Dimps v. DC 37 & HRA, 63 OCB 39 (BCB 1999) [Decision No. B-39-99 (IP)]

BOARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding
--between—

SHIRLEY DIMPS, *Pro Se,*
Petitioner,

DECISION No. B-39-1999

--and--

DOCKET No. BCB-2009-98

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
And NEW YORK CITY HUMAN RESOURCES
ADMINISTRATION (Department of Social
Services),
Respondents.

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DECISION AND ORDER

On August 28, 1998, Shirley Dimps ("Petitioner" and "Dimps"), *pro se*, filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO, ("Union") and the New York City Human Resources Administration ("HRA"), complaining about the quality of legal services provided by her attorney on the termination of her employment from the Department of Social Services. Following a request for an extension of time, HRA filed an answer on October 20, 1998; the Union, on November 13, 1998. Petitioner replied to the City's answer on November 27, 1998, and to the Union's answer on January 5, 1999.

Background

Shirley Dimps was hired by HRA on May 31, 1995, as an Eligibility Specialist III. She first was assigned to the Melrose Income Support Center in the Bronx and later transferred to the

Rider Income Support Center late in 1996. The instant matter arises from circumstances surrounding a disciplinary proceeding against her at the Melrose Center. She received an official reprimand following a Fair Hearing on various charges of misconduct occurring from May to November, 1996. Refusing the reprimand, she went to trial before the Office of Administrative Trials and Hearings ("OATH") on February 10, 1998. She was found guilty of twelve of the charges in full and four in part. Dismissal was recommended by OATH and accepted by HRA. She was discharged on May 1, 1998.

The Report and Recommendation of the OATH administrative law judge ("ALJ") recites efforts by the attorney hired by the Union to represent Dimps at the OATH trial, in obtaining documentation of HRA's claims against Dimps. The report asserts that the attorney, Michael Golden ("Golden"), sought to conduct discovery and that HRA failed to comply with the some of his discovery requests.

The ALJ gave "respondent" an opportunity to conduct further discovery. He imposed a March 25, 1998, deadline for "respondent" to advise the ALJ whether Dimps wished to adduce additional evidence. By letter of March 26, 1998, Golden stated that he did not wish to adduce further evidence at hearing. The ALJ directed that the record be closed that same day.

Petitioner's Position

Petitioner contends that the Union breached its duty of fair representation to her by Golden's alleged mishandling of her case before OATH. Specifically, she charges that Golden failed to process "court papers" in a "timely" fashion. She does not elaborate on the timeliness

argument, but documents appended to the petition include a letter, dated August 27, 1998, purportedly from petitioner to the Union's "Legal Department" in which she contends, "Mr. Golden did not file court required paper work in a timely manner which caused [petitioner herein] not to have a fair trial under 'Due process of law[.']"

Although the petition also does not specify documents which the OATH ALJ may have "required," Petitioner Dimps states in the August 27 letter that Golden "failed/neglected" to provide OATH with "relevant information." She asserts that such "relevant" information included personnel rules, regulations, policies and procedures "as indicated in . . . the 'Citywide Contract,'" and various sections of the unit agreement. In the reply, she cites the Report and Recommendations of the OATH ALJ which recounts the pre-trial procedural history including a request by Golden for additional discovery.

The Petititioner asserts that she wanted files that she worked on at HRA to be offered into evidence at the OATH trial and asserts that Respondents denied her that opportunity. Alleging that those files "may have been tampered with," she also asserts that she was denied "rights" under Executive Order No. 16, dated July 26, 1978, by HRA's purported failure to report the disciplinary proceeding against her to the Office of the Inspector General assigned to HRA within the Department of Investigation.[1]

Dimps asserts that she told Attorney Golden that she wanted to present witnesses on her behalf but that he told her that "it would not be in [her] best interest." Dimps contends that she "[n]ever had [a] chance to prove [her] case and tell [her] side [of] the story. . . ." Consequently,

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[1] This Executive Order, amended by Executive Order No. 105, dated December 26, 1986, established a Commission of Investigation.

she contends that the OATH determination was biased against her; that, as a result of the conduct of HRA personnel, her own attorney, and the OATH ALJ, her employment was terminated on May 1, 1998; and that she was denied unemployment benefits. The petition also alleges various contractual violations as well as constitutional and tort claims.

The petition does not specify relief sought, but the August 27 letter demands that the Union "follow up," requesting an OATH hearing on Charges and Specifications filed against Dimps arising from her assignments at the Rider Center, the site to which she was transferred before her discharge. The letter also requests that her disciplinary case be referred to the HRA Inspector General. Noting that she had not received unemployment benefits despite her filing in May, 1998, Dimps complains in the August 27 letter that "D.C. 37 has not provided me with a lawyer to fight for my unemployment benefits . . . D.C. 37 should be held account[a]ble for not providing me with the type of service that was needed to keep my job."

Union's Position

The Union denies that it mishandled the Dimps case before OATH. It denies that it failed to provide Dimps with a competent attorney or that he failed to provide adequate representation of her in the OATH trial. The Union denies that Golden's actions were arbitrary, capricious or carried out in bad faith.

The Union argues, as well, that it had no control or direction over the legal work provided by Golden on the Dimps matter assertedly because he was an independent contractor and not an employee or agent of the Union. Even assuming for the sake of argument that his performance as

an attorney was deficient, the Union contends it is not responsible for his actions. For this reason, the Union argues that the petition fails to state a claim under the NYCCBL.

With respect to Petitioner's constitutional claim and her claim regarding a denial of unemployment benefits, the Union contends the Petitioner fails to articulate claims cognizable under the NYCCBL.

Agency's Position

The City maintains that the petition fails to cite any provision of § 12-306a of the NYCCBL as having been violated and fails to allege any facts to support a claim of improper practice under any of its subsections. The City argues that, while the petition does allege certain discriminatory acts on the part of the HRA, none of those factual allegations involve discrimination due to union activity and, thus, cannot be sustained here. The City further argues that the petition fails to allege facts sufficient to maintain a claim that HRA took any action for the purpose of frustrating any rights Dimps may have had under the NYCCBL.

As to Petitioner's claims of breach of contract, the City argues that any contractual rights she may have are appropriately addressed in arbitration, not in the instant improper practice proceeding. Similarly, the City argues, any complaints Petitioner may have with respect to asserted rights under statutes other than the NYCCBL are not remediable in this forum. The City maintains this pertains to any right which Petitioner may have to appeal the OATH determination as well as the denial of unemployment benefits, any Workers Compensation claim and any constitutional and civil rights claims.

In any event, the City contends that all claims which are alleged to have occurred before April 27, 1998 -- all events that occurred at the OATH hearings, any alleged failure to report disciplinary proceedings or failure to inform the Inspector General's office of discipline, any alleged failure to provide documents to Petitioner, any alleged failure to comply with discovery requests or rules at OATH, any civil rights or "disparative" treatment claims -- are untimely and should be dismissed on that ground alone. The City argues as well that events occurring more than four months before the petition was filed should not be considered even as background evidence, "because there is no evidence that an improper practice has been committed."

Discussion

Petitioner alleges that the Union breached its duty of fair representation in the handling of her disciplinary case before OATH.[2] Specifically, she complains of the quality of the legal representation afforded her by the attorney hired by the Union to represent her at the OATH trial. We deny the instant petition for the following reasons.

First, the duty of fair representation requires that a union act fairly, impartially and non-

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[2] Section 12-306b of the NYCCBL provides, in pertinent 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;
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> * * *
>
> (3) to breach its duty of fair representation to public employees under this chapter.

arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.[3] Allegations that there may have been violations of statutory schemes protecting rights other than collective bargaining rights which the NYCCBL is designed to protect do not raise issues that are within the jurisdiction of this Board.[4] Such statutes include New York State Civil Service Law governing procedures under OATH, Constitutional laws, the U.S. Civil Rights Act, as well as the New York City Human Rights Law.[5] Because the representation of a client at OATH does not relate to collective bargaining rights under the NYCCBL, we find that Petitioner's claim that Golden inadequately represented her before OATH cannot lie in this forum. We note the absence of any allegation in the petition that the legal representation which the Union provided for Dimps discriminated against her to the advantage of any other union member.

Secondly, even if we were able to consider Petitioner's claim concerning the quality of the legal representation afforded her, we would have to dismiss it before reaching the merits because of its untimeliness. Petitioner's complaint about her attorney relates to conduct while the OATH trial was under way, *i.e.*, before the record was closed. The trial began February 10, 1998; the record was closed March 26, 1998. The instant petition was filed on August 28, 1998. By our rules, the four-month limitations period accrued on April 28, 1998. Only events occurring

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[3] *See, e.g.*, *B. Wallace Cheatham, Probation Officer, and all other New York City Probation Officers, v. Thomas Jacobs, Commissioner, New York City Probation Department, et al.*, Decision No. B-13-81; *Clara Gibson v. David Selvwyn, Grievance Representative, District Council 37, AFSCME, AFL-CIO*, Decision No. B-13-82; and *Jerry Cosentino v. City Employees Union, Local 237, International Brotherhood of Teamsters*, Decision No. B-50-88.

[4] *Kirk Pruitt, pro se, v. New York City Department of Transportation, et al.*, Decision No. B-11-95.

[5] *Id.*

between April 28, 1998, and August 28, 1998, could be considered in the instant proceeding.

While we have held that events occurring outside the limitations period may be considered as background evidence when offered to establish an ongoing and continuous course of violative conduct,[6] the petition herein does not allege any such continuing course of conduct.[7]

Thirdly, with respect to Petitioner' breach-of-contract claims, this Board is prevented from enforcing the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[8] Petitioner's pleadings are devoid of any allegations that the Citywide and unit agreements were violated for reasons improperly motivated under the NYCCBL. Thus, Petitioner's breach-of-contract claims are misplaced here.

In addition, an allegation that rules of procedure may have been violated also does not support a claim of improper practice.[9] Petitioner's claims herein that rules of procedure of OATH were violated are not remediable in this forum.

For the reasons stated above, we find no duty on the part of the Union and no breach of the duty of fair representation on the facts of the case herein. We, therefore, find no derivative

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[6] *District Council 37, AFSCME, AFL-CIO, v. City of New York and New York City Office of Labor Relations*, Decision No. B-37-92 at 14 and cases cited therein.

[7] The August 27, 1998, letter to the Union's legal department, attached to the instant petition, demands a subsequent OATH hearing on misconduct charges relating to Dimps' employment at the Rider Center. We note, however, that the OATH determination which resulted in her discharge related to her prior employment at the Melrose Center which would appear to moot the later charges.

[8] *Kirk Pruitt, pro se, v. New York City Department of Transportation, et al.*, Decision No. B-11-95.

[9] *Id.*

claim against the HRA.

Finally, Petitioner herein does not assert that HRA's acts were motivated by reasons prohibited by the NYCCBL, nor does she claim that her employment termination was intended to, or did, affect any of these protected rights.[10] Therefore, we find no independent allegation of improper practice against the employer.

In sum, the NYCCBL does not provide a remedy for every perceived wrong. Its provisions and procedures are designed to safeguard the rights that are created by that statute, *i.e.*, the right to organize, form, join and assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from such activities. Even accepting as true Petitioner's allegations herein, the instant petition must be dismissed as failing to demonstrate any duty with respect to rights protected by the NYCCBL.

For the aforementioned reasons, the instant improper practice petition is dismissed in its entirety.

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[10] Section 12-306a of the NYCCBL provides, in pertinent part:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees 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. . . .

In addition, Section 12-305 of the NYCCBL provides, in pertinent part, that 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.

ORDER

Pursuant to the authority 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-2009-98 be, and the same hereby is, dismissed.

Dated: New York, N.Y.
September 28, 1999

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
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