Barbee v. L. 1182, CWA & City, 71 OCB 16 (BCB 2003) [Decision No. B-16-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

JAMES BARBEE,

Petitioner,

Decision No. B-16-2003
Docket No. BCB-2292-02

-and-

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA and THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS,

Respondents.
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DECISION AND ORDER

On July 15, 2002, James Barbee, through his representative Moses L. Green, filed a verified improper practice petition against Local 1182, Communications Workers of America ("Union") and the City of New York Office of Labor Relations ("City"). Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Union violated its duty of fair representation when it refused to represent him after he resigned from the New York City Police Department ("NYPD" or "Department"). Petitioner also claims that NYPD forced him to resign and prevented him from seeking union representation. This Board finds that the claims against the City are untimely and that, while claims against the Union are timely, Petitioner has failed to assert sufficient allegations of fact to establish that the Union has breached its duty of fair

representation. Accordingly, the petition is denied.

BACKGROUND

On March 5, 2002, Petitioner, a traffic enforcement agent, was arrested while off duty for possession of a controlled substance. The parties disagree over the underlying circumstances of the arrest. Petitioner claims that he was arrested without cause because no drugs were ever found on his person or in his car, and the police did not make any further investigation. The City claims that Petitioner was arrested after a police officer observed him with white powder on his moustache, a straw in his mouth and an empty glassine envelope in the passenger seat of his car. The record does not reflect the status or history of any criminal proceedings incidental to Petitioner's arrest.

Immediately after his arrest, Petitioner was suspended and directed to undergo a drug screening test in accordance with NYPD's "Zero Tolerance" policy concerning drug use by civilian employees.[1] Petitioner refused to take the test and, pursuant to the policy, his suspension was continued and he was given the option to resign. Petitioner chose to resign and signed a standard resignation form as well as a form entitled Miranda Warnings to Persons in Police

[1] The NYPD's On/Off Duty Drug Use Policy for civilian employees states in pertinent part: [T]he New York City Police Department has a "Zero Tolerance" policy concerning drug usage by all members. Uniform and civilian members who are found guilty of using illegal drugs, or who illegally possess illegal drugs or drug paraphernalia, whether on or off duty, will be terminated from employment. . . . [D]rug screening tests are conducted when there is reasonable suspicion that an employee is engaging in drug usage either on or off duty. When a determination is made that reasonable suspicion does exist, the employee suspected of illegal drug usage must take the drug screening test as directed; refusal to take the test will result in immediate suspension, the service of charges and specifications, and termination of employment.

Custody.[2] Petitioner claims that before signing the resignation papers, he requested union representation but was told by the sergeant overseeing his resignation that he did not require, and could not have, union representation. He claims that the sergeant intimidated him and prevented him from calling the Union.

Approximately six weeks after Petitioner's resignation, on April 22, 2002, Petitioner phoned the Union and spoke to Local 1182 Executive Vice President James Huntley. According to the Union, at no time during the conversation did Petitioner say that he had already resigned. Rather, the Union claims that Petitioner told Huntley that following the drug related arrest, he had refused to take a drug screening test. Huntley then expressed an opinion that the Department would seek Petitioner's termination and that his voluntary resignation would avoid the prospect of being terminated. Petitioner claims that Huntley refused his request for union representation, told him that there was nothing the Union could do for him, and advised him to get his resignation papers before the end of the thirty day period when he would be terminated. Petitioner also asserts that the Union refused to accompany him to pick up his resignation papers.

As a remedy, Petitioner seeks reinstatement with full back pay and an order directing the Union to file a grievance on his behalf.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that he was forced to resign from NYPD and was denied his right to

[2] Although Petitioner claims that he was forced to resign on March 15, 2002, Petitioner's official, signed NYPD resignation form, submitted in his pleadings, is dated March 5, 2002.

union representation at that time. The sergeant's refusal to allow Petitioner union representation confused and intimidated him; thus, the sergeant overseeing his resignation coerced him into signing a resignation form.

Petitioner claims that the Union breached its duty of fair representation in violation of § 12-306(b)(1), (3), (c)(5), and § 209(a) of the Taylor Law (Civil Service Law, Article 14), because the Union refused to represent him after he resigned from NYPD.[3] When Petitioner called Huntley on April 22, 2002, Huntley arbitrarily rejected his request for representation and told him to pick up his resignation papers before he was terminated. Petitioner claims that the Union refused to represent him because of his involvement with an organization called Cat's TEBA, which is not a certified collective bargaining representative.

Further, the Union behaved improperly when it failed to accompany Petitioner to pick up his resignation papers; if it had done so, the Union would have noticed that NYPD inappropriately completed the papers.

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[3] NYCCBL § 12-306 provides in pertinent part:

(b) It shall be an improper practice for a public employee organization or its agents;
(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

* * *

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

* * *

(c) The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

* * *

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

* * *

§ 209(a) of the Taylor Law is similar to NYCCBL § 12-306, which governs improper employer and improper employee organization practices. In this decision, reference will be made only to the NYCCBL.

Petitioner also asserts that the Union has not provided members with the bylaws and constitution of the local, as well as documents which outline the policies of the NYPD, although Petitioner and other employees have asked the Union on several occasions for such documents.

Finally, Petitioner (i) alleges that the functional transfer of the New York City Department of Transportation's Traffic Enforcement employees to the NYPD in 1996 was illegal and the Union failed adequately to represent these employees; (ii) accuses the Union of corruption and criminal behavior; and (iii) claims that the Union has violated the United States Constitution.

Union's Position

The Union claims that the petition is untimely because Petitioner resigned from NYPD on March 5, 2002, as confirmed by his resignation form, and Petitioner waited to get in touch with the Union until April 22, 2002. The date from which the four month statute of limitations should run is the date on which Petitioner resigned. Since the instant petition was filed on July 15, 2002, more than four months after Petitioner's resignation, the claims against the Union are untimely.

Even if the petition were found timely, Petitioner's allegations are speculative, conclusory, and insufficient to support a claim of breach of the duty of fair representation. Huntley's advice to Petitioner was not arbitrary, discriminatory, or in bad faith but was based on experience and knowledge of NYPD's policies and actions regarding drug use matters. Furthermore, the advice was given more than six weeks after Petitioner resigned. Petitioner's claim that the Union did not accompany him to pick up his resignation papers does not constitute a breach of the Union's duty.

In addition, the Union has no knowledge that Petitioner ever requested documents which Petitioner claims the Union withheld, and this matter is irrelevant to this proceeding.

The Board should dismiss Petitioner's allegations regarding violations of the United States Constitution and other claims not covered by the NYCCBL because the Board has no jurisdiction over such matters. Finally, Petitioner's request that the Board order the Union to file a grievance on his behalf is not an appropriate remedy in this forum.

City's Position

The City argues that the petition must be dismissed as untimely. The correct date of the events leading up to Petitioner's resignation and of his actual resignation is March 5, 2002. The petition was filed on July 15, 2002, and thus there are no timely assertions against the City.

Petitioner's claim that he was denied union representation when he signed his resignation on March 5, 2002, must fail because no Weingarten right is recognized for public employees.[4] Additionally, Petitioner's claims regarding NYCCBL § 12-306(a), are inappropriate and no facts support such claims. Thus, they should be dismissed.

Finally, Petitioner fails to show that the Union breached its duty of fair representation when processing Petitioner's grievances, a pre-condition to consideration of the claim of employer liability. Therefore, there can be no derivative claim against the City.

DISCUSSION

[4]A Weingarten right is a right to union representation during an investigatory interview which may result in disciplinary action under *NLRB v. Weingarten*, 420 U.S. 251 (1975); *see Assistant Deputy Wardens,* Decision No. B-9-2003.

Addressing initially the issue of timeliness, this Board may not consider any claimed violation of the NYCCBL if that violation occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e);[5] § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *see Social Services Employees Union, Local 371,* Decision No. B-19-2002 at 6.

Here, since the petition was filed on July 15, 2002, only claims involving events that occurred on or after March 15, 2002 are deemed timely. Although Petitioner asserts that he resigned on March 15, 2002, documentary evidence of the date of Petitioner's resignation – the resignation form dated March 5, 2002, signed by Petitioner and submitted as part of his pleadings – confirms Respondents' contention that he resigned on March 5. Accordingly, this Board finds that Petitioner's allegations that the City prevented him from seeking union representation and forced him to resign are untimely because they address events which occurred more than four months before the petition was filed. We also find untimely Petitioner's claim regarding the 1996 functional transfer of traffic enforcement personnel to NYPD.

Because Petitioner first contacted the Union on April 22, 2002, this Board does find timely Petitioner's claim that the Union breached its duty of fair representation by refusing to assist him after he had resigned.

The claim against the Union, however, must be dismissed because Petitioner fails to

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[5] § 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.

provide allegations of fact sufficient to support a finding that the Union has breached its duty of fair representation. That duty requires that a union act fairly, impartially, and non-arbitrarily in negotiating, administering, and enforcing collective bargaining agreements. *Hassay,* Decision No. B-2-2003 at 10. A union does not breach its duty merely by refusing to advance a grievance if its refusal to act is made in good faith and in a manner which is neither arbitrary nor discriminatory. *Robinson,* Decision No. B-43-2002 at 7. It is not sufficient for a petitioner merely to allege that a union has engaged in conduct in violation of the NYCCBL; such allegations of an improper practice must be supported by adequate facts. *Hassay,* Decision No. B-2-2003 at 11.

In *Swike,* Decision No. B-29-2000, after petitioner was tested positive for use of a controlled substance, the union advised petitioner by telephone that "it might be a good idea" for him to resign. After he did, the union refused to take action on his behalf. The Board held that the union's advice to petitioner and its refusal to assist him after his resignation did not breach the union's duty of fair representation absent any indication that the union's actions were improperly motivated. *Id.*

In the instant case, as in *Swike,* Petitioner has failed to demonstrate that the Union's advice to him several weeks after his resignation was improper. Pursuant to NYPD's policy concerning civilian employee drug use, Petitioner was given the option to resign after refusing to undergo a mandatory drug screening test and chose to resign. Unlike *Swike,* here the Union was not involved in Petitioner's resignation – he first contacted the Union several weeks after his resignation, at which time the Union's advice was irrelevant. Even if Petitioner had sought advice from the Union before his resignation, there is no indication that the Union's advice to

Petitioner, after it assessed his situation with regard to NYPD's policy, was given in bad faith or in an arbitrary or discriminatory manner.

Nor has Petitioner provided legal support for his contention that on the facts of this case, the Union had any duty to accompany Petitioner to pick up a copy of his resignation papers weeks after he resigned. Moreover, the claim that the Union's refusal to represent him was motivated by Petitioner's involvement with Cat's TEBA is speculative and unsupported by factual allegations. Under these circumstances, we find that the Union's refusal to take action on behalf of Petitioner after his resignation did not breach the Union's duty of fair representation.

Furthermore, Petitioner's claim that the Union withheld certain documents from him and other employees is vague and lacks specific allegations of facts. *DeJesus,* Decision No. B-18-86 at 18.

Finally, this Board has no jurisdiction over the allegations that the Union is involved in corruption and criminal behavior and has violated the United States Constitution because these claims do not fall within the purview of the NYCCBL. *White,* Decision No. B-37-96 at 5. Accordingly, the petition is denied in its entirety and all derivative claims against the City are therefore also 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 instant improper practice petition filed on behalf of James Barbee, docketed as BCB-2292-02, be, and the same hereby is, dismissed in its entirety.

Dated: April 22, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
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