

Zeigler v. DC 37 & NYPD, 59 OCB 13 (BCB 1997) [Decision No. B-13-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper :
Practice Proceeding :
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-between- :
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INEZ ZEIGLER, :
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Petitioner, : Decision No. B-13-97
 : Docket No. BCB-1873-96
-and- :
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DISTRICT COUNCIL 37 and THE NEW :
YORK CITY POLICE DEPARTMENT, :
 :
Respondents. :
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DECISION AND ORDER

On October 29, 1996, Ms. Zeigler ("Petitioner") attempted to file a verified improper practice petition. Due to her failure to provide proof that she served the Respondents, the petition was not properly filed until November 13, 1996. The petition alleged that the New York City Police Department ("the City") and District Council 37 ("the Union"), violated §12-306 of the NYCCBL by engaging in harassment of the Petitioner and by failing to provide her with adequate representation, respectively. The City, appearing by its Office of Labor Relations, filed its answer on November 21, 1996, and the Union, filed its answer on December 9, 1996. Petitioner filed her reply on January 28, 1997.

Background

Petitioner began working for the New York City Police Department as an Office Aide in September of 1985. As an Office Aide, Petitioner was responsible for preparing accident reports used in litigation or insurance matters. Beginning in 1991, Petitioner was, according to the City and the Union, involved in several incidents which resulted in her discipline by the City. These incidents included alleged acts of insubordination occurring in January 1991, July 1992 and January 1993. They also included alleged misrepresentations made in April and October of 1993. The final alleged misrepresentation, which the City and Union contends led to Petitioner's discharge, occurred on April 19, 1994. On this day, Petitioner allegedly attempted to leave work earlier than allowed and, when questioned by her supervisor, she claimed that she had not done so. On July 5, 1994, the City issued a decision from a Step II Grievance Hearing¹ indicating that Petitioner's employment was terminated, effective August 3, 1994. While a Step III Hearing was requested by the Union on July 19, 1994, the record fails to indicate whether it was ever granted. Petitioner claims that during the period within which the above-indicated incidents transpired, she requested the Union's assistance but "the union refuse[d] to help".

¹ The record is silent as to when or whether there was a Step I Hearing.

Petitioner proceeded to arbitration in December of 1994, with the assistance of the Union. As a result of that proceeding, on September 30, 1996, an Arbitrator issued a decision stating that Petitioner was terminated with just cause. After being notified of the Arbitrator's decision, Petitioner filed the instant verified improper practice petition.

Position of the Parties

Petitioner's Position

Petitioner submitted a petition with a myriad of documents attached including handwritten accounts of the incidents leading up to the instant petition, letters, memoranda and performance evaluations. It can be deduced, from a reading of the petition and its attachments, that Petitioner is contending that the City engaged in a pattern of harassment culminating in her wrongful termination of employment and that the Union failed to provide her with adequate legal assistance regarding this harassment.

The Union's Position

The Union claims that in spite of Petitioner's contentions, it did assist her in "fighting her termination." It also claims that the instant petition is untimely; that Petitioner failed to state a cause of action of breach of the Union's duty of fair representation and that the Office of Collective Bargaining has no jurisdiction to hear grievances, particularly those that have been arbitrated and decided by an Arbitrator.

The City's Position

The City contends that Petitioner fails to state a cause of action under §12-306 of the New York City Collective Bargaining Law (NYCCBL) and that even if she had, the City had a legitimate business reason for its actions, as was determined in arbitration. The City also notes that Petitioner signed a waiver prior to the arbitration proceeding which bars her from submitting the underlying dispute in that proceeding to any other administrative or judicial tribunal. The City urges that this waiver, coupled with the fact that an Arbitrator's decision is binding and the Board has no appellate review powers over such decisions, precludes Petitioner from "raising either the issue or claim which [she] seeks to raise here" and prevents the Board from adjudicating the instant matter. The City further suggests that after Petitioner exhausted the grievance and arbitration procedure, which they contend is the exclusive remedy for resolution of grievances under the applicable collective bargaining agreement, she sought to bring the same "grievance" before a different forum. The City contends that because of the foregoing, a dismissal of the petition is in order.

Discussion

The Board of Collective Bargaining ("Board") has no jurisdiction or appellate review powers over an issue litigated in arbitration, particularly because, prior to submitting a matter to arbitration, a petitioner must waive her rights to

relitigate the matter in another forum.² However, it must be made clear at the outset that the issue before this Board is whether the City and/or the Union violated Petitioner's §12-305 rights, not whether the City acted properly in terminating Petitioner's employment, the issue examined in arbitration. Therefore, the Respondents' argument concerning Res Judicata and Collateral Estoppel are misplaced.

Regarding the substantive issue at hand, Petitioner's improper practice petition alleges that the City violated the NYCCBL by continually harassing her and ultimately terminating her employment.³ When there is a claimed violation of §12-306a.

² See Decisions No. B-38-91, B-70-90, noting that, in order to prevent multiple litigation, a grievant who seeks redress through arbitration will not be allowed to relitigate the same matter in another forum pursuant to §12-312(d).

³ Although Petitioner fails to specifically allege which section of the NYCCBL was violated, a reading of the petition and attachments submitted by Petitioner supports a conclusion that she claims a violation of §12-306a(1) and (3) of the NYCCBL. Section 12-306(a) of the NYCCBL provides that it is an improper employer practice for the employer:

- (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in §12-305 of this chapter [and to]
- (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;

Section 12-305 of the NYCCBL states that employees have the right to:

self-organize, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations ... [and to] refrain from any or all such activities.

(1) and (3) of the NYCCBL, we ordinarily apply the standard set forth in City of Salamanca⁴. However, a prerequisite to the application of that standard is protected activity by the petitioner. Here, Petitioner merely asserts that she was repeatedly harassed and then terminated; she does not allege any involvement in protected activity. Because Petitioner alleges no facts that can lead this Board to find that the City violated her rights under the NYCCBL, her claim of improper practice against the employer must be dismissed.

The record also suggests that Petitioner believes that the Union failed to provide her with adequate representation, which constitutes an alleged violation of §12-306(b) of the NYCCBL⁵. With regard to this claim, the Union asserts that the petition is untimely and should be dismissed. However, Petitioner fails to allege, with any specificity, when the Union allegedly breached the NYCCBL, and it is not clear to us which event should be used to compute the petition's timeliness.

⁴ 18 PERB ¶3012 (1985).

⁵ Section 12-306(b) of the NYCCBL provides that it is an improper public employee organization practice for a union:

- (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 ...

Even assuming that the petition, as it relates to the Union, was timely filed, Petitioner again fails to set forth any facts that would lead this Board to determine that the Union engaged in an improper employee organization practice. A union has a duty to serve its members without engaging in discriminatory, arbitrary, or bad faith conduct. When alleging a breach of duty, a Petitioner bears the burden to plead and prove that the union engaged in such conduct, thereby breaching its duty and violating the NYCCBL.⁶ A union does not breach this duty merely because the grievance procedure yields an unfavorable result.⁷ Here, Petitioner failed to prove or even allege any discriminatory, arbitrary or bad faith conduct on the part of the union. In fact the record indicates that the Petitioner was assisted and represented by the union throughout the grievance procedure and during arbitration.

Accordingly, Petitioner's claims against the City and the Union are dismissed in their entirety.

⁶ See Decisions No. B-3-96 at 4; B-18-95 at 11.

⁷ See Decision B-31-94 at 12.

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 filed herein by INEZ ZEIGLER, docketed as BCB-1873-96 be, and the same hereby is, dismissed.

Dated: New York, New York
March 25, 1997

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

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