Kaplan v. L.237, IBT & NYCHA, 55 OCB 24 (BCB 1995) [Decision No. B-24-95 (IP)]

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

Joseph Kaplan,

Petitioner,

and

Decision No. B-24-95
Docket No. BCB-1613-93

Local 237, International Brother-
hood of Teamsters and New York
City Housing Authority,

Respondents.
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DECISION AND ORDER

On October 14, 1993, Joseph Kaplan ("the Petitioner") filed a verified improper practice petition against Local 237 of the International Brotherhood of Teamsters ("the Union") and the New York City Housing Authority. The petitioner alleges that the Housing Authority committed an improper practice by failing to reinstate him at his full rate of pay after he returned from a leave of absence. He also alleges that the Union committed an improper practice and breached its duty to represent him fairly and in good faith.

The Union filed an answer on November 19, 1993, and the Housing Authority filed an answer on December 20, 1993. The petitioner filed a reply to the Union's answer on December 10, 1993, and to the Housing Authority's answer on January 8, 1994. A pre-hearing conference was held on July 22, 1994.

The first day of hearing was held on October 12, 1994. On the next scheduled hearing date, November 28, 1994, the Housing Authority was not prepared to go forward. The hearing was

concluded on January 27, 1995. On that day, the Housing Authority was directed to produce several documents by February 10th, but did not do so.

In March 1995, while the Housing Authority had not yet produced the required documents, the Trial Examiner was informed that the firm of Epstein, Becker & Green, P.C. had been substituted as counsel for the Housing Authority. By letter dated March 20, 1995, the Housing Authority's attorney requested that he be sent copies of the pleadings. By letter dated April 6, 1995, the Trial Examiner informed the parties that post-hearing briefs in the case were due on April 24, 1995. The parties submitted briefs on that date. The Housing Authority produced the required documents in May 1995.

Background

The petitioner was hired by the Housing Authority as a provisional Housing Assistant on July 30, 1990. He testified that during his first year as a provisional Housing Assistant he received "satisfactory" ratings on each of four quarterly evaluations. While serving provisionally, the petitioner took the Civil Service test for Housing Assistant.

James Drinane, Deputy Director of Operations services for the Housing Authority, testified that provisional employees remain in provisional status unless they are appointed from a civil service list, and that a provisional employee does not become a Civil Service employee simply by earning satisfactory

performance ratings. The title Housing Assistant is in the competitive class of positions.

The petitioner related that he took what he called an "authorized leave of absence" as a Housing Assistant in 1992. On the other hand, the Housing Authority entered into evidence a letter from the petitioner dated October 5, 1992, which stated, I,Joseph Kaplan, will be resigning my housing assistant position at Baruch Houses effective October 19, 1992."

Ezard Knight, who was a personnel interviewer for the Housing Authority at the time in question, testified that the Housing Authority began to hire permanent Housing Assistants from the Civil service list in February or March of 1993. The petitioner was appointed from the Civil Service list as a Housing Assistant on April 12, 1993 and was immediately assigned to the Park Rock housing project. He stated that after approximately two months, his manager, Elizabeth Thomas, began to instruct him to punch out early and go home. According to the petitioner, Thomas and other supervisors engaged in a pattern of harassment which led him to conclude that they disliked him and wanted him out of their unit.

In the spring of 1993, according to the petitioner, the superintendent of the housing project allowed him to use a locker for his belongings. He stated that Thomas had maintenance workers remove his padlock from the locker and confiscated the contents. According to Thomas, the lockers were scheduled to be moved to another location. She testified that it was only after

she had asked the petitioner to remove the lock and his belongings and he had refused that she had the lock removed.

The petitioner stated that in June 1993, the District Administrator, Kevin Hooker, told him that he was required to submit to urinalysis and told him not to return to work until he had done so. The petitioner refused to report for the examination and did not return to work. His salary was withheld for the period of time that he was absent.

By letter dated June 23, 1993, the Housing Authority advised the petitioner that he had been absent without leave since June 21, 1993, that he was to return to work on June 29, 1993, and that failure to comply would result in termination. When he returned to work on June 29th, Thomas directed that he be examined by a Housing Authority doctor, who found him to be physically able to return to work. According to the petitioner, the results of a urinalysis taken at that time were negative.

Thomas testified that sending the petitioner to a Housing Authority doctor for a medical examination accorded with the agency's policy, which provides that employees who are absent from work for more than three days may be required to undergo such an exam to ascertain their fitness for work. She stated that she also sent a letter to Dr. James Cornelius, chief of Staff Relations, seeking guidance in dealing with the petitioner and requesting that he be referred to the Employee Assistance Program. According to Thomas, all efforts at traditional guidance and management had failed with the petitioner and she

required assistance from a psychologist in dealing with him. Thomas testified that on several occasions she told the petitioner to punch out early because he had arrived at work with an unkempt appearance that rendered him unfit for work. One day, she said, the petitioner arrived at work so late in the morning that she directed him not to punch in for the day.

The petitioner testified that he advised the Union that he was being directed to punch out early and that a shop steward told him not to punch out if that happened again. He followed the shop steward's advice, the petitioner said, when Hooker told him to punch out and go home. The petitioner testified that because Hooker made threats of physical violence, he left the building to avoid an altercation. When he returned to the building, he stated, Hooker and Thomas called the police to have him removed from the building. Thomas testified that the petitioner's behavior was often *unsettling and* that she and Hooker called the police for their own protection. According to Thomas, they did not call the police to force the petitioner to punch out or to be removed from the building, but to ensure that he would not return once he punched out.

The petitioner first testified that he sought the aid of the Union in April 1993, because his manager and district administrator directed him to submit to a urinalysis examination. Subsequently, he said that this occurred in June, July or August of 1993. Eventually, he testified that he believed he first visited the union hall in June 1993, at about the time that he

was directed to submit to a urinalysis examination. According to the petitioner, he was advised by Manny Cuebas, at that time a Union trustee and assistant to the President, but did not think he had received good advice. Cuebas testified that he first met the petitioner in the lobby of the union hall in June and that he asked the petitioner to come upstairs to his office. While they were waiting for the elevator, Cuebas stated, the petitioner left the building without saying anything further.

Nick Mancuso, another Union official, called the petitioner and asked him to write a letter detailing his allegations. In the petitioner's letter, dated July 9, 1993, he asked that the Union file a grievance on his behalf. In response to the letter, Cuebas visited the petitioner at his work site. He testified that he advised the petitioner to gather any relevant documents and bring them to his office. Cuebas stated that he told the petitioner to call him if further problems arose and, if that happened, he would schedule a meeting with Thomas to attempt to resolve them. According to Cuebas, the petitioner did not call him. Cuebas said that he called the petitioner's work site two weeks later and was informed that the petitioner had been terminated. He testified that he did not hear from the petitioner again until the following year, when the petitioner called and asked him for help in getting reinstated. Cuebas said that he told the petitioner to come to the union hall with any relevant documents, but that the petitioner never appeared.

The Housing Authority entered into evidence a letter dated August 4, 1993, in which it informed the petitioner that his employment had been terminated for failure to perform and cooperate. Phil Cioffe, an assistant director and business agent of the Union, testified that the petitioner sought help from the Union by letter dated August 12, 1993, which was forwarded to him. He said that he twice called the petitioner at home and spoke to him about his termination. Cioffe stated that he told the petitioner that he was not entitled to grievance arbitration if he was a probationary employee. Cioffe related that he called a personnel manager at the Housing Authority, who advised him that the petitioner had been on probation at the time that he was terminated. Cioffe stated further that he called the petitioner again and asked him to forward any documents which would refute the Housing Authority's claim that the petitioner was on probation at the time he was terminated. According to Cioffe, he never heard from the petitioner again. The petitioner did not enter into evidence any subsequent letters to the Union.

The petitioner entered into evidence a letter dated April 13, 1994, which he received from Thomas Hines, then New York State Executive Deputy Commissioner of Labor. Hines wrote in response to the petitioner's request for assistance. He told the petitioner that he had called Cuebas, and that Cuebas had again offered to assist the petitioner.

Discussion

The duty of fair representation obligates a union to act fairly, impartially and in a non-arbitrary manner when negotiating, administering and enforcing collective bargaining agreements.[1] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory manner may constitute a breach of the duty of fair representation,[2] but the burden is on the petitioner to prove that a union has engaged in such conduct.[3]

According to the petitioner, he became a permanent Civil Service employee by passing the test for Housing Assistant in February 1991, before he took a leave of absence. As a permanent Civil Service employee, he maintains, he is entitled to due process rights. He claims that the Union did not file a grievance on his behalf and, for that reason, that it breached its duty of fair representation to him. The Union asserts that it offered assistance to the petitioner but that he did not avail himself of its assistance. Further, the Union maintains, the petitioner was a probationary employee who had no right under the collective bargaining agreement to have a grievance filed on his behalf. The Housing Authority argues that the petitioner did not become a permanent employee until April 1993, and that his

[1]Decision Nos. B-8-94; B-44-93; B-29-93; B-21-93.

[2]Decision Nos. B-24-94; B-21-93; B-35-92; B-21-92.

[3]Decision Nos. B-24-94; B-21-93; B-35-92; B-56-90.

employment was terminated during his probationary period, making him ineligible for grievance arbitration.

The burden here is on the petitioner to prove that he was a permanent Civil Service employee on the day that he was terminated. If that were so, the Union would have had a duty to consider filing a grievance on his behalf.[4] We find that the petitioner has failed to prove that he was eligible for the grievance arbitration procedure when he was terminated because he did not prove that he was a permanent employee at that time.

The petitioner's belief that he had permanent status is not substantiated by the record. An employee is granted permanent status only upon appointment from a list of eligible candidates.[5] The petitioner could not have been employed as a permanent Civil Service employee before February or March of 1993, because that is when the Housing Authority first began hiring Housing Assistants from the permanent list.[6]

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[4] We note, however, that permanent status of an employee does not obligate a union to process every grievance. The law requires only that the refusal to advance a claim be made in good faith and in a manner that is not arbitrary or discriminatory. Decision Nos. B-23-94; B-44-93; B-29-93; B-5-91; B-53-89. A wide range of reasonableness is granted to a union in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of discretion. Decision Nos. B-23-94; B-2-90.

[5] N.Y. Civ. Serv. Law § 61(1) (McKinney 1983).

[6] The record clearly shows that the petitioner resigned his provisional position as Housing Assistant in 1992. Even assuming, however, that the petitioner had taken a leave of absence, he would have returned from the leave as a provisional employee.

Contrary to the petitioner's assertion, a probationary period begins on the day of formal appointment to a title, not the date when the individual is placed on an eligible list.[7] The petitioner was appointed to the title Housing Assistant from the Civil Service list in April 1993. As a newly-appointed Civil Service employee, he was required to pass a probationary period.[8] Pursuant to the Rules and Regulations of the Department of Personnel,[9] which have been adopted by the Housing Authority, a one-year probationary period for newly-appointed employees has been established. For the year following his appointment in April 1993, the petitioner was a probationary employee, not a permanent competitive employee as he contends, and as such was subject to termination *as* a probationary employee.[10]

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[7] Hill v. City of New York, 554 N.Y. S. 2d 181 (1st Dept 1990) Reis v. New York State Hous. Fin. Agency, 74 N.Y.2d 724 (1989).

[8] Section 63 of the New York Civil Service Law ("Probationary term") provides, in relevant part:

1. Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term....

[9] Rule 5.2.1 of the Rules and Regulations of the Department of Personnel ("Probationary Term") provides, in relevant part:

(a) Every *appointment and* promotion to a position in the competitive ... class shall be for a probationary period of one year....

[10] Rule 5.2.7 of the Rules and Regulations of the New York City Department of Personnel provides, in relevant part:

(c) [T]he agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of

(continued...)

The petitioner did not identify a provision of the contract which gives the Union the power and correlative duty to file a grievance concerning alleged wrongful termination of probationary employees. Since the petitioner has not shown that he had a right to grievance arbitration as a probationary employee, the Union cannot have breached its duty of fair representation by failing to file a grievance on his behalf.[11] The record shows that, in all other respects, the Union offered assistance of which the petitioner did not avail himself. For these reasons, we find that the Union did not breach its duty of fair representation to the petitioner.

As to the petitioner's claim against the Housing Authority, we find that he resigned his position as a provisional employee in October 1992. The petitioner offers no evidence except his recollection and belief that his hiatus from employment was a leave of absence authorized by the Housing Authority. Indeed, the record contains a letter signed by the petitioner in which he

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10(...continued)
probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the city personnel director. The specified minimum period of probationary service ... shall be: (1) two months for every appointment to a position in the competitive or labor class....

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Decision Nos. B-51-88; B-1-88; B-14-86; B-18-84; B-13-82; B-16-79

In addition, we note that if the petitioner could demonstrate that it was the Union's practice to represent or pursue grievances on behalf of other probationary employees in the same circumstances, it would have had a duty to consider doing so for the petitioner. Here, however, the petitioner did not plead or prove this element.

states that he is resigning his position. Since the petitioner was not on a leave of absence, the Housing Authority could not have committed an improper practice by "failing to reinstate him at his full rate of pay" when he was hired anew from the eligible list in April 1993.

Accordingly, the instant improper practice claims are dismissed.

DECISION AND 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 claims in Docket No. BCB-1613-93 be, and the same hereby are, dismissed.

Dated: New York, New York
November 28, 1995

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

TITLE 61 OF THE RULES OF THE CITY OF NEW YORK (FORMERLY REFERRED TO AS THE REVISED CONSOLIDATED RULES OF THE OFFICE OF COLLECTIVE BARGAINING)

Section 1.07(d) (formerly § 7.4) 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 Section 12-306(formerly 1173-4.2) 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 their 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. Within ten (10) days after petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in section 12-306 (formerly 1173-4.2) of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law constitute a violation, or 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 and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine the petition is not, on its face, untimely or insufficient, notice of determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board Of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

Section 1.07(h) (formerly § 7.8) Answer - Service and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10 days of the receipt of notice of finding by the Executive Secretary, pursuant to Title 61, Section 1-07(d) of the Rules of The City of New York (formerly Rule 7.4), that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon the petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof Of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) days.

OTHER SECTIONS OF THE LAW AND RULES MAY BE APPLICABLE. CONSULT THE COMPLETE TEXT