OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

ELSA PARKER,

Petitioner,

-and-

DONNA DOLAN BRUNNER, CWA Representative; CWA Civil Service Division; Local 1180, CWA; CWA, AFL-CIO,

Respondents.

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DECISION NO. B-16-83

DOCKET NO. BCB-626-82

DECISION AND ORDER

On November 23, 1982, Elsa Parker ("Petitioner" or "grievant"), by her attorney, filed an improper practice petition charging Donna Dolan Brunner, CWA Representative; CWA Civil Service Division; Local 1180, CWA; and CWA, AFL-CIO ("respondents" or "CWA") with the breach of the duty of fair representation in violation of Section 1173-4.2b of the New York City Collective Bargaining Law ("NYCCBL"). On December 2, 1982, CWA submitted an answer, in response to which a reply was filed on December 10, 1982. Further submissions from petitioner, mailed on or about April 1, 1982, were not received by the Office of Collective Bargaining until April 12, 1982; CWA, which had already been served, noted its objection to the post-reply submissions on April 7. 1983.

Background

In 1980, grievant, a Principal Administrative Associate serving in the Human Resources Administration

("HRA"), was charged with "misconduct and conduct unbecoming an employee" in connection with the procurement by her of several loans in the names of co-workers through misrepresentations and the submission of forged documents. Following an informal conference held on April 29, 1980, Thomas A. Roach of HRA recommended the penalty of "demotion to Office Associate."

On August 4, 1980, petitioner signed certain documents by which she: 1) acknowledged the receipt of a copy of the charges and specifications against her and a copy of Sections 75 and 76 of the Civil Service Law; 2) indicated her refusal to accept the decision and the penalty recommended; and 3) waived her rights to utilize the procedures available to her pursuant to Sections 75 and 76. An election was thereby made to proceed with the mat-ter through the grievance-arbitration procedure.

The penalty of demotion was recommended at Step I and was subsequently sustained at Steps II and III. On March 3, 1983, a request for arbitration was filed with the Office of Collective Bargaining, pursuant to which an arbitrator was duly appointed. At the hearing held on August 20, 1982, petitioner walked out before the hearing was either concluded or adjourned. The matter was subsequently withdrawn by CWA on August 23, 1983.

Positions of the Parties

Petitioner's Position

The petition which commenced the instant proceeding cites Section 1173-4.2 (b) (1) of the New York City Collective Bargaining Law as the provision of the law allegedly violated and states that

> [t]he respondents had acted in bad faith throughout the grievance procedure and their actions have been arbitrary and discriminatory. The grievance was processed by the Respondents in a perfunctory and negligent manner...

The relief requested is reappointment to the position of principal administrative associate, or, in the alternative, the reopening of the arbitration proceeding.

The petition contains general references to numerous incidents viewed by the petitioner as acts evidencing CWA's bad faith. To summarize, petitioner alleges, inter alia, that respondents:

- failed to notify petitioner of the Step I conference;
- failed to inspect the files kept by the Inspector General;
- failed to provide petitioner with a copy of the Step II determination;
- failed to adequately prepare her for the Step III conference;
- voluntarily provided the City with documents and information pertaining to matters which were personal and unrelated to the disciplinary action;

- failed to provide her with a lawyer at Steps III and IV;

- failed to provide a stenographer at Steps III and IV;

- pressured her to abandon her grievance; and

- negligently handled her grievance at the arbitration hearing by, among other things, allowing the introduction of irrelevant documents and failing to object to irrelevant and personal questions.

With regard to petitioner's post-reply submissions, it is our practice to reject such submissions unless it can be shown that special circumstances warrant our consideration of the material in question. In the instant proceeding, the additional submissions consisted of: (1) a letter to the Trial Examiner dated April 1, 1983, from Linda Safron, attorney for petitioner herein, explaining the nature and purpose of the late filing; (2) the minutes of Local 1180's December 20, 1982 Executive Board Meeting wherein it was inaccurately reported that an offer of settlement was made at Step II; and (3) a February 4, 1983 letter from Elsa Parker addressed to the Executive Board advising them of the error and requesting that her letter be distributed at the next meeting.

We note, first, that this Executive Board meeting took place on December 20, 1983, approximately one month

after the improper practice petition was filed and approximately four months after the course of action complained of - CWA's alleged mishandling of petitioner's grievance - was completed. Accordingly, this and any other events which took place after the grievance was withdrawn from arbitration cannot be considered by the Board of Collective Bargaining for the purpose of establishing thereby that petitioner's grievance had been mishandled by CWA.

Further, since CWA itself, in a sworn affidavit submitted for its answer to the improper practice petition, correctly states that the offer of settlement was made after Step III and just before the commencement of the arbitration proceeding, we find that the non-verbatim minutes of the Executive Board Meeting, even if accurate, are not probative of bad faith and do not, therefore, enhance the establishment, even prima facie, of an improper practice. Accordingly, the post-reply submissions are rejected.

Respondent's Position

CWA maintains that none of the acts attributed to it, viewed individually or aggregately, constituted a breach of their duty to fairly represent petitioner. Respondents admit, for example, that neither an attorney nor a stenographer were furnished at Steps III and IV, but maintain that 1) staff representatives are regularly used

at Steps III and IV; and 2) stenographic records are never taken at such hearings.

Respondents also admit that they failed to obtain files kept by the Inspector General, but state that such records are confidential and that requests for their inspection and/or release on other occasions have been denied by the Inspector General.

As to the charge that respondents were not adequately prepared for each step, CWA contends that petitioner contributed to any inadequacy by her own unwillingness to cooperate and furnish information essential to her defense.

CWA denies the charge that it "voluntarily" offered the City information pertaining to petitioner's personal life. CWA claims that the information was specifically requested in a letter from John Lewis of HRA, and that reconsideration and possible modification of the penalty imposed on grievant was conditioned on the verification of the extenuating circumstances claimed by petitioner to have existed.

In response to the allegation that attempts were made to coerce petitioner into abandoning her grievance, respondents insist that "only when petitioner absented herself from the arbitration and refused to participate further in her own defense was the case withdrawn from arbitration."

Thus, CWA maintains that there exist no factual allegations that petitioner was treated differently .from any other grievant beyond the presentation of conclusory and generalized allegations. Nor do there exist any factual allegations to substantiate petitioner's claim that she was treated with hostility or that her grievance was handled in an arbitrary manner.

As a further defense to this action, CWA asserts the statute of limitations as a basis for precluding consideration by the Board of Collective Bargaining of certain portions of the improper practice petition. That is, CWA maintains that except as to allegations pertaining to respondents' conduct at the arbitration hearing, all other actions complained of took place more than four months prior to November 23, 1982, the date on which this proceeding was initiated, and are thus barred from Board consideration by Section 7.4 of the Revised Consolidated Rules of the office of Collective Bargaining ("Rules").[1]

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[1] §7.4 Improper Practices. A petition alleging that a public employer or its agents or a public employee organization its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof ...

Discussion

Section 1173-3.0 of-the NYCCBL contains the following definition of a "certified employee organization":

> The term "certified employee organization" shall mean any public employee organization: (1) certified by the board of certification as the exclusive bargaining representative of a bargaining unit determined to be appropriate for such purpose; (2) recognized as such exclusive bargaining representative by a public employer other than a municipal agency; or (3) recognized by a municipal agency, or certified by the department lf labor, as such exclusive bargaining representative Prior to the effective date of this chapter unless such recognition has been or is revoked or such certificate has been or is terminated.

This definition has long been recognized as conferring on employee organizations not only numerous right but correlative obligations and responsibilities. The United States Supreme Court, in Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944), stressed that the legitimacy of exclusive representation depended necessarily on the full appreciation and actualization of "the duty, inseparable from the power of representation, to exercise that authority fairly." In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the Supreme Court held that a union breaches this duty of fair representation when its conduct toward a member is

arbitrary, discriminatory or in bad faith.[2] Section 1173-4.2b of our law creates a cause of action for such a breach by providing that it shall be an improper practice for a union "to interfere with, restrain, or coerce public employees in the exercise of their rights..."

CWA, as one of its defenses to this action, maintains that consideration by the Board of acts alleged to have taken place more than four months prior to the date on which the petition was filed is precluded by Section 7.4 of the Rules of the office of Collective Bargaining. We disagree. We have examined the petition and find that the charges therein relate to a single, ongoing course of action which did not end until the grievance was withdrawn from arbitration, an event which occurred within four months of the date on which the improper practice petition was filed. We find, therefore, that this proceeding was instituted in a timely manner.

In reviewing the facts of this proceeding, however, we find that petitioner has failed to support her conclusory allegations with statements of fact which would support a finding that the treatment afforded her by CWA was either

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[2] The New York State Public Employment Relations Board, in a decision affirmed by a state appellate court, has declared that the duty of fair representation applies with the same force in the public sector as it does in private industry. Jackson v. Regional Transit Service, 388 N.Y.S. 2d 441, 54 A.D. 2d 305, 10 PERB 7501 (1976).

hostile or arbitrary or that it differed in any respect from that received by similarly situated employees. From the pleadings, particularly the documented and uncontroverted explanations furnished by CWA in its answer, we are persuaded that respondents conducted themselves in good faith and without hostility toward grievant Elsa Parker.

The facts have been alleged are not only inconclusive but often misleading. For example, the mere allegation that the union failed to provide an attorney and a stenographer at Steps III and IV does not, standing alone, demonstrate any conduct by the Union which is proscribed by the NYCCBL. In any event, CWA has indicated that staff representatives are regularly utilized at Steps III and IV and that stenographic records are never kept at such hearings. Thus, no discrimination or hostility can be inferred from these facts.

Petitioner has also alleged that CWA voluntarily supplied HRA with personal information concerning the grievant. CWA admits that it furnished HRA with such information but maintains that its purposes in so doing was to provide documentation and verification of claims made by Elsa Parker in her effort to seek a reduction in the penalty. CWA also stresses that the information was specifically requested by John Lewis, Assistant Administrator, HRA, in a letter to respondent Donna Dolan Brunner

dated November 20, 1981:

> Your communication of October 2, 1981 indicated several items alleged by Ms. Parker which we have investigated and have not been substantiated by our review. However, in our conversation on October 13th, we indicated that we were prepared to consider any evidence substantiating Ms. Parker's claims ... As we have discussed, all information presented will be kept in strict confidence. Thank you for your attention in this matter.

As to the alleged conversations between respondents and the grievant wherein CWA informed petitioner of the inadvisability of proceeding any further with the matter, it should be noted that a union possesses a great deal of discretion as to the manner in which it vindicates the rights of its members. "An employee, therefore, is subject to the union's discretionary power to settle, or even to abandon a grievance, so long as it does not act arbitrarily."[3]

As we have held[4], consistent with Vaca v. Sipes, supra, 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." Petitioner's allegations that the actions of respondents

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[3] Bazarte v. United Transportation Union, 429 F. 2d 868 (3rd Cir. 1970), 79 LRRM 2017, 2019. See also Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

[4] Decision Nos. B-16-79; B-13-81; B-12-82; B-13-82; B-21-82. See also Bazarte v. United Transportation Union, supra, Dente v. Master, Mates & Pilots Local 90, 494 F. 2d 10 (9th Cir. 1973); Minnis v. International U., United A., A&A Implement Workers, 531 F.2d 850 (8th Cir. 1975).

herein were arbitrary, discriminatory and in bad faith are conclusory, are unsupported by allegations of fact and are, to a considerable degree, based upon a misconception of the nature, quality and degree of the union's obligation to a unit employee in the matter of its duty of fair representation. We therefore find that CWA has not breached its duty of fair representation to Elsa Parker.

For all the above reasons, we hold that the petition fails to establish any improper practices, and we will direct that it be dismissed.

0 R D E R

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 of Elsa Parker be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 18, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F.X. MULHEARN
MEMBER

CAROLYN GENTILE
MEMBER