Crescente v. L. 237, IBT & NYCHA, 63 OCB 45 (BCB 1999) [Decision No. B-45-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
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-between-	:	
	:	
GERALDO CRESCENTE,	:	
	:	Decision No. B-45-1999
Petitioner,	:	Docket No. BCB-1986-98
	:	
-and-	:	
	:	
INTERNATIONAL BROTHERHOOD OF THE TEAMSTERS, LOCAL 237 and THE NEW YORK CITY HOUSING AUTHORITY,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On May 15, 1998, Geraldo Crescente ("petitioner") filed a Verified Improper Practice Petition pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1] He alleges that he was disciplined by his supervisor at the New York City Housing Authority ("NYCHA") for complaining to Local 237 of the International Brotherhood of the Teamsters

[1] Section 12-306 of the NYCCBL provides, in part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

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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 organization;

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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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(3) to breach its duty of fair representation to public employees under this chapter.

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("Union") about another supervisor. He also alleges that the Union failed to represent him properly in defending him against those disciplinary charges. On June 2, 1998, the Union submitted its answer. On June 5, 1998, the petitioner submitted an amended petition. On June 30, 1998, the NYCHA submitted its answer. On September 14, 1998, the NYCHA submitted an answer to the amended petition. On October 14, 1998, the Union submitted an amended answer. On October 16, 1998, the petitioner submitted his reply. On October 26, 1998, the Union sent a letter to this office objecting to alleged new claims raised by the petitioner in his reply.

BACKGROUND

Petitioner was appointed to the position of City Seasonal Aide with the NYCHA on October 9, 1985. He was assigned to Brevoort Houses as a Caretaker on April 21, 1997. In September 1997, a forum was held to encourage employees to speak about any problems or concerns they had about work without fear of retaliation. Petitioner and William Brown, Sector Chief of the Brooklyn Borough Management Office attended the forum, at which petitioner spoke. The day after the forum was held, Brown was present at Brevoort houses. Soon after, petitioner sent a memorandum to the Caretaker of Brevoort Houses complaining of Brown's actions toward him on the day after the forum. He also copied the memorandum to the Union.

In a separate incident, petitioner alleged that he was threatened at Brevoort and filed a police report on December 16, 1997. On that date, he was assigned to another location. In January 1998, petitioner was reassigned to Brevoort, in a different area than where he had worked before. Petitioner was hesitant to return to the complex and told a superior and a shop steward of that concern. He was told by the NYCHA that if he refused to work, he must punch out and leave the

premises. On January 9, 1998, Julius Tiven, Superintendent of Brevoort Houses, wrote a memorandum to petitioner regarding his refusal to return to Brevoort. Tiven stated that if petitioner continued to refuse to comply with the instructions given to him until they could transfer him, disciplinary action would be taken.

Petitioner contacted James Giocastro, business agent for the Union. Giocastro spoke with Gloria Finkelman of the Brooklyn Borough Management Office, John Hall, Manager at Brevoort, Tiven, Mr. Camacho, the Union's Shop Steward and Keith Alston, a Caretaker at Brevoort. Disciplinary charges were brought against petitioner on March 31, 1998 for a variety of alleged actions between January 14, 1997 and February 18, 1998. On April 20, 1998, petitioner attended a general hearing at the NYCHA Central Office. He was represented by a Union-appointed attorney, Carlos Ortega. On March 16, 1998, the Trial Officer found petitioner guilty of all charges and recommended that he be dismissed. On July 24, 1998, petitioner's employment was terminated.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that after the employee forum, he overheard Brown complaining to other managers in rude language about employees who spoke up at the forum. Petitioner confronted Brown, then wrote a memorandum asking that Brown be disciplined for using derogatory language. He sent a copy of the letter to the Union. He contends that all the charges brought against him were because of this incident and the resulting complaints he made. He states that he had not been disciplined since arriving at Brevoort in April 1997 until the incident with Brown. He also complains that he was told by the Union that Brown was being dealt with, but petitioner doesn't

think he was ever disciplined.

Petitioner asserts that he did not intend to be insubordinate when he refused to go back to Brevoort, but he felt it was not appropriate to be assigned to a building in the complex that was close in proximity to the area of the incident. Petitioner claims that the January 9, 1998 memorandum, which was placed in his file, was composed after Tivens spoke to Brown. He claims that Giocastro incorrectly told him not to worry about the memorandum because it could be removed in a few months and he also contends that he had to take it upon himself to write a rebuttal memorandum. Petitioner states that when he was handed the disciplinary charges a month later, the allegations in the NYCHA memorandum were being used against him. He contends the Union has a practice of not properly addressing disciplinary memorandums, which are then used in hearings to suspend or dismiss employees.

Petitioner contends that there was a conflict of interest by having a Union-appointed lawyer request that a Union agent testify at his hearing. Petitioner alleges that Giocastro, the agent for the Union, is a former NYCHA official and that also creates a conflict of interest because many of the officials have disciplined and terminated people's employment in the past and they now defend those employees against the management.[2] Petitioner contends that if it were not for Brown's actions and false charges, his case would never have gone to a hearing. Petitioner argues that union members should have the right to decide who their representatives will be. He contends that the Union has been slow in returning phone calls and did not call back when promised.

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[2] Giocastro eventually declined to testify. Petitioner claims that the information Giocastro had would have helped his defense, although Giocastro claims that the information he had would hurt petitioner's case.

In his amended petition, petitioner alleges that Camacho, a witness to many of the incidents between petitioner, the Union and the NYCHA, was being considered for a promotion to business agent after petitioner filed his improper practice. Petitioner alleges that the promotion is being used by the Union to stop Camacho from making statements about the Union's actions in his case. In his reply, the petitioner makes further allegations against the Employee Assistance Program and other Union officials in separate incidents. He also alleges that the Union changed law firms at an inopportune time for petitioner - before his Civil Service Commission hearing and that having Giocastro as an agent is a violation of the Union's bylaws. Petitioner attaches four letters of commendation he received in his tenure at the NYCHA.

Union's Position

The Union submitted a general denial to all charges and allegations contained in the original petition. In its amended answer, the Union asserts that Camacho was interviewed for a temporary business agent position, but was never employed in that position.

NYCHA's Position

The NYCHA argues that the petition should be dismissed because it fails to allege facts sufficient to state a cause of action under all of the cited provisions of the NYCCBL. It states that at all times, the NYCHA acted in good faith and in conformity with all applicable laws, statutes, ordinances rules and regulations, and in no way acted in an arbitrary or discriminatory manner, nor did it act in bad faith. Respondent argues that the petition should be dismissed for failure to allege facts sufficient to state a cause of action under Civil Service Law § 209-a(3).[3] It contends that even

[3] Joinder is required by § 209-a(3), and it is also required by § 12-306(d) of the NYCCBL.

assuming *arguendo*, that the petition alleges facts sufficient to state a cause of action, those causes of action are barred in whole or in part by Title 61 of the Rules of the City of New York ("RCNY"), § 1-07(d).

The NYCHA also attaches approximately thirty memorandums regarding petitioner's incompetency and misconduct, dated from September 9, 1987 through May 29, 1998. Respondent also states that petitioner has been counseled numerous times in relation to those acts. Petitioner refused to sign many of them.

DISCUSSION

The City claims that the petition should be dismissed because it fails to state a cause of action under the NYCCBL. However, the petitioner does state that he was retaliated against for having complained to the Union about a supervisor's actions, which could constitute protected activity within the meaning of the NYCCBL; thus, petitioner states a cause of action.

The NYCHA also contends that the petition is untimely. The petitioner claims that he received the January 9, 1998 memorandum and was served with disciplinary charges on March 31, 1998 because of the altercation with Brown in September of 1997. Since the first act of alleged retaliation occurred on January 9, 1998 and the petition was filed on May 15, 1998, we find that those allegations are untimely.[4] The allegations regarding the March 31, 1998 disciplinary charges

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[4] 61 RCNY §1-07(d) provides in pertinent part:

Improper Practices. A petition alleging that a public employer 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 by one (1) or more public employees . . .

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are timely but are conclusory and speculative in nature[5] and are separated in time from the incident with Brown by six months, thereby reducing the likelihood that the two are associated. We also note that some of the accusations in the disciplinary charges pertained to misconduct or incompetency that occurred prior to the confrontation with Brown and also at a different assignment. This further reduces any likelihood that the two are associated.

Many of petitioner's allegations concern purely internal union matters, including the Union's choice of attorneys and representatives. Therefore, we have no jurisdiction over those claims.[6] We also have no jurisdiction in the claims made by petitioner against the Employee Assistance Program.

The remaining allegations in the petition raise the issue of whether the Union breached its duty of fair representation. Those issues are: that petitioner was told the January 9, 1998 memorandum would be removed from his file, that petitioner had to take it upon himself to write a rebuttal to the memorandum and that the Union had been slow in returning phone calls and did not call back when promised.

It is not enough for the petitioner to allege negligence, mistake or incompetence on the part of the union.[7] 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

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[5] We have held in the past that allegations of improper motivation must be based on statements of probative facts, rather than conjecture, speculation and surmise. *Harry J. Muller v. New York City Department of Parks and Recreation,* Decision No. B-35-80.

[6] *Velez v. International Brotherhood of the Teamsters, Local 237*, Decision No. B-1-79.

[7] *Scweit v. NYC Department of Correction, Health Management Division and the Correction Officers Benevolent Association*, Decision No. B-36-98.

faith, even errors in judgment such as faulty advice do not breach the duty.[8] On the record before us, we find that the Union did not breach its duty of fair representation. Since that is the case, any remaining derivative claim against the NYCHA brought pursuant to § 12-306(d) of the NYCCBL also fails. Accordingly, the petition is dismissed 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 improper practice petition docketed as BCB-1986-98 be, and the same hereby is, dismissed in its entirety.

DATED: October 26, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER

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[8] *Valentine v. International Union of Operating Engineers, Local 15C, AFL-CIO and Municipal Tractor Operators Association*, Decision No. B-26-81.