Cheatham, et. al v. Jacobs (Comm. of DOP), DOP, et. al, 27 OCB 13 (BCB 1981) [Decision No. B-13-81 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

B. WALLACE CHEATHAM, Probation Officer and all other New York City Probation Officers,

DECISION NO. B-13-81

Petitioner,

DOCKET NO. BCB-472-80

-and-

THOMAS JACOBS, Commissioner, New York City Probation Department and ARNOLD BILLIG, President, United Probation Officers Association and EXECUTIVE BOARD MEMBERS OF UPOA,

Respondents.

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DECISION AND ORDER

On November 26, 1980, Mr. B. Wallace Cheatham, a Probation Officer, filed a verified improper practice petition with the Office of Collective Bargaining in which he alleged that the City of New York had violated Section 1173-4.2a (4) of the New York City Collective Bargaining Law by refusing to bargain in good faith with the United Probation Officers Association (UPOA), the certified collective bargaining agent for Probation officers, over issues of caseloads and training of Probation Officers. The petition alleges, further, that the leadership of UPOA is incompetent and incapable of representing the bargaining unit employees fairly in contract negotiations with the City.

The UPOA responded to these charges by letter of Arnold Billig, President, which was received on January 22, 1981. The Answer of the City of New York to the charges was filed on January 28, 1981. Mr. Cheatham replied to the answers of the UPOA and the City by separate documents each of which was received on February 11, 1981.

FACTS

The UPOA is a signatory of the Coalition Economic Agreement (CEA) for the period July 1, 1980 to June 30, 1982. Like other non-Uniformed employee unions party to the CEA, the UPOA bargained a separate agreement with the City for non-economic items. In essence, Mr. Cheatham's complaint is that the UPOA and the City allegedly failed to bargain with regard to Probation Officer caseloads and the training of Probation Officers for field work in high crime areas and/or that they failed to reach agreement on these subjects, all of which, according to petitioner's allegations, is attributable to a failure of UPOA to bargain properly and effectively or to the City's refusal to bargain in good faith or a combination of both.

DISCUSSION

1. The duty of the majority bargaining representative to represent fairly all employees within the bargaining unit has long been recognized.[1] However, the phrase "duty of fair representation" is a

[1] Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 65 Ct. 226,89 L.Ed. 173 (1944); Vaca v. Sipes, 386 U.S. 171 87 S. Ct. 903, 17 L.Ed. 2d 842 (1967).

legal term of art. There is no code that explicitly prescribes the standards that govern unions in representing their members when negotiating contracts or processing grievances. Whether a union has breached its duty of fair representation depends upon the facts of each case.[2]

Section 209-a(3) of the Taylor Law states that fundamental distinctions between private and public employment shall be recognized in deciding improper practice charges, and that no body of federal or state law, applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent. Nothwithstanding section 209a(3), it has been held that public labor organizations have the same duty of fair representation as private employee unions.[3] Therefore, in most instances, similar standards are applied in the private and public sectors.

Section 212 of the Taylor Law provides that a local government may enact local procedures "substantially equivalent" to those contained in the Taylor Law. Section 212 also provides that the improper practice provisions of the Taylor Law shall apply to local governments; however, pursuant to Taylor Law section 205.5(d), the PERB does not exercise improper practice jurisdiction in the City of New York. Instead, the provisions of NYCCBL §1173-4.2 apply and are

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[2] Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963); Balowski v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America, 372 F.2d. 829 834 (6th Cir. 1967).

[3] Union Free School District No. 6 v. N.Y.S. Division of Human Rights 43 A.D. 2d 31,35 349 N.Y.S. 2d 757, 762 (Sup Ct., A.D. 2nd Dept. 1973); Jackson v. Regional Transit Service, 54 A.D. 2d 305, 388 N.Y.S. 2d. 441, 1-6 PERB 7501 (Sup. Ct. A.D. 4th Dept. 1976).

administered by the Board of Collective Bargaining subject to review by PERB on questions of lak. Thus, in administering NYCCBL §1173-4.2, we are guided by available interpretations of the improper practice provisions of Taylor Law section 209-a and by our own views as to the appropriate administration of the NYCCBL.[4]

For all practical purposes, the instant dispute is a case of first impression for the OCB. In the only fair representation case that we have decided on the merits, we applied standards that were first handed down in the private sector and which have also been applied by PERB.[5]

It has been held that a breach of the union's duty of fair representation constitutes an unfair labor practice under the NLRA.[6] Similarly, a breach of the duty is an improper practice under the Taylor Law and the NYCCBL.[7]

The parameters of the duty of fair representation were clarified by the leading case of Vaca v. Sipes.[8] Although Vaca dealt with a union's refusal to take a grievance to arbitration, it established

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[4] In the Matter of Jose Velez, and Local 2,37, IBT. Decision No. B-1-79 (1979).

[5] In the Matter of Claude Keitt and the Dept. of Transportation and Local 1182. Decision No. B-16-79 (1979).

[6] Miranda Fuel Co., 140 NLRB 181 (1962) enf't denied. 326 F. 2d 172 (2d Cir. 1963).

[7] Jackson v. Regional Transit, 10 PERB 7501; Matter of Velez and Local 1182, B-17-79.

[8] Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967).

the standard by which all fair representation cases are measured. In Vaca, the Supreme Court held that a union breaches its duty of fair representation "only when the union's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith." According to Vaca, and its PERB progeny,[9] a union must conform its behavior to each of the standards set forth above. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union asserting the rights of the individual must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for findings of failure of fair representation.

In matters of contract negotiation the bargaining representative is allowed considerable latitude. The pivotal issue in most fair representation cases is whether the bargaining representative has acted in bad faith.

A series of decisions reveals the limited extent to which the duty of fair representation applies during collective bargaining negotiations. Unless the union's conduct has been tantamount to intentional and hostile discrimination, there has been a reluctance to find a breach of the duty of fair representation. It has been

[9] Plainview-Old Bethpage Central School District and Local 237, IBT, 7 PERB 3096 (1974); Matter of Local 342, Long Island Public Service Employees and Town of Huntington, 10 PERB 4508 (1977), Matter of Professional Staff Congress of CUNY and Adjunct Faculty Association, 7 PERB 4529 (1974).

held that absent a showing of hostile discrimination, a union does not breach its duty of fair representation simply because all the employees the union represents are not satisfied with the negotiated agreement.[10] Similarly, it has been held that a negotiated bargain which favors one group of employees over another may be valid when no hostile discrimination is shown.[11] Recent decisions have held that

> at least in negotiating and implementing a contract, a union may breach the statutory duty by arbitrary or irrational conduct, even in the absence of bad faith or hostility in the form of ill will or common law malitia; but although the employee may challenge actions other than those involving anti-minority animus or malice, nevertheless "the union has broad discretion to adjust the demands of competing groups within its constituency as long as it doesn't act arbitrarily " Jones v. Trans World Airlines, Inc., 495 F. 2d 790, 798, (2d Cir. 1974).[12]

Finally, a number of cases have determined that negligent conduct by the union does not breach its duty of fair representation.[13]

Applying the law as it presently exists, it becomes clear that Mr. Cheatham's claim that the UPOA has breached its duty of fair representation is without merit. The gravamen of Mr. Cheatham's

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[10] Jackson v. Regional Transit Service, 10 PERB 7501

[11] Matter of PSC & Adjunct Faculty Assoc. 7 PERB 4529, Ferro v. Railway Express Agency, 286 F. 2d 847 (2d Cir. 1961).

[12] Ryan v. New York Newspaper Printing, 590 F. 2d 451, 455 (2d. Cir. 1979).

[13] Dente v. Master, Mates & Pilots Local 90, 494 F. 2d 10 (9th Cir. 1973); Bazarte v. United Transportation Union, 429 F. 2d 868 (3rd Cir. 1970); Minnis v. International U., United A., A&A Implement Workers, 531 F. 2d 850 (8th Cir. 1975).

charge is that the UPOA is incompetent and incapable of representing the interests of the membership. He further alleges that the president of the UPOA did not bargain over the issues of caseloads and training. Mr. Cheatham's final allegation is that even if these issues were discussed, the union was negligent for not taking proper action designed to. insure that these topics would be-covered in the new contract. Petitioner's allegations of incompetency are purely conclusory and unsupported by allegations of fact. Mr. Cheatham is dissatisfied that the new contract has not made any significant changes in the areas of caseloads and training. However, during contract negotiations, failure to obtain all objectives cannot be equated with incompetence, and it is the failure of the union to obtain its objectives in the areas of caseloads and manning to which Mr. Cheatham addresses himself.

The case law is clear that there is no breach of the duty of fair representation merely because the contract fails to satisfy all persons represented by the union.[14] In this respect, therefore, the petition states no basis for a charge of improper practice against the union.

II. In his petition, Mr. Cheatham charges the City of New York with violating §1173-4.2(a) 4 of the NYCCBL, by failing to bargain in good

[14] Ford Motor Company v. Huffmann, 345, 330, 337 (1953); Matter of PSC & Adjunct Faculty Assoc. 7 PERB 4529 (1974).

faith with the UPOA. A review of the relevant case law shows that this claim also lacks merit.

Sections 209-a(l)(d) and 209-(a)(2)(b) of the Taylor Law make it an improper practice for a public employer or a public employee organization to refuse to bargain in good faith. While the Act requires a good faith attempt to seek and reach settlement it does not require that one side give up its values, priorities and aims, and capitulate.[15] Although section 209-a(3) states that PERB is not bound to follow private sector law, PERB has frequently adopted the private sector interpretation of the statutory duty to bargain in good faith. In the Matter of Southampton Police Benevolent Association and the Town of Southampton,[16] PERB held:

> "It maybe desirous [sic] at this time to set forth some basic considerations concerning the duty to negotiate in good faith. In this regard, we have drawn upon our experience from the private sector. Although not binding or controlling, it is persuasive. Ike find that basically the duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's words and deeds; and where there is a variance between the two, experience would dictate that greater reliance be placed upon the latter.
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> Thus whether one had approached the negotiating table with a sincere desire can be determined by the overall conduct in this regard. This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct."

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[15] Yates County Board of Supervisors and Yates CSEA, 4 PERB 4523 (1971).

[16] Matter of Southampton PBA and Town of Southampton, 2 PERB 3011 (1969).

In addition, PERB has held that hard bar-gaining does not necessarily constitute a breach of the duty to bargain in good faith.[17]

Sections 1173-4la(4) and 1173-4.2b(2) of the NYCCBL make it an improper practice for a public employer or public employee organization to refuse to bargain in good faith. Good faith bargaining is defined in §1173-4.2(c) of the NYCCBL. The standards set forth in this section are essentially the same as those found in the private sector and PERB cases. The only evidence that Mr. Cheatham cites to support his charge against the City comes from a union newsletter which states that, out of frustration,'the union had ceased meeting with the City. Mr. Cheatham also claimed that the City had at that time agreed to only 7 of the 15 bargaining demands of the union and that the agreed upon demands were allegedly of minor significance.

Normally, it is questionable how much weight should be given to a union newsletter account of negotiations in assessing the actions of the parties. However, this newsletter specifically"states that it was the union which broke off the negotiations. While the City claims that the talks ceased due to the death of the UPOA attorney, the newsletter asserts that the UPOA's action was motivated by its frustration at the bargaining table. Regardless of UPOA's reason for halting the talks, the law is clear that hard bargaining does not constitute bad faith bargaining. If the UPOA decided to refrain from meeting with the City in frustration as its inability to obtain agreement to all of its demands, it does not follow that the City was not bargaining in good

[17]Columbian County Chapter of CSEA and CSEA Inc., 10 PERB 3047 (1977).

faith.

Based on the facts alleged by petitioner it can be argued with equal force that the state of the negotiations - agreement on almost half of the union's demands was affirmative evidence of good faith bargaining by the City. Since Mr. Cheatham's petition reveals no allegations of fact supporting the claim of bad faith bargaining, the mere conclusory allegation to which the petition is confined must be dismissed.

There is one final issue to be addressed. Even if Mr. Cheatham's charge against the City was meritorious, a review of the PERB case law reveals that a charge alleging a public employer's refusal to negotiate in good faith will be considered only if filed by a recognized or certified organization.[18] While an individual public employee may generally commence an improper practice proceeding, he or she must have an interest in and must otherwise have standing with regard to the particular matter at issue. PERB has reasoned that the duty to negotiate in good faith extends only to a labor organization and not to an individual. We agree and find that Mr. Cheatham, acting as an individual member of the bargaining unit, lacks standing to allege that the City has not bargained in good faith.

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[18] Matter of East Ramapo Central School District and Kalin, 12 PERB 3121 (1979); State of N.Y. & Robinson, 13 PERB 3063 (1980).

O R D E R

NOW, THEREFORE, 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 petition of B. Wallace Cheatham be, and the same hereby is, dismissed. DATED:

DATED: New York, N.Y.
June 17, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD SILVER
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