

DeJusus v. HHC, DC37, et. al, 37 OCB 18 (BCB 1986) [Decision No. B-18-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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Augustina DeJusus,

Petitioner,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (METROPOLITAN HOSPITAL
CENTER)

DECISION NO. B-18-86

DOCKET NO. BCB-745-85

-and-

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
DISTRICT COUNCIL 37,

Respondents.

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DECISION AND ORDER

On November 5, 1984, Augustina DeJesus ("petitioner") though her attorney at that time, Ralph Wood, filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC") and the American Federation of State, County and Municipal Employees, District Council 37 ("Union"). The City and the Union filed their answers to the petition on November 30, 1984 and December 4, 1984, respectively. Pursuant to her request for an extension, the petitioner filed her replies to these answers on March 5, 1985. All parties have submitted briefs in support of their positions.

On June 20, 1985, Thomas M. Laura, the Deputy Chairman of Disputes for the Office of Collective Bargaining ("OCB"),

held a meeting with Mr. Wood, along with representatives from both the City and the Union, for the purpose of discussing settlement of the case. At the conclusion of the meeting, Mr. Wood said that he would contact OCB after he had had an opportunity to discuss the proposed terms of settlement with petitioner. By December 19, 1985, when OCB still had received no communication regarding the outcome of the settlement discussions, Mr. Laura wrote Mr. Wood requesting a report on the status of the case. Mr. Wood advised Mr. Laura on December 23, 1985 that petitioner was in the process of obtaining new counsel.

On January 3, 1986, OCB wrote petitioner directly to request that she advise us promptly on the status of her case, including whether she had obtained new counsel to represent her. OCB received a letter from petitioner on January 7, 1986 indicating that while her efforts to obtain new counsel had been hindered by unexpected illness and the holiday season, she would contact us again in approximately thirty days with further information.

Mr. Howard Lane, an attorney contacted by petitioner, telephoned OCB on January 31, 1986 to request copies of any written settlement proposals offered to petitioner. We advised Mr. Lane that the file contained no such material and that we would continue processing the case as soon as we re-

ceived notification from petitioner or her legal representative that settlement could not be reached. On February 3, 1986, petitioner informed OCB by telephone that she had rejected the parties' offer of settlement.¹

Background

Between 1975 and June 1981, petitioner worked at Metropolitan Hospital Center ("Metropolitan") as an office associate. During this time, petitioner allegedly filed a series of grievances against Metropolitan. The first grievance, dated November 15, 1976, complained, inter alia, that the department's supervisory chain of command was unclear and that petitioner had to perform clerk duties because none of the clerks were able to communicate with the Spanish-speaking patients.

The next grievance, dated August 26, 1977, complained of "repeated demands and warning notices for work that cannot be performed by staff during the day as the information should be completed during night shift." The grievance sought "relief from harassment [and] clear line of responsibility for tour of duty."

Petitioner allegedly filed another grievance on September 16, 1977, again complaining that her supervisor had been harassing her by issuing "repeated demands and warnings to complete information about patients seen on other tours."

¹Petitioner apparently did not retain Mr. Lane as her attorney.

In her final grievance allegedly filed on November 18, 1980, petitioner complained about the various duties to which she was being assigned since her transfer to the Patient Accounts Department in June 1980. Petitioner said that she was seeking "[t]o be treated on a professional basis as regards [her] official title; to be included into and consulted when changes are being discussed re: [her] position."

Petitioner passed an examination in 1980 entitling her to apply for promotion to the position of Principal Administrative Associate ("PAA"). In June 1981, petitioner accepted a probationary appointment at Harlem Hospital Center as a PAA assigned to the Personnel Department, Petitioner's performance in this position was unsatisfactory in the judgment of her immediate supervisor, who rated her work "Below Standard" on November 16, 1981. As a result, Harlem Hospital terminated petitioner's probationary appointment, and she returned to Metropolitan in January 1982 as an office associate.

In May 1982, petitioner accepted another probationary appointment as a PAA in the Psychiatry Department of the City Hospital Center at Elmhurst. Again, petitioner's immediate supervisor rated her probationary performance "Below Standard." Petitioner accordingly returned to Metropolitan in November 1982 as an office associate, where she is currently employed.

Positions of the Parties

The Improper Practice Petition

a. Charges against HHC

Petitioner asserts that upon her application for promotion to a PAA position, "HHC embarked upon a course of action calculated to frustrate petitioner's promotion ... which actions were undertaken in retaliation for petitioner's history of participating in the activities of her union through the grievance proceedings alleged above, as well as because of her national origin (Hispanic)." According to petitioner, HHC's retaliation included the following actions:

- (a) Appointing petitioner to a PAA probationary position at Harlem Hospital in 1981 in the personnel department, with knowledge that petitioner had no prior personnel work experience. This resulted in frustration to petitioner which was then cited as the grounds for poor evaluations inserted into petitioner's work record, and led to the decision not to promote her beyond the probationary period;
- (b) Failure to pay petitioner the salary increases credited to her original position at Metropolitan while she was a probationary PAA at other hospitals, to which she was entitled upon her return to Metropolitan after her probationary periods;
- (c) Improper and unfair scheduling practices including failure to properly record and credit petitioner for her accumulated vacation time and to permit petitioner to take vacation commensurate with her entitlement;

(d) Transferring petitioner to menial assignments, to the extent that she is presently performing out-of-title clerk's duties in the adult emergency room at Metropolitan;

(e) Failure to pay petitioner salary differentials due to her for use of computer skills for a period of one and a half years. Upon inquiry by the Human Rights Division, respondent offered a payment with no documentation as to how computed;

(f) Serving petitioner with a warning notice, dated July 13, 1984, complaining of "inappropriate conduct" and citing alleged incidences [sic] on dates up to six months prior thereto including a date on which the petitioner was not even scheduled to work at Metropolitan. This warning was subsequently downgraded to a Counselling notice on July 20, 1984, but still was improper because it cited incidents alleged to have occurred at least six months previously...

Petitioner contends that by reason of the alleged foregoing actions, she has been obligated to register further complaints and grievances. In so doing, petitioner alleges that she has been trapped by HHC into creating an unfavorable employment record.

b. Charges against the Union

Complaining of essentially the same alleged actions set forth above, petitioner requested the Union on August 10, 1984 to file an improper practice petition with the OCB against HHC. In addition, petitioner allegedly filed two previous grievances with the Union, dated June 28, 1983 and

October 12, 1983, which also cited many of the same complaints. According to petitioner, the Union took no action on any of these complaints and refused to provide petitioner or her counsel with any information about the current collective bargaining agreement. The Union's failure to take action upon these grievances, to file a petition before the OCB, or to provide information about the collective bargaining agreement, in the petitioner's view, constituted improper practices under §1173-5.2(a) and (b) of the New York Collective Bargaining Law ("NYCCBL").

HHC's Position

HHC denies that it has in any way retaliated against petitioner for exercising the rights guaranteed her under the NYCCBL. In HHC's view, the actions of Harlem Hospital and Elmhurst Hospital in rejecting petitioner for a permanent PAA position were proper exercises of managerial prerogative under the NYCCBL, the New York City Health and Hospitals Corporation Rules and Regulations, and HHC Operating Procedure 20-40. According to HHC, petitioner's supervisors during her probationary periods concluded through legitimate agency procedures that petitioner could not satisfactorily fulfill the duties of the PAA positions. HHC points out that petitioner has neither presented evidence nor made allegations which would establish a link between the failure of her probationary per-

iods at Elmhurst and Harlem Hospitals in 1981 and 1982 and the filing of grievances at Metropolitan Hospital between 1976 and 1980. In fact, HHC emphasizes, petitioner has not pleaded that her supervisors at Harlem and Elmhurst Hospitals were even aware of an alleged attempt to rectify her employment concerns at Metropolitan Hospital.

With respect to petitioner's specific charges of alleged retaliatory action, HHC first denies that it intentionally appointed petitioner to a PAA probationary position at Harlem Hospital in the Personnel Department with the knowledge that she would be unsuccessful due to a lack of prior relevant experience. HHC maintains that its role in the selection of applicants for probationary appointment is simply to offer the position to the applicant; whether to accept the position is a decision that rests solely with the applicant, with no effect on eligibility for later positions. Furthermore, in its view, HHC had no obligation to provide training to petitioner, since she still had duties to perform at Metropolitan, and her new job responsibilities could best be learned while actually functioning in the PAA position.

HCC also argues that petitioner has presented no evidence to establish either an underpayment of her salary or a nexus between such alleged underpayment and the protected union activity herein, i.e., the filing of grievances.

HHC likewise denies that it has failed properly to credit and record petitioner's accumulated vacation time and claims that, to the contrary, petitioner has failed to state specifically the discrepancies she finds in her vacation records. Pointing out that it is a managerial right to deny vacation time when required by the Hospital's operational demands, HHC also contends that it has engaged in no "unfair scheduling practices", as petitioner claims. In any event, HHC maintains, petitioner has failed to demonstrate any link between these alleged unfair and improper scheduling practices and the grievances she filed between 1976 and 1980.

Similarly, HHC denies that it has assigned petitioner menial tasks or out-of-title duties in retaliation for filing grievances. Again, HHC asserts that the direction of employees is a managerial right and argues that petitioner has failed to explain or plead facts to show how her current job assignment violates the NYCCBL.

As for petitioner's claim that she is entitled to a salary differential for her computer duties, HHC alleges that, upon inquiry, it paid petitioner the required differential. HHC adds, however, that if petitioner believes the differential was incorrectly computed, the Wage and Salary Unit of Metropolitan is available to discuss the matter with her. In any event, HHC argues that petitioner has failed to ex-

plain or plead facts which in any way show how the delay in paying the differential may be deemed violative of the NYCCBL.

Finally, HHC asserts that, contrary to petitioner's claim, the issuance of the July 24, 1984 warning notice was a legitimate exercise of a management right recognized by the NYCCBL. Again, HHC argues that petitioner has pleaded no facts which demonstrate how the warning notice violated the NYCCBL.

HHC accordingly requests that the petition be summarily dismissed without conducting a hearing, in view of petitioner's failure to state an improper practice claim within the meaning of the NYCCBL.

Union's Position

Contrary to petitioner's allegations, the Union maintains that it fulfilled its duty of fair representation by processing the August 10, 1984 grievance in accordance with the grievance procedures set forth in the collective bargaining contract. The Union claims that upon its submission of petitioner's grievance to Metropolitan, a grievance hearing was scheduled for October 23, 1984. Although the Council Representative and the Chief Shop Steward made appointments to discuss the grievance with petitioner on October 10 and October 17, 1984, according to the Union, petitioner failed to appear on either occasion. On the morning of the hearing,

the union claims that it requested a postponement lasting one hour and forty-five minutes in order to review petitioner's grievance with her. The Union further alleges that the Council Representative and the two shop stewards who represented petitioner at the hearing raised all matters alleged in the grievance form, except for matters pertaining to petitioner's tenure as a PAA, for which it assertedly has no jurisdiction. In addition, petitioner admittedly made a lengthy statement to the hearing officer on her own behalf. The Union claims that although she received the November 13, 1984 determination of the Hearing Officer, petitioner did not thereafter contact the Union about the determination or request its appeal.

As for the grievance dated October 12, 1983, the Union alleges that it met with petitioner to discuss which provisions of the collective bargaining agreement had been violated and requested petitioner to rewrite the grievance form to reflect these violations. According to the Union, petitioner thereafter failed to appear for three scheduled appointments to discuss her grievance and never made the requested modifications. The Union thus argues that it cannot be faulted for grievant's lack of cooperation.

In addition, the Union denies receipt of petitioner's grievance form dated August 6, 1983. Even assuming it had received it, the Union argues that petitioner's allegations

concerning this grievance, as well as those relating to the October 12, 1983 grievance, are time-barred by the four-month limitations period contained in §7.4 of the Revised Consolidated Rules of the OCB.

The Union also maintains that it has no duty to institute an improper practice petition on petitioner's behalf, since its statutory grant of authority, and correlative duty of fair representation, are limited to the collective bargaining process. Outside of this bargaining relationship, the Union asserts that it has no authority to represent union members and no duty to advise those members of their extra-contractual rights.

The Union further argues that petitioner has failed to state an improper practice claim against the Union since she has alleged no facts which show that the Union in any way interfered with, restrained, or coerced petitioner in the exercise of rights guaranteed her under the NYCCBL.

Finally, the Union refutes petitioner's claim that it has refused to provide petitioner and her counsel with information about the collective bargaining agreement. Rather, the Union claims that it has always provided petitioner with any information she requested and that petitioner's counsel has never sought information about the agreement.

Asserting that petitioner has failed to state a cause

of action for breach of the duty of fair representation, the Union requests that the petition be dismissed without further proceedings.

Discussion

a. Charges against HHC

Petitioner essentially charges that HHC committed improper practices under the NYCCBL by allegedly retaliating against her for filing various grievances between 1976 and 1980. HHC's alleged retaliatory actions, according to the petition, included (1) appointing petitioner in June 1981 to a PAA position with the knowledge that she lacked relevant work experience, (2) failing to credit properly petitioner's vacation time and salary increases, (3) transferring petitioner to menial assignments, and (4) serving petitioner with a warning notice in July 1984 for "inappropriate conduct."

Section 1173-4.2 of the NYCCBL provides that it is an improper practice for a public employer:

- (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;
- (2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

We conclude that petitioner has failed to establish a prima facie improper practice case, since she has alleged no fact which supports the underlying theory of her case, i.e., that the actions allegedly taken by HHC between June 1981 and the present are related to grievances she filed between 1976 and 1980. Petitioner's charges consist entirely of surmise, speculation, and conjecture and are totally unsupported by allegations of fact. Such charges, in the absence of allegations which, if proven, would sustain her claim, cannot provide the basis for a finding of improper practice. See Decision No. B-35-80 (petitioner failed to plead sufficient facts to support a finding that he had been suspended for his union election activities); Decision No. B-12-85 (petitioner failed to establish a prima facie improper practice claim since he alleged no facts to support his charges that the presence of certain supervisors in the unit interfered with and dominated the administration of the union); Decision No. B-25-81 (petitioner failed to show that

the disciplinary action taken against him was connected to his union candidacy).

Accordingly, we will dismiss petitioner's improper practice claims against HHC.

b. Charges against the Union

Petitioner claims that the Union committed improper practices by allegedly failing to (1) take action on her grievances dated June 28, 1983 and October 12, 1983, (2) file the improper practice petition asserted herein against HHC, and (3) provide petitioner with information concerning the collective bargaining agreement between HHC and the Union.

Before addressing the merits of the petition, we must first dismiss petitioner's claim that the Union improperly failed to act upon her grievances dated June 28 and October 12, 1983. Under Section 7.4 of the Revised Consolidated Rules of the OCB, a petition alleging an improper practice must be filed within four months of the date on which the alleged improper practice occurred. Since the petition was not filed until November 5, 1984, her claims relating to 1983 are time-barred and, accordingly, will be dismissed.

With respect to petitioner's claim that the Union violated the NYCCBL by failing to institute an improper prac-

tice petition,² we have previously ruled that the Union has no legal duty to take such an action on behalf of its members. Decision No. B-26-84 (duty of fair representation does not obligate a union to file an improper practice petition at a member's request); Decision No. B-14-83 (Union owed no legal duty to institute a lawsuit on petitioner's behalf challenging the employer's alleged violations of the Civil Service Law); Decision No. B-23-84 (duty of fair representation does not extend to the internal affairs of the union); see also Public Employees Federation (Hartner), 15 PERB ¶3066 (1982) (a union's duty of fair representation does not include the obligation to prosecute lawsuits on behalf of its members unless it has provided that service for others and it can be shown that the union is discriminating against the charging party in not providing it to him).

In so ruling, we have reasoned as follows:

We believe that duty of fair representation is co-extensive with a union's exclusive authority to deal with the employer on behalf of bargaining unit employees with respect

²To establish an improper union practice under §1173-4.2(b) of the NYCCBL, public employees must show that the Union interfered with, restrained, or coerced them in the exercise of rights under §1173-4.1 "to self-organization, to form, join or assist public employee organizations, [and] to bargain collectively through employee organizations of their own choosing." A union's breach of its duty of fair representation is deemed to constitute an improper practice within the meaning of this Section. E.g., Decision No. B-13-81.

to certain matters. To the extent that a union's status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, such as negotiation with the employer, the union owes a duty to represent fairly the interests of the employee who is unable to act independently to protect his own interests. In the context of a certified employee representative's exclusive authority under the NYCCBL and the applicable provisions of the Taylor Law, the duty of fair representation does not reach into and control all aspects of the union's relationship with its members. The duty extends only to the negotiation, administration, and enforcement of a collective bargaining agreement. It does not extend to the enforcement of provisions of the NYCCBL, the vindication of which may be obtained by any affected employee through free access to the processes of this Board. In the latter case, the union does not control the sole access to the forum through which rights may be vindicated, and thus there exists no policy reason why the union should be held responsible for protecting those rights. [footnote omitted].³

As in the above decision, the Union here does not control the sole means of obtaining enforcement of employees' rights under the NYCCBL. To the contrary, any affected employee has access to the OCB to challenge the alleged violation of these rights by the employer. In fact, petitioner

³Decision No. B-26-84.

here has availed herself, if of this right by commencing this improper practice proceeding challenging the same actions by HHC of which she complained to the Union. Under all of these circumstances, we therefore hold that the Union owed no legal duty to institute the improper practice proceeding on her behalf.

Finally, petitioner has pleaded no facts in support of her conclusory allegation that the Union has failed to provide her with information about the collective bargaining agreement. Thus, even assuming the truth of petitioner's allegations, we have no basis upon which to find that the Union's actions rise to such a level of unfairness or bad faith as to constitute a breach of the duty of fair representation.⁴

Accordingly, we will dismiss petitioner's improper practice petition against the Union.

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 in the instant case against the New York City Health and Hospitals Corporation and the American Federation of State, County and Municipal Employees, District Council 37, be, and the same

⁴See Decision Nos. B-13-82; B-12-82; B-13-81; B-16-89.

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hereby is, dismissed.

DATED: New York, N. Y.
March 31, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F. X. MULHEARN
MEMBER

SANDRA B. DURANT
MEMBER

CAROLYN GENTILE
MEMBER