Centeno v. L. 237, Robertson, Cross & NYCHA, 59 OCB 7 (BCB 1997) [Decision No. B-7-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
--between--	
	DECISION NO. B-7-97
MINOR CENTENO, Pro Se	
Petitioner,	DOCKET NO. BCB-1804-96
--and--	
CITY EMPLOYEES UNION, L. 237, IBT; DRAKE ROBERTSON, MRS. CAROL CROSS, And THE NEW YORK CITY HOUSING AUTHORITY,	
Respondents.	

DECISION AND ORDER

Minor Centeno ("Petitioner"), appearing pro se, filed a Verified Improper Practice Petition, on January 11, 1996, against the City Employees Union, Local 237, International Brotherhood of Teamsters, ("Union" or "Respondent") and against the New York City Housing Authority ("Authority" or "Respondent") and its agents.[1] The Petition alleges that the Union and the Authority violated § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[2]

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[1] The Petition also names Drake Robertson, Resident Building Superintendent, and Carol Cross, Manager of the General Grant Houses, to which Petitioner was assigned to work.

[2] 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 ...

The Union filed an Answer on January 29, 1996. On February 1, 1996, Petitioner requested amendment of the Petition to include the claim that his employment was terminated as a result of his filing the instant Petition. No objection was heard. After requests for an extension of time to file, the Authority filed its Answer on February 8, 1996. After requesting an extension of time to file a Reply, Petitioner filed an unverified Reply on March 6. The Union filed a sur-reply on March 15.

A conference was held on May 22, 1996, at the Office of Collective Bargaining by which the Trial Examiner assigned to the case explained the relevant law and asked the parties to clarify statements made in the pleadings. She also asked if the parties had explored settlement possibilities. At the meeting, the parties agreed that the Union would submit an amended Answer in order to particularize responses to the Petition. They also agreed that the Petitioner would be entitled to submit an amended Reply. At a follow-up meeting on June 18, 1996, the Union's amended Answer was accepted for filing. On June 27, Petitioner filed verified Replies to the Authority's Answer and to the Union's amended Answer.

Background

Petitioner held the title of Maintenance Worker since January 27, 1993. His Civil Service status was provisional. Petitioner's regular work location

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> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in § 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 public employees of such employer.

was the Grant Houses in Manhattan. Petitioner was a member of a bargaining unit covered by a collective bargaining agreement between the Union and the Authority for the time period from January 1, 1992, through March 31, 1995.[3] Pursuant to the status quo provision of the NYCCBL § 12-311d, the agreement was continued in effect past its expiration date and throughout the time period relevant here.

Petitioner asserts that he was not subject to discipline until he began to question his supervisor, Superintendent Drake Robertson, with respect to work assignments such as a gas leak on February 3, 1995, for which he faced disciplinary charges in a hearing on March 6, 1995, and repairs which he objected to making in an unsanitary apartment for which he contends he was brought up on poor time and attendance charges at a hearing on July 19, 1995. He also states that, in September, 1995,[4] he was "written up" for earlier work on a water leak, the cause of which he disputed with his supervisors. Petitioner maintains that his complaints about Robertson went unheeded by Carol Cross, Manager of the Grant Houses. On January 29, 1996, Petitioner asked to amend the instant Petition to include the assertion that, as a result of his filing the Petition, he was discharged from his position with the Authority.

With respect to his claims against the Union, Petitioner alleges generally that the Union failed to respond to phone calls and visits to the Union hall and that Representative Joe Martino failed to produce documents and witnesses in his defense during the disciplinary hearings. He also states that he was told by a representative of the Union that, if he wanted to file a

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[3] The agreement contains no reference to tenure rights for provisional employees.

[4] Petitioner does not provide the date, but attached to the Authority's Answer is a memorandum from Superintendent Drake Robertson to Petitioner, dated September 20, 1995, admonishing him for a repair he made and recommending "further action by the manager."

racial discrimination claim against his supervisors, he would have to do so without the Union's assistance.

The Union asserts that it represented the Petitioner at the disciplinary hearings and that, with respect to the charge concerning a water leak, the Union maintains that its representatives met with the Petitioner and his supervisors and secured their agreement to review the matter after three months when they would consider dropping the disciplinary charge altogether. As for Petitioner's claim that he was refused help filing a federal race discrimination claim, there is no dispute that on September 22, 1995, he met with a Union officer and discussed the matter. The Union asserts that the Petitioner was advised by the officer at that time, not how to file, but that he should file an E.E.O. claim.

For its part, the Authority contends that Petitioner was discharged for lawful reasons regarding his work performance and denies that it discharged him because of his filing the instant Petition. It asserts that the first memorandum recommending that Petitioner's employment be terminated because of "unsatisfactory work habits" was issued on December 12, 1995, before any agent of the Authority was served with the Petition.

Positions of the Parties

Petitioner's Position

Petitioner claims that his good work record was marred when he "began to have problems with [Superintendent] Robertson" whose "rulings and decisions" Petitioner challenged in an attempt to restrain Robertson "from abusing his powers towards me and other employees." As a result, Petitioner contends, Robertson "embarked on a vendetta to disgrace me as a worker ... in hopes of pursuing my discharge and secondly is to dissuade other workers from voicing their opinions and discontent with the work environment."

Petitioner argues that Robertson "retaliated" by fabricating charges and "improprieties" about such matters as the assignment to repair a gas leak on

February 3, 1995. He also cites the time and attendance charges against him which were the subject of the disciplinary hearing on July 19, 1995. Petitioner argues that, because of his objection to working in what the Authority does not deny were unsanitary work conditions, he was "retaliated against by being brought up on poor time and attendance charges." Petitioner contends that Superintendent Robertson showed him differential treatment in the matter of the water leak on September 19, 1995, for which he was "written up" by Robertson while, he contends, another maintenance worker escaped discipline for a greater infraction.

In addition, Petitioner charges Grant Houses Manager Cross with failure to investigate his complaints against Robertson and failure to "keep an open door policy and communicate with the employees." He also charges her with disgracing him and labeling him a dissident. As for the Authority in general, Petitioner argues that it "has not produced a forum where the worker can freely communicate with department heads in order to voice the progress of those in charge over them." Moreover, Petitioner maintains that his employment was terminated in retaliation for his filing the instant Petition.

As for his claims against the Union, Petitioner argues that it failed to represent him in a "timely and responsible manner," failed to investigate his complaints, and failed to respond to "[n]umerous phone calls and visits to the union hall." He also argues that the Union failed to produce documents and witnesses on his behalf during the disciplinary hearings on March 6 and July 19, 1995, and failed to counsel him with respect to a claim of racial discrimination against Cross and Robertson.

The Petitioner urges the Board to grant the instant Petition and to grant him "recoupment of lost wages due to suspensions and improper pay-docks." In addition, he seeks removal of "defamatory memos in [his] personal folder." He also asks the Board "to do what it deems fit to follow up on my allegations" against all Respondents herein.

Union's Position

The Union asserts that the claims articulated in the Petition should be barred in whole or in part by the applicable statute of limitations. It asserts that the petition fails to state a claim under the NYCCBL. Nonetheless, the Union argues that it represented Petitioner "fairly and in good faith" by representing Petitioner at the March 6, 1995, disciplinary hearing and two subsequent appeals. It points to the Authority's record of the hearing which indicates that Representative Joe Martino questioned Authority witnesses and offered explanations for Petitioner's conduct which was at issue there. The Union asserts that it represented Petitioner at the July 19, 1995, disciplinary hearing and during a subsequent appeal. The Union points to a memorandum from the Manhattan Borough Administrator who denied the appeal.

With respect to the charge regarding the water leak for which Petitioner received a warning memorandum, the Union argues that it organized a meeting between Petitioner's supervisors and Union representatives and that it secured the supervisors' agreement to withdraw the memorandum from Petitioner's file if no further "incidents" were asserted against him.

As to the "formal grievance against management" which the Petitioner contends he wished the Union to file, the Union does not deny that Petitioner complained of racial discrimination against him by Robertson and Cross. The Union answers, however, that, in a meeting on September 22, 1995, with Edmund Kane, Assistant Director of the Union's Housing Division, Kane advised Petitioner to file an E.E.O. claim.

In any event, the Union argues that Petitioner has failed to establish that any action by the Union was based on "arbitrariness, capriciousness, whim, discrimination, bad faith or any other hidden reason." The Union urges the Board to dismiss the instant Petition.

Authority's Position

The Authority argues that the instant Petition should be barred in whole or in part under § 1-07(d), Title 61 (Rules of the Office of Collective Bargaining), of the Rules of the City of New York ("Rules"), which section specifies a four-month statute of limitations for improper practice claims under the NYCCBL. The Authority further argues that the instant Petition fails to state a claim under the NYCCBL. Nonetheless, the Authority contends that all actions of which the Petitioner complains are within management's prerogative pursuant to § 12-307b of the NYCCBL[5] and were carried out in good faith, in conformity with applicable law, and not in an arbitrary or discriminatory manner. The Authority urges the Board to dismiss the instant petition.

Discussion

As to the timeliness of Petitioner's claims, we find those barred which arose prior to September 11, 1995, the date on which the applicable four-month limitations period accrued. The Board has consistently held that the four-month limitations period contained in § 1-07(d) of the Rules will bar consideration of an untimely filed improper practice petition.[6] Allegations

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[5] Section 12-307b of the NYCCBL provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work....

[6] Decision Nos. B-31-94, B-38-93 and B-21-93.

relating to events which occurred more than four months before the filing of such a petition may be considered only in the context of background information and not as specific violations of the NYCCBL. The Board has consistently held this to be so.[7] The application of the four-month limitations period is not discretionary.[8] Therefore, we address here only those claims arising after September 11, 1995.

The allegations which are timely raise the question of whether the Union breached its duty of fair representation in its handling of (i) a disciplinary reprimand of September 20, 1995, against Petitioner and (ii) Petitioner's request to file a grievance against his supervisors whom he said exhibited racial discrimination towards him. The Petition also raises the question of whether any independent claim of improper practice has been stated against the Authority.

The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[9] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[10] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[11] Even where a union makes an error in judgment, no breach of that duty may be sustained without evidence to suggest that the union's

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[7] Decision Nos. B-31-94, B-38-93 and B-21-93.

[8] Kane v. HPD, CSBA and SSEU, B-59-88, aff'd sub nom. Kane v. MacDonald, et al., N.Y. Co. Supreme Court June 27, 1989, aff'd 555 N.Y.S.2d 81 (1st Dep't 1990).

[9] Decision Nos. B-43-96, B-39-96 and B-37-96.

[10] Id.

[11] Id.

conduct was improperly motivated.[12]

In the instant proceeding, we consider Petitioner's allegation, inter alia, that the Union was unresponsive to him when he was disciplined for misconduct concerning a job assignment in September, 1995. Petitioner states that Union Representative Joe Martino "failed to dutifully investigate my complaints." He also states that the Union failed to respond to phone calls and visits to the union hall, but he does not specify which phone calls and visits to the union hall failed to get a response. Moreover, Petitioner does not deny the Union's assertion that he met with its Assistant Director Kane on September 22, 1995, to discuss, inter alia, the September 20 warning memorandum. Nor does he deny that, on September 25, 1995, a meeting was held with Superintendent Robertson and Manager Cross, along with Representative Martino and Assistant Director Kane, to discuss the September 20 warning memorandum. Petitioner does not deny the Union's assertion that management representatives agreed to consider withdrawing the memorandum from Petitioner's personnel file after three months "if there were no further incidents."

We find, therefore, that the Union did respond to Petitioner's request for assistance in this matter, although the outcome of that meeting might not have been satisfactory to Petitioner. A union enjoys wide discretion in handling grievances and does not breach the duty of fair representation simply because the outcome of the grievance is not satisfactory to the grievant.[13] Nothing has been alleged from which we may infer that the Union's actions here were arbitrary, discriminatory, perfunctory, grossly negligent or in bad faith.

Even if it were true that the meeting between Kane and Robertson, who allegedly worked together previously at the Authority, was "more of a reunion

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[12] Id. and Decision No. B-32-92.

[13] Decision Nos. B-43-96, B-39-96 and B-37-96.

of old friends rather than a solution-seeking matter" as Petitioner perceived it, such conduct alone would not rise to the level of unlawful behavior under the NYCCBL.[14] Perhaps conduct of a more prudent nature on the part of the Union's officer might have dispelled any doubts Petitioner may have had about the Union's loyalty. However, based on what the Petitioner has presented, we can not reasonably find that the Union's actions were arbitrary, discriminatory, perfunctory, grossly negligent or in bad faith.

Petitioner also alleges that the Union was nonresponsive to his request to file a "formal grievance against management." Petitioner does not dispute the Union's interpretation of this "formal grievance" as meaning his racial discrimination claim against his supervisors. He asserts that he "got no counsel" on this matter, but he does not deny that he spoke with Union Assistant Director Kane on September 22, 1995, about this claim, nor does he deny that Kane advised him to file such a complaint with the Equal Employment Opportunity Commission. Petitioner states, "I received no counsel as to how to properly file a complaint with the E.E.O."

Under the NYCCBL, the duty of fair representation does not require an employee organization to pursue a unit member's rights outside the ambit of the NYCCBL, such as federal, statutory protection against racial discrimination, e.g., E.E.O. claims. Because the reach of the NYCCBL does not encompass those rights, and because we have been presented with no evidence that the Union actually volunteered to help Petitioner with such a claim but then acted in an arbitrary, discriminatory, perfunctory, bad faith or grossly negligent manner while doing so, we find that the Union was under no duty to assist Petitioner in filing an E.E.O. claim. Moreover, Petitioner himself was not precluded from asserting his racial discrimination claim before the Equal

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[14] Cf. Decision No. B-23-96 (where we found that the petitioner stated a claim arising from a series of events; however, we also stated there "[a]ny of these events, alone, might not be enough for a finding of a breach of the duty....")

Employment Opportunity Commission, which is the best source of information about the proper procedures for pursuing a claim before it.

As to Petitioner's claims against the Authority and its agents, Petitioner describes the discipline to which he was subjected as arising within the context of his increasing self-assertedness vis-a-vis his supervisor. While he suggests that his outspokenness was intended as advocacy on behalf of other employees, the resulting "retaliation" which he alleges was of a personal nature ("Mr. Robertson had a personal vendetta") rather than a collective-bargaining character. Petitioner does not allege facts pointing to retaliation for the purpose of discouraging membership or participation in the Union
itself. These complaints, as well as any discredit of him "as a worker" which he discerned on the part of Manager Cross, while indeed arising out of the employer-employee relationship, do not implicate the collective bargaining rights protected by the NYCCBL. Those are the right to form, join, assist or participate in an employee organization or to refrain from doing so.

Regardless of what may have transpired between and among Petitioner and his supervisors, he has presented no allegations from which we may reasonably infer that the retaliation of which he speaks, if true, was because of the fact that Petitioner was a member of an employee organization or because he exercised any of the rights protected by § 12-305 of the NYCCBL.

With respect to Petitioner's belated claim that his employment termination was a result of his filing the instant Petition, the evidence presented is equally unavailing on this point. A memorandum from Manager Cross recommending Petitioner's discharge was dated December 12, 1995, six days before Superintendent Robertson was served with the instant Petition and nine days before Cross was served. We find that the initial discharge recommendation was dated before either of Petitioner's supervisors was on notice of the instant claims and was based on Petitioner's employment history prior to either of those dates. We, therefore, find no retaliation for the

filing of the instant Petitioner.

Because the Petitioner has failed to sustain his burden with respect to claims against both the Union and the Housing Authority, the Petition must be denied 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 Verified Improper Practice Petition docketed as BCB-1804-96 be, and the same hereby is, dismissed in its entirety.

Dated: New York, New York
January 30, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER