Cooke v. L.1182, CWA & DOT, 57 OCB 46 (BCB 1996) [Decision No. B-46-96 (IP)]

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

-between-

HAROLD F. COOKE, Pro Se,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182, and the NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.
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DECISION NO. B-46-96

DOCKET NO. BCB-1749-95

**DECISION AND ORDER**

Pursuant to Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] and Title 61, § 1-07, of the Rules of

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[1] NYCCBL § 12-306 provides, in relevant part, 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 [formerly § 1173-4.1] of this chapter;
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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;
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> * * *

(continued...)

the City of New York ("OCB Rules"),[2] Harold F. Cooke ("Petitioner"), appearing pro se, filed a verified improper practice petition on May 19, 1995, against Communications Workers of America, Local 1182 ("Union"). The Petitioner also named the New York City Department of Transportation ("City" or "Department") as co-respondent. The petition alleges that the Union breached its duty of fair representation by refusing to process the Petitioner's grievance and that the Department

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[1](...continued)

**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 organization is a certified or designated representative of public employees of such employer.

[2] Section 1-07 of the OCB Rules provides, in relevant part, as follows:

* * *

**d. 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 § 12-306 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 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. . . .

committed an improper practice by refusing to grant the Petitioner a hearing at Step II of the contractual grievance procedure. The City filed an answer on June 20, 1995 and, after requesting an extension of time, the Union filed an answer on January 23, 1996. The Petitioner filed a reply on April 1, 1996. On September 26, 1996, the Trial Examiner assigned to the case wrote to the Petitioner and the City requesting that they provide a legible copy of the Stipulation and Agreement which was annexed as an exhibit to both the improper practice petition and the City's answer. On October 15, 1996, the City provided a legible copy of the Stipulation and Agreement.

## Background

The Petitioner in this case was employed by the Department as a Traffic Enforcement Agent ("TEA"). In July of 1994, disciplinary charges were brought against the Petitioner by the Department. These charges pertained to time and leave or "absence control" violations.

Shortly thereafter, a disciplinary conference was held and the Petitioner signed a Stipulation and Agreement ("Stipulation") resolving the charges. In the Stipulation, the Petitioner pled guilty to the charges and agreed "to be placed on a one year probationary status with the Department commencing July 14, 1994 and terminating August 1, 1995." He further agreed that he would

not "be deemed AWOL", "take any undocumented leave", take an "extended weekend after a pay period", "be late seven times", or "take any 'no pay' leave without prior authorization."

The Stipulation provides that a violation of its provisions may lead to the termination of the Petitioner's employment "without [the Petitioner] having further recourse of any kind." More specifically, the Petitioner agreed as follows:

> In executing this Stipulation and Agreement, I hereby waive any and all rights I may have pursuant to the Civil Service Law and other applicable laws, statutes, rules, regulations or agreements which pertain to disciplinary actions against New York City employees.

On August 26, 1994, the Petitioner did not report to work; he alleges that he was ill. On that date, the Petitioner alleges, his cousin called in sick for him and spoke to a supervisor. The City denies that anyone called in sick on behalf of the Petitioner. According to the City, the Petitioner was AWOL.

On August 27, 1994, the Petitioner alleges, he was examined by a doctor and admitted to LaGuardia Hospital for a pulmonary condition. On August 29, 1994, the Petitioner called the Department and informed Inspector Lorraine Washington that he had been hospitalized. Subsequently, he provided the Department with two doctor's notes, one covering the period from September 2, 1994 to September 8, 1994 and another covering the period from

September 5, 1994 to January 9, 1995.[3]

Apparently, at some point in January of 1995, the Petitioner's employment was terminated.[4] The Department deemed the Petitioner AWOL on numerous occasions between September of 1994 and January of 1995. As a result, the Department determined that the Petitioner had violated the Stipulation.

In his petition, the Petitioner alleges that on January 19, 1995, he informed the Union of his termination and requested that a Step I hearing be scheduled. The Step I hearing took place on January 24, 1995 and the termination was upheld. The Petitioner then requested a Step II hearing.[5] This request was denied by the Department's Step II Hearing Officer Troy Owens and the Union did not pursue the matter.[6]

## Positions of the Parties

### Petitioner's Position

The Petitioner maintains that, contrary to the City's

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[3] The Petitioner alleges that for the period between September 7, 1994 and February 24, 1995, he received disability benefits from the Union.

[4] The exact date of the termination of the Petitioner's employment is not part of the record.

[5] The exact date of this request is not part of the record.

[6] In his reply, the Petitioner seems to allege that a Step II hearing took place, that his grievance was denied at Step II, and that the Union has refused to pursue a Step III grievance.

assertion, he was not AWOL at any time between August 26, 1994 and January 9, 1994. He contends that he submitted doctor's notes which establish that he was ill and unable to work during the entire period. Under these circumstances, the Petitioner alleges, the Union had an obligation to pursue his case. The Petitioner contends that rather than closely examining his case, the Union simply accepted the Department's assertion that the Petitioner was AWOL. As a remedy, the Petitioner seeks reinstatement and back pay.

**Union's Position**

As an initial matter, the Union argues that the instant petition was not timely filed. The Union contends that while the Petitioner's employment was terminated "prior to January 24, 1995," the petition was not filed until May 23, 1995, more than four months after the termination.

As for the merits of the petition, the Union contends that when the Petitioner violated the Stipulation by being AWOL within the probationary period, there was little the Union could do to help the Petitioner. This is so, the Union maintains, because by signing the Stipulation the Petitioner waived his statutory and contractual rights pertaining to disciplinary matters. As a result, the Union argues, he "severely limited any recourse [the Union] could effectively pursue on the Petitioner's behalf."

**City's Position**

The City argues that the instant improper practice petition is untimely. According to the City, the "facts giving rise to the allegation that the City engaged in an improper practice ... occurred on or about July 14, 1994, when the Stipulation placing the Petitioner on probation was executed." The petition was not filed until May of 1995, approximately ten months later.

The City contends that the mere allegation that the Department denied the Petitioner a Step II hearing does not state a claim of improper practice under the NYCCBL. The City points out that it has no obligation to grant a hearing to a probationary employee. Accordingly, the City argues, the denial of a hearing constitutes neither interference with the Petitioner's right to self-organize, form, join or assist in a public employee organization within the meaning of §12-306a(1) of the NYYCBL, nor discrimination on account of union activity within the meaning of §12-306a(3) of the NYYCBL.

Even if the allegation that the Department denied the Petitioner a Step II hearing states a claim of contract violation, the City argues, the Board lacks jurisdiction to enforce the parties' collective bargaining agreement. The City maintains that, pursuant to the collective bargaining agreement, alleged contract violations belong in the arbitration forum.

Finally, the City argues, it is within management's

statutory right to take disciplinary action, unless this right has been limited by the parties in their collective bargaining agreement. There is nothing in the parties' agreement, the City argues, which limits management's right to discipline probationary employees.

## Discussion

As a preliminary matter, we find that the petition in this case was timely filed. The Petitioner alleges, essentially, that the Union breached its duty of fair representation when it refused to pursue his grievance. He also alleges that the Department committed an improper practice when it refused to grant him a Step II hearing. Thus, as against the Union, the events that gave rise to this petition occurred when it refused to pursue the Petitioner's grievance past Step I of the contractual grievance procedure. As against the Department, the events that gave rise to this petition occurred when it refused to grant the Petitioner a Step II hearing. Since the Step I hearing did not take place until January 24, 1995, neither of these respective refusals could have occurred until after that date. As the Petition was filed on May 19, 1995, it was filed within the four month statute of limitations applicable to

improper practice charges.[7]

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.[8] In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance.[9] Rather, the duty of fair representation requires only that the refusal to advance a claim must be made in good faith and in a non-arbitrary, non-discriminatory manner.[10] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[11] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[12] It is not enough for a petitioner to allege negligence, mistake, or

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[7] Section 1-07(d) of the OCB Rules.

[8] Decision Nos. B-24-94; B-8-94; B-44-93 and B-29-93.

[9] Decision Nos. B-24-94; B-8-94; B-29-93 and B-58-88.

[10] Decision No. B-58-88.

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

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

incompetence on the part of the union.[13]

Applying these principle to the instant case, we conclude that petitioner has failed to establish a breach of the duty of fair representation. In reaching this conclusion, we rely on the fact that by signing the Stipulation, the Petitioner agreed to a one year probationary period. Because the rights of probationary employees are limited by the law, and in this case are limited by the terms of the Stipulation, the scope of a union's duty to such employees also is limited.[14] This Board has recognized that while a union owes a duty of non-discriminatory treatment to all members of its bargaining unit, it cannot be expected, nor is it empowered, to create or enlarge the rights of special classes of employees, such as probationary employees, whose rights are limited under the Civil Service Law, under the parties' collective bargaining agreement or, as here, under a signed stipulation.[15] Once the Petitioner waived "any and all" rights he had pursuant to the Civil Service Law and the collective bargaining agreement which pertain to discipline, the Union could not be expected to essentially restore those rights to the Petitioner by forcing management to proceed through the

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[13] Decision No. B-24-94.

[14] Decision No. B-58-88.

[15] Decision No. B-56-88.

contractual grievance procedure.

The Petitioner has presented no evidence to show that the Union treated him differently from any other similarly situated probationary employee. Nor has he presented evidence to demonstrate that the Union's refusal to pursue his grievance, which arose while he was a probationary employee, was improperly motivated in a way that would constitute an improper practice as defined in case law and as contemplated by the drafters of the NYCCBL.

As for the Petitioner's claim against the Department, we find that the mere allegation that the Department refused to grant a Step II hearing to a probationary employee does not state a claim of improper practice under the NYCCBL. The Petitioner has offered no evidence that would even suggest that the employer's refusal was motivated by any reason other than the fact that the Petitioner had signed a stipulation waiving his contractual and statutory rights pertaining to discipline. There is no allegation that the Department's actions were connected in any way with the Petitioner's exercise of his right to form, join, assist, or participate in the activities of a public employee organization; or to refrain therefrom. There is no allegation of retaliation for engaging in protected activity.

In sum, we find that the Petitioner has not satisfied the requirements for a successful claim of a breach of the duty of

fair representation against the Union, and that he has failed to state a claim of improper practice against the City. Accordingly, the instant improper practice petition is dismissed 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 improper practice petition docketed as BCB-1749-95 be, and the same hereby is, dismissed.

Dated: New York, New York
November 26, 1996

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER