Keyes v. L.1182, CWA, 37 OCB 32 (BCB 1986) [Decision No. B-32-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of
the Improper Practice

-between-

DECISION NO. B-32-86

MERRIAN KEYES,

DOCKET NO. BCB-820-85

Petitioner,

-and-

LOCAL 1182, COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Respondent
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DECISION AND ORDER

On October 23, 1985, Merrian Keyes ("petitioner"), by her attorney, submitted a verified improper practice petition charging that the Communications Workers of America, Local 1182 ("CWA" or "respondent") breached its duty of fair representation and thereby violated Section 1173-4.2b of the New York City Collective Bargaining Law ("NYCCBL")[1].The CWA submitted a

[1]NYCCBL §1173-4.2(b) provides:

Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter, or to cause, or to attempt to cause, a public employer to do so;

(more)

verified
answer to the petition and memorandum of law in support thereof on November 25, 1985. Petitioner filed a verified reply and memorandum of law on December 27, 1985. on December 31, 1985, a final letter was submitted by CWA.

Background

The New York City Department of Transportation ("Department") hired petitioner as a Traffic Enforcement Agent on February 27, 1984. On her application for employment, petitioner revealed that she had been convicted on a bad check charge in 1970. Petitioner did not, however, disclose that she had also received a sentence of one year's probation for possession of stolen property in 1975. Petitioner alleges that she was confused about whether a sentence of probation constituted a "conviction." Although petitioner did not list the 1975 sentence on her application, it is alleged that she did make full disclosure to her superiors in the course of her probationary period, which she subsequently completed with favorable evaluations.

([1] continued)

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

In July 1985, four months after petitioner completed her probationary period, the New York City Personnel Director learned of the omission of the 1975 sentence on petitioner's application and discharged her. CWA declined to represent petitioner in her appeal of the discharge to the Civil Service Commission.[2] It informed

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[2] It appears that petitioner was discharged pursuant to section 4.3 of the Rules and Regulations of the New York City Personnel Director which provides, in pertinent part:

> RULE IV: EXAMINATION PROCEDURES, VETERANS PREFERENCE, ELIGIBLE LISTS AND CERTIFICATIONS
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> * * * *
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> SECTION III - DISQUALIFICATION OF APPLICANTS OR ELIGIBLES
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> * * * *
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> 4.3.1 General Provisions
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> (b) Investigation of the qualifications and background of an eligible may be made after appointment, and, upon finding facts which, if known prior to appointment, would have warranted disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in the eligible's application, examination or appointment, the certification of such eligible may be revoked by the City personnel director and the employment directed to be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

petitioner that it could not represent her because its collective bargaining agreement with the City of New York ("Agreement") specifically excludes from the grievance procedure disputes concerning decisions of the Personnel Director.[3]

Positions of the Parties

Petition's Position

Petitioner contends that respondent's refusal to represent her with respect to her discharge was arbitrary and capricious. According to petitioner, CWA cannot refuse to process a discharge grievance merely because the termination was effected by the Personnel Director

[3] Article VI, Section 1 of the Agreement provides, in pertinent part:

> DEFINITION: The term "Grievance" shall mean:
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> * * *
>
> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration; ....

rather than by the Department. Petitioner also complains that respondent arbitrarily refused to provide her with a copy of the Agreement.

It is further alleged that respondent conducted itself in an arbitrary manner when it negotiated a contract provision excluding the Personnel Director's decisions from the grievance procedure. Petitioner argues that CWA thereby bargained away its members' rights to effective representation in a discharge proceeding.

Finally, petitioner contends that her termination by the Personnel Director nearly one and a half years after her appointment, and after successful completion of a probationary period, is tainted by the "laches" of the Personnel Director, to which injustice the union, by its refusal to represent petitioner, is a party.

As a remedy for the union's alleged improper practices, petitioner seeks reimbursement for all legal costs incurred in proceedings directed toward securing her reinstatement, as well as back pay allegedly attributable to the respondent's breach of the duty of fair representation.

Respondent's Position

CWA maintains that the petition fails to state a cause of action for breach of the duty of fair repre-

sentation. Respondent contends that petitioner's conclusory allegations, unsupported by any facts which would demonstrate that the union's conduct was arbitrary, discriminatory or in bad faith, are insufficient to support a finding of improper practice.

CWA contends that it has no obligation to enforce the rights of bargaining unit members with respect to matters outside the collective bargaining process. Respondent notes that Article VI, Section l(B) of the Agreement expressly states that disputes involving decisions of the Personnel Director are not subject to the grievance and arbitration procedure. However, the union notes, an employee who is discharged by the Personnel Director may take an appeal to the City Civil Service Commission. Since this non-contractual avenue of redress may be taken by the individual employee without the assistance of his union, CWA asserts, the pursuit of such a remedy is beyond the scope of the duty of fair representation.

Contending that it has fulfilled its duty to petitioner under the NYCCBL, respondent requests that the improper practice petition be dismissed in its entirety.

Discussion

We have long held that the duty of fair representation is the obligation, co-existence with the exclusive power

of representation, to refrain from arbitrary, discriminatory or bad faith conduct in the negotiation, administration and enforcement of collective bargaining agreements.[4] In the present case, petitioner claims that CWA breached its duty of fair representation in that it arbitrarily refused to represent her with respect to her termination by the Personnel Director, by (a) initiating a grievance under the contract and/or (b) representing her in a proceeding before the Civil Service Commission. While it is not clear from the pleadings that petitioner specifically sought to be represented in one forum as opposed to the other, her failure to demonstrate that the union's refusal to represent her in either forum was arbitrary, discriminatory, or in bad faith precludes us from finding a breach of the duty of fair representation in this case.

In the context of grievance handling, we have held that a union does not breach the duty of fair representation by a mere refusal to advance each and every grievance. The duty of fair representation requires only that the refusal to advance a claim must be made in good faith.[5]

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[4] E.g., Decision Nos. B-16-79; B-39-82; B-16-83; B-26-84. See, Vaca v. Sipes, 386 U.S. 171, 65 LRRM 2369 (1967).

[5] Decision Nos. B-13-82; B-25-84. See, Vaca v. Sipes, supra note 4; Hines v. Anchor Motor Freight, Inc.,424 U.S. 554, 91 LRRM 2481 (1976).

In the instant case, the agreement between the parties clearly and unambiguously excludes from the scope of the grievance procedure "disputes involving the Rules and Regulations of the New York City Personnel Director." Therefore, a determination by respondent that it had neither the authority nor the duty under the Agreement to represent petitioner concerning her discharge under Section 4.3 of the Personnel Director's Rules, and/or that it would be pointless to file a grievance on her behalf, cannot be characterized as arbitrary or as evidencing bad faith.

With respect to respondent's refusal to represent petitioner in an appeal of her discharge to the Civil Service Commission, we note that this non-contractual remedy may be pursued by unit members independently of their union. We have previously held that the duty of fair representation attaches only where the union's status as exclusive bargaining representative extinguishes an individual employee's access to a particular remedy. [6]However, where the union does not control access to the remedial forum, the bargaining representative's duty is limited to evenhanded treatment of the members of the unit.[7]

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[6] See, Decision Nos. B-14-83; B-26-84; B-18-86.

[7] See, Hartner v. Public Employee Fed'n, 15 PERB §3066-(PERB 1982); Farkas v. Public Employees Fed'n, 15 PERB §3134 (PERB 1982), aff'd sub nom. Farkas v. PERB, 16 PERB §7024 (3d Dep't 1983), leave to appeal denied, 16 PERB §7031 (N.Y. Ct. App. 1983).

Succinctly stated:

> a union's fundamental statutory duty of fair representation extends only to matters involving collective negotiations, the administration of collective bargaining agreements and the processing of grievances. With respect to other matters, the duty of fair representation merely prohibits discriminatory practices.[8]

As petitioner has not alleged that CWA has represented other employees in appeals to the Civil Service commission or that its failure to do so in her case was discriminatorily motivated, we find no breach of the duty of fair representation in the union's refusal to challenge petitioner's termination by the Personnel Director.[9]

Petitioner has also alleged that respondent arbitrarily refused to provide her with a copy of the collective bargaining agreement. This allegation may be dismissed because petitioner has failed to

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[8] Barry v: United University Professions, 17 PERB 13117 at 3179 (PERB 1984).

[9] Although we dismiss petitioner's claim in this case, nothing we have said herein is intended to preclude a union from representing a bargaining unit member in an appeal to the City Civil Service commission, or to prevent us from determining, in a proper case, that a union's refusal to prosecute such an appeal on behalf of a unit member constitutes a breach of the duty of fair representation.

allege or to demonstrate that such action interfered with the exercise by petitioner of rights guaranteed by section 1173-4.1 of the NYCCBL, in violation of section 1173-4.2b(l).[10]

Nor can we find merit in petitioner's contention that respondent acted arbitrarily and in violation of its duty of fair representation when it negotiated an agreement that forecloses arbitration of disputes involving the Personnel Director's Rules. It is well-established that a bargaining representative is allowed considerable latitude in matters of contract negotiation. Absent showing of intentional and hostile discrimination, union does not breach its duty of fair representation simply because all the employees it represents are not satisfied with the negotiated agreement. The petitioner in this matter has failed to show that CWA acted with improper motivation or that it discriminated against her when it concluded the agreement to which she objects. Therefore, we must reject petitioner's conclusory allegation that CWA bargained away its members' rights to effective union representation when it negotiated the exclusionary language of Article VI, Section l(B).

[10] See, Decision Nos. B-15-83; B-9-86 and cases cited therein at note 14.

Finally, we note that petitioner's challenge to the action of the Personnel Director as unreasonable and untimely is misplaced in the context of the present proceeding in which CWA is the only named respondent. Moreover, to the extent that it is suggested that the union is an "accomplice" and therefore "jointly liable" for the Personnel Director's allegedly unfair and prejudicial treatment of petitioner, it suffices to say that this allegation is conclusory and wholly unsubstantiated. Further, the equitable doctrine of laches, invoked by petitioner, is a matter of defense; it may not appropriately be relied upon as an affirmative basis for a claim and does not, either alone or in conjunction with other allegations, spell out a cause of action under the NYCCBL.

Since it has not been established that CWA had an obligation in contract or in law to represent petitioner with respect to her termination or that the decision not to represent her was arbitrary, discriminatory or in bad faith, and since it has not been demonstrated that the union's conduct in relation to petitioner in any other respect constitutes a basis for a finding of improper practice, we shall dismiss the petition in its entirety.

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 by Merrian Keyes be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 29, 1986

ARVID ANDERSON
CHAIRMAN

COLLINS G. DANIEL
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
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