Morgan v. L. 1182, NYPD & OLR, 71 OCB 15 (BCB 2003) [Decision No. B-15-2003 (IP)]

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-15-2003
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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DECISION AND ORDER

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 (Union"), Timothy Kerr of the New York City Police Department ("NYPD"), and Andrew Joppa of the New York City Office of Labor Relations ("OLR"), arises out of Morgan's termination on August 15, 2000, and the related grievance proceedings.

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"), the Executive Secretary of the Board of Collective Bargaining reviewed the petition and determined that the charges of improper employer practice and inadequate representation were untimely and without merit. Accordingly, in a determination dated March 10, 2003, the petition was dismissed. *Morgan,* Decision No. B-10-2003 (ES). The determination was served upon the petitioner by certified mail. On March 31, 2003, petitioner filed this appeal.

THE PETITION

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

It appears that a grievance was filed on Morgan's behalf. On January 14, 2000, a Step II hearing was held before NYPD hearing officer Kerr and Richard Brown, a Union representative, was present.

On or about June 2, 2000, the City sent the Union a proposed "Stipulation of Agreement" to settle the grievance without further proceedings if Morgan agreed to be placed on dismissal probation for 12 months. Morgan states that on June 23, 2000, a Union representative "asked [him] to come to Manager Garcia's office and handed me the stipulation agreement." Petition ¶ 8. Morgan claims that he was never consulted about the agreement and that he refused to sign it.

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 same 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 elected to proceed under the parties' contractual grievance procedure. Morgan claims that his signature on the waiver was forged.

On September 22, 2000, OLR scheduled a Step III hearing for October 18, 2000. By notice dated November 20, 2000, the Step III hearing was rescheduled 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 was represented by his own attorney at the Step III hearing.

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. Following the Step III hearing, Morgan obtained new counsel.

On January 16, 2003, the OLR hearing officer, Andrew Joppa, 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, OCB received the Union's request for arbitration. The request was docketed as A-9803-03 and is currently proceeding to arbitration.

Morgan alleges that NYPD waited 18 months before it brought disciplinary charges and then falsified evidence against him. Moreover, no evidence was presented at the Step II conference and hearing officer Kerr lied under oath. With regard to the Union, Morgan alleges

that he was not represented by the delegate of his choice; he objected to Diesso's representation, and his wish was not respected. Morgan claims that Diesso sent him two different letters stating, in Morgan's words, that he "was being offered something other than termination, which was not true other than the stipulation." Petition ¶ 4. Morgan claims that Diesso threatened him and interfered with his grievance moving forward. Morgan also claims that he did not waive his "CSL § 75 rights grievance procedures" and that Union representative James Huntley forged his signature on the waiver. Petition ¶ 2. With regard to OLR, Morgan claims that OLR kept his case for over 30 months and ignored his request for a new hearing. Morgan seeks the right to challenge his termination in an arbitration proceeding.

EXECUTIVE SECRETARY'S DETERMINATION

In Decision No. B-10-2003 (ES), the Executive Secretary found that the petition was untimely on its face as to the allegations that: (1) 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; and (2) 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. Pursuant to § 12-306(e) of the NYCCBL[1] and OCB Rule §1-07(d),[2]

[1] NYCCBL § 12-306(e) provides: 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. . . .

[2] 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

a claim alleging conduct in violation of NYCCBL § 12-306 must be filed within four months of the date the alleged improper practice occurred.

With regard to the claim that Diesso wrote improper letters to Morgan, the Executive Secretary stated that a determination on the sufficiency and timeliness of this claim could not be made because the letters had not been provided by petitioner.

As to the merits of petitioner's claims, the Executive Secretary found that Morgan's assertions failed to state a claim of an improper practice under §12-306 of the NYCCBL. The documents attached to the petition showed that although the grievance has progressed slowly, the Union moved the grievance through the various steps, represented Morgan at the step hearings except when asked not to, and provided him with assistance throughout the process. In addition, although Morgan is entitled to be represented by the Union, he does not have the right to be represented by a union member of his own choosing. *Local 1182, Communication Workers of America*, Decision No. B-49-97 at 7.

With regard to the claim that the Union improperly waived his grievance rights, the Executive Secretary found that the signing of the waiver did not result in Morgan's waiver of his grievance rights. NYCCBL § 12- 312(d) requires a petitioner choose whether to proceed under CSL § 75 or under the contractual grievance procedure, and Morgan's dispute has in fact been submitted to the grievance procedure as he requested.

The Executive Secretary also found that OLR has fully processed Morgan's grievance and the arbitration is pending. There, Morgan will have the opportunity to dispute the charges and

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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 . . . .

evidence that led to his termination and raise any defenses which may affect the merit's of NYPD's case.

THE APPEAL

By letter dated March 28, 2001, petitioner appeals Decision No. B-10-2003 (ES). In his letter, Morgan includes the two Diesso letters which the Executive Secretary stated were not attached to the petition as well as a number of documents which were attached to the original petition. He complains that he had originally sent these documents and they were lost by OCB. Morgan states that the Diesso letters were dated the same day, but were sent two different times.

Morgan also attaches a copy of Decision No. B-10-2003 (ES), which he has highlighted and noted "true" and "not true" throughout the document. Morgan states that he wrote numerous times to OLR and the Union and received one correspondence from them. He questions how the Executive Secretary could find "that they did everything properly." Finally, Morgan asks how the Executive Secretary can "claim that [she was] partial in [her] decision."

DISCUSSION

As a preliminary matter, we note that in the petition, Morgan did not set forth a statement of facts as required by OCB Rule § 1-07(e).[3] Rather all of the facts were gathered by the

[3] OCB Rule § 1-07(e) provides in relevant part that a petition shall contain: a clear and concise statement of the facts constituting the claim under §§1-07 (b), (c) or (d). If the controversy involves an alleged improper practice, such statement shall include but not be limited to the names of the individuals involved in the particular act alleged and the date and place of occurrence of each particular act alleged. Such statement may be supported by attachments which are relevant and material but may not consist solely of such attachments. . . .

Executive Secretary from the numerous unreferenced documents petitioner attached to the petition. Morgan fails to state why the facts as set forth by the Executive Secretary are untrue. Moreover, he fails to state why the documents he attached are unreliable and fails to set forth an alternative statement of facts. We have reviewed the record *de novo* and find the facts to be as stated above.

With regard to the two letters written by Diesso, they had indeed been in the record but had not been identified so that the Executive Secretary would have known that these were the documents Morgan was referring to in his petition. Moreover, these letters were in fact addressed in the Background section of the ES Decision. In any event, we will now review Morgan's claims regarding the Diesso's letters. Both letters state in relevant part:

> After thoroughly reviewing your file, I noticed that you had a Step Two Hearing at which you were offered to accept something less than termination.[4] According to your records, you declined and subsequently the Union proceeded to Third Step of the grievance procedure. This was scheduled for December 14, 2000. However, you did not show up at the hearing. We have now rescheduled your grievance for June 4, 2001, and have notified you in writing.

We find that the documents in the record support Diesso's summary as written, and it is unclear what Morgan means when he alleges that Diesso "offered something other than termination, which was not true other than the stipulation." Morgan fails to explain why these letters give rise to an improper practice and in any event we find this claim untimely. Both letters were written on February 15, 2001, which is more than one year before the petition was filed.

In addition, we find that the Executive Secretary properly dismissed the petition, as to the

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[4] We note that the first letter states "something less than tentative" instead of "something less than termination" and that the subsequent letter has a hand written note saying "please disregard the first letter."

Union and NYPD as time-barred under § 12-306(e) of the NYCCBL and OCB Rule § 1-07(d). The acts complained of occurred more than four months prior to the filing of the verified petition on February 28, 2003. *Griffiths,* Decision No. B-3-99 at 11-12; *Tucker,* Decision No. B-24-93 at 5.

With regard to Morgan's claims that both the City and the Union acted improperly in the processing of his grievance, we find that the documents attached to the petition show that the Union has and continues to assist Morgan and that the City has fully processed the grievance. We note that Morgan will have an opportunity to challenge his termination in an arbitration with an impartial arbitrator pursuant to NYCCBL § 12-312 and OCB Rules § 1-06. Finally, we find that Morgan's contention on appeal that the Executive Secretary was partial in determining this matter is unsupported by even a scintilla of evidence and is wholly without merit. Accordingly, the petition is dismissed.

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 Morgan in the matter docketed as BCB-2324-03 be, and the same hereby is, denied in its entirety.

Dated: New York, New York
April 22, 2003

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER