Vazquez, 75 OCB 36 (BCB 2005)

[Decision No. B-36-2005(IP)] (Docket No. BCB-2430-04).

Summary of Decision: Petitioner claimed that the Union breached its duty of fair representation and prevented and restrained Petitioner from exercising his rights pursuant to NYCCBL § 12-305. Petitioner also alleged that DOT colluded with the Union to deny him a promotion and retaliated against him after he filed a FOIL request which contained complaints against the Union. The Union claimed that the petition is untimely, failed to set forth facts sufficient to state a violation of the NYCCBL, and was barred by the Petitioner's failure to exhaust his available administrative remedies. DOT claimed that Petitioner failed to allege facts sufficient to compel joinder of DOT and has failed to allege facts sufficient to establish that NYCCBL § 12-306 was violated. The Board dismissed the petition because it was untimely in part, and the remaining allegations failed to state a claim under § 12-306. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ISRAEL VAZQUEZ,

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 237 & NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On September 13, 2004, Israel Vazquez filed a verified improper practice petition against the International Brotherhood of Teamsters, Local 237 ("Local 237" or "Union") and the New York City Department of Transportation ("DOT"). The petition alleges 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, Chapter 3) ("NYCCBL"), when it breached its duty of fair representation and prevented and restrained Petitioner from exercising his rights pursuant to NYCCBL § 12-305. Petitioner also alleges that DOT colluded with the Union to deny him a promotion and retaliated against him after he filed a Freedom of Information Law ("FOIL") request which contained complaints against the Union. The Union claims that the petition is untimely, fails to set forth facts sufficient to state a violation of the NYCCBL, and is barred by Petitioner's failure to exhaust his available administrative remedies. DOT claims that Petitioner has failed to allege facts sufficient to establish that NYCCBL § 12-306 was violated. The Board dismisses the petition because it is untimely in part, and the remaining allegations fail to state a claim under NYCCBL § 12-306.

BACKGROUND

Petitioner has been employed by DOT in various titles since 1991. He is currently an Associate Parking Control Specialist, Level II, is assigned to DOT's Parking Control Division ("PCD"), and serves in the in-house title, Assistant Chief.

On January 28, 2004, a Union meeting was held. Petitioner claims that during the meeting, a Local 237 business agent, Noreen Hollingsworth, circulated among other PCD employees a petition to the DOT Commissioner that accused Petitioner and another supervisor of "repeated overt harassments, ethnic discrimination, management encouraged separatism and several other issues." Hollingsworth did not sign the petition, but twelve PCD employees did. On February 4, 2004, Hollingsworth forwarded the petition, with a cover letter explaining why she thought the complaints of harassment were so serious and should be addressed, to DOT's Director of Employee/Labor

Relations. The petition was also forwarded to other DOT offices, including DOT's Equal Employment Opportunity Coordinator.

Petitioner contends that he was subsequently denied a promotion to Chief of PCD. DOT claims that, in December 2003, PCD's Chief was demoted to Captain for misconduct, that it had not been seeking to fill the position of Chief, that it had not made any posting or other announcement for the position, and that the position remains vacant. Petitioner claims that after December 2003, employees at PCD began to refer to a particular employee as Chief, and that that employee was listed as "Acting Chief" on the PCD Organizational Chart for 2004.[1] Both Respondents note that both Chief and Assistant Chief are in-house titles and are neither civil service titles nor are they recognized in the parties' collective bargaining agreement.

Petitioner compiled a petition, dated February 24, 2004, calling for Hollingsworth to be removed as business agent. The petition had eight signatories, who signed the petition between March 1 and March 5, 2004. Petitioner contends that from February through April 2004, he informed the Conflicts of Interest Board of the City New York of what he perceived to be Local 237's and Hollingsworth's misdeeds, and confronted Union officials, at subsequent Union meetings, about the petition that Hollingsworth circulated among employees at the January 28, 2004, meeting. Petitioner also claims he has never been welcome at union meetings. The Union denies the allegations.

Petitioner contends that he was contacted by a Supervisor at DOT's Advocate General's Office ("OAG") in April 2004 regarding an anonymous letter that made a complaint against him.

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[1] The Organizational Chart that Petitioner provided is not dated, but bears a date stamp that reads March 22, 2004.

He claims that the allegations are false and that he perceived the contact by the OAG as a threat of disciplinary charges against him.

Pursuant to FOIL, on June 25, 2004, Petitioner submitted a letter to the DOT Deputy General Counsel of Litigation requesting a copy of the petition submitted by Hollingsworth and of all negative statements made against Petitioner and another supervisor in connection with the petition. The letter also included Petitioner's complaints against the Union.

Petitioner alleges that after he filed the FOIL request, DOT incorrectly recorded vacation time as leave without pay, opened an item of personal mail that was marked "Confidential," denied him opportunities to work overtime, and took disciplinary action against him. Petitioner claims that on his July 2 and July 16, 2004, paychecks, his vacation time was incorrectly designated as Leave Without Pay. The City claims that when the error was brought to its attention, it fixed the error, and that a DOT Deputy Director wrote a Directive to DOT employee Robert Eusatache on July 30, 2004, advising him that neither he nor anyone employed in the administration section of the PCD has the authority to alter time card codes without his or another Deputy Chief's approval. Petitioner claims that he still has eight hours incorrectly coded as Leave Without Pay.

It is undisputed that when Petitioner returned to work from a vacation on July 14, 2004, he found that an item of personal mail, marked "Confidential," had been opened. That day, Petitioner sent an email to Carlos Torres and Susi Vincent, among other DOT employees, complaining that a piece of his personal mail had been "tampered with" and opened "illegally." On July 15, 2004, Susi Vincent sent Erica Caraway, Disciplinary Counsel at OAG, a copy of Petitioner's complaint with the notation, "For your attention and appropriate action."

On August 16, 2004, Petitioner renewed his FOIL request to DOT. On August 18, 2004,

Petitioner requested the same information from the Union pursuant to FOIL. He did not receive a response. On September 9, 2004, DOT's Records Access Officer denied Petitioner's FOIL request, stating that the records could not be disclosed because their release would constitute an unwarranted invasion of personal privacy.

On September 21, 2004, Petitioner received an advisory memorandum from the Deputy Chief of PCD regarding his authorization of overtime for another employee, which was deemed excessive. Petitioner claims that he did not "authorize" the overtime even though he signed the time cards because he was out on sick leave when the overtime was worked, another employee had approved the overtime, and Petitioner wanted to ensure that the employee got his regular paycheck.

As a remedy, Petitioner seeks: (1) appointment to the provisional position of Chief of PCD, with retroactive pay and benefits; (2) reinstatement of Petitioner's approved leave from Leave Without Pay to paid leave; (3) the appointment of a separate Local 237 business agent and the election of a separate shop steward to represent Assistant Chiefs and Captains; (4) an order directing Local 237 to hold monthly meetings for Assistant Chiefs and Captains; (5) compensation for lost sick leave time as a result of Respondents' actions; and (6) an order directing Respondents to provide Petitioner with a copy of the January 28, 2004, petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union violated NYCCBL § 12-306(b)(1) and (3) because Hollingsworth represented members of Local 237 in three different titles within PCD. Petitioner contends that Hollingsworth's representation of the non-supervisory employees concerning the

matters alleged in the January 28, 2004, petition presented a conflict with the rights of Petitioner, a supervisory employee. Hollingsworth also used her position as business agent to the direct detriment of Petitioner, and to the benefit of other union members.[2] Hollingsworth's collusion with certain PCD employees and her urging others to sign a petition against Petitioner, and then her forwarding of the petition to DOT, caused Petitioner to be denied a promotion. The Union also failed to take action after Petitioner informed Local 237 of the apparent conflict of interest in having Hollingsworth act as the business agent for Petitioner and his subordinates, and failed to provide Petitioner with a copy of the January 28, 2004, petition. Finally, Petitioner claims that he has never been welcome at Union meetings.

Petitioner argues that DOT engaged in improper practices in violation of NYCCBL § 12-306(a)(1) and (3) by colluding with Local 237 and Hollingsworth to deny Petitioner a promotion to the position of Chief of PCD.[3] DOT also retaliated against him for requesting the January 28, 2004,

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[2] Section 12-306(b) of the NYCCBL provides:
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.

[3] Section 12-306(a) of the NYCCBL provides, in relevant part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

Section 12-305 of the NYCCBL provides:
Public employees shall have the right to self-organization, to form, join or assist public
(continued...)

petition by refusing to provide it to him. Petitioner also contends that since making the FOIL request to DOT, PCD has opened and read his mail, incorrectly designated vacation time as Leave Without Pay, which has still not been fully corrected, has not given him overtime opportunities, has subjected him to false disciplinary charges regarding the authorization of overtime, and has contacted him regarding an anonymous letter that made false allegations against him.

Union's Position

The Union contends that the petition fails to set forth facts sufficient to state a violation of NYCCBL § 12-306, that the petition is barred in whole or in part by the applicable statute of limitations, and that Petitioner has failed to exhaust his administrative remedies available under Local 237's constitution and by-laws, the parties' collective bargaining agreement, and FOIL.

City's Position

The City argues that it is improperly joined as a party, as the petition alleges a breach of the duty of fair representation and not an allegation that the Union failed to properly process a claim that DOT breached its agreement with the Union. It further alleges that even if DOT were properly joined, the Petitioner has failed to allege facts sufficient to establish that the Union violated NYCCBL § 12-306(b)(1) and (3).

The City also argues that the petition must be dismissed because Petitioner has failed to allege facts sufficient to establish that DOT violated NYCCBL § 12-306(a)(1) and (3). The Petitioner's actions do not constitute protected union activity and the Petitioner has not shown that

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[3](...continued)
employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

DOT's actions were undertaken for the purpose of frustrating his statutory rights.

Furthermore, in the event the Petitioner could establish a *prima facie* case of improper practice, the petition would still fail because DOT's actions were legitimate. Petitioner's FOIL request was denied because the documents requested contained complaints of harassment and discrimination against Petitioner, and DOT advised him that disclosure of the records would constitute an unwarranted invasion of the complainants' privacy. DOT argues that the record shows that Petitioner was denied additional hours of overtime along with ten other employees because they exceeded DOT's cap on overtime. A piece of Petitioner's personal mail was mistakenly opened, but as a precaution, PCD referred his complaint to DOT's OAG for investigation. Petitioner's leave was indeed coded incorrectly, but DOT took immediate action to correct it when the error was brought to its attention and issued an advisory memorandum to the employee responsible for the error. Finally, Petitioner was not subjected to disciplinary charges, but received one advisory memorandum regarding the authorization of excess overtime.

DISCUSSION

As a preliminary matter, we find that the instant petition is barred in part by the four month statute of limitations. Section 12-306(e) of the NYCCBL 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. . . .

See also Section 1-07(b)(4), of the Rules of the Office of Collective Bargaining (Rules of the City

of New York, Title 61, Chapter 1). 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 know of said occurrence. *Rivera-Bey*, Decision No. B-20-2004; *Antoine*, Decision No. B-8-2004 at 9; *Raby*, Decision No. B-14-2003 at 9, *aff'd sub. nom., Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).

Here, the petition was filed on September 13, 2004. Petitioner claims that between January and April 2004, the Union's business agent, Hollingsworth, colluded with PCD employees and urged them to sign a petition against Petitioner, made him unwelcome at Union meetings, and forwarded the January 28, 2004, petition to DOT. Since these acts are alleged to have occurred more than four months before the filing of the improper practice petition, they are untimely. Any allegations against DOT that it colluded with Local 237, and failed to promote him to the position of Chief of PCD, are also untimely because the alleged failure to promote occurred more than four months before the filing of the petition. Furthermore, Petitioner's complaint that in April 2004, he was contacted by OAG regarding the receipt of an anonymous letter, which Petitioner perceived as a threat, is also untimely.

However, Petitioner's claims that he was retaliated against by DOT for requesting a copy of the petition, and that Respondents failed to provide him with a copy of the January 28, 2004, petition, are timely, because these acts occurred within the four-month statute of limitations.

To the extent, if any, that Petitioner's claims that the Union failed to do anything about Hollingsworth's behavior or to remove her from the position of business agent as requested in the petition compiled by Petitioner in February 2004, are timely, we find the claims to be without merit. Issues regarding the discipline or removal of a union business agent concern an internal union matter

over which the Board has no jurisdiction. *Crescente*, Decision No. B-45-99 at 7; *Braxton*, Decision No. B-9-97 at 16.

Petitioner's allegation that the Union failed to provide him with a copy of the January 28, 2004, petition appears to involve a claim that the Union breached its duty of fair representation. In the context of a certified employee representative's exclusive authority under the NYCCBL, the duty of fair representation does not reach into and control all aspects of the Union's relationship with its members. *See Shapiro*, Decision No. B-9-86 at 13-14; *McAllan*, Decision No. B-26-84 at 7-9; *Fortunato*, Decision No. B-23-84 at 9-10. We have found that the duty of fair representation is co-extensive with the union's exclusive authority to deal with the employer only with respect to the negotiation, administration, and enforcement of a collective bargaining agreement. *See Shapiro*, Decision No. B-9-86 at 13-14; *McAllan*, Decision No. B-26-84 at 7-9; *Fortunato*, Decision No. B-23-84 at 9-10.

The duty of fair representation does not extend to the provision of information unrelated to the negotiation, administration and enforcement of a collective bargaining agreement. *Shapiro*, Decision No. B-9-86 at 14. In *Shapiro*, a union member claimed that the union breached its duty of fair representation because it did not provide him with information regarding contract negotiations beyond that already provided. The member's request did not indicate the nature of the additional information sought or demonstrate the request's relevance to the subject negotiations. Since petitioner did not demonstrate its relevance to the negotiation, administration, or enforcement of a collective bargaining agreement, the Board held that the union had no duty to provide the information.

Here, since Petitioner has failed to show how the Union's failure to provide him with a copy

of a petition signed by PCD employees has any impact on the negotiation, administration, or enforcement of a collective bargaining agreement, we dismiss his claim. Petitioner has also not shown how the Union's non-response to a request made pursuant to FOIL interfered with his rights under NYCCBL § 12-305, in violation of NYCCBL § 12-306(b)(1). Moreover, we note that the record shows that Petitioner otherwise obtained a copy of the requested petition and Hollingsworth's letter of transmittal to DOT, as he attached copies of these documents to his reply.

We now address Petitioner's contention that he was retaliated against by DOT for his FOIL request. In determining if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Sergeants' Benevolent Ass'n*, Decision No. B-22-2005 at 21-22.

For activity to be protected under the NYCCBL, it must not only pertain to the relationship between the employer and the bargaining unit employee but must, at a minimum, be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual. *Local 376, District Council 37*, Decision No. B-15-2004; *Doctors Council*, Decision No. B-12-97. For

example, in *Procida*, Decision No. B-2-87, we found that petitioner's complaints about an employer's conduct were personal in nature because his letters advancing the complaints spoke only of his work assignments and the agency's failure to promote him to replace provisional employees serving in a higher title. Thus, petitioner's actions did not constitute activity which fell within the protection of NYCCBL § 12-306.

Here, Petitioner's actions in requesting a copy of the petition signed by PCD employees and "all the negative statements" made against him and another supervisory employee regarding the subject of the petition did not constitute protected union activity. His letter advances a complaint that is personal in nature and refers only incidentally to the fact that one other supervisor is affected. Moreover, the letter does not assert any right or claim any violation under the collective bargaining agreement. The letter largely recounts Petitioner's personal complaints against his Union and how he is barred from meetings and how members of the Union are conspiring against him personally and individually.

Furthermore, even if Petitioner's activity could be considered protected under the NYCCBL, Petitioner has not asserted or shown how those responsible for the alleged retaliation at DOT knew or should have known of his FOIL request. Petitioner's FOIL request was addressed to the Deputy Counsel of Litigation, and ruled upon by DOT's Records Access Officer. Petitioner makes no showing that those responsible for the alleged retaliatory acts knew of his FOIL request. Thus, Petitioner has not satisfied the requirements of the first prong of the *Salamanca* test.

To the extent Petitioner may be claiming that either party's failure to provide information was violative of FOIL, we have held that the Board lacks statutory authority to consider claims that allege a violation of a statute other than our own, as they do not raise issues that are within our jurisdiction.

Pruitt, Decision No. B-11-95 at 12; *Trammell*, Decision No. B-38-87 at 8-9. Accordingly, the petition is dismissed in its entirety.

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 docketed as BCB-2430-04, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
December 5, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER