Castro v. NYPD, OLR & SBA, 65 OCB 17 (BCB 2000) [Decision No. B-17-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CHARLES CASTRO,

Petitioner,

-and-

N.Y.P.D. c/o NEW YORK CITY OFFICE OF LABOR RELATIONS and SERGEANTS' BENEVOLENT ASSOCIATION,

Respondents.

Decision No. B-17-2000
Docket No. BCB-2049-99

DECISION AND ORDER

On October 26, 1999, the Board of Collective Bargaining issued Decision No. B-44-1999 in the case docketed as BCB-2049-99, dismissing an improper practice petition filed by Charles Castro against the Sergeants' Benevolent Association and the NYPD. Therein, pursuant to § 12-306 (b)of the New York City Collective Bargaining Law ("NYCCBL") the Petitioner alleged that the Union violated its duty of fair representation. Pursuant to §12-306(d), the Petitioner also named the NYPD as a respondent. The Board dismissed the petition in its entirety. By letter dated November 12, 1999, the Petitioner requested that the Board reconsider its decision. The Trial Examiner gave the parties an opportunity to state a position on whether the Board should grant reconsideration and by letter filed on November 23, 1999, counsel for the SBA opposed the request.

The Request For Reconsideration

The Petitioner, in his motion for reconsideration, argues that his complaints were not untimely because he had served a copy of the improper practice petition on the Union in March 1999. The Union, according to the Petitioner, claimed to have never received his petition even though he provided copies of the certified return receipt to the Office of Collective Bargaining ("OCB"). The Petitioner argues that the OCB requested that he send another copy to the Union. According to the Petitioner, the OCB used the date of the later petition when it dismissed the arguments on timeliness grounds instead of the earlier date.

The Petitioner also asserts in his request for reconsideration that he wrote to the OCB to withdraw one of his complaints, however, he was unsatisfied with the way the Board addressed the issue.

Discussion

Although § 12-308 of the NYCCBL provides that an aggrieved party must seek review of an order of this Board under Article 78 of the CPLR, it is within our discretion to grant or deny Sergeant Castro's request for reconsideration of Decision No. B-44-1999.[1] We must now consider whether Castro's request for reconsideration provides a sufficient basis to warrant reopening of the case because the Board used the wrong date in evaluating his petition.

In B-44-1999, the Board found that the Petitioner filed his improper practice petition more than four months after most of the allegations in his petition took place. The Board made this determination based on the April 5, 1999 filing of Petitioner's amended petition. On April 5,

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[1] *Vincent Autorino, President, Local 621, Service Employees International Union, AFL-CIO v. The City of New York and the Fire Department of the City of New York,* Decision No. B-37-91 at 4.

1999, at OCB's instruction, the petition was amended to include the NYPD as a respondent pursuant to § 12-306(d) of the NYCCBL. The matter, however, was timely filed on March 19, 1999. Because a different outcome may have resulted had the Board used the original and more appropriate March 19, 1999 filing date in determining timeliness, we find that the circumstances warrant the reopening of the case docketed as BCB-2049-99.

As a threshold issue, the four-month limitations period prescribed in § 1-07(d) of the Rules of the Office of Collective Bargaining bars consideration of untimely allegations in an improper practice petition.[2] Since the Petitioner alleges that his locker was broken into on November 29, 1998 and the Union did not assist him in this matter his March 19, 1999 improper practice petition would, in fact, be timely. However, the allegation that the SBA violated its duty of fair representation by not taking action when Officer Tamayo was told in October 1998 not to take a collection on Petitioner's behalf remains time-barred because the March 19, 1999 petition was filed more that four months after the alleged incident.

The allegation that the Union did not assist the Petitioner after his locker was broken into and its contents were removed, raises the issue of whether the Union violated its duty of fair representation. A Union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do.[3] Where it assumes such an obligation,

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[2] Section 1-07(d) of the OCB Rules provides, in relevant part, 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 within four (4) months thereof...

[3] *Ismael Lopez, Pro Se v. District Council 37, AFSCME, AFL-CIO et al.,* Decision No. B-31-97 at 8.

a union violates its duty of fair representation if a petitioner proves that (1) the union denies the service to a unit employee, and (2) the union's decision to deny that service is improperly motivated, irresponsible, or grossly negligent.[4] The burden is on the Petitioner to plead and prove that a union has engaged in such conduct.[5] In the present case, the Petitioner has not met the burden of proof. He has presented no evidence to demonstrate that the Union treated him differently from any other similarly situated employee. Nor has he presented evidence to show that the Union, by not helping him in this matter, was motivated in a way that would constitute an improper practice as defined under NYCCBL. We therefore find that the Union was under no duty to act and did not assume an obligation to act.

In his motion for reconsideration, the Petitioner complains that the Board to some extent addressed an issue that he wished to have withdrawn in its entirety from his petition and describes with greater clarity the allegation that he intended to have withdrawn. While such clarification does not affect our ruling based upon the information then available to us, it does render the section of our decision regarding Petitioner's claim concerning an Article 78 appeal moot.

Accordingly, upon reconsideration of the matter to the extent set forth above, the improper practice petition is denied in its entirety.

ORDER

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[4] *Id.*; *William S. Kelly v. Uniformed Sanitationmen's Assoc., Local 831*, Decision No. B-11-87 at 8.

[5] *Ismael Lopez, Pro Se v. District Council 37, AFSCME, AFL-CIO, et al.*, Decision No. B-31-97 at 8.

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

ORDERED, that upon reconsideration of the matter to the extent set forth above, the improper practice petition be, and the same hereby is, dismissed in its entirety.

Dated: July 24, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
MEMBER