Jones v. L.1182, CWA, 37 OCB 34 (BCB 1986) [Decision No. B-34-86 (IP)]

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

GLORIA J. JONES,

Petitioner, DECISION NO. B-34-86

-and- DOCKET NO. BCB-824-85

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

Respondent.
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DETERMINATION AND ORDER

This proceeding was commenced on November 4, 1985,[1] when Gloria J. Jones ("petitioner") submitted a verified improper practice petition alleging that respondent Communications Workers of America, Local 1182 ("CWA" or "respondent") improperly refused to represent her with respect to the termination of her employment on September 27, 1985. CWA filed a verified answer to the petition and a memorandum of law in support thereof on December 13, 1985. Petitioner did not file a reply, although advised of her right to do so.[2]

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[1] The petition dated October 11, 1985 was filed with the Office of Collective Bargaining ("OCB") on October 17, 1985, but was returned to petitioner because of her failure to submit proof of service as required by Section 7.6 of the Revised Consolidated Rules of the OCB ("OCB Rules"). The petition was resubmitted with proof of service and was accepted for filing on November 4, 1985.

[2] By letter dated January 3, 1986, sent by certified mail, the OCB-designated Trial Examiner advised petitioner of her

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Background

Petitioner was employed by the New York City Department of Transportation as a permanent Traffic Enforcement Agent when, on or about July 29, 1985, she was advised that she had been found "not qualified" for appointment based upon her "conviction record, and character record." The "Notice of Personnel Director Action" addressed to petitioner, a copy of which is annexed as Exhibit "A" to CWA's Answer, states, in part:

> The Personnel Director has taken the action checked below in connection with the above mentioned position. If you were already appointed and have been found NOT QUALIFIED, your department has been notified to terminate your employment. If you have completed probation and believe this action to be incorrect, you may be kept on payroll pending appeal if you appeal to the City Civil Service Commission and also submit a timely request to be kept on payroll to the Personnel Director....
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> The decision of the Personnel Director...may be appealed in writing

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([2] Continued):

right, pursuant to Section 7.9 of the OCB Rules, to file a reply to respondent's answer and granted her an additional ten days in which to submit a responsive pleading. No reply was received.

> to the City Civil Service Commission, 32 Broadway, New York, N.Y., 10004, within thirty (30) days after the date of this Notice....

Upon receiving the above-quoted notice, petitioner apparently contacted her union representative, the respondent herein, and was advised that the union could do nothing for her. According to CWA, it told petitioner that her termination, which was effectuated pursuant to Section 4.3 of the Rules and Regulations of the New York City Personnel Director ("Personnel Director's Rules"),[3] was not a grievable matter under the collective bargaining agreement between the City and CWA ("Agreement"),

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[3] Section 4.3 of the Personnel Director's Rules 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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> 4.3.1 General Provisions
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> * * *
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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 r 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.

which specifically excludes from the definition of the term "grievance" disputes involving the Personnel Director's Rules.[4]

Positions of the Parties

Petitioner's Position

Although not stated on the face of the petition, it is clear that the gravamen of petitioner's complaint is that CWA breached its duty of fair representation when it refused to provide assistance to petitioner in challenging her termination by the Personnel Director.

Respondent's Position

CWA asserts that the petition fails to state an improper

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

> DEFINITION: The term "Grievance" shall mean:
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> * * *
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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; ....

practice because respondent has no right or obligation under the contract to represent petitioner in her dispute with the Personnel Director, and no statutory obligation to pursue an appeal to the City Civil Service Commission on petitioner's behalf. Further, CWA argues, petitioner has failed to allege any facts to show that the respondent's refusal to take her case was, in any way, arbitrary, discriminatory or in bad faith. Accordingly, it is urged that the petition should be dismissed in its entirety.

Discussion

The duty of fair representation is a judicially developed concept now well-established in the law. It is designed to protect individual bargaining unit members from abuses by unions which have been given exclusive authority in the areas of negotiation, administration and enforcement of collective bargaining agreements. The United States Supreme Court has explained that when Congress gave unions the exclusive power of representation, it simultaneously imposed upon them a corresponding duty "inseparable from the power of representation to exercise that power fairly." [5] This Board has long recog-

[5] Steele V. Louisville & Nashville Railroad Co., 223 U.S. 192, 15 LRRM 708 (1944). See, Vaca v. Sipes, 386 U.S. 171, 65 LRRM 2369 (1967).

nized a cause of action for breach of the duty of fair representation, deriving from Section 1173-4.2b of the New York City Collective Bargaining Law ("NYCCBL").[6]

Essentially, the doctrine of fair representation requires a union to:

> serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete qood faith and honesty and to avoid arbitrary conduct.[7]

The obligation extends, at a minimum, to the representation of the interests of all bargaining unit members with respect to the negotiation, administration and enforcement of collective

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[6] NYCCBL Section 1173-4.2b provides:

> It shall be an improper practice for a public employee organization or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in Section 1173-4.1 of this chapter, or to cause, or attempt to cause, a public employer to do so;
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> (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.

See, Decision Nos, B-16-79; B-13-81; B-11-82; B-14-83; B-26-84 B-5-86.

[7] Vaca v. Sipes, supra note 5, at 177, 64 LRRM at 2371.

bargaining agreements.[8] It does not, absent a contrary practice, extend to the enforcement of rights which an individual employee may vindicate without the assistance of his bargain representative. As we have previously observed, where a union. does not control the sole access to the forum through which rights may be vindicated, there is no policy reason for holding. the union responsible for protecting those rights. To impose a broader scope of duty upon a union would be unwarranted and unduly burdensome.[9]

In the present case, we cannot find that CWA had a duty to represent petitioner with respect to her termination by the Personnel Director. There is no evidence or allegation that petitioner's discharge was based on any reason other than the discovery, some six years after her appointment, of a record of criminal conviction. It is not disputed that termination on grounds of a conviction and character record is a matter governed by Section 4.3 of the Personnel Director's Rules.

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[8] International Bhd. of Elec. Workers v. Foust, 442 U.S. 32, 101 LRRM 2365 (1979); Vaca v. Sipes, supra note 5.

[9] Decision Nos. B-14-83; B-26-84. The courts and the State Public Employment Relations Board ("PERB") are in accord with thin view. See, Black Musicians v. Local 60-471, Am. Fed'n. of Musicians, 86 LRRM 2296 (W.D. Pa. 1974) aff'd 544 F. 2d 512 (3d Cir. 1975); Lacy v. Auto Workers, Local 287, 102 LRRM 2847 (S.D. Ind. 1979); Hawkins V. Babcock & Wilcox Co., 105 LRRM 3438 (N.D. Ohio 1980); 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); Barry v. United Univ. Professions, 17 PERB §3117 (PERB 1984).

Since the grievance definition included in the Agreement specifically excludes disputes involving the Personnel Director's Rules from the grievance procedure or arbitration, we find no basis for concluding that CWA's determination that it had neither the authority nor the duty under the Agreement to represent petitioner in this matter and/or that it would be pointless to file a grievance on her behalf was arbitrary, discriminatory or in bad faith.

An employee discharged by the Personnel Director under the circumstances of the present case may, however, file an appeal with the City Civil Service Commission. This noncontractual avenue of redress may be pursued by unit members independently of their union.[10] Therefore, unless the union has provided such service on behalf of others and it also can be shown that the employee organization, in refusing to provide such service to the petitioner, is discriminating against her, the failure to undertake such appeal does not constitute a breach of the duty of fair representation. We agree with the reasoning of PERB's Hearing Officer, subsequently affirmed by

[10] In fact, it appears-from respondent's answer herein that it advised petitioner of her right to appeal the Personnel Director's action to the Civil Service Commission and that petitioner did exercise this right.

PERB, in Hartner v, Public Employees Federation:

> [w]hile a union is not privileged to refuse to examine the merits of a grievance even though its informed judgment results in a decision not to prosecute it, lawsuits and extra-contractual proceedings are governed by different considerations. Absent its provision to members or others within the unit with respect to matters affecting their employment relationship, a union is under no obligation to furnish a service extraneous to its statutory mandate ....
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> ... [W]hen the institution of a proceeding for judicial review of agency action which affects a unit member is neither statutorily or contractually compelled, the charging p arty must show that the union has voluntarily granted such assistance to its members (or to unit members generally) and that it has discriminated against him "by reason of improper motives or of grossly negligent or irresponsible conduct" (citations omitted).[11]

As the petitioner herein has not alleged that CWA has represented other employees in appeals to the Civil Service Commission or that its failure to do so in petitioner's case was discriminatorily motivated, we conclude that petitioner has failed to establish that respondent breached its duty of fair representation.

Since it has not been established that CWA had a legal obligation to represent petitioner with respect to her termina-

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[11] 14 PERB §4671 at p. 4839, aff'd, 15 PERB §3066 (PERB 1982). Accord, Farkas v. Public Employees Fed'n, supra note 9. See, Barry v. United Univ. Professions, supra note 9.

tion or that the union's decision not to represent her was arbitrary, discriminatory or in bad faith, we shall dismiss the improper practice petition in this matter.[12]

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 by Gloria J. Jones be, and the same hereby is, dismissed.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE

[12] 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.

MEMBER