Barry v. L. 2507, DC 37 & City & FDNY, 67 OCB 38 (BCB 2001) [Decision No. B-38-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
JOHN A. BARRY,	:	
	:	
Petitioner,	:	Decision No. B-38-2001
	:	Docket No. BCB-2131-00
-and-	:	
	:	
DISTRICT COUNCIL 37, LOCAL 2507, NEW YORK CITY FIRE DEPARTMENT AND THE CITY OF NEW YORK,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On April 3, 2000, John A. Barry filed a verified improper practice petition pursuant to § 12-306 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") against District Council 37, Local 2507 ("Union"), alleging that the Union breached its duty of fair representation when it failed to help him concerning several job-related matters. Pursuant to § 12-306d of the NYCCBL, Petitioner also named the New York City Fire Department ("City" or "Department" or "FDNY") as a co-respondent.[1] Petitioner alleges that the Department committed an improper practice when it discriminated against him by transferring and terminating him from his position because of protected union activity. For the reasons stated below, the petition is dismissed.

[1] Section 12-306d of the NYCCBL provides for the joinder of the public employer in duty of fair representation cases.

BACKGROUND

Petitioner was hired by the Health and Hospitals Corporation ("HHC") on December 21, 1987, as a provisional Emergency Medical Specialist - Emergency Medical Technician ("EMT"). On November 11, 1988, Petitioner became a permanent EMT and worked in the Communications Department of the Emergency Medical Services Unit ("EMS") as a Call Receiving Operator ("CRO"). Like all EMTs, Petitioner was required to maintain a valid driver's license and a New York State Department of Health "EMT-D" certificate. He was required to maintain his certification throughout the course of his employment and to successfully complete a refresher course prior to its expiration.

Petitioner claims that from June 1994 until June 1996, he documented in the CRO logbook unsafe conditions that he observed at EMS. His pleadings contain no evidence to substantiate this claim. Sometime in early March 1996, Petitioner, as Chair of the Local 2507 Research Committee, produced a video about FDNY's proposed takeover of EMS and presented it to the New York City Council. On March 17, 1996, EMS was functionally transferred from HHC to FDNY. Shortly thereafter, on June 13, 1996, Petitioner was told he would be transferred from his current position as CRO to a field assignment position in the Bronx, effective June 28, 1996. That same day, Petitioner suffered an "acute stress reaction" and went out on extended sick leave.

On or about June 28, 1996, Petitioner's physician diagnosed his condition as an "exacerbation of post-traumatic stress disorder secondary to his administrative transfer." The record shows that Petitioner first suffered post-traumatic stress disorder in May 1994, after he

was briefly removed from the position he occupied at that time.[2] At Petitioner's request, the Union grieved his involuntary transfer and filed a request for arbitration on May 28, 1997, seeking reinstatement to his former position in the Communications Department. The arbitration is still pending.

Petitioner alleges that on August 20, 1997, his physician told him that he had "cardiomyopathy secondary to the hypertension caused by his post-traumatic stress disorder." Because Petitioner was on leave from his employment for over one year, the Department sought to terminate him pursuant to § 73 of the Civil Service Law ("CSL").[3] On July 7, 1998, a hearing was held at the Office of Administrative Trials and Hearings ("OATH"), and on August 5, 1998, the OATH Administrative Law Judge recommended that Petitioner be reinstated to his former position.

By letter dated February 16, 1999, Don Boyce, FDNY Director of Investigation and Trials, mailed Petitioner a copy of Fire Commissioner Von Essen's decision, which directed Petitioner to report to the Department's Health Services on March 22,1999, for a return to duty physical, and to contact the head of the Pre-Arraignment Screening Program for a light-duty work assignment upon completion of a certification refresher course. Petitioner's previous EMT-D certification expired on May 31, 1997. By letter dated March 20, 1999, Petitioner informed Boyce that he had a Workers' Compensation Board hearing scheduled for March 22, 1999, and

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[2] Petitioner filed a claim for compensation before the Workers' Compensation Board for the alleged post-traumatic stress he suffered in May 1994. The case is still pending.

[3] Pursuant to CSL §73, when an employee has been continuously absent from his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the Worker's Compensation Law, his employment status may be terminated.

that he could not return to work until he completed rehabilitation. Boyce called Petitioner on May 20, 1999, to inform him that a refresher course was scheduled to begin May 24, 1999. Petitioner attended the class but left early and was dropped from the course as a result. He failed to attend two additional refresher courses scheduled for September 13, and November 19, 1999.

By letter dated November 24, 1999, Fire Commissioner Thomas Von Essen notified Petitioner that he was terminated from his EMT position effective November 26, 1999. The letter was postmarked December 2, 1999. The Union filed a Step II grievance regarding Petitioner's discharge on March 27, 2000, and a Step III grievance on April 26, 2000, both of which were denied during the lower stages of the grievance process. A request for arbitration was filed on February 15, 2001.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation because the Union: (1) failed to process his transfer grievance in a timely manner; (2) did not help him when Commissioner von Essen did not reinstate him to his former position in Communications, as the OATH judge recommended; (3) refused to process a grievance regarding the Department's failure to accommodate his disability, but did file an action in State Supreme Court on behalf of another union member who underwent surgery and could not recertify; and (4) ignored Petitioner's request for aid after he was discharged.

Petitioner alleges that the Department transferred and terminated him because: (1) he recorded dangerous conditions at EMS from June 1994 until June 1996 in the CRO logbook; and (2) he produced a video about FDNY's proposed takeover of EMS. He argues that the Depart-

ment's improper actions constitute retaliation because of protected union activity.

Union's Position

The Union argues that the petition is untimely because several events that Petitioner describes occurred more than four months prior to the date of filing.

The Union also argues that Petitioner has failed to show that the Union breached its duty of fair representation. Even before the July 7, 1998, OATH hearing, the Union obtained an offer from the Department of $6,400 in back pay and an alternative light-duty assignment in the EMS Pre-Arraignment Screening Program for Petitioner. After Petitioner refused the Department's offer, the Union successfully argued the case on his behalf, and Petitioner was reinstated by the Department subject to medical exam clearance and certification renewal.

Furthermore, no provision in the collective bargaining agreement requires the Union to file a grievance over the Department's failure to accommodate an employee's disability when, as in the present case, the employee refused to accept a light-duty assignment that was offered by the employer. The fact that the Union has taken legal action on behalf of another union member, even if such action is identical to that which was requested by Petitioner, does not make the Union's refusal to do so in this case actionable.

The Union argues that it filed a timely grievance over Petitioner's transfer and that a request for arbitration was filed on May 28, 1997. The Union informed Petitioner by letter dated June 5, 1997, that an arbitration request had been filed. Similarly, the Union filed an arbitration request over his termination on February 12, 2001. It was Petitioner's failure to return the requisite waiver until May 31, 2001, one month after the Union filed its sur-reply, that caused additional delay.

City's Position

The Department claims that the petition is untimely because the alleged improper incidents occurred more than four months prior to filing with OCB.

The City also asserts that Petitioner has failed to allege facts sufficient to support a claim under §12-306a(3) of the NYCCBL. The Department denies having any knowledge of alleged dangerous conditions recorded in the CRO logbook. The facts show that Petitioner's termination was based upon his failure to maintain his certification despite numerous opportunities to attend a refresher course. There is no causal connection between the video Petitioner produced in March 1996 and his functional transfer in June 1996 or his termination in November 1999.

Petitioner's termination was motivated by legitimate business reasons not violative of the NYCCBL. Pursuant to § 4.2 of the EMS Command Operating Guide Procedure 104-3 ("EMS-OGP 104-3"), entitled "Maintenance of Certifications and Licenses," employees who fail to maintain their required certifications are no longer considered qualified for employment and may be terminated. However, prior to termination, employees are given the opportunity to renew their certification. Section 4.9 of the EMS-OGP states that an EMT is given two chances to pass the refresher course, after which the EMT must take it on his/her own time. If unable to pass after the third time, the EMT will be terminated when the certification expires. The City argues that it made every effort to schedule the required three courses, but Petitioner failed to attend and provided no documents to explain his numerous absences, and, therefore, the Department had the right to terminate him.

DISCUSSION

As an initial matter, this Board addresses the Respondents' assertion that Petitioner's claims are time-barred. This Board may not consider alleged improper practices that occurred more than four months prior to the filing of a petition.[4] In this case, Petitioner learned of his termination by letter postmarked December 2, 1999, and he filed the petition on April 3, 2000. Therefore, while Petitioner's claims regarding the termination of his employment and the Union's conduct in regard thereto are timely, his claims regarding the events that occurred prior to December 2, 1999, are untimely.[5]

We find that three of the four allegations made against the Union are untimely. Petitioner's allegation that the Union did not process his grievance in a timely manner when he was transferred on June 13, 1996, is clearly outside the four month time period. Similarly, his claim that the Union did not help him when Commissioner Von Essen failed to reinstate him as the OATH judge recommended, is also time-barred. Lastly, Petitioner's claim concerning the Union's alleged refusal to process a grievance concerning an accommodation of his alleged disability also occurred before his termination of December 2, 1999, and is therefore untimely.

It is an improper practice under NYCCBL §12-306b for a public employee organization:

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

The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in

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[4] NYCCBL § 12-306(e); OCB Rule § 1-07(d); *see Stepan*, Decision No. B-11-2000 at 5.

[5] OCB Rule § 1-13(d) states that: "In computing any period of time prescribed or allowed by these rules, or by order or direction, the day of the act, event or default after which the designated period of time begins to run shall not be included."

negotiating, administering and enforcing collective bargaining agreements.[6] The burden is on petitioner to plead and prove that the union has engaged in such wrongful conduct.[7] This Board finds that Petitioner has not met the required burden of proof with regard to his allegation that the Union failed to assist him after he was terminated.

After Petitioner received notice of his termination on December 2, 1999, the Union filed a Step II grievance on March 27, 2000, and a Step III grievance on April 26, 2000.[8] After the Union's grievances were denied, the Union filed an arbitration request on February 15, 2001. Contrary to Petitioner's allegation, we find that the Union's response to his termination was timely.

Petitioner failed to provide any evidence in support of his allegation that the Department discriminated against him because he documented unsafe conditions at EMS. Therefore, this Board dismisses the claim.

We now address Petitioner's claim that the Department discriminated against him because of a video he made in March 1996 when he was Chair of his Union's Research Committee. It is an improper practice under NYCCBL §12-306a for a public employer or its agents:

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

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[6] *See Robinson,* Decision No. B-29-2001 at 5; *Perlmutter*, Decision No. B-16-97 at 5; *Grace*, Decision No. B-35-92 at 7.

[7] *See Lopez*, Decision No. B-31-97 at 8.

[8] The record reveals that a Step I grievance regarding Petitioner's termination was not filed.

To determine whether an alleged discrimination or retaliation violates § 12-306a(3), this Board applies the test enunciated in *City of Salamanca,*18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must prove that the employer's agent had knowledge of the employee's union activity and that such activity was a motivating factor in the employer's action. The employer may refute the Petitioner's showing or demonstrate legitimate motives that would have caused the employer to take the action complained of even in the absence of the protected activity.

Petitioner has presented sufficient evidence to establish the first prong of the *Salamanca* test. In regard to the second prong of the test, a finding of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, or surmise.[9] Merely alleging improper motive does not state a violation when Petitioner has failed to prove the requisite causal link between the underlying management act complained of and the protected union activity.[10]

In the instant case, no evidence indicates that the Department was motivated to transfer Petitioner in June 1996 or terminate him in December 1999 because of the video he produced. Rather, Petitioner's functional transfer was the result of EMS's transfer from HHC to FDNY. Furthermore, his termination was due to his failure to renew his certification, which was a qualification for continued employment. Under these circumstances, Petitioner has not established the necessary improper motivation as required under the second prong of the

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[9] *See Communications Workers of Am., Local 1180,* Decision No. B-19-99 at 12.

[10] *See Procida*, Decision No. B-2-87 at 13.

Salamanca test.

Accordingly, the improper practice 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-2131-00 be, and the same hereby is, dismissed in its entirety.

Dated: October 29, 2001
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

BRUCE H. SIMON
MEMBER