Yovino v. USCA & DOS, 69 OCB 40 (BCB 2002) [Decision No. B-40-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

- between -

MICHAEL YOVINO,

Petitioner,

- and -

Decision No. B-40-2002
Docket No. BCB-2199-01

UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT, and THE DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK, KEVIN FARRELL, COMMISSIONER,

Respondents.

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In the Matter of the Improper Practice Proceeding

- between -

ANTHONY W. OLSZEWSKI,

Petitioner,

- and -

Docket No. BCB-2200-01

UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT, and THE DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK, KEVIN FARRELL, COMMISSIONER,

Respondents.

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DECISION AND ORDER

On March 8, 2001, Anthony Yovino and Anthony Olszewski filed their respective verified improper practice petitions against the New York City Department of Sanitation ("DOS" or "Department") and the Uniformed Sanitationmen's Association, Local 831, International

Brotherhood of Teamsters ("Union"), claiming that the Union breached the duty of fair representation by failing to process Petitioners' grievances, which allege breaches of the parties' collective bargaining agreement ("CBA") with respect to workplace performance issues, pay differential, and seniority rights. Petitioners also allege that DOS discriminated against them by disciplining them and otherwise treating them disparately in retaliation for union activity in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). DOS argues that the discipline for misconduct was not carried out in a discriminatory fashion. The Union argues that it represented Petitioners in the disciplinary proceedings and that it acted in good faith towards them. We deny the instant petitions, which are consolidated for decision, on grounds that the claims asserted are untimely, insufficiently pleaded, and, with respect to some, precluded from consideration by a prior determination of this Board of Collective Bargaining.

BACKGROUND

DOS assigned Yovino and Olszewski to work at its Brooklyn North One district garage. On several occasions from 1992 to 2000, Petitioners were reprimanded and disciplined for violation of various work rules and failure to meet productivity standards, including failure to complete their assigned routes. Not all complaints were upheld on appeal, but the Department continued to file disciplinary charges against Petitioners, notably complaints arising in 1995 about their level of productivity. Ultimately, after a hearing at the Office of Administrative Trials and Hearings ("OATH") in March 2000, DOS discharged Petitioners from service on

November 9, 2000.

Olszewski appealed to the New York State Supreme Court under Civil Practice Law and Rules ("CPLR") Article § 78. In December 2001, the Court found that DOS had improperly served Olszewski with the complaint that led to the OATH hearing and directed DOS to restore his job, seniority rights, back pay, benefits, and vacation service time. *Olszewski v. Kevin P. Farrell*, No. 1047-01, (N.Y. Sup. Ct. Dec. 10, 2001). Yovino appealed to the New York City Civil Service Commission ("CSC") under Civil Service Law ("CSL") § 75. In April 2002, the CSC adopted the Court's rationale in *Olszewski* concerning improper service of process and directed DOS to restore Yovino's job, seniority rights, back pay, benefits, and vacation service time as well.

The Union offered legal counsel to represent Petitioners in the matter before OATH. Yovino initially accepted the representation but subsequently discharged the attorney and hired his own legal counsel. Olszewski rejected union-provided counsel from the outset.

Petitioners have continually claimed that DOS agents disciplined them in retaliation for their opposition to incumbent Union leadership since 1991. In 1995, Petitioners filed an improper practice petition against DOS contending that it acted in concert with Union officials to discipline Petitioners and to deny them rights under the NYCCBL as a result of Yovino's campaigns in 1991 and 1995 opposing Union incumbents and Olszewski's support of Yovino's candidacy. The Union was not named as a respondent in that proceeding. A hearing was held and, at the close of the Petitioners' case, the City moved to dismiss. In March 2001, this Board held that Petitioners failed to allege facts to support their claims that DOS agents engaged in

coercion, discrimination, and retaliation for purposes of discouraging Petitioners' participation in union activities. *Olszewski and Yovino,* Decision No. B-9-2001.

Article VII, § 3 (Impartial Chair/Appeal Procedure), of the applicable CBA for the term January 23, 1995, to May 22, 2000, describes a procedure by which a Sanitation Worker who fails to receive differential pay for assignment on a "two worker" truck may appeal to a tripartite panel established to resolve such disputes.[1] This section of the CBA also provides that "[a] claim by the Sanitation Worker that the design or length of the refuse/recycling collection route prevented the Sanitation Worker from completing the collection route shall not constitute good cause." The decision of the panel is final, binding, and not subject to further appeal.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners contend that in retaliation for Yovino's campaigns against incumbent Union leaders and Olszewski's support of Yovino's candidacy, DOS agents discriminated against them by exposing them to more difficult work assignments than other unspecified members of the Department and by denying them "workplace privileges" afforded other similarly situated, but unspecified, employees. Specifically, Yovino alleges that he was required to perform more

[1] This section provides as follows:

> Any Sanitation Worker who may not receive the 1980 Two Worker Truck differential" pursuant to this Article, shall have the right to appeal the Employer's determination to a Tripartite Dispute Resolution Panel for a hearing to be held within forty-eight (48) to seventy-two (72) hours of the Department's notification to the Sanitation Worker . . . The standards governing the determination of the panel shall include those set forth in the Kelly Impasse Award referenced in the "Two Worker Truck Agreement" attached hereto and made a part hereof. . . .

"gate" work on congested streets than other Sanitation Workers were, a maneuver that requires carrying garbage cans around and over parked cars. He also alleges that he and Olszewski, who often worked together as a team, were denied the use of equipment such as front-end payloaders, which would have enabled them greater efficiency and speed in completing their work. Further, he alleges that their route, unlike that of other Sanitation Workers, experienced a dramatic increase in the number of occupied dwellings which made it appear as though their productivity was inadequate.

Petitioners also contend that in retaliation for their involvement in Union elections, DOS agents discriminated against them by singling them out for prosecution at OATH on charges of failure to complete their assigned route. The resulting termination of Petitioners' employment came "nearly five (5) years after the alleged occurrences set forth in the charges and specifications." On the basis of these allegations, Petitioners contend that DOS violated NYCCBL § 12-306(a)(1) and (3).[2]

Petitioners contend as well that in retaliation for their campaigns against Union incumbents, the Union refused to process grievances which Petitioners sought to file against DOS concerning seniority rights to work certain routes and a pay differential to which they were entitled under the CBA as a result of productivity gains. According to Petitioners, by ignoring the contractual grievance procedure, the Union breached Article VII, § 3, of the CBA. Yovino,

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[2] NYCCBL §12-306(a) provides, in relevant part, that it shall be an improper practice for a public employer:

> (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 participation in the activities of, any public employee organization. . . .

in his reply, contends that if the Union had pursued the productivity-related differential-pay issue, it "could have avoided (stopped) productivity complaints that were pursued at O[ATH] . . . and would have protected [his] job."

In addition, Yovino alone complains that the Union did not process his grievance alleging DOS' failure to notify the Union when a member files a contract grievance. Yovino maintains also that the Union ignored his request to provide him with a "survey" of increased workload along Petitioners' assigned routes.

On the basis of these allegations, Petitioners contend that the Union violated NYCCBL § 12-306(b)(3).[3]

Union's Position

The Union argues that the petitions are devoid of specific dates on which the alleged violations occurred but that, in any event, Petitioner's latest prior contact with the Union occurred more than a year before the instant petitions were filed and, thus, any complaint about the Union's conduct on their behalf is untimely. To the extent that any such claims are not untimely, the Union contends that the claim that it failed to process Petitioners' grievances must be dismissed because Petitioners do not allege that they sought the Union's assistance in grieving contract claims on their behalf. Furthermore, that Petitioners' insinuation that the Union caused DOS to bring charges as a result of Yovino's candidacy for union office is simply unsupported. From the time DOS served disciplinary charges on Petitioners in 1995, Business Agent Anthony

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[3] NYCCBL § 12-306(b) provides, in relevant part, that it shall be an improper practice for a public employee organization or its agents:

* * *

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

Rodriguez offered assistance to Petitioners on an ongoing basis, including an offer to pay for experienced legal counsel to represent Petitioners in their disciplinary proceedings. Petitioners instead chose their own attorney to represent them at OATH. In spite of that, when turning over the files of the case, union-provided counsel offered advice to Petitioners' attorney, to wit, that the issue of Petitioners' productivity arguably should have been brought to the Tripartite Panel established by the Kelly arbitration Award. Petitioners have continued to reject the Union's "continuing offers of assistance."

City's Position

The City argues that the petitions should be dismissed because all claims are untimely except for the employment termination. The jurisdiction of this Board does not encompass alleged violations of the Civil Service Law ("CSL"), and thus, claims protesting the disciplinary action and/or termination underlying the instant improper practice petitions may not be considered here. Finally, Petitioners' instant claims against DOS were fully and previously litigated before this Board and should be precluded from further consideration.

DISCUSSION

The issues in this case are whether the Union violated NYCCBL § 12-306(b)(3) by ignoring and refusing to process seniority rights and pay differential grievances arising from DOS productivity complaints against Petitioners dating back to 1995 and whether the City violated NYCCBL § 12-306(a)(1) and (3) by discriminating against them by means of discipline and disparate treatment in retaliation for union activity. We find that some of Petitioners' allegations against the Union are untimely while others fail to state, with sufficient specificity,

claims under the NYCCBL. We also find that some of Petitioners' claims against the Department are untimely while others are precluded from consideration here because they were fully litigated previously before this Board.

Claims against the Union

As a preliminary matter, this Board will not consider a claimed violation of the NYCCBL which occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e); § 1-07(d) of the Rules of the Office of Collective Bargaining, (Rules of the City of New York, Title 61, Chapter 1). *See Stepan*, Decision No. B-11-2000 at 5. Here, both petitions state that the 1995 productivity charges which resulted in termination on disciplinary grounds "were . . . moved to trial nearly five (5) years after the alleged occurrences set forth in the charges and specifications." Therefore, more than five years passed between the time the Union could have grieved the productivity-related issues and the filing of the improper practice petition on March 8, 2001. Petitioners do not allege any facts to show why the Union's alleged failure to process their grievances was not known to them until 2001. Accordingly, those claims are time-barred.

In addition, Petitioners' contention that the Union did not file a grievance protesting DOS's refusal to give them pay differential is also time-barred. The claim concerning pay differential arose before 1995, more than five years before the filing of the instant charges. Again, Petitioners failed to allege any facts to show why the Union's alleged failure to process this grievance was not known to them until 2001. Also time-barred is the claim that the Union should have pursued the productivity-related differential pay issue before a special panel and thereby might have prevented the City from bringing Petitioners before OATH on productivity

complaints.

We turn to Petitioners' assertion that the Union breached its duty of fair representation by failing to process a grievance about contractual procedures which require DOS to notify the Union when a Sanitation Worker files a grievance. The duty of fair representation requires a union to act fairly, impartially, and non-arbitrarily in the administration and enforcement of a collective bargaining agreement. *Smith*, Decision No. B-22-2000; *Cheatham*, Decision No. B-13-81. This duty includes the investigation of breach-of-contract claims. A union has wide latitude in determining which contractual claims it will pursue at arbitration, but it must act in good faith and must not discriminate in its conduct from one member to another even in matters that lie outside the contractual context. *Edwards*, Decision No. B-35-2000 at 9; *Jones*, Decision No. B-34-96; *see generally Vaca v. Sipes*, 385 U.S. 895 (1967); *Civil Service Employees Association v. PERB*, 132 A.D.2d 430, 522 N.Y.S.2d 709 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y. 796 (1988). Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation, but the burden is on a petitioner to plead and prove that a union has engaged in such conduct. *Cooke*, Decision No. B-46-96, at 9. It is not enough merely to allege that a union has engaged in conduct violative of the law. *Id.* Here, Petitioners have failed to specify a time when the claim concerning DOS notification arose and failed to cite the section of the CBA allegedly breached and so have not met their burden of pleading this claim. With respect to Yovino's allegation that the Union failed, at a time not specified in the pleadings, to provide him with a survey concerning workload of his collection route, we find that Petitioner has failed here as well to allege facts sufficient to meet its burden of pleading a claim under NYCCBL.

Claims against DOS

Concerning Petitioners' claims that DOS agents retaliated and discriminated against them by bringing productivity charges and by denying them differential pay and seniority rights, we find, as we did with the claims against the Union, that such allegations dating to 1995 are untimely.

Even if they were timely asserted, those claims could not be considered here. The Court of Appeals of New York has held that justice requires that a case be once fairly and impartially tried but that, having been once so tried, all litigation of that question between those parties should be closed. *Fish v. Vanderlip*, 218 N.Y. 29, 37 (1916). In furthering the finality of its own determinations, this Board has held that an issue may be precluded by estoppel if the issue is: (1) identical with an issue in the prior action; (2) actually litigated and determined in the prior action; and (3) necessary to the determination of the prior judgment. *Lieutenants' Benevolent Association*, Decision No. B-13-91 at 14-15.

Petitioners here attempt to litigate claims which were brought previously against DOS in *Olszewski and Yovino,* Decision No. B-9-2001. In that case, Petitioners alleged that DOS coerced, retaliated, and discriminated against them because of their participation in internal Union elections. They argued that they were required to work with dangerous equipment and under dangerous working conditions, were required to complete heavier collection routes than those completed by other Sanitation Workers in violation of contractual seniority rights, and were disciplined and deprived of two-worker truck differential pay when they failed to complete their routes. Petitioners presented their improper practice case at a full evidentiary hearing and, on a motion to dismiss as a matter of law, this Board found that the evidence they presented was

legally insufficient to articulate and establish their claims.

The instant case concerns issues which are identical to those in the prior case: retaliation for participation in internal Union elections in the form of allegedly disparate working conditions, denial of differential pay, and denial of seniority rights. The issues in the instant petitions were actually litigated against the Department and determined by this Board. And as the issues were necessary to the determination in the prior action, we judge them to be precluded from reconsideration here.

Therefore, since Petitioners have failed to plead timely claims with sufficient specificity against the Union and failed to articulate timely claims, not previously litigated, against the Department, we deny the instant petitions in their 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 filed by Michael Yovino be, and the same hereby is, dismissed in its entirety, and it is further

ORDERED, that the improper practice petition filed by Anthony Olszewski be, and the same hereby is, dismissed in its entirety.

Dated: November 22, 2002
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
MEMBER