

Donofrio v. FDNY, 59 OCB 27 (BCB 1997) [Decision No. B-27-97 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----x
In the Matter of the Improper Practice Proceeding :
-between- : DECISION NO. B-27-97 (ES)
NICHOLAS DONOFRIO, :
Petitioner, : DOCKET NO. BCB-1910-97
-and- :
NEW YORK CITY FIRE DEPARTMENT, :
Respondent. :
-----x

DETERMINATION OF EXECUTIVE SECRETARY

On May 8, 1997, Nicholas Donofrio ("Petitioner") filed a verified improper practice petition pursuant to §12-306 of the New York City Collective Bargaining Law ("NYCCBL"),¹ naming the New York City Fire Department ("Department") as the Respondent.

Petitioner, a firefighter in the Department, alleges that,

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 Section 12-305 of this chapter;

(2) to dominate or interfere with the ... administration of any public employee organization;

(3) to discriminate against any employee for the purpose of ... 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.

on August 19, 1995, a lieutenant used profanity and disrespectful language in accusing Petitioner of not obeying an order. As a result, Petitioner filed a Step I grievance maintaining that the lieutenant's conduct towards him violated Department Rules and Regulations as well as the applicable collective bargaining agreement. The Step I grievance was denied and Petitioner appealed to Step II. On or about February 8, 1996, the Step II grievance was also denied. Petitioner filed a Step III grievance and, he alleges, attempted "for months afterwards" to schedule a Step III hearing. The Department refused to grant such a hearing on the ground that, pursuant to the provisions of the contractual grievance procedure, the grievance was time-barred.² Petitioner further states that "during this period I was also defending myself against charges which [the lieutenant] preferred against me and simultaneously campaigning for union office."

As a remedy, Petitioner requests that "the Step III grievance against [the lieutenant] be heard by the Fire Department" and that his personnel file "be expunged of all relative documents and forms relating to charges preferred against me which were dismissed per the Collective Bargaining

² According to documents attached to the petition, an attorney for the Uniformed Firefighters Association wrote to the Department on January 27, 1997 and requested that it reconsider its decision not to grant Petitioner a Step III hearing. By letter dated April 18, 1997, the Department responded that the decision stood as the grievance was untimely filed.

Agreement Section 7 of Individual Rights."

Pursuant to Title 61, Section 1-07(d) of the Rules of the City of New York ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that it is untimely on its face. Under §1-07(d) of the OCB Rules, a claim alleging conduct in violation of Section 12-306 of the NYCCBL must be filed within four (4) months of the date the alleged improper practice occurred. In the instant case, the act complained of, i.e., the Department's refusal to grant a Step III hearing, took place in February of 1996 or shortly thereafter, more than a year prior to the filing of the improper practice petition. The fact that the Petitioner repeated his request and the Department repeated its refusal, does not serve to extend the statute of limitations.

Even if the petition was not so untimely as to warrant summary dismissal, however, it would be dismissed for failure to state and improper practice under the NYCCBL. Petitioner has failed to allege facts to support a claim that the employer committed any acts in violation of §12-306a of the NYCCBL, which defines improper public employer practices. The provisions and procedures of the NYCCBL are designed to safeguard the rights of public employees set forth therein, i.e., the right to bargain collectively through certified public employee organizations; the right to organize, form, join, and assist public employee

organizations; and the right to refrain from such activities.

The primary allegation made by the Petitioner is that the employer has refused to grant him a hearing under the contractually provided grievance procedure, or that the employer has violated the collective bargaining agreement. It is well-established that the jurisdiction of this Board may not be invoked if the claimed statutory violation derives solely from an alleged violation of a collective bargaining agreement.³ The Board is without authority to enforce the terms of a collective bargaining agreement and may not exercise jurisdiction over an alleged violation of an agreement unless the acts constituting such a violation would otherwise constitute an improper practice.⁴ These principles flow from §205.5(d) of the Taylor Law, a provision which is applicable to improper practice proceedings under the NYCCBL, which states:

[The Public Employment Relations Board, hereinafter "PERB"] 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.

Petitioner's statement that he was campaigning for union office and defending himself against disciplinary charges at the time that his requests for a Step III hearing were denied, does

³ Decision Nos. B-60-88; B-55-88; B-36-87.

⁴ Decision Nos. B-36-87; B-29-87; B-8-85.

not support a claimed violation of §12-306a of the NYCCBL. Petitioner has alleged no facts which would indicate that the Department's denial of the hearing was in any way connected to, or in retaliation for, his campaigning or defending himself against charges.

Accordingly, for the foregoing reasons, the petition must be dismissed. Dismissal, of course, is without prejudice to any rights the Petitioner may have in another forum.

Dated: New York, New York
June 6, 1997

Victoria A. Donoghue
Executive Secretary
Board of Collective Bargaining