Migliaro v. L.2021, DC37, 39 OCB 42 (BCB 1987) [Decision No. B-42-87 (IP)]

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

ROSE A. MIGLIARO,

Petitioner,

DECISION NO. B-42-87

-and-

DOCKET NO. BCB-954-87

LOCAL 2021, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On May 11, 1987, Rose A. Migliaro ("petitioner") filed an improper practice petition against Local 2021, District Council 37, AFSCME, AFL-CIO ("the Union"). The Union filed its answer on May 29, 1987, to which petitioner replied on June 15, 1987.[1]

Background

In July 1986, petitioner was involuntarily transferred from Off-Track Betting ("OTB") branch #123 to OTB branch

[1]Petitioner also submitted a letter containing additional allegations or, August 20, 1987. Since they arise from separate events occurring after her petition was filed and are matters upon which the Union has had no opportunity to respond, these allegations will not be considered herein. Such matters are more properly raised by the filing of a new improper practice petition.

#056. On December 22, 1986, OTB informed petitioner that she was being transferred into the "pool". Petitioner thereupon filed a grievance claiming that, due to personal problems with her former son-in-law, she was being transferred from branch to branch. Tony Reda, the Senior Director of Branch Operations, notified petitioner on January 2, 1987 that her grievance had been denied since the decision to transfer her "was the result of a Labor-Management Meeting."

On January 6, 1987, petitioner filed another grievance claiming that she had been involuntarily transferred in violation of Article X, Section 8 of the collective bargaining agreement.[2] As a remedy, petitioner sought to be re-

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[2]Article X, Section 8 of the collective bargaining agreement provides as follows:

> Section 8.
>
> Involuntary Transfers.
>
> Where the Corporation has decided it is necessary to transfer employees from a location, the following priorities shall be followed:
>
> (A) Volunteers in order of seniority.
>
> (B) Non-volunteers by inverse order of seniority.
>
> (C) Employees under extended probation or special evaluatory supervision who have received written notice of such status.

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turned to her original branch.

Grievance conferences were held on March 4 and April 22, 1987, at which petitioner was accompanied by a Union representative. In her decision dated May 13, 1987, the Conference Officer pointed out that the Union had argued, and OTB did not dispute, that the past interpretation and application of Section 8, Subsection (F) was to limit an employee's involuntary transfer to once within a twelve-month period. The decision states, however, that upon questioning by the Conference Officer, petitioner expressed a desire to remain in the pool. Petitioner was thus advised that she should withdraw the grievance if she "wished to maintain the status quo." Since the grievance was not withdrawn, the Conference Officer issued a decision on May 13, 1987, finding that petitioner had been wrongfully trans-

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(D) A travel hardship case.

(E) Employees with less than six months of service in title.

(F) Employees who have been involuntarily transferred within the past 12 months.

(G) Junior Building Custodians (OTB) (Part-Time and Full-Time) will not be transferred or reassigned for punitive reasons.

The above shall not apply to transfers affected under Article VI.

ferred and directing that she be returned to branch #056 as soon as possible.

On May 11, 1987, petitioner filed a petition with the office of Collective Bargaining asserting that the Union had committed an improper practice by taking the following actions:

> Allowing N.Y.C. Off-Track Betting Corp. to have me involuntarily transferred twice in less than a year, violating the existing contract (see Article X - Section 8F and Section 9 of contract).
>
> - Non-performance and the lack of protection due me as a dues paying member of D.C. 37, Local 2021.
>
> - Making an agreement with N.Y.C. Off-Track Betting Corp. in complete contrast to Section 9 of the contract now in effect. This agreement was made to protect N.Y.C. Off-Track Betting Corp. and not the employee.

Positions of the Parties

Petitioner's Position

The thrust of petitioner's claim revolves around the events that transpired at the two grievance conferences. Petitioner maintains that at the March 4th grievance conference, Mr. Reda told her that an agreement had been made at a labor-management conference between the President of Local 2021 and the Director of Manpower. This agreement

allegedly provided that where involuntary transfers are made because of overstaffing, the cashier will be assigned to the pool, rather than to another branch. Thus, petitioner's transfer from branch #123 to branch #056 was in error under the terms of this agreement, thereby allegedly resulting in her second transfer to the pool.

Petitioner then asked where this agreement appeared in the collective bargaining contract. The Union representative, Sherwynn Britton, allegedly replied that it was an agreement made prior to the hearing and that it would appear in the parties' new contract. Petitioner insisted, however, that the parties were obligated to adhere to the terms of the present contract. At this point, the Conference Officer adjourned the hearing to investigate the circumstances surrounding the agreement.

At the April 22, 1987 conference, petitioner was allegedly advised that the Union and OTB had in fact reached an agreement regarding involuntary transfers and that petitioner should have been assigned to the pool, rather than branch #056. When the Conference officer asked what remedy she was seeking, petitioner allegedly replied that she would like to return to branch #056. When both Mr. Reda and the Conference Officer said no, petitioner asked to be reassigned to branch #123. Again,'they allegedly replied no. Peti-

tioner then said that she had no other choice but to stay in the pool. Ms. Britton allegedly responded that, in that case, the Union had to withdraw the grievance since petitioner was electing to stay in the pool. Petitioner then allegedly said that ."until such time that [OTB] officials cannot use their positions in [OTB] as a sword for their own personal means, the pool was the safest place for [her]."

In May, the Union President and the Union representative called petitioner to ask if she wanted to return to branch #056. On both occasions, a heated discussion allegedly ensued, with petitioner ultimately responding that the matter was now before the Office of Collective Bargaining.

Petitioner then called OTB Field Operations to ask "if here was anything to stop the Union from hunting [her] own and having these phone conversations take place." They responded "not really as [your] schedule is there for all to see."

On May 14, 1987, OTB allegedly notified petitioner that she was to return to branch #056. Petitioner asserts, however, that she was assigned to a five day/twenty hour schedule instead of her previous four day/twenty hour schedule.

Petitioner's remaining claims primarily involve the

Union's alleged failure to notify her regarding the status of her grievance. Petitioner claims that, despite several calls to the Union, she received no notification regarding her January 6th grievance until Ms. Britton informed her on February 25, 1987 that a grievance conference had been scheduled for March. Petitioner also asserts that Ms. Britton evaded her inquiries about the status of the case between the March and April grievance conferences.

Finally, petitioner alleges that when she asked the Union President whether he was attending the April conference, he replied, "No - what for? Just to make a statement look Rose an agreement was made for the good of the Corporation and unfortunately you don't feel that way."

Accordingly, petitioner maintains that the Union has discriminated against her and has failed to represent her fairly and properly in this matter.

Union's Position

The Union denies that it has in any way breached its duty of fair representation to petitioner. The Union points out that Ms. Britton appeared at the grievance conferences on petitioner's behalf and, in fact, persuaded the Conference Officer that petitioner's transfer had violated the contract. Any confusion arising thereafter must be attri- to petitioner, who allegedly told the Conference

Officer that she wished to remain in her current position in the pool rather than return to branch #056. In addition, petitioner allegedly said that "she was interested only in establishing that she had not been fairly treated, that the transfer issue was a matter of principle to her." The Conference Officer then advised petitioner to withdraw her grievance if she no longer sought the relief requested therein. After the hearing, petitioner allegedly changed her mind again and decided that she did, after all, wish to return to branch #056. Ms. Britton, accordingly, did not withdraw the grievance. The Conference Officer then issued a decision on May 13, 1987, recognizing that the transfer had violated the contract and returning petitioner to her former branch.

The Union argues that petitioner's improper practice claim is general and conclusory. It emphasizes that the Union duly represented petitioner and pressed her grievance to successful conclusion. Thus, the Union maintains that its actions provide no basis for a claim of a breach of the duty of fair representation.

Discussion

It is well established that upon undertaking the duty of fair representation, a Union must exercise its powers

"fairly, impartially, and in good faith."[3] The scope of this duty of fair representation includes the negotiation, administration, and enforcement of collective bargaining agreements.[4]

A Union, however, does not breach its duty of fair representation simply by negotiating a change in a term of an existing collective bargaining agreement. For example, in Glass Bottle Blowers, 255 NLRB No. 715, 106 LRRM 1389 (1981), the National Labor Relations Board found that the Union did not breach its duty of fair representation by agreeing with the company to change the seniority system in midcontract term. The Board ruled that the Union was free at any time to negotiate a modification, provided it complied with its duty to fairly, impartially, and in good faith represent all of the employees in the unit.

That some employees are adversely affected by the Union's agreement does not establish a breach of the duty of fair representation. As the Supreme Court stated in Ford Motor Company v. Huffman, 345 U.S. 330, 338, 31 LRRM 2548, 2551 (1953),

> Inevitably differences arise in the manner and degree to which the terms of any

[3]Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 203, 15 LRRM 708, 713 (1944).

[4]E.g., Decision Nos. B-14-83, B-29-86.

> negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Similarly, in United Teachers of Island Trees (Kershen) 15 PERB 4605 (1982), the Public Employment Relations Board ("PERB") found that the Union did not violate its duty of fair representation when it entered into a grievance settlement agreement with the employer that adversely affected certain non-parties to the grievance, including the charging party. PERB reasoned that "an employee organization does not violate its duty of fair representation merely by reaching an agreement which is more favorable to some unit employees than to others."[5]

Applying these principles to the instant case, petitioner's allegations do not, as a matter of law, constitute

[5]See also Decision No. B-26-81 (the duty to represent all employees impartially does not necessarily prevent a union from making a contract that is disadvantageous to some members of the unit in relation to others); Decision No. B-15-83 (a union does not breach its duty of fair representation simply because all employees are not satisfied with the results of representation); Accord, Decision No. B-9-86.

a breach of the duty of fair representation. Although she claims that OTB transferred her because of a "personal vendetta" on the part of her former son-in-law, petitioner in no way alleges that the Union colluded with OTB in acting upon this vendetta. Rather, petitioner claims that the Union permitted the transfer because of its agreement with OTB to place involuntary transfers in the pool. Petitioner, however, does not allege that this agreement was applied solely to her or was created in response to her particular situation. Nor does petitioner allege facts which, if proven, would establish that the Union was acting in bad faith or contrary to the interests of the membership in entering into the agreement with OTB. Thus, petitioner has failed to plead sufficient facts to support a finding of a breach of the duty of fair representation.

As for petitioner's claim that the Union has failed to properly represent her, we note that the Union appeared on petitioner's behalf at the conference and, in fact, achieved the remedy sought in her January 6th grievance, i.e., to be returned to her assigned branch.[6] We therefore cannot

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[6]Petitioner asserted in her reply, however, that she had been assigned to a different work schedule upon her return to branch #056. In an attempt to resolve petitioner's complaints, the Deputy Chairman-Disputes of the Office of

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say that the Union failed to fairly represent petitioner in the processing of her grievance.

Finally, petitioner's allegations regarding the Union's failure to notify her regarding the status of her grievance and the refusal of the Union President to attend the April conference, even if proven, do not establish bad faith, unfairness, or gross negligence constituting a breach of the duty of fair representation.

For the foregoing reasons, the improper practice petition herein is 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

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Collective Bargaining intervened in this matter. As a result, petitioner was returned to her original schedule.

ORDERED, that the improper practice petition herein be, and the same hereby is, dismissed in all respects.

DATED: New York, N.Y.
September 22, 1987

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