UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED FEDERATION OF LAW ENFORCEMENT OFFICERS; ROY MONTORO, President and RON REALE, Vice President, United Federation of Law Enforcement Officers,

Plaintiffs,

-against-

THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, PUBLIC EMPLOYEE RELATIONS BOARD, CITY OF NEW YORK, and DISTRICT COUNCIL 37, AFSCME, AFL-CIO LOCAL 983,

Defendants.

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87 Civ. 7407 (JMW)
OPINION AND ORDER

WALKER, Circuit Judge:[1]

In their amended complaint, plaintiff labor union and officers thereof charge defendants with violation of their federal constitutional rights under color of state law, in contravention of 42 U.S.C. §1983. Plaintiffs and defendants have each moved for summary judgment. For the reasons discussed below, plaintiffs' motion is denied, defendants' motions are granted, and the amended complaint is dismissed.

BACKGROUND

This case centers around a dispute over which union is the most appropriate collective bargaining representative for New York City's Urban Park Rangers and Park Enforcement Personnel

[1] Sitting by designation.

("Rangers"). The Rangers are employees of the City's Department of Parks and Recreation. Currently, they are represented in bargaining with their employer, defendant City of New York, by defendant District Council 37, AFSCME, AFL-CIO Local 983 ("D.C. 37").

D.C. 37 has been certified as the exclusive bargaining representative of the Urban Park Rangers since 1982. The 165 employees who hold the title of Ranger do not maintain a separate, independent bargaining unit unique to them; they are part of a larger bargaining unit comprised of approximately five thousand employees in New York City and New York State holding a variety of non-supervisory blue-collar titles.

Plaintiff United Federation of Law Enforcement Officers ("UFLEO") is a New York State labor union that represents only public law enforcement personnel or "peace officers". UFLEO asserts that the Rangers are primarily peace officers and therefore maintains that UFLEO is a more appropriate bargaining representative for the Rangers than D.C. 37.

UFLEO claims that in the fall of 1986 several members of the Rangers approached the plaintiffs to express dissatisfaction with D.C. 37 and a desire to have UFLEO represent them. Moreover, plaintiffs assert that during the "open period" in which the incumbent union is subject to challenge, the plaintiffs obtained "showing of interest" cards from over 70 percent of the Rangers indicating support for the replacement of D.C. 37 by UFLEO.

UFLEO further alleges that during this open period its

representatives attempted to communicate with both existing members and the incoming class of Rangers, but were denied permission to do so by defendant City of New York. On the other hand, UFLEO alleges, D.C. 37 was permitted to address the incoming class of Rangers during that same period. UFLEO claims that the City's denial of equal access to it violated plaintiffs' First Amendment rights of speech and association and their Fourteenth Amendment right to equal protection of the laws. Neither UFLEO nor any of its officers, however, ever protested this alleged denial of equal access by complaining to the New, York City Board of Collective Bargaining as provided for under local labor law.

In January, 1987, plaintiffs filed a petition with defendant New York City Office of Collective Bargaining ("OCB") seeking to decertify D.C. 37 and certify UFLEO as the exclusive bargaining representative for the Rangers. After a hearing conducted by an OCB Trial Examiner, the OCB Board of Certification denied UFLEO's petition.

At the hearing the Trial Examiner did not permit the UFLEO officers present, plaintiffs Roy Montoro and Ron Reale, to read into the record certain prepared statements, nor did she allow them the opportunity to cross-examine OCB Deputy Director/General Counsel Malcolm D. Macdonald, who was assisting the Trial Examiner, after Macdonald made a statement regarding agency hearing procedure. In addition, the Trial Examiner conferred ex parte with Macdonald and other unspecified agency officials before making certain evidentiary decisions. Plaintiffs assert that the foregoing conduct by the OCB Trial Examiner violated their due process rights.

Furthermore, plaintiffs contend that since a majority of the Rangers support their certification petition, as evidenced by the "showing of interest" cards, UFLEO is entitled to certification as a matter of federal constitutional law. This argument is based on plaintiffs' assertion that OCB rules, promulgated pursuant to the New York City Collective Bargaining Law, which set forth criteria to be considered when determining whether a unit is an appropriate bargaining representative, violate the First Amendment guarantee of freedom of association since the criteria do not give dispositive weight to the preferences of those who are to be represented. See Plaintiffs' Reply Affirmation at 5.

Despite these asserted deprivations of constitutional rights, including a failure of the Trial Examiner to afford plaintiffs due process, UFLEO never sought to challenge the OCB Board's denial of its petition for certification through an Article 78 proceeding in New York State court. Plaintiffs now request this Court to issue an injunction permanently proscribing D.C. 37 from representing the Rangers and ordering OCB and the City of New York to recognize UFLEO as the Rangers' exclusive bargaining-representative. In addition, UFLEO prays for monetary relief of $50 thousand in compensatory damages and $1 million in punitive damages.

DISCUSSION

On a motion for summary judgment the court must decide whether there are genuine issues of material fact requiring a trial, or whether one side is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists if "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). In so deciding a court must look beyond the face of the complaint, considering all pleadings, memoranda, affidavits, and other materials submitted by the parties. Fed. R. Civ. P. 56(c).

A. Plaintiffs' Summary Judgment Motion

Addressing first plaintiffs' motion for summary judgment, the Court concludes that plaintiffs are not entitled to judgment as a matter of law and that their motion must be denied. The amended complaint and plaintiffs' other submissions are vague as to the factual basis for their claim. However, construing the facts in the light most favorable to plaintiffs, their motion for summary judgment is denied for the reasons set forth below.

Since plaintiffs have failed to support their motion with any affidavits, and since there is no indication that such affidavits are forthcoming, their motion is functionally the same as a motion for judgment on the pleadings. See Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 273 (2d Cir. 1968); Franklin & Joseph. Inc.. v. Continental Health Industries. Inc., 664 F. Supp. 719, 720 (S.D.N.Y. 1987) ; 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2713 at 594 (2d ed. 1983). See also Summers v. Penn Central Transp. Co., 518 F. Supp. 864, 865 (S.D. Ohio 1981) (motion for summary judgment unaccompanied by supporting affidavits not treated as motion for judgment on the pleadings because court assumed that missing affidavit was easily obtainable and forthcoming).

A motion for judgment on the pleadings should be denied if the nonmoving party contradicts "one or more of the factual allegations in the complaint:" or interposes an affirmative defense. 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2713 at 597 (2d ed. 1983). Defendants dispute the allegation that they denied equal access to the Rangers when such access was required, asserting that there was no incoming class of Rangers during the time that UFLEO was legally entitled to equal access privileges. They also deny that the Trial Examiner behaved improperly, asserting that all her actions fully conformed to OCB rules that govern hearing procedures and that plaintiffs were fully afforded due process. Furthermore, defendants maintain that the rules governing OCB certification decisions are constitutional and fair and that, while employee preferences are one factor to be considered, the Constitution does not require that local-law union certification decisions be made solely on the basis of employee preferences. Given the legal and factual issues thus raised, plaintiffs' motion for judgment on the pleadings is denied.[2]

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[2] Defendant City of New York argues quite correctly that plaintiffs' equal protection claim appears only in their memorandum of law and not in their amended complaint and, as such, it is not properly before the Court on a motion for summary judgment. See 6 J.W. Moore, W.J. Taggart & J.C. Wicker, Moore's Federal Practice, §56.11(2) at 111-12 (2d ed. 1988) (statements of fact set forth in brief or memorandum cannot ordinarily be considered in support of that party's motion for summary judgment) . However, it is unnecessary for this Court to determine whether the amended complaint could be construed to include the equal protection claim since even if this claim is properly before the Court, unsupported by affidavits, it merely constitutes part of plaintiffs' motion for judgment on the pleadings which is denied for the reasons stated previously.

B. Defendants' Summary Judgment Motion

1. Denial of Equal Access claim

In ruling on defendants' motion for summary judgment, this Court must first determine whether plaintiffs' allegation of denial of equal access to the class of incoming Rangers during the open challenge period and defendants' denial of this allegation is a dispute over an issue of material fact that warrants a trial on the First Amendment and equal protection claims. The Court holds that it is not such an issue of material fact.

UFLEO has failed to put forth any affidavits specifying the location to which they were allegedly denied access. They merely allege that the City of New York did not allow them to speak to the new employees. See Amended Complaint section III:13. Since the Court is deciding a motion for summary judgment, this allegation unaccompanied by affidavits which lay out the relevant details, is an insufficient showing upon which this Court can conclude that the alleged denial of access took place in a “public forum”.

In a "nonpublic forum" a public employer is constitutionally permitted to distinguish between the certified incumbent union and a rival union in terms of their access to certain modes of communication, if such distinctions are reasonable. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983). The distinctions in access privileges that allegedly took place in this case are reasonable since D.C. 37 has special responsibilities based on its status as the certified union and

this justifies the exclusive access privileges that it may enjoy. See id. at 49-53. With that said, this Court sees no constitutional violation in the denial of equal access.

Plaintiffs misread Perry if they contend that it establishes a constitutional right to equal access during election periods. See Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 10. Perry merely states that as a matter of Indiana state law, while a representational contest is in progress, unions must be afforded equal access. Id. at 41. Indeed, under New York state and city law, failure to provide equal access opportunities to a certified union and its challengers during the open challenge period is an improper labor practice. See DC 37, BCB 554-81, B82 at 11-13; League of Registered Nurses, BCB 383-79; County of Erie, 13 PERB 3105, 3167, 3170 (1980); Gates-Chilli Central School Dist., 12 PERB 4578, 4656 (1979); Great Neck Union Free School Dist., 11 PERB 3079, 3129 (1977); TBTA Office Benevolent Assoc., 6 PERB 3078, 3127 (1973); New York City Transit Authority, 3 PERB 3082, 3578 (1970). In view of the above, denial of equal access even during the open election period, did not amount to a constitutional violation; at most it was an unfair labor practice addressable as such.

Assuming arguendo that plaintiffs were denied equal access during an open challenge period, they were free at that time to pursue their grievance with the City's Board of Collective Bargaining, which is empowered to issue appropriate orders as a remedy for improper labor practices. See New York City Collective Bargaining Law § 12-309(4). See also League of Registered Nurses, BCB 383-79, 5-7 (following a finding of inequality of access, Board orders implementation. of a plan ensuring equal access so that rival unions can compete fairly before certification vote).

This Court is aware that the Board might view the filing of an improper labor practice grievance at this time as time-barred. See Rule 7.4 of the Revised Consolidated Rules of the OCB; Matter of Lanzet, B47-86. However, the fact that this remedy may be unavailable to the plaintiff today in no way transforms this local, labor law issue into an issue deserving of relief in federal court. See Surowitz v. New York City Retirement System, 376 F. Supp. 369, 377 (S.D.N.Y. 1974) (plaintiff will not be heard to assert absence of state remedy and thereby compel federal court to hear his case, where plaintiff would not have been deprived of a state remedy in the first instance had he filed a timely Article 78 proceeding in state court).

Moreover, even if the alleged denial of access during the open challenge period implicated a constitutional right of plaintiffs, they a titled to any relief at this time. Other circuits have ruled that where a plaintiff claims deprivation of his constitutional due process rights, he waives his right to make such a claim if the deprivation could have been prevented in the first instance had plaintiff taken the appropriate measures. See Correa v. Tampa School Dist., 645 F.2d 814, 816-17 (9th Cir. 1981) (plaintiff cannot complain of denial of due process where she would

not have been deprived of due process had she followed administrative procedures which would have granted her a complete hearing on her claim); Bignall v. North Idaho College, 538 F.2d 243, 246-47 (9th Cir. 1976) (plaintiff does not state a claim under 42 U.S.C. § 1983 where she would not have been deprived of due process had she pursued the hearing procedures initially offered her); Randell v. Newark Housing Auth., 384 F.2d 151, 156 (3d Cir.), cert. denied, 393 U.S. 870 (1967) (party cannot refuse to utilize available administrative and judicial remedies and then be heard to complain in federal court that he was denied due process). Cf. Toney v. Reagan, 467 F.2d 953, 957 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973) (failure to make use of adequate administrative remedy designed to forestall threatened discharge of college professors constitutes an acceptance of the discharge and prevents aggrieved party from bringing action under Civil Rights Act); Whitner v. Davis, 410 F.2d 24, 29 (9th Cir. 1969) failure to make use of this same remedy constitutes an acceptance of the discharge and prevents faculty member from later complaining that she was deprived of her rights).

Here, by not filing an unfair labor practice grievance with the City's Board of Collective Bargaining, plaintiffs chose not to take advantage of available and effective remedial procedures that could have prevented or remedied the alleged denial of equal access. Therefore, they have waived their right to claim a deprivation of a constitutional right. Because this Court concludes that the alleged denial of equal access does not

implicate a constitutional right of plaintiffs and that, even if it did, they waived their right to make such a claim in this Court by failing to pursue available remedies under local law, defendants must prevail on the equal access point as a matter of law.[3]

2. Claim of Due Process Violations at OCB Hearing

The next issue to be considered is whether plaintiffs' allegations of denial of procedural due process at the OCB hearing raise genuine issues of material fact. The Court holds that they do not.

If the actions taken by the OCB Trial Examiner at the administrative hearing are viewed as "random and unauthorized" acts, as opposed to acts taken pursuant to established policy, they cannot support a claim for denial of due process at the hands of the state unless plaintiffs can demonstrate that state post-deprivation remedies were inadequate to provide redress for the asserted deprivation. See Parratt v. Taylor, 451 U.S. 527, 538-44 (1981); Campo v. NYC Employees' Retirement Sys., 843 F.2d 96, 100-102 (2d Cir. 1988); Marino v. Ameruso, 837 F.2d 45 (2d Cir.

[3] While we grant summary judgment for defendants based on the reasons set forth in this opinion, we reject defendant City of New York's argument that the doctrines of Pullman and Buford abstention favor federal court abstention in this matter. Both these doctrines require, for one, that there be an unclear, unsettled state law question at issue before a federal court may abstain from exercising its jurisdiction. Canady v. Koch, 608 F. Supp. 1460, 1466-69 (S.D.N.Y. 1985); Naylor v. Case and McGrath, Inc., 585 F.2d 557, 565 (2d Cir. 1978). Abstention is not appropriate in the present case since even the City of New York concedes that denial of equal access during the challenge period is an improper labor practice under established interpretations of state and city law. See Memorandum of the City of New York in Support of Motion for Judgment on the Pleadings/ Summary Judgment at 39-40.

1988). Plaintiffs, however, do not even allege, much less present proof, that an Article 78 proceeding in state court, see N.Y. Civ. Prac. Law §7803, would not have provided an adequate means of redress for the alleged due process deprivations.

Plaintiffs view the Trial Examiner's actions at the hearing as manifesting an established policy of the Board. Even if this Court views her actions in this light, it does not find a due process violation. First, the evidence supports the conclusion that each of the Trial Examiner's challenged actions were consistent with established OCB rules for the conduct of such hearings. As for the constitutional adequacy of those OCB procedures, a fair reading of the record demonstrates that UFLEO was given a full and fair opportunity to present its case to the Board and was in no way denied due process.

Denying plaintiffs the opportunity to read their prepared statements directly into the record, without being subject to contemporaneous objection and cross-examination, was far from being a constitutional breach; it was reasonable and fair. Communication between the OCB Trial Examiner and OCB Counsel Macdonald, who according to OCB rules could himself have served as Trial Examiner, was not improper, and plaintiffs cite no case to the contrary. Finally, plaintiffs cite no case that would support a constitutional right to cross-examine Macdonald while he was acting in his capacity as a representative of and advisor to the adjudicatory body.

In evaluating whether due process has been served in a given

case, the Court must consider the interest at stake for the individual, the risk of an erroneous deprivation through the procedures currently used, and the government interest in maintaining the current procedures. Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976). Here, in light of the uncontested fact that the written statements of plaintiffs Montoro and Reale were actually presented to and considered by the Board in making its determination, it is virtually impossible to see how plaintiffs were prejudiced at all, much less that their interests in the procedures they sought outweighed those of the Board in maintaining fair and uniform procedures. The Court concludes that the procedures in place were typical of administrative hearings and were reasonable, and that they a fair hearing for all participants. The Board of Certification acted in an appropriate manner in not permitting counsel for UFLEO to dictate the procedural rules that were to be followed at the hearing.

3. Entitlement to Certification Claim

The final issue before this Court is whether the First Amendment guarantee of freedom of association entitles the plaintiffs to certification as the exclusive bargaining representative of the Rangers. Plaintiffs do not contest the fact that the Board based its decision on the OCB rules which set forth criteria to be considered in making a certification determination. See Revised Consolidated Rules of the Office of collective Bargaining 2. 10. The OCB Board of Certification has both the power and duty to promulgate such rules. New York City Collective

Bargaining Law § 12-309(b)(5). Moreover, these rules specify that the expressed preferences of the employees themselves is only one factor involved in certification determinations. See OCB Rule 2.10(a). Plaintiffs assert, however, that when a group of employees wants to be represented by a particular union, the First Amendment's protection of freedom of association mandates the certification of that union as the collective bargaining representative. See Plaintiffs' Reply Affirmation at 5. This Court disagrees.

Plaintiffs cite no cases supporting their position. Furthermore, while a law which forbids an employee from joining or affiliating with the labor union of his choice violates the constitutional guarantee to freedom of association if the law does not serve a compelling state interest, see Police Officers' Guild v. Washington, 369 F. Supp. 543, 550-53 (D.D.C. 1973), laws which deny the benefit of certification to a labor union based on its failure to meet specific criteria do not violate the First Amendment. See Brennan v. Koch, 564 F. Supp. 322 (S.D.N.Y. 1983). In Brennan, Judge Sprizzo of this Court rejected a First Amendment challenge to a section of the New York City Collective Bargaining Law which prohibits certification of a union as representative of police officers if the union includes, or is affiliated with an organization that includes, employees who are not police officers, or advocates the right to strike. Judge Sprizzo held that, at best, the law restricting certification infringed only indirectly or insubstantially on associational rights and as such, plaintiff

bore the burden of proving that the law was arbitrary or irrational. Id. at 325 (citing Kelley v. Johnson, 425 U.S. 238, 247 (1976) (county regulation limiting length of policemen's hair held not violative of liberty interests)). The Court concludes that the test used by Judge Sprizzo in Brennan is applicable here.

UFLEO cannot satisfy the burden of proving that the criteria in question are arbitrary or irrational. The Board of Certification has both the power and the duty to make certification determinations that are consistent with the goals of maintaining sound labor relations and efficient operation of the public service. New York City Collective Bargaining Law § 12-309(b)(1). Since 1968 the OCB has pursued a consistent policy of consolidating bargaining units, creating larger units based on broad occupational groupings, to help ease the strain caused where a public employer has to deal with multiple bargaining units. Based on this policy, UFLEO's petition was denied because, among other reasons, the Board considered it too small a unit. The Board viewed the certification of UFLEO as contrary to its long standing policy of avoiding the fragmentation of pre-existing bargaining units that it considered destructive of sound labor relations and the efficient operation of the public service. See Determination and Order of the Board of Certification, RU-982-87, at 18-19 (Exhibit B of the City of New York's Notice of Motion). Under the circumstances of this case, the OCB criteria at issue have a rational basis and, if they infringe at all on associational rights, they do not do so impermissibly.

CONCLUSION

In view of the foregoing, this case presents no genuine issues of material f act which warrant a trial on the merits of plaintiffs' constitutional claims. Defendants are entitled to judgment as a matter of law. Accordingly, plaintiffs' motion for summary judgment is denied, defendants' motions for summary judgment are granted and the amended complaint is dismissed.

IT IS SO ORDERED.

Dated: New York, N.Y.
July 30, 1990

U.S.C.J.