Morgan v. Diesso, L. 1182, CWA, Kerr, NYPD, Joppa, OLR, 71 OCB 10 (BCB 2003) [Decision No. B-10-2003, IP(ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

MICHAEL MORGAN,

Petitioner,

Decision No. B-10-2003 (ES)
Docket No. BCB-2324-03

-and-

JOE DIESSO, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182, TIMOTHY KERR OF THE NEW YORK CITY POLICE DEPARTMENT, ANDREW JOPPA OF THE NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

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DETERMINATION OF EXECUTIVE SECRETARY

On February 28, 2003, Michael Morgan ("Morgan"), 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"). The petition filed against Joe Diesso of the Communications Workers of America, Local 1182 ("Diesso" or "Union"), Timothy Kerr of the New York City Police Department ("Kerr" or "NYPD"), and Andrew Joppa of the New York City Office of Labor Relations ("Joppa" or "OLR") arises out of Morgan's termination on August 15, 2000, and the related grievances proceedings. For the reasons set forth below, the petition is dismissed.

BACKGROUND

Morgan was employed by NYPD as a Traffic Enforcement Agent. On October 12, 1999, disciplinary charges were filed against Morgan alleging that on May 6, 1998, he knowingly possessed a forged NYPD restricted parking plate and supplied such plate to a civilian.

On December 1, 1999, an informal conference was held and Morgan was advised of NYPD's investigation and findings. Morgan in the presence of his union representative, declined the penalty of termination and elected to have a formal grievance proceeding. A Step II hearing was held on January 14, 2000, with Richard Brown, a Union representative, and NYPD Hearing Officer Kerr. On or about June 2, 2000, NYPD sent the Union a "Stipulation of Agreement" to settle the grievance without further proceedings if Morgan agreed to be placed on dismissal probation for a period of 12 months. Morgan states that he was given a copy of the stipulation on June 23, 2000, and that he was never consulted regarding the terms of the agreement. Morgan refused to sign the document. On or about August 9, 2000, a decision of guilt based on the evidence, with a penalty of termination was rendered by NYPD Hearing Officer Kerr. As a result, Morgan was dismissed from his employment effective August 15, 2000.

On August 18, 2000, the Union filed a request for a Step III hearing. On that day, a waiver was signed in which Morgan waived his right to a disciplinary hearing pursuant to § 75 of the Civil Service Law ("CSL") and accepted to proceed under the parties' contractual grievance procedure. OLR advised the Union that it would hold a Step III hearing on October 18, 2000, which was later rescheduled for unspecified reasons to December 14, 2000. Morgan claims he did not receive notice of the December 14, 2000, hearing. By letter dated February 15, 2001, Diesso wrote to Morgan advising him that due to his failure to appear on December 14, 2000, the Step III hearing was rescheduled for June 4, 2001. By letter dated March 10, 2001, Morgan wrote to the Union advising that he did not want Diesso representing him. Morgan hired William Martin, Esq. to represent him at the Step III hearing. Martin then wrote that he could not make the June 4, 2001, Step III hearing at 10:00 am and it was rescheduled for June 7, 2001. Morgan appeared for the Step III hearing with his counsel.

Following the Step III hearing, Morgan wrote a number of letters to the Union and various employees at OLR seeking a Step III determination and requesting that if a decision was not forthcoming to have a Step VI, Request for Arbitration filed. It appears that following the Step III

hearing, Morgan obtained new counsel, Robert Julian Shaw. It also appears that sometime in 2000, Morgan commenced a *pro se* Article 78 proceeding challenging NYPD's determination to terminate him following the Step II hearing. The petition was dismissed for Morgan's failure to exhaust his administrative remedies. *Morgan v. City of New York*, No. 119042/00, Slip Op. (S. Ct. N.Y. Co. December 12, 2000).

On January 16, 2003, Joppa, on behalf of OLR, issued a Step III determination denying the grievance and upholding the penalty of termination. By letter dated January 23, 2003, Morgan's counsel wrote to the Union requesting that it file for arbitration. On January 29, 2003, the Office of Collective Bargaining ("OCB") received the Union's request for arbitration. The request has been docketed as A-9803-03 and is currently proceeding to arbitration.

With regard to respondent NYPD, Morgan alleges that NYPD waited 18 months before it brought disciplinary charges and then it falsified evidence against him. Moreover, no evidence was presented at the Step II conference with Hearing Officer Kerr and Kerr lied under oath. With regard to respondent Union, Morgan alleges that he was not represented by the union delegate of his choice during the steps of the grievance process. He objected to Diesso's representation and his wish was not respected by the Union. Morgan claims that Diesso sent him two different letters stating that he "was being offered something other than termination, which was not true other than the stipulation." Morgan does not attach copies of these letters to the petition. Morgan claims that Diesso threatened him and has interfered with his grievance moving forward. Morgan also claims that he did not waive his CSL § 75 rights to pursue his grievance and that Union representative James Huntley forged his signature on the waiver. With regard to respondent OLR, Morgan claims that OLR kept his case for over 30 months and ignored his request for a new hearing. Morgan does not ask for a specific remedy but from the documents attached to the petition it appears that he seeks the right to challenge his termination in an arbitration proceeding.

DISCUSSION

As a preliminary matter, the petition against the individuals Diesso, Kerr and Joppa is dismissed. Pursuant to NYCCBL § 12-306 it is an improper practice for a public employer or a public employee organization to engage in certain proscribed conduct. An individual cannot commit an improper practice in his or her personal capacity. However, a public employer or a public employee organization may be held responsible for the acts of its agents. *Hassay*, Decision No. B-02-2003. Because the conduct about which Morgan complains occurred when Diesso, Kerr and Joppa were acting as agents of the Union, NYPD and OLR, respectively, the public employer and the public employee are proper parties to this proceeding, not the named individuals. *Id.*

In addition, the petition is time-barred by the four month statute of limitations under § 12-306(e) of the NYCCBL. That section provides, in relevant 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 this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

See also Section 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 charge of improper practice must be filed no later than four months from the time the disputed action occurred. *Griffiths*, Decision No. B-3-99 at 11-12; *Tucker*, Decision No. B-24-93 at 5.

Here, the petition was filed on February 28, 2003. With regard to Morgan's claims that NYPD waited 18 months before it brought disciplinary charges in October 1999, and then falsified evidence against him at the Step II hearing held on January 4, 2000, these claims occurred more than three years before the petition was filed. With regard to the claims that the Union did not provide him with the union delegate of his choice at the Step hearings and that James Huntley forged his signature on the waiver signed on August 18, 2000, these claims are also beyond the four month statute of limitations. Because Morgan does not attach copies of the letters allegedly written by Diesso regarding "being offered something other than termination,

which was not true other than the stipulation" a determination on the sufficiency and timeliness of this claim cannot be made.

In any event, even if the petition were timely filed, a thorough review of the petition fails to reveal any facts which show that either the Union, NYPD, or OLR 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, Morgan's assertions fail to state a claim of an improper practice under §12-306 of the NYCCBL.

As to the Union, § 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. This well-established standard has come to mean that a union may not be 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. *McAllan*, Decision No. B-15-83 at 20.

Morgan has neither alleged nor offered any evidence to show that the Union treated him in an arbitrary, discriminatory or bad faith manner. Indeed, the petition shows that the Union has and continues to assist Morgan. On December 1, 1999, a Union representative represented Morgan at an NYPD conference regarding its investigation and findings. Following the conference, the Union requested a Step II hearing which was held on January 14, 2000, and Morgan was represented by Richard Brown, a Union representative. In June 2000, the Union attempted to resolve the dispute and presented Morgan with a "Stipulation of Agreement" which he refused to execute. On August 18, 2000, the Union filed a request for a Step III hearing. Morgan chose to be represented by his own counsel and not the Union. Following the Step III

decision, the Union filed a request for arbitration which is currently pending at OCB. Thus, contrary to Morgan's claims, the Union has moved his grievance through the various steps and has provided him assistance throughout the grievance process.

Moreover, contrary to Morgan's claim, the waiver of a CSL § 75 hearing and acceptance of grievance procedure, did not result in his waiver of his grievance rights under the parties' contract; Morgan's dispute has been submitted to the grievance procedure. It should be noted that the law requires a petitioner choose whether to proceed under CSL § 75 or under the contractual grievance procedure. He may not attempt to do both. NYCCBL § 12-312(d). To the extent Morgan is complaining that the Union forged his signature on the document, an improper practice petition is not the proper forum for such a claim and it is dismissed for lack of subject matter jurisdiction. *Green*, Decision No. B-34-2000 at 9. Finally, though Morgan is entitled to be represented by the Union, he does not have the right to be represented by union member of his own choosing. *Local 1182, Communication Workers of America*, Decision B-49-97 at 7. Here, Morgan chose to hire his own counsel to represent him at the Step III hearing.

As to NYPD, 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. To the extent Morgan claims that NYPD waited 18 months before it brought disciplinary charges, it falsified evidence against him, then failed to present any evidence at the Step II hearing and that Kerr lied under oath, Morgan will have the opportunity in the arbitration proceeding to dispute the charges and evidence that led to his termination and raise any defenses which may effect the merit's of NYPD's case.

As to OLR, the petition fails to allege any facts that would demonstrate that the delay in processing Morgan's grievance was improperly motivated within the meaning of § 12-306(a) of the NYCCBL. Although the grievance process has taken more than two and a half years since Morgan was terminated on August 15, 2000, it should be noted that the Step I and II hearings were handled by NYPD and not OLR. Moreover, after OLR got involved at Step III, some of the

delay can be attributed to Morgan's failure to appear for the Step III hearing as scheduled. Although OLR took more than a year to render a Step III decision, Morgan's grievance has been fully processed and an arbitration is pending, which is the remedy Morgan is apparently seeking.

In summary, since Morgan has not alleged that either NYPD, OLR, 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 Morgan may have in another forum.

Dated: New York, New York
March 18, 2003

Alessandra F. Zorgniotti
Executive Secretary