

Kapetanos v. L. 371 SSEU & HRA, 73 OCB 18 (BCB 2004) [Decision No. B-18-04 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

CHRISTOPHER KAPETANOS,

Petitioner,

Decision No. B-18-2004(ES)

Docket No. BCB-2436-04

-and-

LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION,
And HUMAN RESOURCES ADMINISTRATION,

Respondents.

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DETERMINATION OF EXECUTIVE SECRETARY

On October 12, 2004, Christopher Kapetanos, filed a *pro se* verified improper practice petition against Local 371, Social Service Employees Union (“Union”). The New York City Human Resources Administration (“HRA”) was joined pursuant to § 12-306(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).¹ Petitioner alleges that on January 13, 2004, the Union failed to adequately represent him in an arbitration hearing when it refused to offer certain documents into evidence in violation of NYCCBL § 12-306(b)(3). Since the petition is untimely and fails to state a claim under the NYCCBL, it is dismissed.

¹ NYCCBL § 12-306(d) provides:

The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

BACKGROUND

According to the petition, on March 27, 1998, Petitioner was appointed Fraud Investigator, Level I, in the Eligibility Verification Review section of HRA's Office of Revenue and Investigation. On August 23, 1999, he voluntarily transferred to a unit dealing with claims and collections. According to Petitioner, he reviewed legal documents, conducted negotiations pertaining to pay-off requests, prepared reports on Medicaid lien cases, coordinated special projects, and oversaw the work of five co-workers. In this title, Petitioner has been represented by the Union.

According to records in this office, on August 28, 2002, Petitioner filed an out-of-title grievance seeking a salary differential claiming that since August 23, 1999, he has been performing duties consistent with the title of Associate Fraud Investigator. On July 23, 2003, the Union filed a request for expedited arbitration on Petitioner's behalf.

According to Petitioner, on December 12, 2003, the Union notified him that his grievance would be heard on January 13, 2004. Petitioner claims that he was not contacted by the Union to discuss the documents necessary for the hearing as required by the applicable collective bargaining agreement. Petitioner relies on Article VI concerning expedited arbitrations which states: "the parties shall, whenever possible, exchange any documents intended to be offered in evidence at the hearing at least one week in advance of the first hearing date. . . ."

At the hearing Petitioner was represented by Union Representative Robert Jordan and Organizer Jose Valez. During the hearing, Petitioner allegedly told his representatives that he wanted to submit into evidence two twelve-inch thick folders of relevant documents. Jordan and Valez allegedly told him that they had already submitted enough evidence and that there was no

need to submit any more.

According to records in this office, by Expedited Award dated April 16, 2004, the arbitrator denied the grievance finding that Petitioner's duties were and are consistent with those described in the position description for Fraud Investigator Level I.

Petitioner argues that the Union breached its duty of fair representation when it failed to offer Petitioner's evidence which demonstrated that he was working out-of-title. Petitioner seeks a salary difference between Fraud Investigator and Associate Fraud Investigator.

DISCUSSION

Pursuant to §1-07(c)(2) 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 it is untimely and that it does not contain facts sufficient as a matter of law to state a violation under the NYCCBL.

Section 12-306(e) of the NYCCBL provides in relevant part that:

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 OCB Rules § 1-07(b)(4). A charge of improper practice must be filed no later than four months from the time the disputed action occurred. *Raby*, Decision No. B-14-2003 at 9, *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003); *Tucker*, Decision No. B-24-93 at 5.

Here, the petition charges that the Union mishandled Petitioner's grievance at the

arbitration held on January 13, 2004. Since the petition was filed on October 12, 2004, which is nine months after the alleged violation occurred, it is barred by the applicable four month statute of limitations.

Even if the petition were not so untimely as to warrant summary dismissal, the petition would still be dismissed because it fails to state a claim of a breach of the duty of fair representation. Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization “to breach its duty of fair representation to public employees under this chapter.” This duty requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements.

Minervini, Decision No. B-29-2003 at 15. A union is recognized as having the implied authority to make a fair judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled. *White*, Decision No. B-37-96 at 5. A union member’s mere dissatisfaction with the outcome of a case is insufficient to ground a claim that a union has breached its duty of fair representation. *Minervini*, Decision No. B-29-2003 at 15; *McAllan*, Decision No. B-15-83 at 20. Petitioner has the burden of pleading and proving that a union has engaged in prohibited conduct. *Barry*, Decision No. B-38-2001 at 8.

Here, Petitioner has not presented any facts from which the Board could infer that the Union discriminated against him in the manner in which it provided representation, or in any other way violated his rights under the NYCCBL. Except for conclusory statements and his dissatisfaction with the outcome of the hearing, Petitioner presents no factual allegations which could demonstrate that the Union’s decision not to submit Petitioner’s evidence was in violation of the NYCCBL. Petitioner’s reliance on Article VI of the grievance procedure, which states that

the parties shall exchange documents intended to be offered at the hearing at least one week in advance, is misplaced. This provision refers to obligations between the parties, *i.e.* HRA and the Union, to exchange information prior to the hearing. It does not create an obligation on the Union to meet with its members a week in advance to discuss document exchanges. Here, the Union arbitrated Petitioner's grievance and submitted evidence on his behalf. Absent facts to support a claim that a union acted in a manner that could be classified as arbitrary, discriminatory, or in bad faith, the Board will not evaluate or pass judgment upon the strategy employed by a union during a hearing. *Green*, Decision No. 34-2000 at 9.

Because there has not been a breach of the duty of fair representation by the Union, there can be no derivative claim against HRA. *Barbee*, Decision No. B-16- 2003; *Silva*, Decision No. B-31-2000. For the reasons stated above, the petition is dismissed.

Dated: New York, New York
October 28, 2004

Alessandra F. Zorziotti
Executive Secretary