Lopez v. L. 983, DC 37, Dep't of Parks, 59 OCB 31 (BCB 1997) [Decision No. B-31-97 (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-31-97 |
| ISMAEL LOPEZ, Pro Se, Petitioner, | : DOCKET NO. BCB-1734-95 |
| --and-- | : |
| DISTRICT COUNCIL 37, AFSCME, AFL-CIO, AND LOCAL 983, and the NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION AND ITS REPRESENTATIVES, | : |
| Respondents. | : |

**DECISION AND ORDER**

Ismael Lopez ("Petitioner"), appearing pro se, filed a verified improper practice petition, on March 20, 1995, against District Council 37, AFSCME, AFL-CIO, Local 983, ("Union") and against the New York City Department of Parks and Recreation ("Department") and its agents. The Petition alleges that the Union violated Sec. 12-306(a) of the New York City Collective Bargaining Law[1] ("NYCCBL") by failing to represent him in an

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[1] NYCCBL Sec. 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...

appeal in the Civil Court of the City of New York under Article 78 of the Civil Practice Law and Rules ("CPLR"). It also alleges that the Department violated NYCCBL Sec. 12-306(b) by refusing to bargain in good faith, harassing and discriminating against him by denying him reinstatement after discharge for violating a stipulation which settled a disciplinary proceeding.

The Department requested and was granted an extension of time to file its answer. On April 13, 1995, the Department and the Union filed their respective answers. In February, 1996, the Trial Examiner assigned to the case in January, 1996, inquired by letter whether the Petitioner would be filing a reply. No response was forthcoming. In September, 1996, the Petitioner, inquiring about the status of the case, was asked if he wished to withdraw the Petition or to request settlement negotiations. No response in the affirmative was heard, and the Trial Examiner closed the record.

## BACKGROUND

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**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 Sec. 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 pubic employees of such employer.

Petitioner was employed by the Department as an Urban Park Ranger from July 13, 1987, until December 16, 1994. He was a member of a bargaining unit of public employees, represented by the Union and covered by the Blue Collar Bargaining Unit collective bargaining agreement. In December, 1993, the Department served disciplinary charges on Petitioner for alleged violations of time regulations. Petitioner was placed on probation for one year under a stipulation signed in December, 1993. Near the end of Petitioner's probation, his file was reviewed by the Department. By letter dated December 14, 1994, Department Personnel Director David Terhune informed Petitioner that, as a result of numerous violations of departmental time-and-leave regulations, his employment would be terminated effective December 16, 1994. At the behest of Union Representative Tony Mammalello, the Department reviewed the alleged violations and dismissed fourteen of the twenty-one allegations but maintained it still had the right to terminate Petitioner's employment.

The following facts are not in dispute. On or about January 19, 1995, a draft stipulation proposed by the Department, which provided for Petitioner's reinstatement was transmitted to Mr. Mammalello by facsimile and relayed to Petitioner. The draft stipulation provided for the reinstatement of the Petitioner for an additional six-month probationary period, provided satisfactory arrangements could be made for Petitioner to

reimburse the Department the sum of $7,909.23, which had been paid to him upon discharge from service. The draft agreement did not specify a date by which Petitioner was required to accept the terms of the stipulation. Petitioner decided to wait for further advice from non-union legal counsel with whom he was scheduled to meet on February 6, 1995. The Union negotiated the draft stipulation of January 19 on behalf of Petitioner, but was not active in assisting Petitioner's decision to accept or reject the draft stipulation.

In a letter from Parks Advocate Luiz C. Aragao on February 1, 1995, Respondent Department modified its previous offer to reinstate Petitioner by requiring him to repay, no later than 5:00 P.M. on February 3, 1995, $2,397.50 of the $7,909.23 Petitioner had received upon termination. The Department asserted that the amount to be repaid immediately was an accidental overpayment rather than the cash equivalent of accrued benefits, which represented the remainder of the money to be paid. In a letter also dated February 1, 1995, Susan Hennefield, Director of Payroll and Timekeeping for the Department, notified Petitioner that the overpaid amount could be repaid utilizing deductions from forthcoming paychecks.

Petitioner did not immediately accept either Aragao's or Hennefield's offer, and allowed the February 3 deadline to pass. On or about February 12 and February 25, the Union and the Department met to discuss possible changes in Aragao's February 1

offer, at which time the Union was informed that the Department would not alter its position on the condition of repayment prior to reemployment or extend the deadline for repayment.

On March 6, 1995, Petitioner met with Union Representative Mammalello and Local President Robert Taylor to request the Union's assistance in filing an Article 78 review of the Department's decision. During the meeting, the Union asserts that it denied Petitioner's request on the grounds of a long-standing policy of not representing individuals in Article 78 proceedings, but advised that Petitioner could retain outside counsel if he wished to pursue an Article 78 proceeding regarding his termination.

Petitioner wrote a letter dated March 20, 1995, to John S. Ciaffone, Assistant Commissioner of the Department. In this letter Petitioner expressed an inability to repay the $2,397.50 by February 3 with such short notice, but asked to utilize the scheduled repayment plan offered by the Director of Payroll and Timekeeping. The Department did not respond to Petitioner's letter.

## POSITIONS OF THE PARTIES

### Petitioner's Position

Petitioner's complaint against the Union relates only to its failure to assist him with the litigation he was contemplating, i.e., an Article 78 appeal of his employment termination. Petitioner claims that the Union had a duty to provide him with

legal counsel for the appeal and that the Union's unwillingness to provide legal counsel constituted an improper practice.

As for Petitioner's claim against the Department, he called the Department's actions "capricious, discriminating and harassing," when it revised its conditions for his reinstatement by requiring repayment of money as a condition precedent. Petitioner asserted that the Department breached its duty to bargain in good faith, accusing it of "purposefully placing obstacles impossible to overcome" into the February 1 draft stipulation, specifically by requiring repayment of monies before returning to work, instead of permitting him to accept the installment plan offered by the Director of Payroll and Timekeeping. Petitioner maintains that this change in the requirements for reemployment and the imposition of a time limit of only two days for compliance with the condition precedent, constituted an effort to keep Petitioner from meeting with legal counsel regarding the draft stipulation, scheduled for February 6, 1995. This, Petitioner maintains, was an attempt to interfere with his efforts to understand the stipulation which he contends is an improper practice.

**Union's Position**

The Union maintains that it has, at all times, acted fairly and impartially toward the Petitioner. The Union successfully negotiated for him to remain at work despite the fact that the

December, 1993, stipulation settling his earlier disciplinary problems conferred unilateral power on the Department to determine what would constitute sufficient cause for termination. The Union contends that Petitioner's decision to pursue rights granted to him under Article 78 of the CPLR assertedly does not involve a right under the exclusive control of the Union, and therefore does not implicate any duty on the part of the Union to provide legal services, unless it has done so for similarly situated members, which the Union claims it has not.

**Department's Position**

The Department argues that Petitioner has failed to allege any facts sufficient to support a violation of any subsection of NYCCBL Sec. 12-306(a). It points out that Petitioner is not a "collective bargaining unit" within the meaning of Sec. 12-306(a) and therefore does not have standing to pursue a claim for failure to negotiate under Sec. 12-306(a)(4). Moreover, the Department maintains that its actions were at all times appropriate and that it was within its legal rights to establish preconditions for Petitioner's return to work.

## DISCUSSION

The Petitioner alleges that the Union breached the duty of fair representation which he claimed it owed to him, by declining to provide legal counsel for an Article 78 appeal of his

employer's decision to terminate his employment.

The United States Supreme Court recognized the duty of fair representation when it held that where a union is the exclusive bargaining agent for a unit, it has a correlative duty to treat all members fairly.[2] The BCB has recognized the duty of fair representation in several previous cases.[3] The scope of this duty of fair representation generally extends only to the negotiation, administration, and enforcement of collective bargaining agreements, and not to the institution of lawsuits on behalf of unit members.[4] When the right or issue in controversy is not under the exclusive control of the union, it does not have an obligation to act.[5]

A union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do. Where it assumes such an obligation, a union violates its duty of fair representation if a petitioner proves that (1) the union denies the service to a unit employee, and (2) the union's decision to deny that service is improperly

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[2] Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d. 842 [64 LRRM 2369] (1967); Steel v. Louisville & Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

[3] See, e.g., Decision Nos. B-17-90, B-72-88, B-58-88, and B-2-84.

[4] Decision Nos. B-14-83, and B-29-86.

[5] Decision Nos. B-18-86, and B-11-87.

motivated, irresponsible, or grossly negligent.[6]

However, the burden is on a Petitioner to plead and prove that a union has engaged in such conduct[7]; Petitioner herein has not met the burden of proof. He has presented no evidence to show that the Union treated him differently from any other similarly situated employee. Nor has he presented evidence to demonstrate that the Union's refusal to assist in an Article 78 proceeding, which arose after his employment termination, was motivated in a way that would constitute an improper practice as defined under NYCCBL. We, therefore, find that, on this ground, the Union was under no duty to act, and did not assume an obligation to act.

Moreover, with respect to Petitioner's status as a probationary employee, we have held that the union cannot be expected to create or enlarge the rights of special classes of employees, such as probationary employees, whose contractual rights were limited by virtue of a signed stipulation.[8] Petitioner herein was placed on probation as a result of time and leave violations leading to a disciplinary action culminating in a signed stipulation where Petitioner waived his right to appeal employer actions. Probationary employees' rights are limited in

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[6] Decision Nos. B-32-86, B-11-87, B-18-95, and B-3-96.

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

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

general,[9] and Petitioner relinquished any remaining rights by signing the 1993 stipulation. Further, Petitioner has presented no evidence that the Union has provided other similarly situated employees with a service that was denied to him. Therefore we find that the Union had no duty to act in this case, and the Petitioner's claim against the Union on this ground must fail as well.

Because Petitioner has failed to demonstrate a breach of the Union's duty of fair representation with respect to contract administration, he also failed to state a necessary precondition for the existence of any potential derivative claim against the Department pursuant to Sec. 209-a.3 of the Taylor Law.[10] Moreover, Petitioner fails to articulate an independent claim of improper practice against the Department under Sec. 12-306(a)(4) of the NYCCBL. The Department had no duty to bargain with the Petitioner as an individual member of a bargaining unit. This section of the NYCCBL creates a duty to bargain in good faith that runs between the employer and the union. It may not be asserted by an individual employee.

As to Petitioner's allegation of discrimination on the part of the Department, we note that the discrimination proscribed by

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[9] Decision Nos. B-56-88 and B-34-86.

[10] Section 209-a.3 of the Taylor Law requires joinder of the employer when it is alleged that a union has breached its duty of fair representation in the processing of or failure to process a claim that the employer has violated the collective bargaining agreement.

Sec. 12-306(a)(3) of the NYCCBL is discrimination for the purpose of interfering with or discouraging the exercise of rights protected under the NYCCBL.

We find that the allegations of the petition fail to establish either that the Petitioner was engaged in protected activity or that the employer's actions were improperly motivated. Allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[11] The mere allegation that the change in offers to reinstate the Petitioner and the imposition of a time limit by which he had to accept the offer was improperly motivated does not state a claim of improper practice under NYCCBL. A mere coincidence in time is not probative evidence of improper motive. Moreover, the Petitioner has offered no evidence that would even suggest that the employer's later offer was motivated by any reason other than the belated discovery of an overpayment of funds upon his discharge.

As to the allegation that the change in the condition precedent was in response to and an attempt to hamper Petitioner's efforts to meet with non-union legal counsel, we find the Petitioner's arguments unavailing. Again, 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,

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[11] Decision No. B-28-89; see also Decision Nos. B-55-87 and B-2-87.

assist, or participate in the activities of a public employee organization; or to refrain therefrom. Nor is there an allegation of retaliation for engaging in a protected activity as defined by NYCCBL Sec. 12-306(a).

For all these reasons, 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-1734-95 be, and the same hereby is, dismissed.

Dated: June 26, 1997
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER