Galleano v. L. 237, IBT & HA, 57 OCB 39 (BCB 1996) [Decision No. B-39-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
--between--	DECISION NO. B-39-96
ROBERT GALLEANO, Pro Se Petitioner,	DOCKET NO. BCB-1782-95
--and--	
CITY EMPLOYEES UNION, L. 237, IBT; And THE NEW YORK CITY HOUSING AUTHORITY, Respondents.	

DECISION AND ORDER

Robert Galleano ("Petitioner"), appearing pro se, filed a Verified Improper Practice Petition, on August 30, 1995, against the City Employees Union, Local 237, International Brotherhood of Teamsters, ("Union") and against the New York City Housing Authority ("Authority"). The Petition alleges that the Union violated § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1] On September 25, 1995, the Union filed an Answer.

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[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 § 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 with a public employer on matters within the scope of collective bargaining provided the public employee

(continued...)

After requesting an extension of time, the Housing Authority filed an Answer on September 29, 1995.

By letter dated April 24, 1996, the Trial Examiner assigned to the case requested that the parties meet to clarify information which appeared to be incomplete. Following a postponement of the meeting, at the Petitioner's request, the parties met on June 18, 1996. The Petitioner spoke of allegations with regard to a date not specified in the Petition. The Trial Examiner asked the Petitioner if he wished to amend the Petition to include the allegations of which he spoke. The Petitioner responded that he did not wish to amend the Petition but rather that he would include any such information in his Reply.

The Trial Examiner also entertained requests by the Union and Housing Authority to amend their Answers. The Union submitted an Amended Verified Answer on July 5, 1996. The Authority filed its Amended Verified Answer on July 19, 1996.

By letter dated June 18, 1996, received on June 21, 1996, the Petitioner further clarified information discussed at the June 18 meeting concerning the relief which he requested. On July 12, 1996, Petitioner filed annotations handwritten on a copy of the Union's Amended Verified Answer. The document was signed

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[1](...continued)
organization is a certified or designated representative of public employees of such employer.

by the Petitioner and dated July 9, 1996, but was not verified. In writing, the Trial Examiner informed Petitioner that the document was not in acceptable form for a Verified Reply and that his annotations were unclear in that form. The Trial Examiner requested that the Petitioner submit a statement in complete sentences containing the information which he wished to be considered in a Reply. The letter authorized the submission in the form of a letter but stressed that it needed to be sworn-to. It also authorized, but did not direct, the submission of a single Verified Reply in response to the Amended Verified Answers of both the Union and the Authority, at the Petitioner's option. The letter set August 15, 1996, as the filing date for a Verified Reply. On August 15, 1996, the Petitioner filed a notarized letter Reply. The Reply addresses claims against both the Union and the Authority.

Background

The collective bargaining agreement between the Housing Authority and the Union which covers the period of January 1, 1992, through March 31, 1995, memorializes an Automated Transfer List System ("ATLS") by which a vacancy in an enumerated civil service position is subsequently permanently filled.

Paragraph 40(f) of that agreement provides that, effective March 1, 1994, employees in the title of Maintenance Worker,

inter alia, may apply and be considered for a transfer under the ATLS procedure. Each year, during a one-month "window" period, an eligible employee applying for a transfer is permitted to submit requests for a maximum of six Authority locations. For the initial implementation, the month of September, 1994, was designated as the application period.

The transfer is to be effectuated in the one-year period commencing on the first day of the second month following the completion of the application period. When a position becomes vacant, the ATLS generates a list of ten employees, ranked by civil service status and time in title, who have submitted transfer requests for that particular position and location. The Manager/Superintendent reviews the list and selects a candidate to fill the vacancy.

According to an internal memorandum dated August 23, 1994, from Donald Matthews, Director of Management for the Authority, and Madelyn Oliva, Director of Personnel for the Authority, to building superintendents, managers and Authority administrators, which memorandum was appended to the Authority's Amended Verified Answer, when a vacancy occurs and no one in the title has requested a transfer to that location, the Personnel Department is then to post that vacancy as a promotional opportunity for eligible employees in lower titles. If there is a vacancy for an entry level position and no one has requested a transfer to the

location, a new employee will be hired.

Petitioner is a member of the Union and is employed by the Authority in the permanent civil service title of Maintenance Worker. He was appointed October 1, 1979. His regular work location during the times relevant here was the Bronx North District Office of the Authority's Management Department. From December, 1994, to June, 1995, Petitioner was temporarily assigned to the Fort Independence Houses at Bailey Avenue in the Bronx North District to replace an employee who initially was on sick leave. That employee's position became permanently vacant in January, 1995. A new civil service employee was appointed to the position on May 19, 1995.

In letters appended to the instant Petition, one dated August 7, 1995, addressed to the Union, and another dated August 10, 1995, addressed to the Authority, Petitioner stated that the employee for whom he was substituting "had declared his intention to retire many months before ['mid-December, 1994']. Therefore I had put in a request for transfer to these [Fort Independence] houses. My district supervisor, Kevin Burns, was aware of and approved my request in January. This position, however, was granted to a person with **no** Housing Maintenance experience whatsoever. . . ." (Emphasis in original.) Petitioner demanded to know how it was determined that this individual was more qualified than Petitioner, who, it is undisputed, had an

"excellent" work record. Neither the letter to the Authority of August 10, 1995, nor the letter to the Union of August 7, 1995, refers to the ATLS system. The letter to the Union states, "I requested representation from you. I have had no reply."

In addition to the above-described internal memorandum, also attached to the Authority's Amended Verified Answer are copies of (1) a completed "Transfer Request Form -- Automated Transfer List Program," signed by Petitioner herein and dated "9-21-94," requesting transfer to any vacancies that might occur in his job title at the following locations: Compactor Div., Environmental Programs, Plant Services, Technical Services, Management Planning, or Management Systems; (2) Petitioner's letter of August 10, 1995, to "Mr. Riley," at the Housing Authority; and (3) a "Table of Contents" of a document entitled "Agreement Between New York City Housing Authority and City Employees Union, Local 237, I.B.T., 1/1/92 -- 3/31/95" and § 51 thereunder, entitled "Adjustment of Grievances."

Attached to the Union's Amended Verified Answer are copies of (1) the title page of a document entitled Agreement Between New York City Housing Authority and City Employees Union, Local 237, I.B.T., 1/1/92 -- 3/31/95 as well as § 40 thereunder, entitled "Transfer and Filling of Job Vacancies," applicable to employees, inter alia, in the title of Maintenance Worker; and (2) Petitioner's letter of July 24, 1995, to Union Representative

Laverne Chappelle, in which he stated, in its entirety, as follows:

> I last spoke to you three weeks ago regarding my request for help with the transfer to Fort Independence Houses (Bailey Building). I requested your assistance in setting up a grievance hearing. I have had no response from you. Therefore, at this time, I would like a copy of the Collective Bargaining Agreement. If I do not hear from you within a week of the receipt of this letter, I will feel compelled to pursue this matter with the Office of Collective Bargaining.

Positions of the Parties

Petitioner's Position

Petitioner describes his claim against the Union as a "failure to represent petitioner under terms of the Collective Bargaining Law § 12-306, provisions one and two (subsection b)." He also appears to claim a breach of contract against the Housing Authority with respect to this request to be transferred to a work location of his choice.

Petitioner disputes the Union's contention that it kept him informed regarding the status of his transfer request. He maintains that Ms. Chappelle did not answer his letters to her. He also denies that she met with him in person or that she "explained in detail and kept [him] up to date on the matter of the transfer." He does not deny, however, that she spoke with him. In fact, a letter dated July 24, 1995, which he sent to her stated, "I last spoke to you three weeks ago regarding my request for help with the transfer to Fort Independence Houses (Bailey

Building). . . ." Moreover, he does not deny that she sent a copy of the collective bargaining agreement which he requested.

Petitioner contends that he was refused access to speak with Authority officials about his transfer request. He states the following:

> I also wrote to the head of the Labor Dept., Ms. Oliva of NYCHA, but received no reply. I also tried to see Mr. Elliot Levine, the assistant director of Management for NYCHA, but was refused access. His secretary told me that I needed a union representative in order to see him. I further informed you that my immediate supervisors expressed sympathy, but did little to help.

Petitioner maintains that the selection process was unfairly applied to deny him a transfer. As relief, he seeks a permanent transfer to the Maintenance Worker position at Fort Independence Houses and restoration of lost overtime pay. He also requests restoration of sick leave which he states he used "due to the stress while trying to pursue a fair hearing of my case."

Authority's Position

The Authority raises procedural arguments in requesting that the Board deny the Petition. First, it argues that the Petitioner's claims are barred in whole or in part by the applicable limitations period. It also avers that the claims are barred for failure to comply with prerequisites to filing an Improper Practice Petition. The Authority presumably refers to the requirement of verification. The Petition was not verified

when initially filed on August 22, 1995. It was verified subsequently and accepted for filing on August 30, 1995.

The Authority also argues that the subject matter of the claims alleged in the Petition are outside the jurisdiction of the Board of Collective Bargaining ("Board"). It contends that all actions which are the subject of the complaint lay within the Authority's discretion.

As to the substance of the Petition, the Authority maintains that the Petition fails to allege facts sufficient to constitute a violation of the NYCCBL. It asserts that it "in no way acted arbitrarily, discriminatorily []or in bad faith" in applying laws, statutes, ordinances, rules and regulations at issue.

The Authority argues that the transfer failed because of the Petitioner's failure to abide by the contractually provided ATLS procedure. In that regard, it observes that the Fort Independence Houses was not among the locations to which the Petitioner asked to be transferred when he submitted an ATLS transfer request form dated September 21, 1994. Rather, the locations to which Petitioner asked to be transferred were in the Authority's central or field administrative offices. The Authority contends that, at the time the position of Maintenance Worker at the Fort Independence Houses became permanently available, no Authority employee, including Petitioner, had submitted a transfer request to this location during the

applicable window period. Because the vacancy at the Fort Independence Houses was for an entry level position, the Authority continues, it selected a new employee from the appropriate civil service list and appointed him to this position on May 19, 1995. Finally, the Authority maintains that no grievance was submitted to it regarding the "'issue' of this transfer."

The Authority requests that the instant Petition be denied. In the event that the Union is found to have breached the duty of fair representation to Petitioner, the Authority argues that any damages should be assessed solely against the Union.

Union's Position

The Union argues that the Petition fails to allege facts sufficient to constitute a violation of the NYCCBL. It alleges that it rendered assistance to the Petitioner and represented him fairly and in good faith, and it argues that Petitioner has failed to establish that the Union refused to provide him with representation or that it acted "in any way, based upon arbitrariness, capriciousness, whim, discrimination or any other hidden reason." Moreover, the Union states that the Petitioner did not timely submit his request under the contractual ATLS procedure.

As to the specific allegations that the union representative

was not responsive, the Union answers as follows:

> When the union was made aware that Mr. Galleano desired this transfer a union representative, Laverne Chappelle, Business Agent, Local 237, despite the Petitioner's non-compliance with an instituted procedure, attempted to have him transferred. The union representative contacted the [Authority's] central office at 250 Broadway, on information and belief, spoke with Miss Clark in March, 1995, and was informed that the transfer would not be effected since the Petitioner had not filed a request to be transferred to Fort Independence Houses as required by the established procedure. The union representative, Ms. Chappelle, then contacted the District Administrator of Bronx North and was informed by Mr. Cohen that the transfer would not be forthcoming because the Petitioner had not submitted a request for transfer to the Bailey Building of Fort Independence Houses during the appropriate filing period.
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> The union representative did maintain contact with the Petitioner during the period in question (beginning March, 1995).
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> Ms. Chappelle informed the Petitioner in May, 1995, of management's refusal to transfer him based on his failure to request assignment to Fort Independence Houses in September, 1994. She informed him of this on May 19, 1995, and in subsequent occasions in May or June whether they spoke on the telephone or met at the project location (Fort Independence Houses). With respect to the July 24, 1995, letter to Ms. Chappelle referred to in the petition, Ms. Chappelle spoke to Mr. Galleano in June and July, 1995, after Mr. Galleano became aware that vacancies at Fort Independence Houses would be filled by new hires. Ms. Chappelle informed Mr. Galleano again that since he had not submitted a request for transfer to Fort Independence Houses in September, 1994, management could fill the positions with new hires. A copy of the July 24, 1995, letter is annexed hereto, as Exhibit B. Ms. Chappelle did send a copy of the contract to Mr. Galleano as requested in [his] July 24, 1995, letter.

In addition to arguing that the Petition fails to state a claim under the NYCCBL, the Union maintains that this Board "lacks the power" to grant the relief requested.

Discussion

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

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.[2] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[3] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[4] Even where a union makes an error in judgment, no breach of that duty may be sustained without evidence to suggest that the union's conduct was improperly motivated.[5]

While a union must act fairly towards all employees whom it represents without hostility or discrimination towards any individual unit member, and while it must exercise discretion

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

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

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

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

with complete good faith and honesty, avoiding arbitrary conduct, a union enjoys wide discretion in the handling of grievances and does not breach its duty simply because the outcome of the grievance issue does not satisfy the grievant.[6] Although the Board may inquire in a limited fashion into the merits of claims underlying a grievance in order to evaluate an allegation that, in failing to pursue a grievance, a union violated the NYCCBL, it is not this Board's function to determine the ultimate merit of that grievance.

Here, Petitioner alleges that his union representative, Laverne Chappelle, did not answer his letters to her and did not meet with him in person or "explain in detail and [keep him] up to date on the matter of the transfer." He does not deny, however, that she spoke with him, as the Union asserts here. In fact, a letter dated July 24, 1995, which he sent to her stated, "I last spoke to you three weeks ago regarding my request for help with the transfer. . . ." In addition, he does not deny that she sent him a copy of the applicable collective bargaining agreement, as he requested in that letter.

The Union asserts that Ms. Chappelle contacted the Authority's central office in March, 1995, and the District Administrator of Bronx North and was told that the transfer which the Petitioner requested would not be approved because the

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[6] Decision Nos. B-5-91, B-50-91, B-27-90.

Petitioner had not satisfied the procedure set forth in the parties' collective bargaining agreement for requesting such a transfer. The Petitioner does not dispute these statements nor does he dispute that he submitted a Transfer Request Form in September, 1994, which did not request a transfer to the Fort Independence Houses location.

We find it reasonable under the circumstances that the Union declined to pursue the grievance beyond the efforts which the Union's Amended Verified Answer details, particularly inasmuch as the Petitioner's transfer request did not comply with the contractually prescribed procedure. The Petitioner does not deny this deficiency. Instead, in his Reply, he discounts it in the following terms:

> The lawyers for both parties rely heavily on the fact that there is a new system for transferring employees. As you know, I am a civil service employee of 17 years with an excellent record. The claim has been made that a system of circling numbers on a piece of paper once a year is more important than a person's record of actual service. The persons picked for the maintenance openings at Fort Independence included a person with no housing experience, the other, a caretaker with limited experience. Both of whom came to me repeatedly for instruction and help. In contrast, I had already been working at Fort Independence for seven months and had put in a claim for transfer as soon as I found out the worker I was filling in for was in fact putting in for retirement. The argument that I was temporarily assigned and should therefore have had no expectations of remaining permanently is disingenuous under the circumstances . . . [I]t should be clear that the selection process was unfairly applied in this instance. No other conclusion can be reasonably drawn. I ask only for what is a fair solution to this matter.

We find that the Petitioner has failed to assert any facts from which we may infer that the Union's handling of the Petitioner's contract grievance constituted conduct which was arbitrary, discriminatory, perfunctory, or in bad faith, as those terms have been interpreted. To the contrary, we find that the Union's conduct on Petitioner's behalf, while not to his satisfaction, does not rise to the level of a breach of the duty of fair representation under the criteria interpreted in prior case law which we are compelled to follow.

This Board is prevented from enforcing the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[7] As we find that the Petitioner has failed to sustain his burden as required

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[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.

In addition, 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. See Decision Nos. B-3-95, B-26-94 and B-25-94.

under the NYCCBL 12-306b for sustaining the burden of proving a breach of the duty of fair representation, we are prevented from inquiring further into the terms of the parties' collective bargaining agreement and any grievance herein that may arise thereunder.

With regard to Petitioner's claim against the Housing Authority, we reject the Authority's timeliness defense. 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] However, 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 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]

To the extent that the petition alleges a claim against the Housing Authority arising out of the appointment, on May 19, 1995, of a new employee to a position which the Petitioner claims

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

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

he sought, such a claim would be timely since it falls within four months of the filing of the petition. The operative event to which we look to determine this question is the date of appointment of the newly hired employee. That is the date on which it can be said that Petitioner knew he would not be appointed to the position which he sought. The claim is timely, as it occurred within four months of the filing of the instant Petition.

Nevertheless, we find that Petitioner has failed to state an independent claim of improper practice against the Housing Authority. The Petition fails to specify how the actions of the Authority are violative of any of the enumerated subdivisions of § 12-306a of the NYCCBL which defines improper public employer practices.[10] The Petition alleges only that the Petitioner "had

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[10] NYCCBL § 12-306 provides, inter alia, 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 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.

put in a request for transfer," that his district supervisor "was aware of and approved [his] request," and that he had been denied a transfer. The form which Petitioner submitted in September, 1994, for a transfer under the ATLS program which did not request the Fort Independence Houses indicates that he was aware of the contractually provided ATLS program and procedures. Thus, the substance of his complaint is that he was denied a transfer under that program. Such an allegation attempts to state a claim for breach of the parties' collective bargaining agreement with respect to the ATLS procedure. As stated above, the Board is prevented from enforcing the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[11]

Because the Petitioner has failed to sustain his burden with respect to claims against both the Union and the Housing Authority, we must deny the Petition in its entirety.

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 Verified Improper Practice Petition docketed as BCB-1784-95 be, and the same hereby is, dismissed in

[11] See n. 7, above.

its entirety.

Dated: New York, New York
October 31, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER