L.1182, CWA v. DOT, 55 OCB 15 (BCB 1995) [Decision No. B-15-95 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA

DECISION NO. B-15-95
DOCKET NO. BCB-1644-94

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.

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INTERIM DECISION AND ORDER

On April 13, 1994, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Transportation ("Department" or "City"). The petition alleges that the City violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL") when it placed Leon Tankard ("Petitioner"), a Traffic Enforcement Agent, on a leave of absence in retaliation for his having provided representation to a fellow employee. The City, by its Office of Labor Relations, filed a verified answer on June 9, 1994 and the Union filed a verified reply on September 30, 1994.

A pre-hearing conference was held at the Office of Collective Bargaining ("OCB") on November 17, 1994 and a hearing was scheduled to commence on January 24, 1995. At the pre-

hearing conference the City's attorney indicated that it had come to his attention that Petitioner had executed a settlement agreement and that, as a result, he wished to make a motion to dismiss the petition. The Trial Examiner assigned to the case stated that such a motion would have to be made in writing within a reasonable time prior to the commencement of the hearing.

By letter dated January 17, 1995 the City's attorney requested an adjournment of the scheduled hearing dates because he was leaving the employ of the City. The City attorney stated that "as soon as the case is reassigned, the new attorney will contact you to reschedule." The Union's attorney agreed to an adjournment.

By letter dated April 21, 1995 the City informed the OCB that the case had been reassigned. On the same date, the City filed a motion to amend its verified answer wherein it requested that the petition be dismissed.[1] On June 9, 1995 the Union filed a reply to the amended answer and an "affirmation in opposition to respondent's motion to amend its answer and in opposition to its motion to dismiss." On June 19, 1995, the City filed a "reply to petitioner's affirmation in opposition to respondent's motion to amend its verified answer" and on June 29, 1995, the

[1] While the City refers to its pleading as a motion to amend its answer, we deem it to be a motion to dismiss as well. The pleading itself requests that the petition be dismissed and the Union's reply treats it as a motion to dismiss. Furthermore, it was clear to the Trial Examiner assigned to the case that the City intended to file a motion to dismiss.

Union filed an "affirmation in sur-reply to respondent's 'reply' to Petitioner's affirmation in opposition to Respondent's motion to dismiss."[2]

The hearing in this matter, which was adjourned, has been rescheduled to commence on August 29, 1995.[3]

Background

On March 30, 1994, Petitioner, a Union delegate, was assigned to Department District Office 109 in Manhattan. At some point, a second Traffic Enforcement Agent ("co-worker"), who had been suspended in the recent past, appeared at the district office. According to the City, this employee had not completed his period of suspension.[4]

According to the City, when the co-worker appeared at the district office Captain Anthony Toussant notified the Office of Integrity and Internal Controls ("Internal Controls"). The City

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[2] The City's motion to amend and motion to dismiss the instant improper practice petition is governed by Title 61, Section 1-13(k) of the Rules of the City of New York ("OCB Rules"). That section provides for moving papers and answering papers; it does not permit "replies" and "sur-replies." For this reason, we will not consider either of these submissions.

[3] The City and the Union agreed to this date tentatively since it will become unnecessary if the instant motion to dismiss is granted.

[4] As an exhibit to its answer, the City submitted a letter from the Department addressed to the co-worker. The letter states that the suspension period was to begin on March 14, 1994 and directs the co-worker to report to the Department on March 28, 1994 for further instructions. The City alleges, and the Union denies, that the co-worker failed to report on March 28th.

alleges that Internal Controls dispatched two investigators. The Union alleges that when the investigators arrived and confronted the co-worker, Petitioner, "in his role as a union delegate", "provided representation" to the co-worker.

The Union alleges that on the same day, "immediately following such representation", Petitioner was directed to report to Internal Controls. When he did so, the Union alleges, he was informed that Internal Controls had determined that his driver's license was suspended. Petitioner was placed on an unpaid leave of absence until his license was revalidated.[5]

At a meeting held on April 28, 1994, after the instant improper practice petition had been filed, Petitioner signed an "Agreement of Penalty and Waiver of Rights" ("Agreement") which provides:

I, Leon Tankard [Social Security Number] TEA-II of

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[5] As an exhibit to its answer, the City submitted a copy of a form memo addressed to Chief Sadie Culler regarding petitioner. The memo indicates that petitioner's license was found to be suspended and purports "to confirm the telephone conversation between Supervising Inspector Pat Brown of the Integrity & Internal controls and Inspector Goggins of your command on March 29, 1994". It states that, pursuant to "DOT BOT Order 86/36", the petitioner may use up to five days of accrued annual leave or compensatory time to revalidate his license. If the employee is unable to accomplish the revalidation in the five day period, his status changes to "LNP - LEAVE NO PAY". If the employee does not revalidate his license within thirty days, his status changes to AWOL and the Office will initiate action to terminate employment. This document was signed by petitioner. The City alleges that this was given to petitioner by the Investigator and constitutes "written notice of the information communicated to petitioner orally." The City alleges that Petitioner was placed on an unpaid leave of absence because he had no accrued annual leave or compensatory time.

> the Bureau of Enforcement, acknowledge certain charges relating to:
>
> Suspended driver's license
>
> I hereby agree to accept a penalty of:
>
> fifty dollar fine to be paid in one installment of fifty dollars ($50.00) to commence on May 20, 1994.
>
> In full satisfaction of these charges. I understand that by doing so I am waiving any and all rights that I have pursuant to the Civil Service Law and any other applicable statute, regulation, or agreement which pertains to disciplinary action against New York City employees.
>
> I execute this Agreement of Penalty and Waiver of Rights in consideration of the City of New York's resolving this matter without placement of formal charges towards me.

Charlesetta Horton, the Union's Delegate at Large in Manhattan, signed the Agreement as a witness.

Positions of the Parties

City Position

The City argues that because the "basis of" the instant improper practice petition is the discipline of Petitioner, and Petitioner waived "any and all rights" that he has "pursuant to the Civil Service Law and any other applicable statute, regulation, or agreement related to disciplinary matters," the petition should be dismissed. According to the City, Petitioner's "waiver of all rights pursuant to the Civil Service Law includes, by definition, a waiver of all rights pursuant to

the NYCCBL." The City maintains that Petitioner is not entitled to "a second proceeding pursuant to another Section of the Civil Service Law, the NYCCBL, to recoup the penalty [he] voluntarily agreed to accept..."[6]

Union Position

According to the Union, the Agreement signed by Petitioner addresses solely the disciplinary charges relating to the suspended driver's license; it is silent as to the pending improper practice charge. The Union maintains that these proceedings involve two completely different issues. The issue involved in the disciplinary matter is whether Petitioner violated the departmental policy requiring Traffic Enforcement Agents to have a current and valid driver's license, while the issue involved in the improper practice is whether Petitioner was retaliated against for attempting to represent the co-worker in his capacity as a Union delegate. Therefore, the Union argues, the settlement of the disciplinary matter does not dispose of the improper practice petition.

According to the Union, the language used in the Agreement makes the intent clear. The Union argues that the exclusive use of the personal pronoun "I" makes it clear that Agreement applies

[6] In connection with this argument, we note that while the Taylor Law is a section of the Civil Service Law, and the Taylor Law authorizes the existence of the NYCCBL, the NYCCBL is not a section of the Civil Service Law.

only to "Petitioner's personal disciplinary action and not to the Union's improper practice proceeding." The Union points out the Agreement refers to neither the Union nor Petitioner's status as a Union delegate. Moreover, the Union argues, by its own terms the Agreement is limited to rights pertaining to "disciplinary action".

Along with its affirmation in opposition to the City's motion to amend its answer and motion to dismiss, the Union submitted the affidavit of Charlesetta Horton. In that affidavit Ms. Horton stated that the April 28, 1994 meeting concerned only the disciplinary matter against [Petitioner] for having a suspended driver's license. She further stated that "at no time during that meeting was there any discussion whatsoever pertaining to the improper practice proceeding...there was never any discussion whatsoever that the Agreement or the waiver in that Agreement pertained in any way to the Union's improper practice petition."

Discussion

Initially, we must address the City's motion to amend its answer to include the factual allegations and legal arguments concerning the Agreement. The Board has the discretion, with consideration given to issues of due process, to apply its rules liberally and in a fashion that will promote the resolution of real issues, rather than the application of technical rules of

procedure more appropriate to the courts.[7] Where the rules are in essence complied with and there is no showing of prejudice to the other party, the Board will not allow a technical oversight to preclude full adjudication of the merits of the claims raised in a petition.[8] Applying these standards to the instant matter, we note that there is nothing in our rules to prevent the amendment of an answer that was timely filed. The City did not include the facts concerning the Agreement in its original answer because its existence did not come to the City's attention until November of 1994. The City informed the Union of its existence at that time. The delay in actually moving to amend the answer was caused by the City's change of counsel. Thus, the explanations offered by the City to justify its need to amend its answer and its delay in doing so are reasonable. More importantly, however, the Union has failed to make a showing of prejudice; because it has been afforded a full opportunity to address the new factual allegations and legal arguments, its due process rights have not been interfered with. Therefore, we will permit the City to amend its answer as requested.

The fact that Petitioner signed the Agreement is undisputed by the parties. However, there is much dispute as to the proper interpretation of that Agreement. The City's motion to dismiss is based upon the premise that in signing the Agreement,

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[7] Decision No. B-9-89.

[8] Decision No. B-9-89.

Petitioner waived his right to pursue the instant improper practice charge. This is so, the City maintains, because Petitioner's improper practice claim arises out of the disciplinary action, and Petitioner has waived all rights pertaining to that disciplinary action. The Union, on the other hand, argues that Petitioner waived no more than his right to challenge the disciplinary action; he has not waived his right to charge that he was retaliated against on account of union activity in violation of the NYCCBL. The Union points out that the issues involved in the disciplinary action are not the same as those involved in the improper practice charge.

We find that plausible contentions can be made for each of the conflicting interpretations put forth by the parties. In order to interpret the Agreement, we must ascertain and give effect to the mutual intent of the parties. In determining the intent of the parties, inquiry must be made as to what the language meant to the parties. This can be accomplished only through a hearing at which testimony is given and evidence is offered. For this reason, we deny the City's motion to dismiss the petition at this time. The parties will be permitted to give testimony and offer evidence concerning the meaning of the Agreement at the hearing in this matter which is scheduled to commence on August 29, 1995.

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 dismiss the instant improper practice petition by the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the motion to amend its answer by the City of New York be, and the same hereby is, granted.

DATED: New York, New York
July 18, 1995

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Robert H. Bogucki
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER