dismissed. However, the dismissal is without prejudice to the Petitioner's pursuit of claims which he may have in another forum.

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[13] Decision Nos. B-3-95, B-26-94 and B-25-94.

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 improper practice petition docketed as BCB-1641-94 be, and the same hereby is, dismissed.

Dated: New York, New York
May 30, 1995

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER