

McKeen N'Diaye v. DEP, Joseph & DC 37, 69 OCB 32 (BCB 2002) [Decision No. B-32-2002 (ES)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

BETTYE MCKEEN N'DIAYE

Decision No. B-32-2002 (ES)  
Docket No. BCB-2303-02

Petitioner,

-and-

DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
TERRY JOSEPH AND, DISTRICT  
COUNCIL 37,

Respondents.

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**DETERMINATION OF EXECUTIVE SECRETARY**

On October 9, 2002, Bettye McKeen N'Diaye, ("Petitioner"), filed a *pro se* verified improper practice petition pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner alleges that the Department of Environmental Protection ("DEP") improperly terminated her employment on February 1, 1999, and created a hostile work environment in 1997. Petitioner also alleges that District Council 37 ("Union") breached its duty of fair representation by failing adequately to represent her in these matters. For the reasons set forth below, the petition is dismissed.

**BACKGROUND**

According to the petition, Petitioner was employed by DEP. Petitioner was terminated on February 1, 1999, pursuant to Civil Service Law ("CSL") § 73 because she had been on disability

leave for an unspecified amount of time.<sup>1</sup>

On February 5, 1999, Petitioner met with Union representative Eddie Douglas to discuss her termination and to answer her questions. Douglas asked Petitioner to fill out some paperwork and also made a call and sent a fax on her behalf. The Union requested an extension of time prior to the commencement of the disability proceeding. The Union appointed a lawyer to represent Petitioner and had a doctor examine her and prepare a report for the hearing. The hearing was conducted on March 14, 2000.

Petitioner alleges that the Union did not adequately represent her and ignored her complaints about a hostile work environment that existed since 1997. Petitioner alleges that she was fit to return to work and that a fraud and a conspiracy were perpetrated against her by the Union, DEP and the doctors who examined her. Petitioner seeks reinstatement and back pay.

### **DISCUSSION**

Pursuant to § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”), a copy of which is annexed hereto, the undersigned has reviewed the petition and determined that the claims asserted must be dismissed because they are untimely and, in any event, they fail to state a claim of an improper practice under the NYCCBL.

OCB Rule Section 1-07(d) provides, in pertinent part:

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 Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . . . If it is determined . . . that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary . . . .

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<sup>1</sup> CSL § 73 concerns the termination of a permanent employee who has been absent from or unable to perform the duties of his position for more than one year by reason of a disability as defined by the workers’ compensation law.

Since OCB received the improper practice petition on October 9, 2002, more than five years after Petitioner alleges DEP created a hostile work environment and more than three years after Petitioner was terminated, the claims against DEP are untimely. The claims against the Union are also untimely because the petition was filed more than three years after the Union met with Petitioner regarding her termination and more than two years after Petitioner alleges that the Union breached its duty of fair representation at the hearing. Accordingly, pursuant to OCB Section 1-07(d), the petition is dismissed as untimely.

Even if the petition were timely filed, a thorough review of the petition fails to reveal any facts which show that either DEP or the Union violated any rights delineated in the NYCCBL. The provisions and procedures of the NYCCBL are designed to safeguard the rights of public employees to organize and assist unions or to refrain from doing so. Here, Petitioner's assertions fail to state a claim of an improper practice under §12-306 of the NYCCBL.

As to the Union, Section 12-306(b)(3) of the NYCCBL, the duty of fair representation, requires a union to treat all members of a bargaining unit in an evenhanded manner and to refrain from arbitrary, discriminatory and bad faith conduct. *Hug*, Decision No. B-5-91 at 19. A union breaches its duty of fair representation if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. *Perlmutter*, Decision No. B-16-97 at 5; *see also Bowers*, Decision No. B-56-90 at 5. Petitioner has neither alleged nor offered any evidence to show that the Union herein treated her in an arbitrary, discriminatory or bad faith manner. Indeed, the petition shows that the Union did assist Petitioner. On February 5, 1999, Petitioner met with Union representative Eddie Douglas to discuss her termination and to answer her questions. Douglas asked Petitioner to fill out some paperwork, made a call and sent a fax on her behalf. The Union then obtained an adjournment for the CSL § 73 hearing, assigned counsel to represent Petitioner at the hearing, and had her examined by a doctor who then prepared a report for the hearing.

As to DEP, the petition fails to allege any facts that would demonstrate that the employer's actions were improperly motivated within the meaning of § 12-306(a) of the NYCCBL. Petitioner's claims that DEP created a hostile work environment, besides being conclusory, do not allege interference with Petitioner's union activities or discrimination against her because of possible union activities. With regard to Petitioner's claims that DEP improperly terminated her because of her disability, this Board lacks jurisdiction to review a termination pursuant to CSL § 73. *Green*, Decision No. B-34-2000 at 9.

In summary, since Petitioner has not alleged that either DEP or the Union committed acts in violation of the NYCCBL within four months of the filing of the instant improper practice petition, the petition is dismissed. Dismissal of the petition is without prejudice to any rights that Petitioner may have in another forum.

Dated: New York, New York  
October 17, 2002

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Alessandra F. Zorghiotti  
Executive Secretary