SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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In the Matter of the Application of

LLEWELLYN LIBERT,

Petitioner

For a Judgment under Article 78 of Civil Practice Law and Rules,

Index No. 401234/97

-against-

NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING,

Respondents.

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HERMAN CAHN, J.:

In this Article 78 proceeding, the petitioner seeks an order annulling and setting aside a determination (Decision No. B-1-97) of respondent Board of Collective Bargaining ("Board") of respondent New York City Office of Collective Bargaining (“OCB”) dated January 30, 1997. Respondents have moved to dismiss the petition on the ground that this proceeding is barred by the thirty-day limitations period applicable to Article 78 review of Board decisions, which is contained in section 213(a) of the New York State Civil Service Law.

On July 11, 1994, petitioner was initially employed in the civil service position of Provisional Principal Administrative Associate, Level II (PAA-II) and assigned to the Department of Health's Tuberculosis control unit in the in-house title of Special Assistant to the Program Management officer, Joseph Slade. Effective April 13, 1995, petitioner's title was administratively

changed from PAA-II to the non-competitive civil service title of Community Associate. Petitioner alleges that the change was occasioned by the fact that appointments were then being made by the City from a Civil Service list, and that petitioner was at risk of being replaced by someone appointed from the list had his title not changed. Petitioner's supervisor recommended and urged him to accept the change in title, representing that it was the only way to save his job. The job staff, however, did not change as a result of the change in title, and petitioner continued to perform the same functions and duties he previously performed in the same office, at the same address, and for the same supervisor.

Effective August 29, 1995, petitioner was terminated from his position with the Department of Health, approximately four and one-half months after the title change.

Petitioner's union, Local 371, Social Services Employees Union ("SSEU Local 371"), filed a Step I grievance contesting petitioner's termination. When no response was received to the Step I grievance, the union filed a Step III grievance on November 24, 1995. No response to this grievance having been received, the union filed a request for arbitration on February 15, 1996. On May 23, 1996, the City of New York filed a verified petition challenging the arbitrability of petitioner's grievance. On August 9, 1996, SSEU Local 371 filed an answer, and on September 4, 1996, the City filed a reply. The Board rendered its determination in Decision No. B-1-97 on January 30, 1997, granting the City's petition challenging arbitrability on the ground that petitioner

was a non-competitive employee with less than six months in-title at the time his employment was terminated, and, therefore, was not covered by the parties agreed upon grievance procedure.[1]

Respondents allege that a copy of Decision No. B-1-97 was served upon SSEU Local 371 by certified mail to the union's attorney of record, Jeffrey L. Kreisberg, Esq., on January 31, 1997. It is also alleged that the decision was actually received by Kreisberg's office on February 3, 1997, as is evidenced by a U.S. Postal Service return receipt. The instant Article 78 proceeding was commenced by petitioner, acting pro se, on March 21, 1997, 52 days after the claimed service of the decision on SSEU Local 371's attorney.

Petitioner's original petition alleged that the Board should have denied the City's May 23, 1996 filing of a petition challenging the arbitrability of his grievance on that ground of untimeliness. Petitioner relies on OCB's own rules, specifically title 61, chapter 1, section 1-06 (d) of the-New York City Rules and Regulations ("NYCRR"), which provides as follows:

> A request for arbitration may contain a notice that a petition for final determination by the board, as to whether the grievance is a proper subject for arbitration, must be served and filed within ten (10) days or the party served with the notice shall be precluded thereafter from contesting in any forum the arbitrability of the grievance. A petition pursuant to

[1]The City and SSEU Local 371 are parties to a collective bargaining agreement covering the period January 1, 1992 through March 31, 1995. Article VI (1) (f) of this agreement defines a grievance to include "[a] claimed wrongful disciplinary action taken against a full-time non-competitive employee with six (6) months service in-title,...."

> §1-07(c) of these rules[2] must be served and filed with the board within ten (10) days after service of such notice or the party served therewith shall be so precluded.

It appears that the request for arbitration contained such a notice, and that the City's petition was filed on May 23, 1996, more than three months after petitioner's request for arbitration was filed.[3]

Following service of respondents' motion to dismiss, petitioner filed a Second Amended Petition, in which he specifically alleges that SSEU Local 371 breached its duty of fair representation by (1) failing to raise the untimeliness of the City's petition as an affirmative defense in the answer it filed in opposition to the City's petition; and (2) refusing to pursue the matter further after the unfavorable decision was rendered by the Board. Although this proceeding was filed on March 21, 1997, petitioner claims that he did not become aware of the union's breach of its duty to him until March 24, 1997. (Affidavit of Llewellyn Libert sworn to on April 25, 1997 at ¶4).

The rights and obligations of public sector employees and unions are governed by article 14 of the Civil Service Law (Civil Service Law § 200 et seq.; Baker v. Board of Educ., 70 NY2d 314, 319). Section 213 of that law provides that final orders of the

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[2]Section 1-07(c) refers to petitions regarding the scope of collective bargaining and grievance procedure.

[3]It should be noted that the ten day period runs from service of the request for arbitration (22 NYCRR § 1-06 (d]). The record on this motion contains only the date the request for arbitration was filed with the Board, not when it was served on the City.

Board are reviewable under CPLR article 78 "upon petition of an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party. . . .” Here, respondents argue that a copy of the decision was served on the attorney of record for SSEU Local 371 -- petitioner's duly certified bargaining representative -- on January 31, 1997 in accordance with the statute. Thus, the instant Article 78 petition, being filed more than 30 days following said service, is time-barred.

Although the: alleged service was on the attorney for petitioner's union, and not on the petitioner himself, the service is proper (Kalinsky v. State University of New York at Binghampton, 2.14 AD2d 860). However, respondents have not met their burden on this motion of showing that a true or properly conformed copy of the Board's decision was served by certified mail on SSEU Local 371's attorney. The affidavit submitted in support of this motion is from the Deputy Chair and General-Counsel of the OCB, who does not give the basis for her personal knowledge of the alleged service. While she submits a copy of a return receipt card, there is nothing to tie that receipt to the alleged service of a copy of Decision No. B-1-97 on SSEU Local 371's attorney. Moreover, the copy of the decision allegedly served (or at least the copy attached to respondents' motion papers) is unsigned, nor is it a copy which has been conformed. Accordingly, respondents have not met their burden on this motion to dismiss.

In any event, even assuming that SSEU Local 371's attorney was

properly served with a completely conformed copy of Decision No. B-1-97 on January 31, 1997, petitioner correctly argues that the proceeding is not untimely because of the 1990 amendment to CPLR 217 adding subsection 2 (b) (see, L 1990, ch 467) This subsection states, in pertinent part, that:

> Any action or proceeding by an employee or former employer against an employer subject to article fourteen of the civil service law..., an essential element of which is that an employee organization breached its duty of fair representation to the person making the complaint, shall be commenced within four months of the date the employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later [emphasis added].

Petitioner has amended the petition to allege that SSEU Local 371 breached its duty of fair representation by failing to raise the untimeliness of the City's petition challenging petitioner's request for arbitration, pursuant to 13 NYCRR §1-06(d), as an affirmative defense in the answer it filed in opposition to the City's petition (see, Civil Service Law §203). Petitioner also claims that his union breached its duty of fair representation to him by refusing to pursue the matter further after the unfavorable decision was rendered by the Board, and presumably, by failing to commence an Article 78 proceeding within 30 days or advise petitioner of said time constraints. Since this proceeding was commenced within four months of the date petitioner alleges he learned of his union's breach of duty, it is not time-barred.

For the foregoing reasons, it is hereby

ORDERED that the respondents, motion to dismiss the petition is denied and respondents are directed to serve and file an answer

to the Second Amended Petition within thirty (30) days of service of a copy of this order upon their attorney with notice of entry.

Dated: December 24, 1997

ENTER:

J. S. C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 49

In the Matter of the Arbitration of

LLEWELLYN LIBERT,

Petitioner,

Index No. 401234/97

-against-

NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING,

Respondents.

HERMAN CAHN, J.:

Petitioner, a former employee of the City of New York, brought this proceeding pro se, to annul and overturn an adverse decision of respondent New York City Board of Collective Bargaining (the "Board") dated January 30, 1997. Respondents move, pursuant to CPLR 2221, for reargument and/or renewal of this court's decision and order dated December 24, 1997 denying their motion to dismiss the petition. That motion sought dismissal on the ground that this proceeding was commenced in excess of the 30-day period of limitations contained in Civil Service Law § 213(a).

In support of their motion for reargument, respondents argue: (1) that the court improperly accepted petitioner's Second Amended Petition dated April 25, 1997, (2) that the Board had met its burden of showing that a true or properly conformed copy of the Board's decision was served by certified mail on petitioner's

counsel on January 31, 1997; and 7) that the court erred in finding this proceeding timely pursuant to the four-month Statute of Limitations contained in CPLR 217(2)(b), when the limitations period of Civil Service law 213(a) controlled. For the foregoing reasons, reargument is granted as to the first and third contentions, and renewal is granted as to the second contention regarding service of the Board's decision.

Starting with the alleged improprieties concerning the Second Amended Petition, the court notes that the original Petition, dated March 27, 1997, was returnable on April 29, 1997. Respondents filed their motion to dismiss the Petition on or about April 16, 1997 in accordance with CPLR 7804(c) and (f) i.e., five days before the Petition was noticed to be heard. Petitioner then had the right to submit reply papers one day before the return date of the Petition (CPLR 7804[c]). What petitioner did here was to serve and file a Second Amended Petition dated April 25, 1997 returnable on May 15, 1997 (despite the fact that the original petition and motion were noticed for April 29, 1997) together with an affidavit in opposition to the motion to dismiss. Respondents are correct that this amended petition was not filed with leave of court as required by CPLR 3025(b), and, as discussed below, the amendment should not have been allowed. In addition, petitioner's papers raised a brand new claim, i.e., that petitioner's union, non-party Social Services Employees Union, Local 371 (“SSEU Local 371"), had breached its duty of fair representation both with respect to the

underlying arbitration proceeding, before the Board and in the instant proceeding. Where a party has not been given a chance to respond, new claims raised for the first time in reply papers should not be considered by the court (Azzonardi v American Blower Corp., 192 AD2d 453, 454 [1st Dept 1993]; Ritt v Lenox Hill Hospital, 182 AD2d 560, 562 [1st Dept 1992]),

Second, the court found that the evidence proffered by the respondents in support of the claim that the Board's decision was served by certified mail on petitioner's counsel of record on January 31, 1997 was insufficient to meet their burden of proof on this issue. Again, because respondents did not submit additional evidence on this issue, renewal is proper. Counsel for respondent Office of Collective Bargaining has now sufficiently explained the basis of her personal knowledge, has detailed the procedures relating to the mailing of decisions of the Board, has supplemented the supporting documentary evidence, and has explained the reason for the absence of the signatures of the seven members of the Board who joined in the decision. Considering all of this new evidence, the Court finds that the respondents, have now met their burden of proof on this issue and that a copy of the Board's decision was served by certified mail on petitioner's counsel on January 31, 1997.

The third and final ground for reargument is that the court wrongly applied the four-month Statute of Limitations contained in CPLR 217(2)(b), and not the 30 days specified by Civil Service Law § 213(a). Respondents are correct that the 30 day limitations

period applies:

Since this proceeding was not commenced until March 21, 1997, it is untimely under this limitations period.

In the prior decision, the court ruled that CPLR 217(2)(b) was applicable to this proceeding. That section, which was added by the Legislature in 1990 (L 1990, ch 467), states in pertinent part:

> (b) Any action or proceeding by an employee or former employee <u>against an employer subject to article fourteen of the civil service law</u> ... , an essential element of which is that an employee organization breached its duty of fair representation to the person making the complaint, shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

(Emphasis added). Upon reargument, the court determines that this section does not apply to this proceeding for two reasons. First, the Board was not the petitioner's employer as is required by CPLR 217(2)(b). The Board is an independent, neutral decision-making body charged with administering and enforcing the provisions of the New York City Collective Bargaining Law. The City of New York was petitioner's employer, and has never been named a respondent in this proceeding. Second, the petition that was the subject of the respondents, motion to dismiss did not contain any claim, an essential element of which is that the petitioner's union breached its duty of fair representation to him. Even assuming that, pursuant to CPLR 3025(b), petitioner had requested leave to amend his petition to add this claim, and

leave should have been denied.

It is well settled that a union breaches its statutory duty of fair representation only when its conduct toward a member is arbitrary, discriminatory or in bad faith. (Civil Service Bar Assn., Local 237, Intl. Brotherhood of Teamsters v City of New York, 64 NY2d 188, 195-96 [1984]; Kleinmann v Bach, 195 AD2d 736 Dd Dept 19931). "The fact that the union was guilty of mistake, negligence or lack of competence does not suffice for such a claim." (Mellon v Benker, 186 AD2d 1020, 1021 [4th Dept 1992]; see also, Kaminsky v Connolly, 51 AD2d 218, 221 [1st Dept 1976], affd 41 NY2d 1068 [1977]; Trainosky v Civil Service Employees Assn., Inc., 130 AD2d 827 Dd Dept 19871). Moreover, "[a] union is not required to carry every grievance to the highest level, and the mere failure on the part of a union to proceed to arbitration with a grievance is not, per se, a breach of its duty of fair representation." (Matter of Garvin v New York State Public Employees Relations Bd., 168 AD2d 446, 447 [2d Dept 1990]).

Here, the petitioner alleges nothing more than a failure by SSEU Local 71 to object to the timeliness of the City's petition challenging the request for arbitration, and a failure to pursue the matter in this Court by way of an Article 78 proceeding within 30 days of service of the Board's decision. He fails to allege "fraud, ... dishonest conduct, or ... discrimination that is intentional, severe, and unrelated to legitimate union objectives." Badman v Civil Service Employees Assn., 91 AD2d 858

[4th Dept 1982]). As such, the Second Amended Petition fails to state a claim for breach of the duty of fair representation by SSEU Local 71, and thus this proceeding is governed by Civil Service Law § 213(a) and is time-barred.

For the foregoing reasons, respondents, motion for reargument, and/or renewal is granted. Upon reargument and renewal, the respondents' motion to dismiss is granted, and the petition is denied and the proceeding is dismissed.

The Clerk may enter judgment accordingly.

The foregoing constitutes the order and judgment of the Court.

Dated: June 10, 1998

ENTER:

J. S. C.