Schweit v. DOC & COBA, 61 OCB 36 (BCB 1998) [Decision No. B-36-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding Between Daniel Schweit, Petitioner, And NYC Dept. Of Correction, Health Management Division and the Correction Officers Benevolent Association, Respondents.	Decision No. B-36-98 Docket No. BCB-1584-93

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DECISION AND ORDER

On May 10, 1993, Daniel Schweit ("Petitioner"), appearing *pro se*, filed an improper practice petition alleging that the Correction Officers Benevolent Association ("Union") and two of its officers, Phil Seelig and Stan Israel, had violated the New York City Collective Bargaining Law ("NYCCBL") by failing to represent him "on many occasions."[1] The petition was returned because it was unverified and the petitioner filed a verified petition on June 1, 1993.

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1 Section 12-306 of the NYCCBL provides, in relevant part:
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....

Section 12-305 of the NYCCBL provides, in relevant part:
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 their own choosing and shall have the right to refrain from any or all of such activities....

On September 8, 1993, the Union filed an "answer and motion to dismiss."[2] The Petitioner filed a reply to the Union's pleading on September 21, 1993. Thereafter, he submitted three documents that were intended as replies to the Union's pleading, on September 28, 1993, September 29, 1993, and November 14, 1993.

By letters dated September 30, 1993, November 17, 1993, December 29, 1993, January 6, 1994, January 29, 1994, and February 18, 1994, the Trial Examiner told the Petitioner to join the City as a necessary party under § 209-a(3) of the Taylor Law.[3] The Petitioner submitted an amended petition on February 18, 1994, against the Department, which alleged an independent claim of discrimination. That petition was returned to him because it was not verified. He submitted a verified petition on March 14, 1994, and served a copy on the Department of Correction ("Department") at its office at 60 Hudson Street in Manhattan.

Subsequently, when scheduling a conference in the case, the Trial Examiner discovered that the Department had not informed the City's Office of Labor Relations of the petition. Some time elapsed before the Office of Labor Relations received the petition, on November 14, 1994, and assigned an attorney to the case. A conference was held on December 6, 1994.

The Union elected new officers, who chose to be represented by a different law firm.

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[2]The motion to dismiss was not submitted separately, and in a form complying with the requirements of the OCB Rules, and so was not deemed to be before the Board for an interlocutory determination.

[3]Civil Service Law Article 14, Section 209-a(3) provides:

The public employer shall be made a party to any charge filed under [the improper employee organization practices 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.

After the Union's new representative received the Union's legal files, a second conference was held on March 28, 1996.

The petitioner then hired an attorney and a third conference was held on October 9, 1996. The Union wanted to explore settlement options, and asked to revive an old grievance which it believed had been brought on behalf of the petitioner, and the City objected. The Union did not pursue its request after it became evident that the previous grievance was not identical to the matter to be resolved in the instant proceeding.

A hearing was held on September 9, 1997, October 24, 1997 and January 12, 1998.[4] At the close of the third day of hearing, the Union and the City moved to dismiss. The petitioner agreed to allow the motions to dismiss to be decided before he was finished presenting his case and the attorneys for the Union and the City agreed that they would forego the opportunity to cross-examine the petitioner before the motions were decided. The parties subsequently filed pleadings on the motions to dismiss, which is the only issue we now consider. For purposes of the motions to dismiss, we deem the petitioner's factual allegations to be true.[5]

BACKGROUND

The petitioner was employed by the Department in the title Correction Officer beginning

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[4]At the second day of hearing, the Union stated that it wished to renew its motion to dismiss on grounds of timeliness. Since the hearing had already begun, the Trial Examiner directed that it continue until the petition finished presenting his case.

[5]*See, e.g.,* Decision Nos. B-15-94; B-7-89; B-38-87 (on a motion to dismiss, the factual allegations of the petition must be deemed to be true, and the only question presented for adjudication is whether, taking the facts as alleged by the petitioner, a cause of action within the meaning of the NYCCBL has been stated).

in 1982. In 1987 and 1988, the petitioner sustained back injuries when he was assaulted by inmates. In November 1990, he sat on a bench in the prison locker room, the bench collapsed, and his back was injured again. Although his physician told him not to work, the Department's physician kept returning him to work. He remained on sick leave and, in accordance with the Department's sick leave policy, was confined to his home for 20 hours a day, 7 days a week. If he needed to visit a health care professional or get prescription medication, he was required to log in and out with the Department's Health Management Division ("HMD").

When the petitioner attempted to log out to visit a doctor, HMD refused permission. HMD then ordered him to return to work against the advice of his physician. When he told HMD that he was unable to return to work, the Department ordered him to report to the HMD office, which is an hour from his home, or face AWOL charges. The petitioner was unable to drive because he was taking pain medication, so his wife left work to drive him. The ride to HMD worsened his back injury but, when he arrived there, the Department ordered him to return to work without giving him a physical exam.

From November 1990 until November 1991, the petitioner repeatedly presented medical documentation to the Department that he was unable to return to work, and the Department repeatedly ordered him back to his post.[6] Sometimes he was able to report to work but, when he was too ill to report, he was marked AWOL. When he did return to work, he discovered that he

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[6]In January 1991, the petitioner's claim with the Workman's Compensation Board for the November 1990 injury was accepted, after examination by that Board's physicians, and he was classified as being "permanently partially disabled." He continues to received benefits arising from that claim.

had been removed from his steady post and tour, which had accrued to him through seniority. Throughout this time, the petitioner made numerous calls to the Union to complain about his treatment by the Department, but they were not returned. He also notified his shop steward in person, but that individual did not investigate. Whenever the petitioner did return to work, the Department assigned him to a light duty post.

In February, 1991, the petitioner was ordered to attend a command discipline hearing. A command discipline charge is temporary and the worst outcome of such a charge is several days' suspension. He advised the Union and asked that a Union representative accompany him. The Union failed to provide a representative on eight occasions and, each time the Union failed to appear, the hearing was rescheduled. It is unclear whether the hearing was eventually held.

In January 1992, the petitioner again returned to work. On the first day that he reported, he was transferred to a post in the Bronx, which takes an hour longer to reach than his original post. He complained to the Department that the longer drive aggravated his injury, and was ordered to report to the HMD office every day. At about this time, the Department classified him as a "chronic absent." Again, the petitioner made numerous phone calls to the Union, asking for assistance which was not forthcoming.

In January, 1992, the petitioner did speak to the Union's Vice President, Howie Figueroa, who told the petitioner that the Union would include him as a plaintiff in a class action suit that it planned to bring against the Department. The Union promised the petitioner that it would bring a lawsuit against the Department to compensate him for the Department's violations of his contractual and constitutional rights. It failed to do so, although it brought suits for two other

Correction Officers who suffered similar treatment.

The Union placed flyers in the HMD facility advising officers that it intended to bring legal action against the Department for implementing an unconstitutional sick leave policy and for harassment. The Union also produced "HMD Complaint Forms," which the petitioner filled out numerous times and mailed to the Union. In these forms, he complained of each instance in which he had been returned to duty against the advice of his doctor, and of the occasions when the HMD receptionist refused to log in his sick calls.

In January and February of 1992, employees at HMD began to refuse to accept the petitioner's telephone calls. Also around this time, he spoke to Bob Hoops, a Union delegate, who told him not to worry about the AWOL charges because, as long as he had medical documentation, the Union would "deal with them" later.

The command discipline charges were converted to formal charges of AWOL, failure to log in and failure to produce documentation and were served on the petitioner in March 1992. A possible penalty for those charges is termination.

The petitioner attended a hearing on these charges in June, 1992, at the Office of Administrative Trials and Hearings ("OATH"), accompanied by an attorney provided by the Union. The attorney did not prepare the petitioner for direct examination, review the petitioner's documentation or ask the petitioner if witnesses on his behalf were available. At the hearing, the petitioner was coerced into remaining for four hours while in extreme pain. The petitioner's attorney advised him, in his wife's presence, that he could not leave unless he resigned but that a resignation signed that day could be rescinded within 48 hours. Relying on the advice of the

attorney, he signed a resignation letter and a Negotiated Plea Agreement in exchange for dismissal of the charge. Later that evening, he called the Union to advise it to rescind his resignation. The Union attempted to do so, but the City would not allow it. On July 20, 1992, the petitioner filed a complaint with the county Bar Association against the Union-appointed attorney who had represented him at the OATH hearing.[7]

On July 28, 1992, the Union, through its attorneys, commenced a proceeding on the petitioner's behalf under Article 78 of the New York Civil Practice Law and Rules. The court granted a temporary injunction preventing the Department from acting on the petitioner's resignation.

In the summer of 1992, there was an incident at HMD in which the petitioner was ordered to report, waited at HMD for several hours, and was taken by his wife to the hospital for back pain. When he returned home from the emergency room, HMD refused to take his phone call and he was again marked AWOL.

In November, 1992, the petitioner's resignation was confirmed by the New York State Supreme Court and his Article 78 petition was dismissed.[8] On December 1, 1992, the Department notified the petitioner that his resignation was effective on November 20, 1992.

In December, 1992, the petitioner went to the HMD office to pick up a paycheck and was arrested for not leaving the premises when requested to do so. He called the Union, but its officers refused to send a representative to assist him.

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[7]The complaint was dismissed in October, 1995.

[8]*Schweit v. Abate*, N.Y. Sup. Ct., Index No. 20834/92 (1993).

On February 18, 1993, the Union filed an appeal of the dismissal of the Article 78 petition. On February 22, 1993, the Workers' Compensation Board gave the petitioner an award of permanent partial disability. In March, 1993, the petitioner wrote to the President of the Union three times but received no response.

On January 25, 1994, the Appellate Division, First Department, upheld the decision of the lower court confirming the petitioner's resignation.[9] In April, 1994, Figueroa was subpoenaed to appear on behalf of the petitioner at a Workers' Compensation Board hearing, but declined to do so. By letter dated April 15, 1994, the Union informed the petitioner that Figueroa would not appear on his behalf.

THE UNION'S POSITION

The Union contends that the June 1, 1993 petition should be dismissed because the petitioner failed to join the City as a necessary party.[10] It also claims that the petition should be dismissed for vagueness.

According to the Union, the petition was filed outside the four-month limitations period provided under the OCB Rules, and is time-barred.[11] It cites Decision Nos. B-38-93 and B-31-94 for the proposition that where there are allegations relating to events which took place more than four months before a petition was filed, the allegations may be considered only as background

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[9]*Schweit v. Abate*, 200 A.D.2d 522, 606 N.Y.S.2d 670.2 (1st Dep't, 1994).

[10]The Union cites Decision No. B-6-96.

[11]Title 61, § 1-07(d) of the Rules of the City of New York provides that "[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 four (4) months thereof...."

information. Background information, it asserts, may be admitted to show an ongoing and continuous violation, but may not be considered to constitute grounds for charges of specific violations.

The Union notes that the petitioner's sick leave, the harassment by the Department and his resignation took place between November, 1990 and November, 1992. Throughout this time, it maintains, the petitioner clearly believed that the Union was not properly representing him. At the very latest, it claims, the petitioner had four months to act after his sick leave ended on November 30, 1992, so his petition of June 1, 1993 is time-barred. Even his letters to the Union in December, 1992, May, 1993 and June, 1994 do not constitute a continuing violation, the Union asserts, because the Board has held that a union is not obligated to respond to redundant requests.[12] In addition, it claims, the petitioner's December, 1992 grievance asserting entitlement to pay through December 1, 1992 is time-barred since, when the Union did not respond, he was required to act within four months. The Union makes the same argument concerning the 122 phone calls that it did not return.

The Union argues that it had no duty to provide the petitioner with representation before the Workers' Compensation Board. However, even if it were, it claims, the four-month statute of limitations began to run when the petitioner received a letter dated April 15, 1994 in which the Union informed him that its Vice President would not testify on his behalf. Therefore, the Union asserts, the November 14, 1994 amendment to the petition, which raised this issue for the first time, does not come within the statutory time limits and should be barred. Similarly, the Union

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[12]The Union cites Decision No. B-21-93.

maintains, the petitioner's claim regarding the Union's failure to represent him when he was arrested is also time-barred.

THE CITY'S POSITION

The City claims that the petition is time-barred. It maintains that the petitioner resigned on June 9, 1992 and that his claim is outside the four-month statute of limitations because it was served on the City on November 14, 1994. Citing the current procedural requirements for filing a petition,[13] the City maintains that the June 1, 1993 petition lacked proof of service and failed to include the public employer as a party, rendering it both defective and improperly served. In any event, it contends, the petitioner's claims are also untimely with respect to that petition. It also argues that the November, 1994 petition concerns alleged discrimination by the Department because of the petitioner's Workers' Compensation Claim and events that took place before June, 1992, which renders the later-served petition untimely and not within the Board's jurisdiction.[14]

PETITIONER'S POSITION

The petitioner claims that the petition he filed on June 1, 1993, is timely and that all other submissions were considered by the Office of Collective Bargaining to be amendments to the

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[13]Title 61, § 1-07(f) of the Rules of the City of New York.

[14]NYCCBL § 12-306 provides, in relevant part:
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 formation or administration of any public employee organization;
(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....

original petition. However, he claims, he did not know that the Union breached its duty of fair representation until January 25, 1994, when the Appellate Division reviewed his Article 78 proceeding and held that he could not rescind his resignation. It was only then, he says, that he or any reasonable person could have known that the Union had given him faulty advice. Evidence of this, he maintains, is the Union's filing of the Article 78 proceeding, since:

> the Union would not have filed an Article 78 proceeding claiming that petitioner was permitted to rescind his resignation had it known that petitioner was prohibited from rescinding his resignation. Had the Union known that petitioner could not rescind his resignation, the filing of the Article 78 proceeding, and the subsequent appeal, would have been frivolous and therefore sanctionable. Since the Union, its attorneys and the petitioner would not have brought a frivolous action (subjecting them to sanctions as well as potential disbarment) none of the aforementioned parties could have known that the petitioner could not rescind his resignation.

Further evidence of this claim, he maintains, is the fact that the petitioner allowed the Union to represent him until his appeal was exhausted.

The petitioner argues, further, that his claims were of continuing violations. He maintains that the circumstances of the cases relied upon by the respondents are different from those in the instant dispute. In any event, he contends, those cases do not state that the continuing violations doctrine applies where a failure to represent is alleged. He claims that all of his grievances and complaints are interrelated and that he continually complained to the Union that the City engaged in improper practices which eventually led to his coerced resignation from the Department. In fact, he asserts, he had a viable claim for constitutional deprivation under 42 U.S.C. § 1983 until November 1995, which the Union also failed to bring; therefore, it was not until November 1995 that he could state definitively that the Union had failed to bring a timely action.

The petitioner maintains that his original petition of June 1, 1993, shows that the Union knew the City was treating him and similarly situated members inappropriately. For example, he cites a memo submitted as an exhibit in which the Union stated, "COBA is preparing a legal action against the [Health Management Division of the Department] for violating the human rights of Correction Officers;" that officers "may be entitled to receive cash compensation for illegal treatment by the Health Management Division;" and that officers "who have been victimized by HMD's inhuman treatment" should contact the Union.

The petitioner claims that the Union knew that HMD was harassing Correction Officers. Although he filled out numerous Union complaint forms, he says, the Union did not respond to any.

DISCUSSION

At the outset, we will consider the contentions of the Union and City that the original petition of June 1, 1993 was defective or improperly served. The petitioner filed a verified petition on that date, but did not know that he was required to join the City pursuant to the relevant provision of the Taylor Act. It has been the practice of this Office to allow *pro se* petitioners great latitude in filing pleadings,[15] and the General Counsel followed our precedent by allowing this petitioner an opportunity to correct the procedural defects in his pleadings,

[15] *See, e.g.,* B-24-94 (the Board does not require a petitioner, particularly one who is appearing *pro se*, to execute technically perfect or detailed pleadings).

including joining the City as a necessary party under the Taylor Act.[16] At the time the petitioner filed his pleadings, Title 61, § 1-07 of the Rules of the City of New York provided that "one copy of the petition shall be served upon the respondent and the original and three (3) copies thereof, with proof of service, shall be filed with the Board." The petition that he filed with the OCB on June 1, 1993 was properly verified. Therefore, we find that the petitioner's claim against the Union was filed on June 1, 1993, and was neither defective nor improperly served. The employer was properly made a derivative party to this claim, as required under the Taylor Act, when the Department of Correction was served on March 14, 1994.

The issue here is timeliness. We have long held that our statutory limitation period bars consideration of an untimely improper practice petition. However, when a petition alleges a continuing violation of the statute, the allegation may not be entirely time-barred even if the allegedly violative conduct began more than four months before the petition was filed.[17] We have found previously that, "in such cases, although a specific claim for relief is time-barred to the extent a petitioner seeks damages for wrongful acts which occurred more than four months before the petition was filed, evidence of the wrongful acts may be admissible for purposes of background information when offered to establish an ongoing and continuous course of violative conduct."[18] Because the petition was filed on June 1, 1993, evidence of acts committed before February 1, 1993 may only be admitted to establish the existence of a continuing violation. That

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[16]*See,* Decision No. B-21-93.

[17]*See, e.g.,* Decision No. B-37-92.

[18]*See*, Decision No. B-37-92 at 14 and the cases cited therein.

being the case, we may only consider the events that allegedly occurred after February 1, 1993.

The petitioner claims as an improper practice the failure of the Union President to answer his letters concerning his resignation and other events which took place before February 1, 1993. Continuing to contact the Union about those untimely events, however, does not toll the limitations period.[19] Therefore, the complaint concerning the Union's lack of response to the letters written in 1993 may not stand as an independent claim of improper practice.

The petitioner claims that Figueroa's failure to appear on his behalf at a Workers' Compensation Board hearing breached the duty of fair representation. The Union argues that it is not required to provide representation at such a proceeding. The record shows that Figueroa was asked to testify, not to represent the petitioner. The duty of fair representation requires that a union act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.[20] Giving testimony at a Workers' Compensation Board hearing does not relate to these activities and, therefore, the Union did not breach its duty of fair representation when its agent, Figueroa, refused to appear.

The petitioner also claims that he could not and did not know that the Union had given him faulty advice until January 25, 1994, when the Appellate Division reviewed his Article 78 proceeding and held that he could not rescind his resignation. We do not need to reach the question of whether this tolls the statute of limitations because giving bad advice does not breach

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[19]Decision No. B-29-98.

[20]*See, e.g.,* Decision Nos. B-13-81; B-13-82; B-50-88.

a union's duty of fair representation. It is not enough for a petitioner to allege negligence,[21] mistake,[22] or incompetence[23] on the part of the union. Unless the petitioner shows that the Union did more for others in the same circumstances than they did for him, or that its actions were discriminatory, arbitrary or taken in bad faith, even errors in judgment such as faulty advice do not breach the duty. [24]

For all of these reasons, we find that the petitioner's claim against the Union cannot go forward. Since that is the case, his derivative claim against the Department also may not go forward.

The petitioner made an independent claim against the Department, alleging that it discriminated against him when he filed a Workers' Compensation claim. That charge is outside the jurisdiction of this Board.[25] Accordingly, the instant improper practice petition is dismissed.

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[21] *Smith v. Sipe*, 109 A.D.2d 1034, 487 N.Y.S.2d 153 (3d Dep't 1985), *rev'd for reasons stated in dissenting memo*, 67 N.Y.2d 928, 502 N.Y.S.2d 134, 493 N.E.2d 237 (1986); *Shah v. State*, 140 Misc.2d 16, 529 N.Y.S.2d 442 (3d Dep't 1988).

[22] *Trainosky v. Civil Service Employees Association, Inc.*, 130 A.D.2d 827, 514 N.Y.S.2d 835 (3d Dep't 1987); *Civil Service Employees Association, Inc. v. PERB*, 132 A.D.2d 430, 522 N.Y.S.2d 709, 127 LRRM 3122 (3d Dep't 1987), *aff'd*, 73 N.Y.2d 796, 533 N.E.2d 1051, 537 N.Y.S.2d 22 (1988), 533 N.E.2d 1051 (1988).

[23] *Braatz v. Mathison*, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dep't 1992).

[24] Decision Nos. B-29-93; B-51-90; B-27-90; B-9-86; B-15-83; B-26-81.

[25] *See, e.g.,* Decision No. B-8-86.

DECISION AND 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 instant improper petition docketed as BCB-1584-93 be, and the same hereby is, dismissed.

Dated: New York, New York
September 28, 1998

STEVENC. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

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THOMAS J. GIBLIN
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