OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding Between	:	
WILLIE J. SMITH, Petitioner,	:	DECISION NO. B-22-2000
--and--	:	DOCKET NO. BCB-2091-99
NEW YORK CITY DEPARTMENT OF TRANSPORTATION and PAVERS AND ROADBUILDERS DISTRICT COUNCIL, LOCAL 1042, Respondents.	:	

DECISION AND ORDER

On September 2, 1999, Willie J. Smith, ("Petitioner") filed a verified improper practice petition against the New York City Department of Transportation ("City") and the Pavers and Roadbuilders District Council, Local 1042 ("Union"). The petition alleges a breach of the Union's duty of fair representation and wrongful discipline by the City as well as a contractual violation and unspecified rights to due process. On September 20, 1999, the Union filed an answer. The City filed an answer on September 27, 1999.

On October 20, 1999, Glen Gentile, Esq., told the Trial Examiner by phone that he would be representing the Petitioner and inquired as to procedures of the Office of Collective Bargaining ("OCB") with respect to requesting an extension of time to reply to the Respondents' answers. The Trial Examiner indicated that a timely request for extension of time would be considered for good cause shown. On November 12, 1999, the Trial Examiner followed up with

a recorded phone message at the Gentile law firm seeking to ascertain whether a reply would be filed as earlier indicated. She also requested that Gentile file a letter indicating his appearance for the Petitioner. On November 15, 1999, Gentile phoned the Trial Examiner, saying he was optimistic that the instant matter could be settled and asking for an extension of time.

A few weeks later, Gentile phoned again to request a further extension, stating as well that he was attempting to settle the case. On December 15, 1999, the Trial Examiner again told him to submit a notice of appearance on behalf of the Petitioner and a written request for a further extension of time with the reason therefor. On January 5, 2000, Gentile phoned the Trial Examiner once more, advising that no settlement had been reached yet but requesting still another extension of time to file a reply pending negotiations. Again, the Trial Examiner told Gentile to file a letter indicating his appearance on behalf of Petitioner, and requesting an extension as well as the reason for the request and a statement to the effect that no objection was heard from opposing counsel to Gentile's request for more time. As of this date, no such letter has been received.

Background

On May 25, 1997, Petitioner was appointed to the non-competitive, Rule 11, title of Apprentice Inspector--Highway and Sewer. On March 26, 1999, he was suspended without pay and reassigned to active status on or about April 26, 1999. His employment was terminated on June 6, 1999.

Positions of the Parties

Petitioner's Position

Petitioner seeks reinstatement to his job as Apprentice Highway and Sewer Inspector from which he was discharged. He alleges the discharge was a result of wrongful disciplinary actions and a breach of Article XVI (Disciplinary Procedures for Provisional Employees) of the Citywide Agreement by the City. He also alleges the City violated "employee rights to due process." Petitioner further alleges that the Union failed to represent him. He seeks reinstatement and back pay to March 23, 1999, and expungement of negative remarks in his personnel record.

Union's Position

The Union alleges that Petitioner served for "approximately two (2) years" in the unclassified, non-competitive title of Apprentice Highway and Sewer Inspector before being discharged from that position. The Union further alleges that, because of his employment status, Petitioner "was, and is not entitled to a hearing or any other protections provided in Section 75 of the Civil Service Law or the parties' collective bargaining agreement."

City's Position

The City contends, first, that, if anything, the instant petition alleges a contract violation, a claim which is not within the jurisdiction of the Board of Collective Bargaining. The City argues, secondly, Petitioner has provided no information about the circumstances surrounding the

alleged wrongful discipline or any basis by which the claim may constitute an improper practice.

In addition to the "speculative, vague and unsubstantiated" assertions in the petition, the City argues, thirdly, Petitioner has failed to identify any section of the NYCCBL as having been violated. In this regard, the City argues, the Petitioner has failed to allege facts to substantiate any claim that Respondents have taken actions for the purpose of frustrating Petitioner's collective bargaining rights.

Fourthly, the City contends that the petition offers no facts to substantiate the assertion that the Union failed adequately to represent the Petitioner. The City asserts that the petition contains no facts indicating that the Union treated the Petitioner in a discriminatory fashion or that it interfered with his right to assist a public employee organization or to refrain from such activity. The City argues that, "insofar as Petitioner has alleged that the [Union] committed an improper practice by breaching its duty to properly represent the Petitioner, Respondents, the Department of Transportation and the City of New York bears no responsibility for any damage incurred by the Petitioner should Petitioner's claim against the Union be sustained." Finally, the City contends that the instant petition should be dismissed as untimely.

As the Petitioner seeks a remedy of back pay from March 23, 1999, the City concludes that the act about which he complains in the instant petition occurred on or before that date. As the certified mail receipts attached to the petition indicate it was mailed August 28, 1999, the City concludes, the petition was filed at least a month too late.

Discussion

Petitioner herein alleges that the Union breached its duty of fair representation by failing to represent him in connection with his suspension and discharge. He demands back pay and reinstatement to the job from which he claims the City wrongfully discharged him.

The duty of fair representation requires that a union act fairly, impartially and non-arbitrarily in, *inter alia*, administering and enforcing a collective bargaining agreement.[1] This includes the investigation of breach-of-contract claims. An employer is also subject to the jurisdiction of this Board on a fair representation claim where the petitioner's claim relates to the union's handling of a contractual grievance.[2] But a union has wide latitude as to which claims it will pursue through the steps of a contractual grievance process.[3] Provided a union's conduct is not, *inter alia*, discriminatory or perfunctory, it will not be found to have breached the duty of fair representation for declining to pursue a contractual grievance.[4]

The instant petition alleges that the Union breached its duty of fair representation, presumably, in the handling of, or failure to handle, a disciplinary case against the petitioner

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[1] *See, e.g., B. Wallace Cheatham, Probation Officer, et al. 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.

[2] NYCCBL § 12-307d.

[3] *See, e.g., William Liebold v. Uniformed Sanitationmen's Association, Local 831, IBT, and New York City Department of Sanitation*, Decision No. B-42-97, n. 10.

[4] *Id.*

which resulted in the termination of his employment. But it fails to describe any facts from which the instant complaint arose and thus fails to allege what the Union did or failed to do to satisfy its duty towards Petitioner. Although we permit liberal construction of OCB rules governing improper practice pleadings, nonetheless, a petition must offer more than the speculative assertions and legal conclusions set forth in the instant petition.[5]

Petitioner seeks back pay to March 23, 1999, but offers no factual support for his assertion that his discharge was the result of wrongful discipline and none for the claim that the Union failed to represent him in the matter of his discharge.[6] In fact, no facts are alleged to indicate whether the Union's conduct about which he complains took place before or after March 23, 1999. For want of specificity, and, further, for failure to deny the additional facts alleged in the Union's answer, we must deny the instant petition's conclusory claims against the Union.

As to the employer, the City asserts that Petitioner was suspended without pay on March 26, 1999; thus, we conclude that the request for back pay to March 23, 1999, relates in some fashion to the employer's decision to suspend him. However, because of the lack of factual support in the petition, we cannot discern whether Petitioner's claim against the employer is merely derivative of his claim against the Union or is intended to stand alone as an independent claim of improper practice against the City. If the former, the claim against the City fails,

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[5] *See, e.g., Michael P. Kelly et al. v. City of New York et al.*, Decision No. B-38-88, n. 9.

[6] In this connection, we note that Article XVI of the Citywide Agreement provides contractual due process rights to "provisional" employees with two years of service. Petitioner fails to allege that he is a provisional employee. Rather, the record reflects that the Petitioner served in a non-competitive, not a provisional, position.

because, as stated above, the claim against the Union is insufficient. If the latter, it fails as well, because Petitioner's discharge occurred more than four months before the filing of the instant petition on September 2, 1999, and any independent claim against the City is thus untimely.[7]

Petitioner's breach-of-contract claim is also unavailing in this improper practice proceeding. Unless an alleged violation would otherwise constitute an improper practice,[8] which is not the case here, the Board of Collective Bargaining is without jurisdiction to consider breach-of-contract claims in an improper practice proceeding.[9]

Finally, with respect to the assertion that "employee rights to due process" may have been violated, an allegation of a possible violation of constitutional or a statutory right derived from a source other than the NYCCBL or the applicable provisions of the Taylor Law does not raise issues that are within the jurisdiction of this Board.[10]

For all these reasons, we find no violation of the duty of fair representation on the part of the Union. Thus, we find no derivative claim against the City. In addition, we find no assertion that the City's acts were motivated by reasons prohibited by the NYCCBL, nor any assertion that

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

[8] *Kirk Pruitt v. New York City Department of Transportation, et al.*, Decision No. B-11-95, n. 7.

[9] Section 205.5(d), Civil Service Law (Public Employees' Fair Employment Act), which is applicable to this agency, provides that "the board shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice. . . ."

[10] *Id*.

Petitioner's employment termination was intended to, or did, affect any rights protected by the NYCCBL. Therefore, we find no independent allegation of improper practice against the employer. The instant improper practice petition, therefore, is dismissed in its entirety.

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-2091-99 be, and the same hereby is, dismissed in its entirety.

Dated: New York, N.Y.
July 24, 2000

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER