Thomas v. Melish, L. 1969, Civ.Serv.Painters & NYCHA, 59 OCB 37 (BCB 1997) [Decision No. B-37-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:
--between--	:
DENNIS M. THOMAS, Pro Se, Petitioner,	: DECISION NO. B-37-97 : DOCKET NO. BCB-1703-94
--and--	:
MR. STEPHEN B. MELISH, JR., LOCAL 1969, CIVIL SERVICE PAINTERS, MR. LEON CASE, PAINT FIELD OFFICE SUPERVISOR, and the NEW YORK CITY HOUSING AUTHORITY,	:
Respondents.	:

DECISION AND ORDER

Dennis M. Thomas ("Petitioner") filed the instant Verified Improper Practice Petition on December 16, 1994. In it, Petitioner alleges that the New York City Housing Authority ("Authority") committed an improper practice by bringing false disciplinary charges against Petitioner, and that Local 1969 of the Civil Service Painters, International Brotherhood of Painters and Allied Trades ("Union") refused to appeal a determination of those charges. The Union filed a verified answer on February 24, 1995. The Authority, after requesting and being granted a mutually-agreed time extension to July 13, 1995, filed a verified Answer on July 19, 1995. Petitioner was advised by the Trial Examiner of his right to file a reply, but Petitioner declined, and the record was closed.

BACKGROUND

Petitioner was hired on December 7, 1992, by the Authority as a Painter, and during the period of time relevant herein was a member of the bargaining unit represented by the Union. Wages and supplemental benefits of members of this unit in this title are established by determinations issued by the Comptroller of the City of New York pursuant to Sec. 220 of the New York State Labor Law. The economic terms of Petitioner's employment at the Authority are controlled by a Comptroller's consent determination, but the Authority and the Union are not parties to a collective bargaining agreement containing a grievance procedure. Moreover, we also take administrative notice of the Housing Authority's election, pursuant to a letter to the Mayor containing a Notice of Election under Local Law No. 53-1967, dated June 26, 1968, to reserve the right to undertake direct collective bargaining on all matters with representatives of non-unique employees concerning grievances. There is no dispute that a consequence of this election is that Petitioner's title is not controlled by Executive Order 83, which provides a grievance and arbitration procedure which may be used by employees in a bargaining unit where there is no written collective bargaining agreement containing a grievance procedure.

On June 22, 1994, a memo from Leon Case, Supervisor, Housing

Authority Paint Field Office, charged Petitioner with: 1) excessive time in apartments; 2) late starting time; and 3) violation of time and attendance regulations. Petitioner notified his Union of the charges the same day, whereupon Petitioner requested of Local 1969 President Stephen Melish by phone that the Union represent him in the local hearing.[1] Melish agreed to appear on his behalf. On or about July 1, 1994, the Union requested an adjournment of the local hearing scheduled for July 6, 1994, in order to continue its investigation of the charges. The Authority agreed to reschedule the hearing for August 3, 1994.

By memorandum dated July 22, 1994, to Charles Foley, Housing Authority Administration, Petitioner attempted to rebut the charges against him. He specifically attempted to rebut two memos written by his supervisor and submitted in support of the charges against him. Petitioner points to an alleged inconsistency in application of work rules, and the alleged inadequate manner in which Foley presented the situations. Petitioner offered his own interpretations and recollections of the incidents, and added, "I further wish to state for the record, this is all part of an ongoing conspiracy to terminate my employment as a New York City Housing Authority Painter." It is

[1] A local hearing is one held before an officer outside an employee's department appointed by the Authority to hear disciplinary matters against the employee.

undisputed that Petitioner sent this rebuttal without consultation, advice, or knowledge of the Union. In fact, Petitioner did not give a copy of the rebuttal to the Union until August 1, 1994.

The local hearing was held on August 3, 1994, before Francine Levy, Manager, Redfern Houses, who was appointed by the Authority to hear the matter. Petitioner was represented by Union President Melish. At the hearing, Petitioner pled not guilty to the first two charges and guilty with an explanation to the third charge of violations of time and attendance regulation. The Authority presented witnesses whose testimony the Petitioner disputed with his own testimony. With the assistance of President Melish, Petitioner herein also submitted several character witness letters to the hearing officer, which she accepted. Melish objected to the admission of several memos submitted to support the Authority charges and cross-examined Authority witnesses.

On August 25, 1994, the hearing officer issued her determination, which found the Petitioner guilty on all three charges and recommended suspension without pay for three days. The determination was mailed to the Authority and the Petitioner, who, in a telephone conversation on September 7, 1994, informed the Union of the hearing officer's determination. At that time Petitioner also requested that the Union file an appeal of the

determination and the penalty. The Union asserts that, on two occasions, both before the local hearing and again on August 3, Melish informed Petitioner herein that there was no appeal process from a determination of the hearing officer. Petitioner contends, however, that Melish told him that an appeal would be possible, and, although there was only a remote possibility of losing, that if Petitioner herein did lose at the local hearing, "we can and will appeal." Petitioner herein asserts that this statement was made in the presence of Mr. Pretta, Vice President of the Local, during a preparatory meeting for the local hearing. Petitioner maintains that he relied on the President's assurances. The Union asserts that in subsequent phone conversations President Melish again advised Petitioner that the local hearing was not a contractual process and that the Union had no contractual or other right to appeal a determination after a local hearing, and that, on the advice of counsel, no appeal would be filed.

Petitioner does not refute the Union's assertions but, in his Petition, claims that the Union committed an improper practice by failing to file an appeal "in a timely fashion."

The Authority admits that it allows an informal procedure by which either an employee or a Union may seek review of a penalty assessed following a local hearing. This procedure involves the submission of a request for review of the penalty to, in

Petitioner's case, the Administrative Director of the Paint Administration Division. No such review was filed by either the Union or the Petitioner in the instant case.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union breached its duty of fair representation by colluding with the Housing Authority to terminate his employment. He alleges specifically that the Union was complicit in allowing him to be charged and found guilty of what he contends were false disciplinary charges[2] and that it failed to appeal that finding in a timely and proper fashion.

Union's Position

The Union argues that the Petitioner has failed to state a claim under §12-306(b) of the NYCCBL. It argues that the Union and the Authority had no collective bargaining agreement containing a grievance procedure on which Petitioner could rely as a source of a right to grieve his discharge. Despite the non-existence of such a contractually provided grievance procedure, the Union asserts that its representation of the Petitioner in the hearing and thereafter was not arbitrary, discriminatory or

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[2] Petitioner does not assert that his employment was in fact terminated.

in bad faith. It also states that if an extra-contractual right to appeal did exist, the burden of going forward would rest with the Petitioner, not with the Union.

The Union points to its past practice in dealing with local hearings and notes that it has never appealed a hearing before. It also points out that, it relied on the advice of counsel in reaching its decision with regard to this matter. The Union further notes that at the time in question, Petitioner himself could have filed an appeal pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"). In sum, the Union maintains that it acted at all times in good faith and afforded equal service and care to the Petitioner as any other similarly situated employee.

Authority's Position

The Authority argues that the instant petition is time-barred and that it fails to allege facts sufficient to sustain a claim of improper practice. Moreover, the Authority, in any event, asserts that it did not act arbitrarily, discriminatorily, or in bad faith.

DISCUSSION

The Petitioner claims the Union breached its duty of fair representation by failing to represent him adequately in a

disciplinary hearing and by failing to appeal the adverse determination of that hearing.

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,[3] i.e., to refrain from actions which can be construed as "arbitrary, discriminatory, or in bad faith."[4] The Board of Collective Bargaining ("Board") also has recognized this duty, the scope of which extends to the negotiation, administration, and enforcement of collective bargaining agreements.[5]

In the instant case, the disciplinary hearing in which the Union represented the Petitioner is not a procedure created by any collective bargaining agreement to which the Union was a party. Therefore, we find that the Union had no duty to appeal the determination of the hearing officer on behalf of Petitioner.

This Board has also held that a union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do, but, where it assumes such an obligation, that union violates its duty

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[3] Steel v. Louisville & Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Vaca v. Sipes, 386 US 171 (1967).

[4] Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)

[5] Decision Nos. B-11-95, B-16-94, B-8-94.

of fair representation if a petitioner proves, first, that the union has denied that service to him, and, secondly, that the union's decision to deny that service is "arbitrary, discriminatory, or in bad faith."[6]

In the instant case, as we have found, the Union did not have a duty under any written agreements to represent the Petitioner in the disciplinary hearing, but that it chose to assist him. In this way the Union assumed a duty to assist the Petitioner.[7] However, Petitioner has offered no evidence whatsoever that Melish's conduct and performance at the local hearing was arbitrary, discriminatory, or in bad faith.

Petitioner has offered no evidence of a contractual source of a right to grieve, nor has he alleged facts from which we may reasonably conclude that the Union breached its duty of fair representation by failing to appeal the decision of the hearing officer. There existed no contractual right to appeal, and, in any event, there was no avenue of appeal open exclusively to the Union.

The duty of fair representation does not extend to the enforcement of rights which an individual employee may vindicate without the assistance of his or her bargaining representative. Where a union does not solely control access to the forum through

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[6] Decision Nos. B-11-95, B-8-94, B-21-93, B-21-92.

[7] See Decision Nos. B-20-97, B-31-94, B-51-90.

which rights may be vindicated, there is no policy reason for it to be held responsible for protecting such rights. Imposing a broader scope of duty upon a union would be unwarranted and unduly burdensome.[8]

Once Petitioner received notice from the Union that it would not appeal the decision of the hearing officer, he was free to seek review under the informal procedure of the employer or to exercise his individual right to appeal in the courts under Article 78 of the CPLR.

Accordingly, for the above stated reasons, the instant improper practice motion 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-1703-94 be, and the same hereby is, dismissed.

Dated: New York, New York
July 31, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

[8] See Decision No. B-23-94 at n. 24 and cases cited therein.

SAUL G. KRAMER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

DENNISON YOUNG, Jr.
MEMBER