Green, Jr. & CAT v. L. 1182, CWA & OLR, 65 OCB 34 (BCB 2000) [Decision No. B-34-2000 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
Moses L. Green, Jr., *pro se* and Concern Agents of Traffic,	:	
Petitioner,	:	Decision No. B-34-2000
	:	Docket No. BCB-2109-99
-and-	:	
Local 1182, Communications Workers of America, and New York City Office of Labor Relations,	:	
Respondents.	:	

DECISION AND ORDER

On December 20, 1999, Moses L. Green ("Petitioner") filed a verified improper practice petition on behalf of himself and an organization he founded called Concern Agents of Traffic ("CAT"). The Petitioner alleged that Local 1182, Communications Workers of America ("CWA" or "Union") violated §12-306(b) of the New York City Collective Bargaining Law ("NYCCBL") by breaching its duty to properly represent the Petitioner during his disciplinary hearing.[1] Pursuant

[1] 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 their 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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(continued...)

to 12-306(d), Petitioner also named the Office of Labor Relations as a respondent ("City").[2] The City filed an answer on February 17, 2000 and the Union filed an answer on March 2, 2000. The Petitioner filed a reply on April 26, 2000.

BACKGROUND

The Petitioner was a Traffic Enforcement Agent ("TEA") at the Department of Transportation ("DOT") for approximately ten years. On August 8, 1996, the DOT's Traffic Enforcement Unit was transferred to the New York City Police Department ("NYPD"). As a result of the merger, the Petitioner, who was a Department of Transportation employee, was transferred to the NYPD at that time. The Union represents TEA's who are employed by the City and the Petitioner was a member of the Union.

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[1](...continued)

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

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§12-305 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 organizations of their own choosing and shall have the right to refrain from any or all of such activities....

[2] §12-306(d) of the NYCCBL provides:

d. Joinder of parties in duty of fair representation cases. The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

On March 6, 1998, the Petitioner was charged with being absent without leave ("AWOL") for five (5) consecutive tours during the period of February 26, 1998 to March 5, 1998. Formal disciplinary hearings were held on December 4, 1998 and December 18, 1998 before the Police Department's Disciplinary Unit. The Petitioner was on a Step 4 sick record status because of excessive absences. A TEA on a Step 4 status is required to document all sick leave absences with an original doctor's note submitted within five days of the employee's return to the workplace. A TEA on Step 4 status must also telephone in to his command each day he is out sick and must also notify his command if he will be away from his home while on sick leave. The Petitioner was found to have violated these procedures. On July 7, 1999, Police Department Assistant Deputy Commissioner for Trials, Robert W. Vinal ("Commissioner Vinal"), found the Petitioner guilty of the charges and recommended that he be dismissed. On August 18, 1999, Police Commissioner Howard Safir adopted Commissioner Vinal's finding and the Petitioner's employment was terminated.

According to the Petitioner, he was wrongfully charged with being AWOL. Petitioner contends that he was on sick leave during the period of time in question and that he did submit a doctor's note. Petitioner says the Union failed to represent his interests by not conducting a full investigation surrounding the charges brought against him. The Petitioner also claims the presentation of certain documents during his hearing violated §75 of the Civil Service Law ("CSL"), and Article V, Section 1(a) of the Local 1182 Unit Contract ("Unit Contract").

The Petitioner maintains that it is the Union's job to challenge Commissioner Vinal's determination by way of an Article 78 proceeding. By letter dated September 27, 1999 addressed to the Union President, Robert Cassar, the Petitioner requested information as to which firm the

Union would retain to commence an Article 78 proceeding on his behalf. As a remedy, the Petitioner seeks to have the Union's President, Robert Cassar, and all other Executive Board Members, replaced with no possibility of future affiliation with the Union. Petitioner requests back pay and to be returned to the DOT, rather than the NYPD.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner contends that the Union breached its duty of fair representation by not fully investigating the allegation that he was AWOL for five (5) consecutive tours. The Petitioner asserts that he was on sick leave on the days he was alleged to have been AWOL. Petitioner contends that the Union should have further investigated Petitioner's claim that he faxed a doctor's note to his workplace.[3] Petitioner also asserts that being instructed to bring in a doctors note while on sick leave violated the Citywide Agreement which provides him five days to present a note upon his return to work.

The Petitioner claims that his performance evaluation was used "as part of the Judge['s] penalty" and that this was in violation of Civil Service Law and Article V, Section 1(a) of the Unit Contract.

The Petitioner also alleges that "there was a lot of disingenuousness" on the part of the NYPD's two witnesses, Traffic Supervisors Lorraine Washington and Samuel Rock. He maintains that the Union is required to retain a law firm to file an Article 78 proceeding to challenge the

[3] During the disciplinary hearing, Petitioner alleged that he faxed a doctor's note to a fellow TEA at work who had promised to fax it to his Traffic Supervisors, Lorraine Washington and Samuel Rock. Both Traffic Supervisors testified that no such note was ever received. No note was found and Petitioner testified that he did not retain a receipt for the fax.

determination against him. To that end, in the Improper Practice Petition, he states that he "ask[ed] the local for witnesses, and documents, and even wrote the attorney for that local, used for my defense, and still, did not get a response." Petitioner contends that "it continues to be the job of the local" to challenge the order of dismissal.

The Petitioner seeks to have all Executive Board Members, including the Union's President, replaced. The Petitioner also requests to be returned to the DOT, rather than the NYPD.

Union's Position

The Union argues that the petition must be dismissed as untimely pursuant to §1-07(d) of the Rules of the City of New York ("RCNY").[4] The Union contends that Petitioner's four-month time period began to run from the last day of the hearing on December 18, 1998. The Union argues that the Petitioner, who had attended both days of the hearing and knew what evidence had been presented and what witnesses had been called to testify, waited more than one year before filing the petition on December 20, 1999. Thus, the Union says that the petition, which was filed outside of the four-month statute of limitations, must be dismissed as untimely.

The Union also maintains that the Board has no jurisdiction over Petitioner's allegations of contractual violations or violations of statutes such as the CSL, with the exception of the NYCCBL.

The Union argues that the Petitioner has failed to allege facts sufficient to maintain a charge that the Union breached its duty of fair representation. The Petitioner has not made a satisfactory showing of a violation of §12-306b(3) of the NYCCBL under the standard adopted by the Board

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

requiring a showing that the Union's actions toward the Petitioner were arbitrary, discriminatory or in bad faith.[5] In its answer, the Union states that it assigned the Petitioner an attorney to represent him at the trial just as it provides all traffic agents who are in the same situation with counsel. Petitioner's attorney, Kevin B. Campbell, fully represented the Petitioner throughout his trial during which oral testimony and other evidence were offered in Petitioner's defense. The Union maintains that Petitioner's claims of contractual violations and allegations of "disingenuousness on the part of the Department's witnesses" do not support a showing of a breach of a duty of fair representation. The Union states that such complaints have nothing to do with the Union.

Addressing Petitioner's request that the Union retain a law firm to commence an Article 78 proceeding on his behalf, the Union explains that since Robert Cassar, President of 1182, has been in office, the Union has never provided a traffic agent with counsel for the sole purpose of initiating an Article 78 proceeding. Such a special proceeding is maintained by the individual employee so that "the Union does not control the sole access to such forum and cannot be said to violate its duty of fair representation." Furthermore, the Union maintains that Petitioner has not pleaded facts which support the allegation that the Union failed to retain a law firm to initiate an Article 78 proceeding for reasons that were arbitrary, discriminatory or in bad faith.

According to the Union, the remedies requested by the Petitioner are another basis for dismissal and serve only to emphasize that the petition is without merit. Replacement of the Union's President and Executive Board members as well as Petitioner's request to be transferred back to DOT is outside the Board's jurisdiction.

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[5] *See*, Decision No. B-16-89.

City's Position

The City argues that the Petitioner was "a chronic sick leave abuser who had been placed in the highest level of sick leave monitoring." After being suspended on two prior occasions, both of which were the result of excessive absences, the Petitioner was placed on Step 4 status.[6]

The City claims that the case should be dismissed because it does not state a *prima facie* claim of improper practice. The City maintains that the Petitioner did not provide any facts to substantiate a claim against the Union or the NYPD. In its answer, the City states that "[t]he fact that the trial judge decided against him does not mean that the Union breached its duty." Furthermore, the City asserts that "insofar as Petitioner has alleged that the CWA committed an improper practice by breaching its duty to properly represent the Petitioner, the Police Department and the City of New York bear no responsibility for any damage incurred by the Petitioner should Petitioner's claim against CWA be sustained."

The City also claims that the petition is untimely pursuant to RCNY §1-07(d). The City argues that the four month time period began to run from when the trial ended on December 18, 1998 or when Commissioner Vinal's decision was returned on July 7, 1999. The City asserts that the Commissioner Safir's final order of dismissal on August 18, 1999 does not toll the Petitioner's time to file a petition. The City argues that if the Union violated the NYCCBL, "the violation occurred when the actions were performed, not one year later when the Petitioner decides he is unhappy with

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[6] Step 4 status is defined in Commissioner Vinal's decision as follows:
Step 4 is imposed when an employee has five undocumented absences before or after RDO/Holiday/Vacation leave, or six undocumented absences. The employee remains on this Step until he has worked a complete six month period with two or fewer documented sick leave occurrences.

the end result of the disciplinary case against him."

The City cites several Board Decisions for the proposition that this Board does not have jurisdiction over allegations concerning violations of contracts or statutes aside from the NYCCBL.[7] Therefore, the Petitioner's claims regarding any alleged violations of the Civil Service Law and collective bargaining agreements must be dismissed.

DISCUSSION

We have consistently held that there is a four-month limitations period barring consideration of untimely allegations in an improper practice petition. Section 1-07(d) of the Rules of the City of New York and §12-306(e) of the NYCCBL provide that a petition alleging an improper practice in violation of §12-306 may be filed no later than four months after the disputed action took place. The Union and the City argue that the petition is untimely because Petitioner's cause of action started to run when the hearing concluded on December 18, 1998, or at the very latest, on July 7, 1999 when the decision was rendered. Petitioner argues that August 18, 1999, the date Commissioner Safir issued the final order of dismissal, should be considered the measuring date.

Even if we were to use the August 18, 1999 date as Petitioner suggests, the petition would still be dismissed on the merits due to Petitioner's failure to provide any facts to support a claim that the Union breached its duty of fair representation. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[8] This well-established standard has come to mean that a union may not be

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[7] *See* Board Decision Nos. B-8-96; B-14-95; B-23-91; B-39-88; B-1-83.

[8] *Perlmutter v. Uniformed Sanitationmen's Ass'n. et al.*, Decision No. B-16-97 at 5; (continued...)

found to have breached its duty of fair representation simply because an employee represented by the union is dissatisfied with the outcome of his case.[9]

Contrary to the Petitioner's contention that his Union attorney did not fully investigate the matter and did not adequately defend him during the disciplinary proceeding, we find that the Petitioner has not provided any facts to support a claim that Petitioner's attorney acted in a manner that could be classified as arbitrary, discriminatory or in bad faith. Thus, the derivative claim against the City cannot stand.

Claims regarding an alleged violation of the CSL and violations of laws external to the NYCCBL, are matters beyond the jurisdiction of the Board of Collective Bargaining. Similarly, we have no jurisdiction over Petitioner's request to have the Executive Board Members of the Union replaced or his demand to be transferred back to the DOT. Accordingly, the claim of improper practice 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-2109-99 be, and the same hereby is, dismissed in its entirety.

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[8](...continued)
and *Grace* v. *Helen Friedman, NYSNA et al*., Decision No. B-35-92 at 7.

[9] *Richard J. McAllan v. Emergency Medical Services et al.*, Decision No. B-15-83 at 20.

Dated: October 10, 2000
New York, New York

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