Fabbricante v. Somma, FDNY, L. 3, IBEW & City, 59 OCB 43 (BCB 1997) [Decision No. B-43-97 (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-- 43 --97 |
| JOHN J. FABBRICANTE, Pro Se, Petitioner, | DOCKET NO. BCB-1672-94 |
| --and-- | |
| AL SOMMA, SHOP STEWARD, F.D.N.Y. ELECTRIC SHOP, LOCAL 3, I.B.E.W., and ANTHONY BIANCHINO, SUPERVISOR ELECTRICIAN, F.D.N.Y., and the CITY OF NEW YORK, | |
| Respondents. | |

**DECISION AND ORDER**

On August 2, 1994, John J. Fabbricante ("Petitioner") filed a verified improper practice petition against Al Somma, Shop Steward for Local 3, International Brotherhood of Electrical Workers, ("Union"), and Anthony Bianchino, Supervisor of Electricians for the Fire Department of the City of New York ("City"). The City requested an extension of time to file an answer to which Petitioner objected. The City was granted a limited extension and the Union also was offered an extension to the same date. The City filed an answer on September 26, 1994. The Union submitted no answer. On November 10, 1994, Petitioner filed a reply after he requested and was granted an extension of time.

**Background**

At all times relevant herein, Petitioner has held the civil service title of Electrician in the

Building and Maintenance Division of the New York City Fire Department ("Department"). The bargaining unit of which he is a member is represented by the Respondent Union. The Union and the Department were parties to a collective bargaining agreement ("contract") for the term of July 1, 1989, through June 30, 1992. The contract contains a procedure for resolving grievances arising thereunder.[1] Petitioner asserts that he used this procedure in filing complaints spanning a period of time from June 24, 1993, to May 13, 1994, about the alleged denial of opportunities to work overtime and about the alleged lack of attention which his complaints received.

Specifically, Petitioner asserts that his complaints -- most of which were submitted in the form of memoranda and entitled "Letter of Grievance" -- concerned his lack of overtime assignments and were ignored by his supervisors as well as by Shop Steward Al Somma. In fact, he contends that Somma was involved in a conspiracy with one supervisor, Anthony Bianchino ("Bianchino"), to deprive him intentionally of the opportunity to work overtime. Petitioner also alleges, without specificity, that Bianchino retaliated against him by attempting to "bias" employees against him for filing his grievances. Petitioner asserts that the source of his right to grieve is Executive Order ("EO") No. 7, dated March 26, 1990. That document states, at Section 6, that "it is necessary and desirable to control overtime abuses which might arise and to equalize

[1] The four-step grievance procedure described in Article V of the contract culminates in arbitration. It provides that a grievant, alone or together with the Union, may pursue a claim through the first three steps, but the Union is vested with sole authority to decide whether to seek arbitration.

the apportionment of overtime among similarly-titled employees."[2]

When Petitioner met with his supervisor's superior, Robert Katz, on April 5, 1994, to file another protest, reasserting objections first stated in his complaints of March 28 and April 1, 1994, Katz undisputedly told him that a grievance had to be submitted on a printed form and signed by the Shop Steward before it could be accepted for consideration. Petitioner asserts -- without contradiction by the Union -- that he asked Shop Steward Somma to sign the grievance form the next day but that Somma refused, vowing, in Petitioner's words, to "stand in the way of this grievance, which included using his pull in the Union hall to stop it." Petitioner also asserts without contradiction that Somma "expressed his support" of Bianchino and "his hatred toward [Petitioner]," because, Somma is quoted as saying, "You're a ... letter writer, and I hate letter writers." Also undisputed is Petitioner's assertion that Somma refused to put into writing the reasons for refusing to sign the grievance form, adding, "I'm not that stupid. I'm not signing nothing." Petitioner submitted the form, dated April 13, 1994, albeit without Somma's signature.

The City asserts --without contradiction -- that Katz inquired as to the validity of Petitioner's grievance and was informed that the assignment of overtime does not represent a matter which is subject to the grievance procedure. No Step I decision was issued. By memo dated April 25, 1994, to Department Chief Nastro, Petitioner requested a Step II hearing, alleging "retaliation, procrastination on the part of the City, and a campaign of misinformation" against him in response to his complaints about overtime assignments. He requested a written

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[2] It incorporates language identical to Executive Order No. 56, Section 2, dated April 2, 1976, which, in turn was incorporated into Mayoral Directive 78-12. The language prohibits overtime in excess of a specified formula.

determination, but no Step II decision was issued.

Petitioner alleges that, on May 5, Supervisor Bianchino warned several of Petitioner's co-workers to be wary of Petitioner because "he is a letter writer," echoing the statement which Somma allegedly made. On May 13, 1994, Petitioner filed a request for a Step III hearing. By decision dated June 3, 1994, the Step III hearing officer dismissed the April 13 grievance on the ground that the assignment of overtime was a right reserved to management under §12-307(b) of the New York City Collective Bargaining Law ("NYCCBL").

Petitioner asserts that, on June 9, 1994, he contacted Union Business Agent Joseph Vicarri to ask that the Union arbitrate his claim about inequitable assignment of overtime. The Union did not do so. Four years earlier, Petitioner notes, the Union arbitrated a grievance brought by Al Somma regarding overtime assignments.[3] In that case, the Board of Collective Bargaining ("Board") denied a challenge to arbitrability of the Union's claim that Executive Order No. 56 was violated by the Department's assignment of compulsory overtime. The Board determined that the Executive Order constituted a written rule of the Department, the alleged violation of which stated an arbitrable grievance. Petitioner contends that the Union's failure to pursue his claims regarding overtime assignments, having arbitrated Somma's grievance a few years earlier concerning overtime assignments, evinces disparate treatment towards him, breaching the Union's duty of fair representation.

## Positions of the Parties

### Petitioner's Position

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[3] *See* Decision No. B-59-90, Docket No. BCB-1287-90 (A-3435-90).

Petitioner alleges that the City and the Union have conspired to prevent his exercise of rights protected under §12-306(a) and (b) of the NYCCBL.[4] Petitioner claims the Union breached its duty of fair representation by according him disparate treatment vis-a-vis Shop Steward Somma. Petitioner also alleges that Somma himself prevented Petitioner's grievances concerning overtime assignments from being processed by the Union.

In addition, he claims that the City committed an improper practice by refusing to process most of his grievances and by allegedly retaliating against him for filing them. Petitioner argues that the Department's failure to process the grievances demonstrates a hostile attitude towards him. To support his contention that his grievances were valid but ignored, Petitioner points to Executive Order No. 7, which, he argues, "mandates that overtime shall be equally distributed and it was not" and which, he contends, has been incorporated into the rules and regulations of the Department, therefore, giving him a right to grieve the assignment of overtime.

Petitioner further argues that the Department intentionally misconstrued his letters as

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[4] Section §12-306 of the NYCCBL 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 publicployees in the exercise of their rights granted in Section 12-305 of this chapter;

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(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;

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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....

"complaints" instead of contractual grievances, demonstrating bad faith against him on the part of the City. From the time he filed a grievance in March, 1994, he contends, he has been subject to "harassment, retaliation and in the least, great resentment" not only by Shop Steward Somma but also by Supervisor Bianchino.

In his reply to the City's answer, Petitioner states that he "seeks to correct an improper situation that exists regarding the awarding or not awarding of overtime." He asserts that the Department's "action or lack of action" was not for legitimate business reasons but rather for his supervisor's "self-serving motives." He asserts further that the Department's actions were "arbitrary, discriminatory and retaliatory."

Petitioner also asserts that the City and the Union have violated Section 12-113 of the Administrative Code of the City of New York ("Whistleblower Law"). He asserts the "retaliation and harrasment" took on "a new dimension" the week of May 29, 1994, when Bianchino allegedly accused Petitioner of writing a letter to the Department's "I.G. naming him in some wrong doing."

**Union's Position**

The Union did not file an Answer to the claims against it. Petitioner submitted a photocopy of a certified mail return receipt as proof of service of the instant petition on the Union.

**City's Position**

The City argues that, insofar as Petitioners' complaints concern actions which took place more than 120 prior to the filing of the instant petition, those complaints are untimely. It also

argues that Petitioner's claims which concern contractual interpretation and/or retaliation for complaints arising under the City's "Whistleblower Law" do not fall within the jurisdiction of this Board. As for timely claims within the Board's jurisdiction, the City contends that its agents' actions which are the subject of the complaints were a legitimate exercise of managerial prerogative and that Petitioner has failed to allege facts sufficient to constitute an improper practice under either Section 12-306(a) or (b) of the NYCCBL.

The City also asserts that, upon receipt of Petitioner's various memos, its agents treated them, not as grievances submitted under the contractual grievance procedure, but as "letters of complaint" because the letters did not request a conference at the first level of the contractually provided, multi-step, grievance procedure. The City also reasons that, because the memos were not submitted on what it describes as the "proper" grievance form, its decision not to grant a hearing at the lower steps in the grievance process did not violate the contractual grievance procedure. Moreover, it argues that the applicable contract allows a grievant on his/her own to pursue a complaint up to arbitration in the absence of a response from a public employer, and that the Department's failure to hold a hearing at various stages of the grievance procedure is not improper under the NYCCBL. Finally, the City contends that it is not liable for any breach of the duty of fair representation which may have been committed by the Union.

## Discussion

Petitioner claims that the Union breached its duty of fair representation by discriminating in the handling of his grievances concerning the equitable distribution of overtime assignments among members of his bargaining unit. He also contends that the City retaliated against him

because he filed numerous complaints about overtime assignments.

As a preliminary matter, any claim which Petitioner may intend arising under the City's Whistleblower Law is not within the purview of this Board and cannot be entertained in this proceeding. In addition, under the applicable statute of limitations set forth in Section 1-07, Title 61, of the Rules of the City of New York, Petitioner's complaints arising before April 2, 1994, are untimely and cannot be considered here for purposes of redress. They may be considered, however, as background evidence with respect to timely claims arising after that date.

With respect to the claim that the Union breached its duty of fair representation, the United States Supreme Court has recognized the duty of fair representation, holding that, where a union is the exclusive bargaining agent for a unit, it has a correlative duty to treat all members fairly.[5] The criterion for deciding whether a union has breached that duty is a determination that the union's actions were "arbitrary, discriminatory, or in bad faith."[6] The scope of the duty extends to the negotiation, administration, and enforcement of collective bargaining agreements,[7] including the processing of contractually based grievances,[8] as in the proceeding before us.

It is well settled that a union does not breach the duty of fair representation merely because it refuses to advance a grievance, nor does it breach the duty merely because the

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[5] 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).

[6] Vaca v. Sipes, 386 US 171, 64 LRRM 2369 (1967)

[7] Decision Nos. B-20-97, B-8-94, B-44-93, B-92-93.

[8] Decision Nos. B-20-97, B-8-94, B-44-93, B-92-93.

outcome of a settlement does not satisfy a grievant.[9] The U.S. Supreme Court determined, in Vaca v. Sipes, that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures...If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined....

In our jurisdiction, the only condition limiting a union's discretion is that a decision not to process a grievance must be made in good faith and in a manner that is not arbitrary or discriminatory as to collective bargaining rights under the NYCCBL.[10] A violation of the duty of fair representation may be found if a petitioner alleges with sufficient specificity and proves by a preponderance of evidence that a union or its agents employed bad faith in the handling of a request to pursue a contractually based grievance.

In the instant proceeding, we find that Petitioner has presented a *prima facie* case against the Union, as required under the law.[11] As the Union filed no answer, all facts alleged in the petition regarding the Union's conduct are deemed admitted.[12]

With respect to Petitioner's claim against the Union, the Union has offered no explanation as to why it failed to consider Petitioner's grievance. Of course, it is well settled that

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[9] Decision Nos. B-20-97, B-8-94, B-29-93, B-21-93.

[10] Decision Nos. B-20-97, B-8-94.

[11] Decision Nos. B-23-96, B-22-96, B-32-92.

[12] Decision Nos. B-17-94, B-23-87.

a union may exercise discretion in deciding whether to arbitrate a grievance.[13] It is also well settled that a grievance, to be arbitrable, must be contractually based.[14] The gravamen of Petitioner's complaint concerns the distribution of overtime assignments among members of his bargaining unit. While the assignment of overtime is generally a prerogative of management, we have held that a claim that an executive order has been violated may be submitted to a contractually-provided grievance procedure where parties to a collective bargaining agreement have included such a claim within the contract's definition of a grievance, as here.[15]

Petitioner herein grieves such a complaint with regard to Executive Order No. 7, which relates to the assignment of overtime. We find, therefore, that Petitioner has stated a grievance arguably based upon the applicable contract and that the Union has offered no good faith rationale for not considering it.

We take notice of the fact that the Union processed Shop Steward Somma's own claim a few years ago about overtime assignments. That claim was also based on an executive order concerning overtime assignments.[16] In the absence of any explanation by the Union, its failure

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[13] Decision Nos. B-31-94, B-21-94, B-8-94, B-21-92.

[14] Decision Nos. B-4-95, B-3-94, B-40-93.

[15] Decision Nos. B-16-93, B-38-92, B-38-91.

[16] The case cited by Petitioner herein and the instant proceeding are factually distinguishable. The grievant in the earlier case contested the assignment of compulsory overtime; Petitioner herein protests the failure to be assigned overtime. Also, the right to grieve in the earlier case was based on the applicability of Executive Order 83, which provided the grievance procedure to be used in the absence of a collective bargaining agreement; in the instant matter, the right to grieve is based on a collective bargaining agreement. The distinctions are not germane to the determination herein.

to assist Petitioner herein with his grievance about overtime assignments after having pursued Somma's grievance about overtime assignments creates the appearance of disparate treatment between unit members. The Union's failure to file any response to the claims in the instant petition, even after being granted a gratuitous extension of time to file, leaves us with no choice but to conclude that the Union failed to exercise good faith in its handling of Petitioner's arguably meritorious grievance.

With respect to Shop Steward Somma, we find that Somma exhibited bad faith in his conduct as Shop Steward toward Petitioner as a unit member desirous of exercising his right to pursue a grievance. It is uncontested that Somma vowed to "stand in the way of this grievance, which included using his pull in the Union hall to stop it" and refusing to sign it. Petitioner's unrefuted assertion that Somma expressed "his hatred toward [Petitioner]" because "[Petitioner is] a ... letter writer, and [Somma] hate[s] letter writers" supports the claim that the Shop Steward sought to prevent Petitioner from exercising his right to grieve the overtime assignments. For these reasons, we find that the Union and its agent, Shop Steward Al Somma, breached the duty of fair representation in the handling of Petitioner's grievance filed on April 13, 1994.

Section 209-a(3) of the Civil Service Law ("CSL") requires that the public employer be made a necessary party to a proceeding alleging a breach of the duty of fair representation by a union in the handling of a contract claim. Section 205.5(d) of the CSL authorizes this Board -- upon a determination that the union breached the duty of fair representation in the processing or failure to process a contract claim -- to direct a union and a public employer to process the contract claim in accordance with the parties' grievance procedure. This section of the CSL also

authorizes us to retain jurisdiction over the matter to apportion between the union and the public employer any damages assessed as a result of the grievance procedure. In the instant proceeding, therefore, we direct that the Union and the Department process the Petitioner's grievance in accordance with the contractual grievance procedure, and we retain jurisdiction in the event that apportionment need be considered.

We find, however, that the allegation that the Department failed to consider Petitioner's complaints, without more, fails to state an independent claim under the NYCCBL against the Department. Petitioner pursued the April 13, 1994, claim himself through the steps of the contractually provided grievance procedure which he was able to pursue by himself. He requested and was given a written determination at Step III of that grievance procedure. It was not for the public employer to decide whether to pursue the matter beyond that step. That is a determination which the contract has vested only in the Union.

As for Petitioner's allegations that Supervisor Bianchino retaliated against Petitioner or "biased" fellow employees against him, we find these statements to be based on conjecture, speculation, and surmise, devoid of probative fact as required.[17] With respect to the allegations against the Department's agent, Supervisor Bianchino, also, Petitioner has failed to state a claim under the NYCCBL.

## ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York

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[17] Decision Nos. B-28-89, B-55-87, B-2-87.

City Collective Bargaining Law, it is hereby,

DIRECTED, that the Union shall process Petitioner's grievance filed on April 13, 1994, through the lower steps of the grievance procedure up to and including a Request for Arbitration; and it is further

DIRECTED, that the Union shall, at Petitioner's discretion, either represent Petitioner in arbitration of his claim with respect to his grievance filed on April 13, 1994, or pay the cost of legal representation for Petitioner throughout the arbitration process of said grievance; and it is further

DIRECTED, that the Department shall submit to the arbitration of the contractual grievance which is the underlying subject of the instant improper practice proceeding over which we retain jurisdiction in the event that an apportionment of damages is necessary; and it is further

DIRECTED, that the Union shall post the attached notice for no less than thirty days, at all locations used by the union for written communication with unit employees; and it is further

ORDERED, that, in all other respects, the improper practice petition docketed as BCB-1672-94 be, and the same hereby is, dismissed.

DATED: New York, New York
October 28, 1997

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER

MEMBER

SAUL G. KRAMER
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

All employees that Local 3, International Brotherhood of Electrical Workers, committed an improper practice by breaching its duty of fair representation in the case of John Fabbricante v. Al Somma, Local 3, I.B.E.W., & Fire Dept. of the City of New York.

It is hereby:

DIRECTED that the Union shall process Petitioner's grievance filed on April 13, 1994, through the lower steps of the grievance procedure up to and including a Request for Arbitration; and it is further

DIRECTED, that the Union shall, at Petitioner's discretion, either represent Petitioner in arbitration of his claim with respect to his grievance filed on April 13, 1994, or pay the cost of legal representation for Petitioner throughout the arbitration process of said grievance; and it is further

DIRECTED, that the Department shall submit to the arbitration of the contractual grievance which is the underlying subject of the instant improper practice proceeding over which we retain jurisdiction in the event that an apportionment of damages is necessary; and it is further

DIRECTED, that the Union shall post the attached notice for no less than thirty days, at all locations used by the union for written communication with unit employees.

Local 3, International Brotherhood of Electrical Workers
(Union)

Dated: October 28, 1997

____________________________________
(Posted By) (Title)

*This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*