Kurland v. HHC, L.371, SSEU, 33 OCB 2 (BCB 1984) [Decision No. B-2-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice

- between -

GEORGE HARRY KURLAND,

Petitioner,

DECISION NO. B-2-84
DOCKET NO. BCB-.672-83

- and -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION,

Respondents.

DECISION AND ORDER

This proceeding was commenced on September 9, 1983, by the filing of a verified improper practice petition by Mr. George Harry Kurland (hereinafter "petitioner").
Petitioner alleges that the New York City Health and Hospitals Corporation (hereinafter "HHC") and Local 371, Social Service Employees Union (hereinafter "the Union" or "Local 371") , jointly referred to as "respondents," violated Section 1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL") by their actions in connection with Senior Hospital Care Investigator (hereinafter "Senior HCI") appointments. Local 371 submitted its answer on October 3, 1983, as did HHC on October 13, 1983. On November 23, 1983, the Union amended its answer. Counsel for petitioner filed a reply on December 7, 1983.

Background

In March, 1979 a Senior HCI promotional list was established. Based on his examination score, petitioner was ranked number 226 on that list.

Petitioner states that in September, 1982, he was offered the opportunity to interview for an open Senior HCI position at Bronx Municipal Hospital; he declined. Respondents state that on that occasion petitioner was offered, and declined, a temporary appointment.

Similarly, in March, 1983, petitioner was called to a certification pool for a position in Manhattan. Again, he declined. Respondents state that petitioner was again offered, and declined, a temporary position.

Petitioner's actions resulted in his removal from consideration for temporary appointments in the Bronx and in Manhattan. On June 30, 1983, petitioner requested that his name be restored to the promotional lists for consideration in these boroughs. HHC granted petitioner's request on July 5,1983.

According to HHC, on July 19, 1983, petitioner attended a certification pool conducted to fill vacancies at Bronx Municipal and Kings County hospitals. Two individuals, both of whom ranked higher than petitioner on the Senior HCI promotional list, were selected. Bronx Municipal still had remaining vacancies. Petitioner and one other

person were considered for the openings. Neither was chosen. HHC states that Rule 4:7:2 [1]"provides that promotions from an eligible list shall be made by selection of one of three eligible individuals on a list." (emphasis supplied)

Petitioner contends that a Union delegate informed him that five out of the six available Senior HCI positions at Bronx Municipal were filled by provisional employees not on the promotional list. Petitioner states that when he spoke to a hospital manager regarding the matter, she refused to either confirm or deny the information.

On July 25, 1983, the Senior HCI promotional list was terminated. Petitioner states that he requested "legal representation" from the Union to pursue his "twofold claim, i.e. the misapplication of the one-in-three rule and the arbitrary termination of the promotional list," which he sought to grieve. His requests were denied.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that HHC violated the Rules and Regulations governing appointments by not assigning him to

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[1] HHC Rule 4:7:2 reads, in pertinent part, as follows:

> Appointments or promotions from an eligible list to a position in the competitive class shall be made by selection of one of the three persons certified by the Vice President as standing highest on such lists who are available and willing to accept appointment or promotion.

one of the Senior HCI vacancies at Bronx Municipal Hospital. Petitioner concedes that the "one-in-three" rule (Rule 4:7:2) would apply and be controlling if Bronx Municipal had only one opening. However, petitioner claims, on information and belief, that at least five other positions were available. Petitioner asserts that he was "legally entitled to be interviewed for these positions." Petitioner argues that the appointment of provisional employees to these positions without first having afforded individuals on the promotional list the opportunity to be interviewed amounts to violative conduct.

Petitioner also claims that he repeatedly sought the Union's assistance in "redressing the wrongs" committed by HHC but that "no efforts" were made to process his complaints. Thus, he concludes, Local 371 breached its duty of fair representation.

Respondents' Positions

HHC maintains that the selections made at the certification pools in question were proper exercises of managerial discretion and "entirely consistent" with its Rules and Regulations and with Civil Service Law. Furthermore, urges HHC, even if the Rules and Regulations and Civil Service Law had not been followed, petitioner has failed to establish any connection between HHC's actions and the

exercise of his rights under the NYCCBL. Thus, maintains HHC, petitioner has failed to state a cause of action under our Law.

Local 371 contends that the Senior HCI promotional list expired on July 25, 1983 "in accordance with law." The Union claims that HHC's actions were in compliance with Civil Service Law so that there was no legal basis to validly challenge HHC's decisions at the July, 1983 certification pool.

Discussion

In essence, petitioner alleges that respondent HHC committed an improper practice by failing to strictly comply with its own Rules and Regulations and with Civil Service Law. In his reply, petitioner recites, in substantial detail, the theory behind the "one-in-three" portion of Rule 4:7:2 and how it was allegedly misapplied. Nowhere, however, does petitioner state that any action of an HHC official was based upon motives prohibited by NYCCBL Section 1173-4.2(a) or how any such conduct interfered with or otherwise violated the rights to organize and to bargain collectively (or to refrain from doing so) granted by Section 1173-4.1.

Absent evidence of discriminatory intent, questions related to compliance with an employer's internal rules and

regulations or with Civil Service Law do not amount to issues as to violation of rights granted by NYCCBL Section.,1173-4.1 nor do they present matters subject to adjudication pursuant to procedures applicable to improper practices under Section 1173-4.1.

The record herein is devoid of any evidence that respondent HHC undertook any action which was intended to or did, in fact, interfere with or diminish petitioner's rights under the NYCCBL. In the absence of a showing of denial or violation of rights guaranteed by our Law or any inhibition of protected activity, we cannot find that a violation of the NYCCBL has been stated against HHC.

An alleged breach of the Union's duty of fair representation is, however, clearly within our jurisdiction.[2] While petitioner's reply asserts that "no efforts" were made to process his complaints, a letter attached thereto from petitioner to Local 371 President Charles Ensey, dated July 22, 1983, indicates: (1) that while petitioner thought that it was "an unfair labor practice to terminate a list with eligible candidates," he acknowledged the list's "07/25/83 termination date" and; (2) that although petitioner claims it was "misapplied," Union staff members cited the "one-in-three" rule to him when explaining the

[2] NYCCBL Section 1173-4.2(b); Decision Nos. B-16-79, B-13-81, B-39-82.

appointments made at Bronx municipal Hospital.

A union is obligated to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. However, it is not obligated to advance every complaint made by a bargaining unit member. The decision to refuse to process a particular grievance must be made in good faith and not in an arbitrary or discriminatory manner.[3] Nor may a union arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.[4]

Contrary to the assertion in his reply, petitioner, through his own correspondence, has established that the Union was aware of his complaints, assessed the facts and decided not to process the matter further. Regardless of the correctness of the Union's decision, efforts were made by Local 371 to deal with petitioner's complaints. Petitioner has failed to make a prima facie showing which demonstrated that the Union acted in an arbitrary or capricious manner or with improper motive. We cannot, therefore, find that the duty of fair representation has been breached.

Our findings herein do not constitute rulings on the merits of any claim petitioner may have in another forum.

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[3] Vaca v. Sipes, 386 U.S. 1711 190 (1967); Board Decisions Nos. B-13-81, B-12-82, B-13-82, B-39-82.

[4] Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

Rather, we hold that the improper practice petition fails to establish any improper practices within the meaning of the NYCCBL and direct that it be dismissed.

O 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 filed herein by George Harry Kurland be, and the same hereby is, dismissed.

DATED: New York, N.Y.
February 2, 1984

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