Lucchesse v. L.237,IBT, 57 OCB 22 (BCB 1996) [Decision No. B-22-96 (ES)]

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

-between-

MICHAEL LUCCHESSE,

Petitioner, DECISION NO. B-22-96

-and- DOCKET NO. BCB-1756-95

L. 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AND THE NEW YORK CITY HOUSING AUTHORITY,
Respondents.

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DECISION AND ORDER

On June 6, 1995, Michael Lucchesse ("Petitioner"), appearing pro se, filed a verified improper practice petition against the New York City Housing Authority ("Authority"), alleging the Authority acted improperly in discharging him, and against Local 237, International Brotherhood of Teamsters ("Union"), alleging that the Union violated § 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] by failing to file a grievance.

[1] Section 12-306 of the NYCCBL provides, in relevant part:

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 rights granted in Section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization; 12-305 of this chapter;

The Authority filed an Answer on June 26, 1995. The Union filed an Answer on July 3, 1995. The Petitioner filed a Reply on July 7, 1995.

Background

The Petitioner was employed by the New York City Housing Authority as a Housing Caretaker beginning in June 1982. On August 30, 1993, Petitioner suffered a work-related injury to his back while lifting and cleaning a refrigerator. Petitioner was on workers' compensation leave from the date of injury until August 8, 1994. On August 16, 1994, Petitioner was again injured on the job and again went on workers' compensation leave. Petitioner thereafter received a letter dated March 9, in which the Authority notified him he had been terminated effective

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(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;

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 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so. . . .

Section 12-305 of the NYCCBL provides, in relevant part:

Rights of public employees and certified employee organizations. Public employees shall 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 such activities. . . .

February 22, 1995, "pursuant to § 71 of the Civil Service Law ("CSL"),[2] because [Petitioner had] been absent for a total of one year by reason of disability."

On March 30, 1995, Petitioner sent a letter to Philip Bibla, Department Advocate, New York City Department of Personnel, requesting reinstatement to his former position. In a letter dated April 20, 1995, Mr. Bibla replied that, "[i]n order to comply with statutory requirements, [Petitioner] must wait a

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[2] Section 71 of the Civil Service Law provides:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the [Worker's Compensation Law], he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by the employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filing of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar provision. . . .

reasonable period of time in order to insure that [Petitioner's] disability is terminated before making another application for a medical exam." Mr. Bibla instructed Petitioner to request a medical examination after June 9, 1995.

In a letter sent to the Union, dated April 25, 1995, Petitioner requested the Union "file a grievance with the New York City Housing Authority for an unjustly and unfair termination of my disability." Petitioner requested the Union "represent [Petitioner] on this case" and to "assist [Petitioner] with this matter."

In a letter dated May 8, 1995, Deborah Amore, Chief of Records Control, New York City Personnel Department, explained the reason for the discharge:

> Please be advised that you were terminated because you were out of work for a total of one year. Our records indicate that you were out on compensation from August 30, 1993 to August 8, 1994. You returned to work on August 8, 1994 and went out on compensation on August 16, 1994. Since the period to which you returned to work was less than 10 days, a decision was made to terminate you.

The Union, in its Answer, maintains that Business Agent Aubrey Ferguson "made various efforts to speak with Petitioner on the telephone. . . but was unsuccessful." The Union further states that, on May 11, 1995, Ferguson sent a letter to two addresses associated with Petitioner, requesting Petitioner to come to the Union hall for a meeting. The Union affixed copies

of the letter and photostatic copies of the addressed envelopes in its Answer, along with a sworn affidavit from Ferguson attesting to the truth of the Answer. The Union claims that the letter was not returned and that the Union was not contacted by Petitioner after the letter was mailed.

Petitioner, in his Reply, denied receiving any phone calls or letters. Petitioner asserted that "neither certified mail nor legal papers were sent to [Petitioner] to make contact . . ." On June 6, 1995, Petitioner filed the instant Improper Practice Petition.

Positions of the Parties

Petitioner's Position

Petitioner claims he received "unfair representation from Local Union 237" because the Union failed to file a grievance or respond to his grievance request. While Petitioner does not refer specifically to NYCCBL § 12-306, he claims it is "untrue" that the Union has acted in good faith, and supports his claim by asserting his repeated attempts to receive help from the Union:

> I have called the Union Local 237 left numerous amount of messages through different answering machines and received no response from either messages. I have called 3 time in March, 3 time in April, 2 time in May, 1 time in June, 1995, I then wrote another letter to Local 237 by certified mail on 4-25-95 addressed to Mr. Carl Haynes, President of Local 237 which I haven't received any reply by him or by anyone of the Union; I have waited 30 days for an answer which I never received.

As for his Improper Practice claim against the Authority,

Petitioner also does not cite a section of NYCCBL § 12-306, but asserts that his employment was "terminated on Feb. 22, 1995 without any legal warning or legal document or by certified mail which was unfair towards me." Petitioner claims to have "spoken to Mr. Bibla 3 times during the month of March and [Bibla] refused to reinstate [Petitioner] . . ."

In his Reply, Petitioner asserts that, each time he spoke to Mr. Bibla about reinstatement, Bibla responded "with excuse or something was done wrong." Petitioner also asserts that CSL § 71 was "never explained to [Petitioner] in any way."

Union's Position

The Union maintains that, while it "ordinarily" meets with members to discuss disability and workers' compensation determinations as well as, inter alia, CSL § 71 matters, it does not represent unit members regarding such matters. Further, the Union asserts that Business Agent Ferguson responded to Petitioner on May 11, 1995, indicating a willingness to meet with Petitioner to discuss the matter. The Union states it received no response to Ferguson's communication. The Union maintains that Petitioner has not alleged facts sufficient to establish an improper practice.

As its first affirmative defense, the Union maintains that the duty of fair representation does not extend to the

enforcement of provisions of law, specifically determinations as to disability and separation from service as a result of disability under the Civil Service Law. Also, the Union alleges that the Petitioner has not alleged any facts to suggest that the Union has commenced similar representation for other unit members while denying it to Petitioner or that the Union's conduct herein is the result of improper motivation under the NYCCBL.

As its second affirmative defense, the Union claims Petitioner has failed to avail himself of administrative remedies provided in CSL § 71. As its third affirmative defense, the Union maintains it responded to Petitioner's April 25, 1995, letter. As its fourth affirmative defense, the Union claims the Petition is barred by the applicable statute of limitations. As its fifth affirmative defense, the Union asserts that it has acted in good faith and in conformity with the law.

Authority's Position

As the Authority's first affirmative defense, it admits Petitioner's recitation of the facts, but asserts the facts are insufficient to state a cause of action under the NYCCBL. The Authority claims Petitioner has failed to allege facts "which show that the Authority has taken any action for the purpose of frustrating the statutory rights of its public employees or any public employee organization . . ."

As its second, third and fourth affirmative defenses, respectively, the Authority contends the Petitioner has failed to establish a prima facie case of improper practice based with specific regard to either Subsections (1), (2) or (3) of NYCCBL § 12-306(a). In particular, it asserts that Petitioner cannot meet either part of the Salamanca test, which requires a petitioner to plead and prove that the employer or its agent(s) responsible for the allegedly violative conduct knew of the petitioner's protected activity and that the action which is the subject of the complaint was taken because of that knowledge.[3]

As its fifth affirmative defense, the Authority maintains Petitioner's complaint is premature because Petitioner has not sought a medical examination and therefore has failed to exhaust the administrative procedure outlined in CSL § 71. In the Authority's sixth affirmative defense, it claims the Petitioner is barred by the applicable statute of limitations. In its seventh affirmative defense, the Authority maintains it acted in good faith and has conformed with all applicable laws.

Discussion

The allegations in the Petition raise the issue of whether the Union breached its duty of fair representation in the processing of a grievance on Petitioner's behalf. The Petition

[3] City of Salamanca, 18 PERB ¶ 3012 (1985).

also raises the question of whether the Authority committed an improper practice when it discharged Petitioner and refused to promptly reinstate him.

