Rodriguez v. L.30, IUOE & Elmhurst Hospital, 53 OCB 13 (BCB 1995) [Decision No. B-13-95 (IP)]

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

-between-

Julio Rodriguez,

Petitioner,

Decision No. B-13-95
Docket No. BCB-1643-94

-and-

Local 30, I.U.O.E, and Elmhurst Hospital,

Respondents.
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INTERIM DECISION AND ORDER

On February 22, 1994, Julio Rodriguez ("petitioner") filed a verified improper practice petition. He alleges that Local 30 of the International Union of Operating Engineers ("Union") committed an improper practice by not representing him fairly at a disciplinary hearing, and that this failure lead to his termination from the position of Plant Maintainer (Oiler). The petition also named the employer, Elmhurst Hospital, as a respondent. In the petition, reference was made to attachments which the petitioner had neglected to include. He was asked to file a copy of the original petition with the referenced attachments, and did so on April 4, 1994.

By letter dated March 17, 1994, the law firm of Adam Ira Klein, Esq. advised the office of Collective Bargaining that it was appearing in the case on behalf of the Union. By letter dated June 23, 1994, Elmhurst Hospital, by the New York City Health and Hospitals Corporation ("HHC"), requested an extension

of one week to file an answer to the petition, which was granted. On June 27, 1994, HHC filed a motion to dismiss, claiming that the petitioner had failed to state an improper practice under the New York City Collective Bargaining Law ("NYCCBL").

On October 13, 1994, the Trial Examiner advised the Union that it had not filed an answer to the petition. The Union filed an answer on November 23, 1994. The petitioner filed a reply on February 2, 1995.

A pre-hearing conference was held on March 31, 1995 to discuss, among other matters, HHC's motion to dismiss. HHC requested that the claim against Elmhurst Hospital be dismissed, contending further that no remedy could be afforded the petitioner even if his claim were upheld. The Union requested that the claim against it be dismissed, arguing that the petitioner had no right to representation under the Union's contract. The Trial Examiner afforded the Union and HHC the opportunity to file additional motions to dismiss, and the petitioner the right to reply. The Union stated that it chose to proceed to a hearing. HHC filed another motion to dismiss on April 20, 1995. The petitioner filed a reply to HHC's motion on May 1, 1995.

Background

Julio Rodriguez was appointed by Elmhurst Hospital as a provisional Plant Maintainer (Oiler) on February 11, 1991. The Hospital claimed that the petitioner abandoned his post on

December 10, 1993. On December 27, 1993, he was served with a notice of a Step 1A disciplinary hearing. A business representative of the Union, Martin Ross, attended the hearing, which was held on January 4, 1994. The testimony of Edward McGay, a Stationary Engineer who is also a member of the Union, was cited extensively by the hearing officer in his recommendation upholding the charges. The petitioner was terminated by letter dated January 25, 1994.

According to the Union, Ross "zealously represented" the petitioner at the Step 1A hearing, "elicited the testimony of petitioner, cross examined respondent Elmhurst's witnesses and offered into evidence several documents, including letters of other Elmhurst employees which contradicted the underlying disciplinary charges." According to the petitioner, Ross failed to represent him and indicated that he did not intend to represent him. The petitioner claims that Ross:

> appeared to represent Edward J. McGay. Rather than introducing Mr. Rodriguez's supporting affidavits and cross examining Mr. McGay's version of the facts, Mr. Ross simply looked to Mr. Rodriguez to make a statement.... None of the highly suspect actions of management were questioned by Mr. Ross in this matter in any respect and Mr. Ross failed to say anything whatsoever on Mr. Rodriguez's behalf.

According to the Union and HHC, provisional employees with two or more years of service with HHC may accept the informal conference recommendation or appeal to the Personnel Review Board (“PRB”), but do not have the right to pursue grievances. A notice of appeal to the Personnel Review Board was filed on

January 26, 1994 and the petitioner retained independent counsel for the appeal.

A PRB hearing was held on June 2, 1994. The hearing officer issued a finding of guilt and recommended termination. On January 30, 1995, the PRB issued a Decision and order affirming the hearing officer's findings that the termination of the petitioner's employment was neither arbitrary nor capricious, that it was supported by a fair preponderance of credible evidence, and that the penalty was not excessive.

Positions of the Parties

HHC's Position

HHC maintains that the Board of Collective Bargaining has neither authority nor jurisdiction to review the PRB decision and order and may not order a new hearing. If the sole issue remaining is the Union's failure fairly to represent the petitioner, it claims, and the Board finds in favor of the petitioner, any monetary award would be solely against the Union. For these reasons, it argues, HHC need not be retained as a party in the case.

Petitioner's Position

The petitioner asserts that his work was not evaluated, nor was a complaint made about him, during the two and a half years that he worked at Elmhurst Hospital. He alleges that in December 1993, seven performance evaluations were prepared without his

knowledge by individuals who were not familiar with his work performance. He maintains that he was not aware of these performance evaluations until the end of December 1993, shortly before he was notified to appear at a Step 1A disciplinary conference.

The petitioner contends that an abnormally long amount of time elapsed between the occurrence of the alleged incident upon which his termination was predicated and the time when the disciplinary conference was held. According to the petitioner, although Ross was supposed to appear at the conference on his behalf, the Union's representative protected the interests of others at the hearing rather than his interests. He alleges further that neither the Hospital nor the Union investigated or interviewed potential witnesses who would have supported his position.

The petitioner asserts that he does not request the Board to review the PRB decision. The issue, he maintains, is whether the Hospital participated with the Union in engaging in a course of conduct with the intention of depriving him of rights under the collective bargaining agreement. This issue, he argues, was not heard by the PRB.

If the Hospital participated in the Union's failure to represent him, the petitioner claims, it is responsible for the injury done to him. He asserts that the Hospital violated its own rules by issuing numerous performance evaluations from individuals with whom he rarely worked, although no evaluations

were issued during the course of his employment. He claims that, by so doing, the Hospital acted in a manner contrary to his rights under the collective bargaining agreement. If the Union is found to have breached its duty of fair representation, the petitioner maintains, the Hospital may be required to participate in a remedy. For this reason, he contends, HHC must remain a party to the case.

Discussion

When evaluating a motion to dismiss, the facts alleged by the petitioner are deemed to be true. The only question is whether, on its face, the petition states an arguable cause of action under the NYCCBL. In addition, the petition is entitled to every favorable inference and will be taken to allege whatever may be implied by reasonable and fair intendment.[1]

The sole question to be addressed in this interim decision is whether HHC is to remain a party in the case. HHC argues that this Board has no jurisdiction over the PRB and, for that reason, may neither review the PRB proceedings nor order a new hearing. We view the situation differently.

Although our authority does not extend to the administration of a statute other than the NYCCBL,[2] this Board has jurisdiction

[1] See, e.g., Decision Nos. B-15-94; B-15-93; B-4-93; B-17-92; B-36-91; B-34-91; B-33-91; B-32-91; B-6-91.

[2] Decision Nos. B-21-93; B-1-83;

over HHC as a respondent to a charge of improper labor practice.[3] The petitioner has made an arguable claim against the Union of a breach of the duty of fair representation. Section 209-a.3 of the Taylor Act requires that the public employer be joined as a party when a union is alleged to have breached its duty of fair representation in processing or failing to process a claim that the public employer has breached its agreement with a union.[4]

In the instant case, the parties agree that the Step 1A disciplinary conference was held pursuant to the applicable collective bargaining agreement. The Union appeared at the conference and purported to represent the petitioner. The petitioner's claim of a breach of the duty of fair representation is based on events which allegedly occurred at the Step 1A disciplinary conference.

We are required to make a public employer a party "to any charge...which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer breached its agreement with such employee organization."[5] The petitioner's claim is the type of claim contemplated by the statute, that is, that the Union breached its duty fairly to

[3]Decision Nos. B-57-87.

[4]Decision Nos. B-15-93; B-4-93.

[5]Civil Service Law § 209-a.3.

represent him at a disciplinary hearing held by HHC pursuant to the contractual grievance procedure. In the circumstances of the instant case, the Taylor Act clearly requires joinder of HHC and its continued participation as a party. Accordingly, the motion must be denied.

The arguments presented by HHC concerning the effect of the PRB decision, and our power to review that matter, relate to the question of the remedy to be granted if the claim against the Union is sustained, not to the status of HHC as a necessary party in the case. It is premature and unnecessary to address the question of the scope of the Board's remedial powers in the context of the instant motion, and we decline to do so.

INTERIM 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 motion to dismiss submitted by the New York City Health and Hospitals Corporation in Docket No. BCB-1643-94 be, and the same hereby is, denied.

Dated: New York, New York
June 21, 1995

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

THOMAS GIBLIN
MEMBER

ROBERT BOGUCKI
MEMBER

SAUL KRAMER
MEMBER