

Fair Hearing Reps v. City, Dir. Of Med. Assist& SSEU, 59 OCB 6 (BCB 1997) [Decision No. B-6-97 (IP)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----X

In the Matter of the Improper :
Practice Proceeding :

-between- :

FAIR HEARING REPRESENTATIVES, MAP, :
(EDGAR BERGEN, et al.), :

Petitioners, : Decision No. B-6-97

-and- : Docket No. BCB-1859-96

THE CITY OF NEW YORK, DIRECTOR of :
the MEDICAL ASSISTANCE PROGRAM, :
and SOCIAL SERVICE EMPLOYEES UNION, :

LOCAL 371, :

Respondents. :

-----X

DECISION AND ORDER

On September 27, 1996, a verified improper practice petition was filed by eight (8) Fair Hearing Representatives ("Petitioners" and or "Representatives") of the Medical Assistance Program (MAP). The petition alleged that the City of New York's Director of the Medical Assistance Program ("the City") and the Social Service Employees Union Local 371 ("the Union"), violated §12-306 of the NYCCBL. Both Respondents filed their answers on November 12, 1996. Petitioners did not file a reply.

Background

The City and the Union are parties to a collective bargaining agreement which, according to the City, is currently in status quo.

According to the record, on or about March 2, 1995, the director of the Fair Hearings division of the MAP sent a letter to the Representatives outlining changes in the procedure of preparing for fair hearings. These changes, which the City contends were due to "redeployment and emergency needs," required the Representatives to be responsible for preparing the documents they used to defend the MAP's position at hearings. For example, they would have to arrange their own fair hearing folders which necessitates making computer entries and retrievals. It is undisputed that this work was formerly performed by Office Aides and Office Associates.

On April 20, 1995, the Union, on behalf of Petitioners, filed a Step I and a Step II Grievance alleging that the Representatives were assigned tasks outside of their job descriptions. The MAP Director of Personnel and Administration rendered a Step I Decision on May 17, 1995 and on August 4, 1995, a Step II Decision was rendered by the HRA Hearing Officer. In both Decisions, the grievance was denied.

The Union filed a Step III Grievance with the Office of Labor Relations (OLR) on Petitioners' behalf on September 9, 1995. A Decision, denying this grievance, was rendered by the OLR Review Officer on April 17, 1996. The Decision indicated that should the Union decide to proceed to arbitration, it would have to do so within fifteen (15) days of the decision or waive and abandon the right to do so in the future. According to the Union, subsequent to the issuance of the Step III Decision, Petitioners informed the

Union of their desire to proceed to arbitration. However, maintains the Union, "after giving due consideration to Petitioners' request," it determined that "the likelihood of success in arbitration ... was insubstantial and that further proceedings ... were therefore not warranted." On May 23, 1996, Petitioners notified the Union that they were "requesting that the [U]nion reconsider to forego arbitration" and warned that if the Union took "no further action on this grievance, [they] would be forced to consider all options ... including the Office of Collective Bargaining."¹

On September 27, 1996, Petitioners filed the instant petition alleging that the Union breached its duty of fair representation when it refused to proceed to arbitration and that the City failed to bargain in good faith, pursuant to NYCCBL §12-306(a)4, when it allegedly "fused clerical and supervisory roles and functions" in disregard of the terms of the union contract. Petitioners request that the Board of Collective Bargaining ("the Board") direct management to "return all clerical assignments to the appropriate clerical personnel and direct that no further action be taken in this regard until a settlement has been reached between the two parties in labor-management negotiation and contractual agreement."

Positions of the parties

¹ The record does not reveal whether the Union responded to Petitioners' letter. In any event the Union did not submit a request for arbitration.

Petitioners' Position

Petitioners posit that the City "engaged in [an] improper practice and a failure to bargain in good faith" when it unilaterally assigned them out-of-title work.

Petitioners assert that the Union "failed to exhaust all means available to it, including arbitration, for a successful resolution of [their] grievance." They further maintain that since the roles and functions of the employees were already agreed upon by the City and the Union, and the City disregarded "the terms of the Union contract", the matter was appropriate for arbitration. The Union's refusal to proceed to arbitration, according to Petitioners, constitutes an improper practice.

The Union's Position

The Union claims that Petitioners failed to bring a timely petition regarding their dissatisfaction with the Union's representation. It noted that Petitioners filed their petition more than four (4) months from the date of the Union's act of failing to file a timely request for arbitration of the grievance. The Union also contends that it did not violate the NYCCBL when it decided to refrain from filing a grievance. It supports this contention by maintaining that its decision "was based upon its good faith determination that the grievance lacked merit."

The City's Position

The City asserts that Petitioners "failed to allege sufficient facts to demonstrate that the City [took] any action for the purpose of frustrating [their] statutory rights in violation of [any section] of the NYCCBL." The City adds that Petitioners failed to show that it violated §12-306(a)4, by failing to bargain in good faith. In support of this contention, the City asserts its managerial right to unilaterally implement changes in work assignments, claiming that the Board has held that management's unilateral decision "to add duties to [a] job assignment could not constitute a refusal to bargain in good faith in violation of the NYCCBL."²

Discussion

Petitioners' claim against the Union

Title 61, Section 1-07(d) of the Rules of the City of New York ("RCNY") bars our consideration of improper practice petitions not filed within four (4) months of the alleged improper practice.³ In

² The City cites Decision B-6-87 where a union brought an improper practice petition against the City alleging that the City failed to bargain in good faith over an assignment of duties not listed in an employee's job specification.

³ Section 1-07(d) of the RCNY states, in pertinent part:

Improper practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of §12-306 of the statute may be filed within four months thereof ...

(4)

See also, e.g., Decision Nos. B-40-96; B-11-95; B-31-94.

accordance with this rule, we find that Petitioners' petition, as it relates to the Union, is untimely since it was filed on September 27, 1996, more than four (4) months from the date that the Union waived its opportunity to proceed to arbitration.⁴

It should also be noted that the fact that Petitioners informed the Union of their desire that it file a request for arbitration after May 2, 1996, does not toll the period of limitations set forth in the Rules of the City of New York. The Union did not, at any time, indicate that it intended to reconsider its decision. Furthermore, in the Petitioners' May 23, 1996, letter, they acknowledged that the Union waived its right to arbitrate; they also acknowledged their right to seek recourse at the Office of Collective Bargaining. The Petitioners have presented no justification for the belated filing of this petition and, accordingly, their claim against the union is dismissed.

Petitioners' claim against the City

While Petitioners did not allege that the City violated a specific section of the New York City Collective Bargaining Law

⁴ The Step III Determination, indicating that the Union had fifteen (15) days to proceed to arbitration, was issued on April 17, 1996. Since the Petitioners claim that the Union breached its duty of fair representation by refusing to file a request for arbitration, the statute of limitations is calculated from the moment the Petitioners knew or should have known that the Union would not proceed to arbitration. While the record fails to show exactly when Petitioners learned of the Union's decision to forego arbitration, it does reflect that they possessed this knowledge on or before May 23, 1996, more than four (4) months prior to the filing of the instant petition.

("NYCCBL"), a fair reading of their petition indicates their contention that the City violated NYCCBL §12-306(a)4 when it allegedly disregarded the terms of the union contract and failed to bargain in good faith.

It is well established that "the express language of the NYCCBL leaves no doubt that an employer owes the duty to bargain in good faith only to the certified or designated bargaining representative."⁵ Individual unit members lack standing to allege bad faith bargaining by the employer and this Board will only consider such a petition if it is brought by a union.⁶ Because the duty to bargain runs exclusively between the City and the Union, the Petitioners here lack standing to assert a failure to bargain in good faith and, therefore, their independent claim against the City must be dismissed.

Since the claim against the Union has been dismissed, any potential derivative claim against the employer pursuant to §209-a.3 of the Taylor Law also must fail.⁷ Accordingly, the instant petition is dismissed in its entirety.

⁵ E.g., Decision No. B-22-87 at 7.

⁶ Decision Nos. B-33-89; B-29-84; B-15-83.

⁷ 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.

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-1859-96 be, and the same hereby is, dismissed.

DATED: New York, New York
February 25, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
M E M B E R

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

DANIEL G. COLLINS
MEMBER