As a preliminary matter, the Union and the Authority allege Petitioner's claim is untimely under the four-month statute of limitations set forth in § 1-07(d) of Title 61 (Rules of the Office of Collective Bargaining) of the Rules of the City of New York ("Rules"). The Union does not specify the date at which it contends the limitations period began to accrue. The Authority also alleges Petitioner is barred from asserting his claim by the statute of limitations, and it also fails to cite an accrual date.

We have held that the four-month limitations period under our Rules bars consideration of an untimely filed improper practice petition,[4] but we reject the Union's assertion that Petitioner's claim is barred. Petitioner first sought the Union's assistance in his April 25, 1995, letter to Union President Carroll Haynes. It was the Union's declination to file a grievance pursuant to the April 25 request on which Petitioner bases his allegation that the Union breached its duty of fair representation. Since the four-month limitations period began to accrue no earlier than April 25, Petitioner is not barred by the statute of limitations for this Petition filed on

[4] Decision Nos. B-11-95; B-21-93; and B-37-92.

June 6, 1995.

As to the Authority's timeliness defense, we again find the Petitioner is within the limitations period. His employment was terminated on February 22, 1995. Because Petitioner's claim against the Authority arose out of this termination, the statute of limitations began to accrue no earlier than February 22, 1995. Thus, the Petition was timely filed on June 6, 1995.

We now turn to the substantive issue of whether the Union or its agent breached a duty of fair representation to Petitioner. The duty of fair representation doctrine was defined by the U.S. Supreme Court in Vaca v. Sipes[5] as:

> the exclusive agent's . . . statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[6]

New York State Courts impose a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives under the Taylor Law[7] and related local laws, such as the NYCCBL.[8] In 1990, the New York

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[5] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[6] Vaca, at 177.

[7] Public Employees' Fair Employment Act, Title 41, Civil Service Law.

[8] Matter of Civil Service Bar Association, Local 237, I.B.T., v. City of New York, 64 N.Y.2d 188, 196, 485 N.Y.S.2d 227, 230 (Ct.App., 1984); see, also, Decision No.

State Legislature recognized this judicial doctrine by enacting an amendment to the Taylor Law that codifies the duty of fair representation.[9] The law makes it an improper practice for an employee organization deliberately to breach its duty of fair representation to public employees. It also authorizes the Public Employment Relations Board ("PERB") to retain jurisdiction and apportion liability between the union and the employer according to the damage caused by the fault of each in cases where the union has been found to have breached its duty by processing grievances improperly.[10]

A breach of the duty of fair representation occurs "only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[11] Specifically in the handling of grievances, we have held that a union is afforded considerable discretion and that it does not breach its duty of fair representation simply because it fails to initiate or advance a grievance, even if the failure is on account of negligence, mistake, or incompetence.[12] A union

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B-32-92.

[9] Laws of 1990, Ch. 467, adding new Subdivisions 2(c) and 3 to 209-a of the Taylor Law; see, also, Decision No. B-32-92.

[10] Decision No. B-32-92.

[11] Vaca, at 190.

[12] Decision Nos. B-22-94; B-8-94; and B-32-92.

breaches its duty of fair representation when it refuses to file a grievance in a manner that is arbitrary or discriminatory or shows evidence of bad faith,[13] and the burden is on a petitioner to plead and prove that the union has engaged in such conduct.[14] Even where a union may have been guilty of an error in judgment, there is no violation, provided the evidence does not suggest that the union's conduct was improperly motivated.[15]

Further, the extent to which a union investigates the basis of its members' grievances generally is an internal union affair. We will not assess the thoroughness of a union's grievance investigation in the absence of evidence that the grievance was treated arbitrarily, perfunctorily, or in bad faith.[16] A union has broad discretion as to the manner in which it vindicates the rights of its members.[17]

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[13] Albino v. City of New York, 80 A.D.2d 261, 438 N.Y.S.2d 587 (2nd Dept., 1981); see, also, Decision Nos. B-11-95; B-22-94; B-8-94 and B-32-92.

[14] Decision Nos. B-11-95; B-24-94; and B-21-93.

[15] Standard narrowly reiterated by the Third Department (CSEA v. PERB and Diaz, 132 A.D.2d 430, 522 N.Y.S.2d 709 [1987]), rejecting the "gross negligence" standard that PERB had applied below (18 PERB ¶ 3047 [1985]). The Court of Appeals affirmed the Third Department decision on other grounds, without comment on the appropriateness of the standard that it had applied (sub nom. CSEA v. PERB, 73 N.Y.2d 796, 537 N.Y.S.2d 22 [1988]); see, also, Decision Nos. B-32-92; B-51-90; B-27-90 and B-9-86.

[16] Decision Nos. B-32-92; B-27-90; B-9-86; and B-15-83.

[17] Decision Nos. B-32-92 and B-16-83.

In order to evaluate a petitioner's allegation that a union acted arbitrarily in failing to pursue a grievance, it is necessary for us to look at the merits of claims that he raised in the underlying grievance. In this regard, it is not our function to determine the ultimate merit of the grievance; rather, our limited evaluation of the arguable merit of the grievance will provide a basis for determining whether the union's failure to pursue the grievance was violative of the NYCCBL.[18]

A union's refusal to pursue a grievance or a Civil Service Commission appeal challenging the termination of a petitioner's employment, which was in accordance with a rule of the City Personnel Director, is not, of itself, arbitrary, discriminatory or in bad faith, where the applicable collective bargaining agreement between the City and the Union specifically excludes disputes involving Rules and Regulations of the Personnel Director from the scope of the contractual grievance procedure.[19]

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[18] Decision Nos. B-32-92.

[19] Jones v. L. 1182, Communications Workers' of America, Decision No. B-34-86 (Article VI [Grievance Procedure], § 1 [Definitions], of the parties' collective bargaining agreement provided, in pertinent part, as follows:

> The term "Grievance" shall mean:
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> * * *
>
> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and

Moreover, unit members such as Petitioner can independently challenge employment termination by way of an appeal to the Civil Service Commission. Since a union does not control access to the Commission as a remedial forum, the union's duty with respect to a petitioner is limited to even-handed treatment.[20]

Here, Petitioner asserts he received "unfair representation from Local Union 237" because the Union allegedly failed to pursue his grievance request. Petitioner cites repeated attempts to reach the Union by phone and alleges the Union's failure to respond to his April 25, 1995, letter as evidence of the Union's asserted improper motivation. The Union's assertion by Business Agent Ferguson's sworn affidavit that it did attempt to respond to Petitioner in the May 11 letter inviting further discussion and attempts to reach Petitioner by phone is sufficient to counter any allegation that the matter was handled in a perfunctory fashion. Moreover, Petitioner does not claim that the Union never sent the May 11, 1995, letter; rather, he asserts that he did not receive it. Further, in his Reply, Petitioner states he "made no allegation [of] the Union['s] purported refusal" to respond to his request, but only that he

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conditions of employment; **provided, disputes involving the Rules and Regulations of the New York City Personnel Director . . . shall not be subject to the grievance procedure or arbitration**. . . .).

[20] Decision No. B-32-86.

had made several unsuccessful attempts to reach the Union. By this we are further satisfied that the Union's handling of the matter was not done in a perfunctory manner.

As to the Union's defense that Petitioner has not exhausted his administrative remedies under CSL § 71 and that it has no legal responsibility to represent Petitioner in his disability claim, we observe that failure to exhaust administrative remedies under CSL § 71 does not preclude a determination by this Board with regard to a claim of improper practice.[21] However, as the Union has correctly stated, a claim of a breach of the duty of fair representation is unsustainable without an allegation and evidence that the Union has treated the claimant in a discriminatory fashion, i.e., that it has failed to provide a service for Petitioner which it has provided or promised to provide for another member.

In McAllan v. Emergency Medical Services[22] which the Union cites, the Board reiterated that the duty of fair representation does not extend to the enforcement of provisions of law[23] but that the Union may still be found to have committed an improper practice if the charging party can prove:

that the union has voluntarily granted such assistance

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[21] Decision Nos. B-11-95; B-8-94; and B-21-93.

[22] Decision No. B-14-83.

[23] McAllan, at 30.

> to its members (or to unit members generally) and that it has discriminated against [the charging party] "by reason of improper motives or of grossly negligent or irresponsible conduct."[24]

In its Answer, the Union admitted Local 237 Business Agents "will ordinarily meet with members to discuss disability and workers' compensation determinations as well as Civil Service Law §§ 71 and 73 matters." However, with respect to the failure of the Union to file a Civil Service Commission appeal of Petitioner's employment termination, Petitioner has failed to show that the Union represented other unit members in such proceedings and that its refusal to do so in his case was discriminatory.

Moreover, the applicable collective bargaining agreement in the instant matter contains language identical to our earlier case wherein we found that disputes involving the Rules and Regulations of the Personnel Director were not redressable under the contractual grievance procedure.[25] Thus, the Union's

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[24] McAllan, at 33, quoting from 14 PERB ¶ 4671 (1981).

[25] Article VI (Grievance Procedure), § 1 (Definitions), of the Special Officers Agreement for the term October 1, 1991, to December 31, 1994, provides, in pertinent part, as follows:

> The term "Grievance" shall mean:
>
> * * *
>
> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; **provided, disputes involving**

decision not to pursue the underlying grievance through the contractual grievance mechanism, which, under the facts of this case, would be unavailing, was not unjustified, in our view.

Given the contractual language excluding such matters from the contractual grievance procedure, and considering the Union's wide discretion in determining its manner of handling grievances at any rate, and in the absence of countervailing evidence to rebut the Union's sworn statement that it made attempts to contact the grievant, Petitioner's claim against the Union fails here.

Similarly, Petitioner has failed to sustain a claim against the Authority. While Petitioner does not specify a subsection of § 12-306a allegedly violated, we find no support for any claim that the Authority committed an improper practice under either § 12-306(a)(1) or § 12-306(a)(2). These provisions protect public employees from employer interference in the formation of a public employee organization and in asserting their rights under § 12-305. No such allegations have been posited herein.

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the Rules and Regulations of the New York City Personnel Director . . . shall not be subject to the grievance procedure or arbitration. . . .

The terms of this agreement were extended pursuant to the status quo provisions of NYCCBL § 12-311(d) to cover the period relevant herein. Non-economic provisions of this agreement pertain to employees, inter alia, in the title of Maintenance Worker;

see, also, n. 19 at 13, above.

It appears Petitioner's claim is that the Authority discriminated against him "for the purpose of encouraging or discouraging membership in, or participation in the activities of, [Petitioner's] public employee organization" under § 12-306(a)(3). In City of Salamanca,[26] PERB established a two-part test to determine whether a petitioner can establish a prima facie case of an improper practice under § 12-306(a)(3). First, the petitioner must prove that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity. Second, the petitioner must prove that the employee's union activity was a motivating factor in the employer's decision.

We find that Petitioner has not established a prima facie case of an improper practice under § 12-306(a)(3). Petitioner offers no evidence that the decision to discharge him was a result of his union activity. Petitioner has not pointed to any activities in which he may have engaged which were protected activity and for which his discharge was motivated. The evidence Petitioner has put forth, that he was discharged because of his disability and absences from work, without more, do not establish a claim under § 12-306(a)(3).

The NYCCBL does not give the Board jurisdiction to consider and attempt to remedy every perceived wrong or inequity which may

[26] 18 PERB ¶ 3012 (1985).

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 to assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from those activities.[27] Petitioner herein does not assert that the Authority's actions were intended to or did affect any of these protected rights.

Accordingly, and for all the reasons stated hereinabove, the instant Improper Practice Petition is dismissed. However, this dismissal is without prejudice to the Petitioner's pursuit of any claims he may have in another forum.

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-1756-95, and the same hereby is, dismissed.

Dated: June 27, 1996
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

[27] Decision Nos. B-11-95; B-3-95; B-26-94; and B-25-94.

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER