Sweeney v. Local 831. IBT, The Mayors office of Labor Relations, 73 OCB 9 (BCB 2004) [Decision No. B-9-2004]

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

-between-

DARRYL K. SWEENEY,

Petitioner,

Decision No. B-9-2004
Docket No. BCB-2370-03

-and-

UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT, and THE MAYOR'S OFFICE OF LABOR RELATIONS,

Respondents.
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DECISION AND ORDER

On December 1, 2003, Darryl Sweeney filed a verified improper practice petition against the Uniformed Sanitationmen's Association ("Union") alleging that the Union violated § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter3) ("NYCCBL"), by failing to represent him after he was discharged for allegedly violating the provisions of a Last Chance Agreement. The Mayor's Office of Labor Relations ("City") was joined pursuant to § 12-306(d) of the NYCCBL.[1]

This Board finds that the petition is untimely. Accordingly, the petition is dismissed.

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[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

Petitioner began his employment at the Department of Sanitation ("DOS") as a sanitation worker on July 10, 2000. On May 23, 2002, Petitioner was disciplined for testing positive for alcohol while on duty. On July 22, 2002, Petitioner tested positive for marijuana while on duty. In settlement of the disciplinary charges resulting from this second offense, and with assistance and counsel of the Union, Petitioner entered into a Last Chance Agreement ("LCA") which provided that a resignation letter signed by the Petitioner could be submitted "upon a subsequent positive Breathalyzer of any level." The LCA stated that Petitioner waived any hearing or right to be heard for the purpose of contesting test findings and stated that the LCA would be effective for 24 months. Counsel for the Union explained to petitioner the consequences that would result from any further positive test.

On May 9, 2003, Petitioner tested positive for alcohol while on duty. On May 27, DOS sent Petitioner a letter stating that Petitioner's resignation would be accepted as of June 19. In early June 2003, Petitioner contacted the Union for assistance. The Union representative told Petitioner that he could not do anything for Petitioner because of the LCA, but suggested that Petitioner enter into treatment for substance abuse, and told Petitioner to contact a Union attorney in case he had any further inquiries. Petitioner did not contact the Union attorney. Petitioner again asked for assistance regarding the termination of his employment from the Union in a letter dated September 10, 2003.

The instant improper practice petition was filed on December 1, 2003.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that a last-minute schedule change, without prior notification, caused him to report to work approximately six hours after he had a few drinks to calm his nerves prior to, and during, a flight home from vacation. Petitioner claims the Union should have helped him because there was a discrepancy between the Breathalyzer's computer printout and the report filled out by the technician.[2]

Union's Position

The Union contends that the petition is untimely since it was filed more than four months after his employment was terminated on June 19, 2003. Alternatively, Petitioner did not allege any arbitrary or bad faith conduct on the part of the Union and the petition should be dismissed for failure to state a claim. Since there was simply no action the Union reasonably could have taken to assist Petitioner in light of his having signed the LCA, the Union acted well within the wide discretion afforded unions in determining how to proceed with grievances.

City's Position

The City also contends that the petition is untimely and that petitioner failed to state a claim. Additionally, the City argues that the petition made reference to "a collective bargaining matter," but the Board lacks jurisdiction to interpret Petitioner's collective bargaining agreement.

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[2] The Breathalyzer's computer printout showed that the first test was done at 8:32 a.m., and had a blood alcohol content of .031. The second test was done at 10:02 a.m. and had a blood alcohol content of .021. The report filled out by the technician stated that a test was done at 9:33 a.m. and had a blood alcohol content of .031.

DISCUSSION

NYCCBL § 12-306(e) 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 Section 1-07(b)(4), formerly § 1-07(d), of the newly revised 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 or from the time the petitioner knew or should have known of said occurrence. *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). Here, it is undisputed that the Union told Petitioner that it would not be able to help him with the termination of his employment in early June 2003. However, Petitioner did not file his petition until December 1, 2003, approximately six months later.

Furthermore, repeated requests with no response from the Union do not serve to toll the running of the statute of limitations when a petitioner knew or should have known at an earlier time that the Union would not pursue a grievance. *Id.* at 12; *Overstreet*, Decision No. B-37-98 at 5. Since Petitioner here knew or should have known in June 2003 that the Union would not assist him, the letter he sent in September 2003 did not extend the time to file.

Petitioner has not raised an independent improper practice claim against the City. Since we dismiss the claim against the Union, any potential derivative claim against the employer

pursuant to NYCCBL § 306(d) must also fail.[3] *See* OCB Rule § 1-07(F)(iii), formerly § 1-07(f)(2). *Raby* at 13. Therefore, the petition is dismissed in its entirety.

[3] NYCCBL § 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.

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, BCB-2370-03, be, and the same hereby is, dismissed in its entirety.

Dated: May 17, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER