Swike v. Murad, NYFD & Swierlowski, L. 2507, 65 OCB 29 (BCB 2000) [Decision No. B-29-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding -between- KEVIN SWIKE, Petitioner, -and- LIEUTENANT MURRAY MURAD, NYC FIRE DEPARTMENT and CHRISTOPHER SWIERKOWSKI, LOCAL 2507. Respondents.	Decision No. B-29-2000 Docket No. BCB-2086-99

DECISION AND ORDER

On August 27, 1999, Kevin Swike filed a verified improper practice petition alleging that the New York City Fire Department ("FDNY" or "City") violated §12-306(a)(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] when Lieutenant Murray Murad

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

Improper practices; good faith bargaining. 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;

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization;

* * *

Section 12-305 of the NYCCBL provides, in relevant part:

Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee

tampered with Petitioner's drug test in retaliation for the Petitioner having "embarrassed him by disagreeing with him and his policies." Petitioner also alleges that Christopher Swierkowski, then vice-president of Local 2507 ("Union"), violated § 12-306 (b)(3) of the NYCCBL when he advised Petitioner to sign a Stipulation with the FDNY, when he advised Petitioner to resign from his position at the FDNY, and when he did not help Petitioner get his job back.[2] The City filed a verified answer on September 30, 1999 and the Union filed a verified answer on October 25, 1999. Petitioner did not file a reply.

Background

Petitioner worked as an Emergency Medical Technician for the FDNY from 1988 through his resignation on or about April 30, 1999. On August 5, 1998, the Petitioner was arrested on criminal drug charges. Following his arrest, the FDNY restricted Petitioner from administering first aid and from driving a department vehicle. Eventually, the Petitioner pled guilty in criminal court to lesser charges.

Once Petitioner provided the FDNY with a certificate of disposition regarding his criminal case and agreed to sign a Stipulation and Agreement ("Stipulation") regarding the departmental charges, his departmental restrictions were lifted. In lieu of charges, Petitioner

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organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[2] Section 12-306(b) 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:
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> (3) to breach its duty of fair representation to public employees under this chapter.
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signed the Stipulation on March 18, 1999, in which he admitted violating various rules and regulations of the Department. The Stipulation further provides that the Petitioner would be subject to random drug testing for thirty-six (36) months. Should the Petitioner violate the Stipulation, he would be terminated without a hearing. Through the Stipulation, the Petitioner waived any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules, and any applicable collective bargaining agreement.

On April 15, 1999, the Petitioner was tested for the use of a controlled substance. Petitioner alleges that Lt. Murad did not follow the appropriate drug testing procedures during the test, thus rendering the results unreliable. In a letter dated April 22, 1999, the Bureau of Trials and Investigations ("BITS") informed Swike that on April 15, 1999, he tested positive for a controlled substance. The letter stated that he had seven days to "provide any relevant evidence" on his behalf prior to the Department taking action and failure to provide satisfactory and acceptable mitigation would result in his termination on April 30, 1999.

The Petitioner alleges that on April 23, 1999, he informed Swierkowski of all the recent events. But according to Petitioner, Swierkowski did not assist him.

Petitioner claims that on April 28, 1999, he went to the Union office at which time Swierkowski advised him with regard to whether he should resign. On or about April 30, 1999, Petitioner resigned. He alleges that on April 30, 1999, he contacted the Union office to find out what the Union was doing on his behalf and was told that the Union would not help him.

Positions of the Parties

Petitioner's Position

Petitioner contends that in April 1999, he was required to sign a Stipulation that stated the he could be drug tested for three years as a result of criminal charges. Petitioner argues that he refused to sign the Stipulation arguing that the charges against him were dropped. Petitioner claims that he told the Union that he wanted to go to arbitration over the threat of termination but that Swierkowski told him that he would lose at arbitration and signing the Stipulation would be the only way to keep his job. On March 18, 1999, Petitioner signed the stipulation even though he felt that it was unfair. Petitioner emphasizes that the current vice-president of the Union told him that he was ill-advised by Swierkowski and that he should have gone to arbitration.

According to the Petitioner, he was returned to full duty on April 13, 1999 and was drug tested on April 15, 1999. Petitioner alleges that his test was in violation of drug screening procedures. In this regard, Petitioner contends that there were irregularities in the manner that the test was conducted. Petitioner also alleges that his rights were violated because he was not allowed to have union representation at the test.

Petitioner contends that on April 22, 1999, he was placed on restricted duty because of a positive test result and was then suspended for thirty days. Petitioner further contends that on April 23, 1999, he received a phone call from Swierkowski telling him that he tested positive for drugs at which time Petitioner informed Swierkowski of all the injustices that he believed took place. In response to a plea for monetary assistance in having his sample retested, Petitioner

alleges that he was directed by Swierkowski to seek help at DC 37's Public Assistance program.[3]

According to Petitioner, on April 28, 1999, he went to the Union office and spoke to Swierkowski about what he should do about his pending termination. He asked if he "should resign rather than let them fire me because I would not be able to get another job." According to Petitioner, Swierkowski told him "that might be a good idea." Petitioner claims that he was led to believe that the Union would help him get his job back because of the questionable circumstances of the drug test.

Petitioner claims that as a union delegate he has had numerous "run-ins" with Lt. Murad over "his way of violating people's rights" and he has "tried to have me relieved of duty more than once because of the fact that I embarrassed him by disagreeing with him and his policies."

On April 30, 1999, Petitioner contacted the Union office to find out what was being done for him. Petitioner states that at that time he found out that Swierkowski was no longer vice-president. Petitioner claims that he then waited a week to get in touch with DC 37 at which time he spoke to Tracey Glickson. Petitioner argues that when he asked her what was being done to help him get his job back, she told him "nothing would be done because you resigned and we do not have to help you." When Petitioner told her that Swierkowski advised him to resign, she said it still did not matter. Petitioner claims that Swierkowski never told him that the Union would help if he was terminated but not if he resigned.

Petitioner further claims that he had been a union delegate for six years and was on the job for eleven years. He believes that having been a civil service employee for ten years, the

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[3] According to Petitioner, he would have been able to have his urine sample retested at one of the Department's labs for $400.

Union should have investigated his claim and helped him.

Union's Position

The Union denies knowledge and information sufficient to form a belief as to almost all of Petitioner's allegations. It admits that Petitioner was arrested in August 1998, and that the Petitioner signed a written stipulation with the FDNY. The Union also admits that Swierkowski had a telephone conversation with Petitioner, but disputes Petitioner's characterization of the telephone call.

The Union asserts that Petitioner has failed to allege facts sufficient to constitute an improper public employee organization practice under § 12-306(b) or any other provision of the NYCCBL.

The Union asserts that all of Petitioner's allegations that occurred prior to April 27, 1999 are time-barred. The Union emphasizes that sole allegation against it that occurred on or after April 27, 1999, is that Swierkowski said "that might be a good idea," when asked if Petitioner should resign. The Union asserts that the case should be dismissed because it does not state a *prima facie* claim of improper practice.

City's Position

The City contends that Petitioner's April 15, 1999 drug test did not violate any terms of the Stipulation and that the integrity of the drug test was never compromised.

The City argues that Petitioner has failed to allege facts to support an improper employer practice under the NYCCBL. The City alleges that the facts are insufficient to support an improper practice under 12-306(a)(1). The City contends that there has been no allegation of

interference, restraint or coercion in the exercise of rights under §12-305. The City argues that Petitioner admits that he signed the Stipulation and presents no facts that the FDNY prevented him from initially taking his case to arbitration prior to executing the Stipulation. According to the City, Petitioner was never prevented from exercising his Union rights by the FDNY.

The City further contends that Petitioner fails to allege facts sufficient to support an improper practice under §12-306(a)(2) because there has been no allegation of interference with the formation or administration of any public employee organization.

The City also argues that Petitioner fails to allege facts sufficient to support an improper practice under 12-306(a)(3) or under the *Salamanca* test because there has been no allegation of discriminatory activity on the part of the employer for the purpose of encouraging or discouraging membership in, or participation in the activities of any public employee organization. The City maintains that the Petitioner presents no evidence that the FDNY ever prevented or encouraged the Petitioner's participation in union activities. In fact, according to the City, Petitioner admits that he continually interacted with the Union but in hindsight disliked its advice.

The City further alleges that the Petitioner fails to allege facts sufficient to support an improper practice under 12-306(a)(4) since there have been no allegations regarding failure to bargain.

Furthermore, the City maintains that the petition must be dismissed because the Board lacks jurisdiction over the Stipulation. According to the City, the Petitioner, by signing the Stipulation, waived "any and all rights, including any right to a disciplinary hearing pursuant to

Section 75 and 76 of the Civil Service Law, Article 78 of the CPLR, and any applicable collective bargaining agreement." The Stipulation also states that Swike is "estopped from commencing or continuing any judicial or administrative proceedings or appeal, before any court of competent jurisdiction, administrative tribunal or Civil Service Commission..." Therefore, according to the City, the Board is precluded from examining the drug testing procedures under this Stipulation.

Furthermore, the City argues that any alleged problems with the drug test leading to Petitioner' resignation concern employee discipline rather than any issue under the NYCCBL. In this matter, the City argues that the Petitioner has presented no evidence regarding anti-union animus, discrimination for participation in union activities or interference, coercion or restraint in the exercise of Union rights. The City thus maintains that the Board has no jurisdiction over this matter and the petition must be dismissed.

Discussion

The Petition alleges that the Union breached its duty of fair representation when it recommended that Petitioner sign the Stipulation, when Swierkowski told the Petitioner that it might be a good idea if he resigned from the FDNY rather than be terminated, and when the Union would not help Petitioner get his job back after he resigned. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[4] In the area of contract administration, including the processing of employee grievances, it is well-settled that a union

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[4] *Perlmutter v. Uniformed Sanitationmen's Assoc. et al.,* Decision No. B-16-97 at 5; and *Allcott v. Local 211 et al.*, Decision No. B-35-92 at 7.

does not breach its duty of fair representation merely because it refuses to process every complaint made by a unit member.[5] The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and non-discriminatory. It is only when a union arbitrarily ignores a meritorious grievance or processes a grievance in a perfunctory fashion that the union violates the duty of fair representation.[6] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[7]

As a threshold matter, the Petitioner's allegation that the Union improperly advised him to sign the Stipulation is raised in an untimely fashion. We have consistently held that there is a four-month limitations period barring consideration of untimely allegations in an improper practice petition.[8] While Petitioner signed the Stipulation on March 18, 1999, he filed the improper practice petition more that four months later, on August 27, 1999. Assuming, *arguendo,* that such an allegation was timely, given the disciplinary and criminal charges brought against him, Petitioner has not shown that the alleged advice to sign the Stipulation was either arbitrary or in bad faith.

Furthermore, Petitioner has failed to establish that the Union's actions were effected

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[5] *Id.*

[6] *Jiminez v. New York City Health and Hospitals Corp. et al.*, Decision No. B-25-98 at 8; *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11-12; and *Allcot v. Local 211 et al.*, Decision No. B-35-92 at 7.

[7] *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11.

[8] *See*, Section 1-07(d) of the Rules of the City of New York and § 12-306(e) of the NYCCBL which provide that a petition alleging an improper practice in violation of §12-306 may be filed within four (4) months of the improper practice.

arbitrarily, discriminatorily or in bad faith when it advised Petitioner to resign and when it refused to assist Petitioner after his resignation. Petitioner does not establish that the Union's advice was in any way improperly motivated. Rather, the evidence indicates that the Union's determination was reached in good faith, after it assessed the circumstances of the Petitioner's situation. The Petitioner has failed to demonstrate that Swierkowski was improperly motivated when he agreed with Petitioner that resigning "might be a good idea" and when he failed to assist Petitioner after his resignation. Once the Petitioner signed the Stipulation and Agreement, he waived all rights and remedies available to him and there was virtually nothing that the Union could do on his behalf. On March 18, 1999, the Petitioner signed a Stipulation and Agreement in which the parties stipulated that:

> 12. That EMT Swike understands that in the event of any violation of this agreement and/or any future misconduct related to alcohol, marijuana, or controlled substance, including conviction, he will be terminated, and that the Department has the right to terminate his services without a hearing of any kind, and EMT Swike hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Section 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules, and any applicable collective bargaining agreement;
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> 14. That EMT Swike understands and agrees that, if he is deemed to have resigned pursuant to paragraph 12, or if he is terminated pursuant to paragraph 12, he waives any and all rights to apply for reinstatement or rehire by the Fire Department;
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> 17. That this Stipulation constitutes a waiver by EMT Swike whereby he is estopped form commencing or continuing any judicial or administrative proceedings or appeal, before any court of competent jurisdiction, administrative tribunal or Civil Service Commission, including but not limited to, actions pursuant to the Civil Rights Act of 1964 or any other Federal Civil Rights Statute, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990 and any applicable contractual grievance procedures, to contest the authority and jurisdiction of the

> Fire Department to impose the terms and condition which are embodied in this Stipulation;

Once Petitioner tested positive for a controlled substance, under the Stipulation, the Petitioner waived all manner of recourse available to him. Where, as here, the evidence does not suggest that the union was improperly motivated, there is no violation of the duty of fair representation.[9]

We next address Petitioner's allegation of employer retaliation. We note that Petitioner's allegation that Lt. Murad tampered with his drug test is untimely, because the drug test took place on April 15, 1999 and by Petitioner's own admission, he was informed of the positive test result on April 23, 1999. Both events occurred more that four months before the petition was filed. However, even if the claim was timely, the facts as alleged by Petitioner do not show that action taken by the FDNY was motivated by Union activity. Therefore, Petitioner's allegations against the FDNY must also be dismissed.

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[9] *See, Cromwell v. New York City Housing Authority et al.,* Decision No. B-29-93 at 13-14.

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

Dated: September 7, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER