Baith v. DC 37, 57 OCB 6 (BCB 1996) [Decision No. B-6-96 (IP)]

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

-between-

DECISION NO. B-6-96

JIHAD A. BAITH,

DOCKET NO. BCB-1719-95

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

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DECISION AND ORDER

On January 23, 1995, Jihad A. Baith ("Petitioner") filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO, ("Union"), alleging that the Union misrepresented information concerning his medical condition which he asserted had a bearing upon a promotion which he seeks from the title of Debris Remover with the Department of Transportation to the title of Assistant City Highway Repairer ("ACHR").

The Executive Secretary of the Board of Collective Bargaining ("Board") reviewed the petition pursuant to RCNY, Title 61, § 1-07(d), and determined that it did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective

Bargaining Law ("NYCCBL"). Accordingly, in a determination dated November 21, 1995, the petition was dismissed.[1]

By letter received in the Office of Collective Bargaining on December 21, 1995, the Petitioner appealed the Executive Secretary's determination to the Board.[2]

The Petition

In the original petition, the Petitioner alleged that the Union made detrimental representations about him and that it failed to raise the issue of his medical fitness for a promotion. Attached to the petition was documentation from a supervisor supporting Petitioner's contention that he was fit to perform the duties of the job title which he sought. In essence, the Petitioner argues that the Union has failed to press the public employer about his fitness for the promotion.

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[1] Decision No. B-21-95 (ES).

[2] Section 1-07(d) of the OCB Rules, in relevant part, provides:

> Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition . . . , 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 . . . The statement shall set forth the reasons for the appeal.

The Executive Secretary's Determination

In Decision No. B-2-95 (ES), the Executive Secretary found that the petition was untimely on its face. The petition was filed on January 23, 1995, complaining of DOT's alleged failure to promote him in or around March, 1993, and complaining as well of alleged out-of-title work assignments during the period from February, 1993, through February, 1994. The Executive Secretary determined that, since these events occurred more than four months prior to the filing of the instant petition, these claims were untimely and could not be maintained.

The Executive Secretary also determined that even if the events complained of were not so untimely as to warrant summary dismissal, the petition would still be dismissed, because it failed to allege facts sufficient as a matter of law to show that the Respondent Union committed any acts in violation of § 12-306b of the NYCCBL,[3] which has been held to prohibit violations of the judicially recognized fair representation doctrine. The

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[3] Section 12-306b of the NYCCBL provides:

> **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;
>
> (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.

Executive Secretary held that the Petitioner's allegations that the Union made detrimental representations about him and that it failed to raise the issue of his medical fitness for a promotion were entirely conclusory and lacking in any detail. The Executive Secretary explained:

> In the absence of sufficient specificity concerning this claim, it is impossible for us to find that the petition states a claim of arbitrary, discriminatory or bad faith conduct by the Union which would be sufficient as a matter of law to constitute an improper public employee organization practice within the meaning of § 12-306b of the NYCCBL.

The Appeal

The Petitioner requests reconsideration of allegations contained in the petition. Those allegations complain of a failure to be promoted from City Debris Remover to Assistant City Highway Repairman and state a possible out-of-title claim:

> The purpose of this letter is to appeal my case against District Council 37, AFSCME, AFL-CIO ("Union"). The documentation enclosed requires investigations and recommendation for relief on my behalf. Provided with compensation (up-graded) to the title of Assistant Highway Repairman, retroactive monies and all other action to make the situation whole.

Without elaboration, his request for reconsideration reiterates arguments from the Petition and alleges violations of the Blue Collar unit agreement,[4] the Citywide agreement,[5] and the Americans with Disabilities Act.

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[4] He specifically alleges violation of Article I [Union Recognition and Unit Designation], § 1; Article VI [Grievance Procedure], § 1 [Definitions], Subsections (b) [claimed violation, etc., of rules, regulations, written policy or orders of the Employer applicable to the agency (continued...)

Discussion

The Petitioner's appeal of the Board's determination must be rejected on several grounds. First, with regard to his complaint that the employer failed to promote him, the Petitioner failed to name the public employer as a respondent. RCNY, Title 61, § 1-07(e), requires that an improper practice petition must, among other things, set forth "[t]he name and address of the other party (respondent)." Section 1-07(f) further requires that a copy of the petition "shall be served upon the respondent . . . with proof of service" which must be filed with the Board. Where the Petitioner challenges a failure by the employer to promote him, he attempts to state a case against the employer. However, the Board cannot assert jurisdiction over the employer as a result of the Petitioner's failure to name the employer as a respondent and his failure to serve the employer with notice of an improper practice proceeding against it. This rule is designed to place the adverse party on notice of the nature of a petitioner's claim so that it may frame a meaningful response.[6] Although we construe our rules liberally,[7] we cannot permit a pleading to stand if it fails to satisfy the minimum standard set forth in RCNY § 1-07(e) and (f).

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[4](...continued)
which employs the grievant, etc.] and (c) [claimed assignment to duties substantially different from those stated in job specification].

[5] Article XV [Adjustment of Disputes].

[6] Decision Nos. B-20-94; B-59-88 and B-12-85.

[7] Decision Nos. B-20-94; B-59-88; B-12-85 and B-8-77.

Secondly, RCNY, Title 61, § 1-07(d), requires that a petition alleging conduct in violation of NYCCBL § 12-306 must be filed within four (4) months of the date the alleged improper practice occurred. The application of the four-month limitation period is not discretionary.[8] Untimeliness cannot be cured by the belated assertion of relevant evidence that was available at the time of the initial filing.[9] Moreover, allegations relating to events which occurred more than four months before the filing of an improper practice petition may be considered only in the context of background information and not as specific violations of the NYCCBL.[10]

In the present case, the Executive Secretary determined that (i) the events of which the Petitioner complains did not occur within the applicable limitations period for the filing of the instant petition, and (ii) the Petitioner did not allege with any degree of specificity any instances from which may be inferred a continuing violation under the NYCCBL. We agree with the Executive Secretary's findings and, therefore, reaffirm that the petition herein was untimely.

Thirdly, the purpose of an appeal of the Executive Secretary's determination is to review the correctness of that ruling based upon the facts that were available at the time that it was made. When a petition is filed it must state the nature of the controversy, specify the statute involved, and include all other relevant and material documents, dates and facts. It must

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[8] Decision Nos. B-31-94; B-38-93 and B-21-93.

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

[10] Decision Nos. B-31-94; B-38-93 and B-21-93.

supply enough essential facts to make out at least a prima facie case. Even where new facts are alleged in an appeal, the Board will not reconsider a case based upon the mere failure of a party to present relevant evidence that was available at the time that it commenced its initial action, unless good cause is shown.[11]

In the instant matter, the Petitioner asserts no new facts in his request for an appeal. His conclusory allegations fail to provide a basis for any inference that the Union has conducted itself in an arbitrary, discriminatory or bad faith manner towards the Petitioner with regard to any instances within the allowable limitations period (or beyond it, for that matter). He also fails to call to the Board's attention any facts which would warrant reconsideration of its earlier determination.

Based upon the record that was before the Executive Secretary when she made her determination, we agree entirely with her conclusion. Accordingly, we dismiss the Petitioner's appeal and confirm the determination of the Executive Secretary in Decision No. B-21-95 (ES). We note, however, as did the Executive Secretary, that dismissal of the petition is without prejudice to any rights the Petitioner may have in any other forum.

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[11] See Decision No. B-20-94 and the cases cited therein.

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 appeal of the Executive Secretary's determination in the matter of the improper practice petition of Jihad A. Baith in Docket No. B-1719-95 be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-21-95 (ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y.
January 31, 1996

STEVE C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER