Amaker v. L. 1182, CWA & DOT, 61 OCB 32 (BCB 1998) [Decision No. B-32-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition - between - JOEL L. AMAKER Petitioner, - and - COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182 and NEW YORK CITY DEPARTMENT OF TRANSPORTATION Respondents.	Decision No. B-32-98 Docket No. BCB-1543-92

DECISION AND ORDER

On November 27, 1992, Joel L. Amaker ("petitioner") filed a verified improper practice petition with the Office of Collective Bargaining ("OCB"). In it, he alleged that the Communications Workers of America, Local 1182 ("CWA" or "Union") failed to represent him when his employment was terminated by the New York City Department of Transportation ("DOT" or "City"). The Union filed an answer on February 24, 1993. Amaker filed a reply on November 12, 1993.

On April 18, 1994, Amaker filed an amended petition in which he named both the Union and the City as Respondents, and he added a claim that the City had improperly terminated him from his position with the DOT. The City filed an answer to the amended petition on December 7, 1994.

A hearing was held on July 12, 1995 and October 27, 1995, at which the petitioner and

the Union were represented. The City did not appear. The parties were instructed to file post-hearing briefs in November, 1995.

The Union filed a post-hearing brief but the petitioner did not. By letters dated September 24, 1996, April 15, 1997 and March 11, 1998, the Trial Examiner inquired about the petitioner's filing of a brief, which never was submitted.

BACKGROUND

On October 1, 1990, Joel Amaker was hired by the DOT as a probationary employee with the title Traffic Enforcement Agent, Title I ("TEA"). At that time, he also became a member of the CWA.

The petitioner was assaulted and injured in June of 1991. Until he returned to work on June 12, 1992, he received Workers' Compensation benefits. Although, the probationary period is normally one year in length, because Amaker was not working for the last four months of his probationary period, he was required to remain on probation until he completed the required twelve months of probation. Accordingly, October 12, 1992 was set as the day for his probationary period to end.

Upon returning to work on June 12, 1992, the petitioner was served with disciplinary charges for a day of work missed prior to his leave of absence. He acknowledged receipt in the presence of Union representative Joel West and was directed to attend a disciplinary hearing on August 6. Amaker was accompanied to the hearing by Union representative Mamie Partie. Amaker produced evidence that his absence from work had been excused and charges against him were dropped.

The petitioner continued working as a TEA until September 20, 1992, when he was hit by a truck. When he learned that he had suffered a fractured shoulder and an injured knee, Amaker signed an application for Workers' Compensation benefits. On September 23, 1992, Amaker phoned Lt. Wells, Command 303, to inform Wells that he would be going out of work and receiving benefits from Workers' Compensation.

On September 24, 1992, while attempting to pick up his paycheck for the previous two weeks' work, Amaker met Margie Sharpe, Captain, Command 303. She showed him his eleventh-month probation evaluation in which she was recommending his termination from the DOT. At that time, Amaker signed the evaluation, though he testified that he did so only because he wanted to rebut the allegations made against him in the evaluation.

The next day, the petitioner contacted the Union to discuss his situation. He spoke with Anthony Lucas, the vice-president, and described his September 24th encounter with Sharpe. According to Amaker, Lucas said he would speak with Sharpe himself and promised to contact Amaker at some point in the future.

The petitioner claims to have heard nothing from the Union until October 2, when he received a letter from Sharpe indicating that his employment would be terminated as of October 9, 1992. In a letter dated October 8, Mark Barron, Director of Personnel of the DOT, told Amaker that he would be terminated under Paragraph 5.2.7(c) of the Rules and Regulations of the City Personnel Director[1] effective October 9.

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[1]Paragraph 5.2.7(c) provides, in relevant part:

> [An] agency head may terminate the employment of any probationer whose conduct or performance is not satisfactory...before the completion of the maximum period of probationary service...

Shortly thereafter, the petitioner again called Lucas to discuss these developments with him. Lucas informed Amaker that the Union neither could nor would do anything for him because he was terminated during his probationary period.[2] Amaker claimed that he had never received any indication of charges or complaints pending against him and asked Lucas to pull his file so he could see the nature of any such allegations. According to Amaker, Lucas said he lacked the authority to pull Amaker's file and that he could do nothing to help him.

On October 28, 1992, the petitioner sent a letter to the DOT requesting an investigation of his termination under section 22.10 of the Rules and Regulations by the DOT's Bureau of Traffic. None was granted. Amaker claims that his termination without negotiation between the DOT and the Union constitutes interference with his rights under section 12-305 of the NYCCBL in violation of section 12-306 of NYCCBL.[3] He asserts that he was never given a reason for his termination, and his complaint is founded upon the belief that he was fired for contrived reasons.

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[2]Section II of the Rules and Regulations of the City Personnel Director, paragraph 5.2.1(b) provides, in relevant part:

> [Probationary employment] may be terminated by the city personnel director or by the agency head before the end of the probationary period, and the appointment shall thereupon be deemed revoked.

[3]§§ 12-305 and 12-306 of the NYCCBL provide, in relevant part:

> **§12-305 Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of heir own choosing ...
>
> **§12-306 Improper practices** ...
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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 section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so...

In the original petition (dated November 25, 1992), only the CWA was named as a Respondent. Amaker was directed to file an amended petition adding the City as a party pursuant to Civil Service Law §209-a(3), which he did on April 4, 1994.[4]

POSITIONS OF THE PARTIES

Petitioner's Position:

Amaker contends that the CWA failed to represent his interests, though it had an obligation to do so when he was inappropriately terminated. His position rests primarily on the assertion that the CWA represented him on a prior disciplinary charge and, therefore, was required to represent him in the matter of his termination. He further suggests that the Union has provided representation to others in similar situations in the past.

The petitioner claims that he was terminated because he filed for Workers' Compensation benefits, not because his conduct or performance was unsatisfactory. Moreover, he maintains that the Union had a duty to investigate the situation rather than accept the employer's representations. Therefore, Amaker contends he was not properly represented.

Finally, it is the petitioner's position that, since he claims to have been terminated for contrived reasons, he has a legitimate grievance as defined in the CBA. Accordingly, he believes the Union had a duty to represent him in this matter.

Union's Position:

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[4]Civil Service Law, §209-a(3) provides, in relevant part:

> The public employer shall be made a party to any charge filed under subdivision two [improper employee organization practices] of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

Because the petitioner was a probationary employee for the entire term of his employment, the CWA asserts it had no authority to represent him in termination proceedings. Further, the Union asserts that the collective bargaining agreement between the City and the Union provides for no due process rights for probationary employees terminated during their probationary term. Accordingly, because Amaker had no due process rights with respect to termination, the Union had no authority to obtain a fair hearing or take any other actions for him in this matter. Therefore, Amaker was not entitled to representation from the Union on the matter of his termination.

City's Position:

The City maintains that it should not be a party to this suit for procedural reasons because the original petition was never served on or received by the City, failed to name the City as a party, and did not contain any allegations of improper practice on the part of the City. Furthermore, the City claims the amended petition must be dismissed because it was untimely filed.[5] The City argues that this is true regardless of the existence of prejudice to the party charged.[6] The City maintains that, because the allegations in the amended petition were contemporaneous with the facts giving rise to the original petition, the petitioner should not be

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[5]The City cites Title 61, Rules of the City of New York §1-07(d), which provides, in relevant part:

> [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 with the board within four (4) months thereof...

[6]The City cites Patrolmen's Benevolent Association v. McGuire, Board Decision No. B-26-80, Aff'd sub. nom P.B.A. et al. v. Robert J. McGuire, et al., N.Y. County Supreme Court 7/14/81; Board Decision No. B-37-92.

allowed to amend his petition to include them. Furthermore, the City contends that the amended petition is untimely with regards to the allegations of improper practices by the City and should thus be disallowed.

The City's second contention is that both the petition and the amended petition should be dismissed because they fail to allege facts sufficient to make a claim of improper practice by the City.

The City claims that the allegation that it terminated the petitioner for pretextual reasons fails to state an arguable claim of a violation of §12-306 of the NYCCBL because the Union did not show that the agent responsible for the discharge had knowledge of the employee's union activity, that the agent acted with anti-union animus, and that the discharge would not have occurred but for the union activity.[7]

DISCUSSION

The petitioner contends that the Union breached its duty of fair representation by failing to represent him when he was terminated by the City. However, he was a probationary employee at the time of the termination. A probationary employee does not have due process rights with respect to termination during the probationary employment term and may be dismissed at any time pursuant to Rule 5.2.1(b) of Section II of the Rules and Regulations of the City Personnel Director[8]. Moreover, disputes regarding the Rules and Regulations of the City Personnel

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[7]The City cites City of Salamanca, 18 PERB 3012 (1985), Board Decisions B-51-87; B-1-94; B-20-93; etc.

[8]See Footnote 1, *supra*.

Director are explicitly exempted from the grievance procedure.[9]

Therefore, the only way the petitioner might succeed in his claim against the Union is if he were able to prove that it has represented other probationary employees in similar circumstances. We find that he has offered no evidence to support his conclusory allegation on this issue. Amaker claims that, because it represented him in disciplinary matters in the past, the Union was required to represent him when he was terminated. However, unlike the termination of his employment, the grievance concerning his previous disciplinary action did not involve the Rules and Regulations of the City Personnel. In any event, the Union did not assume any obligation to represent him for purposes of challenging the termination of his employment by representing him in the past.

The petitioner's claim was amended to join the City as a party, pursuant to §209-a(3) of the Taylor Law[10], which requires that the public employer be joined as a necessary party in an action alleging a union breached its duty of fair representation. To the extent we find that the Union did not breach the duty of fair representation, the derivative claim brought against the City pursuant to §209-a(3) cannot stand. Any independent claims of improper practice alleged for the

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[9]Article VI, Section 1(B) of the CBA, in relevant part, provides:

> DEFINITION: The term "Grievance" shall mean: ...
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> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director...shall not be subject to the grievance procedure or arbitration...

[10]See Footnote 4, *supra*.

first time in the amended petition are clearly untimely.[11]

Accordingly, the claim of improper practice is dismissed in its entirety.

[11]See Footnote 5, *supra*. See also B-37-92 and B-26-80.

DECISION AND ORDER

Pursuant to the powers invested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the petition docketed as BCB be, and the same hereby is, dismissed in its entirety.

Dated: New York, New York
September 28, 1998

STEVEN C. DECOSTA
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