

Baith v. DC37, 55 OCB 21 (BCB 1995) [Decision No. B-21-95 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

JIHAD A. BAITH,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

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DECISION NO. B-21-95 (ES)

DOCKET NO. BCB-1719-95

DETERMINATION OF EXECUTIVE SECRETARY

On January 23, 1995, Jihad A. Baith ("Petitioner") filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO, ("Union"), pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").¹

¹ NYCCBL § 12-306 provides, in relevant part, 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-

(continued...)

In his improper practice petition, Petitioner alleges that the Union has misrepresented information about his medical condition which bears upon a promotion which he seeks from the title of Debris Remover with the Department of Transportation ("DOT") to the title of Assistant City Highway Repairer ("ACHR"). As relief, Petitioner requests a promotion to ACHR.

Attachments to the petition include: (i) a letter from DOT dated March 1, 1993, finding Petitioner "medically **Not Qualified** for the position of ACHR (emphasis in original);" (ii) a note from Petitioner's optician dated March 4, 1993, stating that his vision as corrected "shouldn't stop his performance of work;" (iii) a memorandum from a DOT supervisor dated May 7, 1993, which describes the duties that Petitioner would be required to perform as an ACHR

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(2) to refuse to bargain collectively in good faith 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 in of such employer.

and reiterates that his optician found him fit to perform these duties; (iv) a copy of DOP's "Medical Standards for Positions Involving Motor Vehicle Operation;" (v) a Step One grievance form dated June 7, 1993, which Petitioner filed on his own behalf, seeking a promotion to ACHR; (vi) a list of out-of-title assignments that Petitioner allegedly performed;² and (vii) an article from an unknown source dated October 14, 1994, concerning the successful grievance of an Assistant Highway Repairer whose promotion had been blocked by a vision test that had been found to violate the Americans with Disabilities Act.

Pursuant to Title 61, Section 1-07(d) of the Rules of the City of New York ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that it is untimely on its face. Under § 1-07(d) of the OCB Rules, a petition alleging conduct in violation of NYCCBL § 12-306 must be filed within four (4) months of the date the alleged improper practice occurred. In the present case, the petition, which was filed on January 23, 1995, complains of DOT's alleged failure to promote Petitioner in or around March 1993, and alleged out-of-title work assignments which occurred during the period February, 1993, through February, 1994. Since these events occurred more than four months prior to the filing of the instant petition, these claims are untimely and cannot be maintained.

Even if the events complained of were not so untimely as to warrant summary dismissal, however, the undersigned has determined that the petition

² Petitioner states that he is "still doing ACHR work and not getting the fruit of [his] labor. Some of the dates are as follows: April 2, 1993, April 5, 1993, April 6, 1993, April 18, 1993, April 24, 1993, and May 30, 1993. These dates are recent!"

still would be dismissed, because the petition fails to allege facts sufficient as a matter of law to show that the Union has committed any acts in violation of § 12-306b of the NYCCBL, which has been held to prohibit violations of the judicially recognized fair representation doctrine. The doctrine of fair representation requires a union to treat all members of the bargaining unit in an evenhanded manner and to refrain from arbitrary, discriminatory and bad faith conduct.³ A union breaches its duty of fair representation if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.⁴

In the instant case, the Petitioner's allegations that the Union made detrimental representations about him and that it failed to raise the issue of his medical fitness for a promotion are entirely conclusory and lacking in any detail. In order to state a claim of breach of the duty of fair representation, Petitioner must allege facts sufficient to show that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. In the absence of sufficient specificity concerning this claim, it is impossible for us to find that the petition states a claim of arbitrary, discriminatory or bad faith conduct by the Union which would be sufficient as a matter of law to constitute an improper public employee organization practice within the meaning of § 12-306b of the NYCCBL.

For these reasons, the instant improper practice petition must be dismissed in its entirety.

DATED: New York, New York

³ Decision Nos. B-5-91; B-51-90, B-15-83.

⁴ Decision Nos. B-56-90; B-27-90, B-72-88.

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November 21, 1995

Wendy E. Patitucci
Executive Secretary
Board of Collective Bargaining