Cosentino v. L.237, IBT, CEU, 41 OCB 50 (BCB 1988) [Decision No. B-50-88 (IP)]

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

JERRY COSENTINO,
Petitioner,
-and-

CITY EMPLOYEES UNION, LOCAL 237 INTER-NATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.
---------- X

DECISION NO. B-50-88
DOCKET NO. BCB-1060-88

DECISION AND ORDER

On May 23, 1988, Jerry Cosentino ("petitioner") filed a verified improper practice petition against City Employees Union, Local 237 International Brotherhood of Teamsters ("respondent" or "the Union"). The Union, after being granted an extension, filed its answer on August 23, 1988. Petitioner filed a reply to the respondent's answer on October 5, 1988.

Background

Petitioner is a Principal Housing Storekeeper, employed by the New York City Housing Authority ("the Authority.") On June 23, 1987, a meeting was held at the Fort Washington Storeroom ("Storeroom") with respect to operations at that site. In attendance were petitioner, Mechanical Section Supervisor Samuel Richmond, and one J. Nash.

During the course of the meeting, the participants disagreed on the scope of petitioner's assignment at the Storeroom, as well

as his request to take time off to reduce his leave time before retiring. Petitioner became upset, left the meeting and did not return to work until the following day. The parties to the meeting disagree as to the actual circumstances of petitioner's subsequent departure from the job site.

Petitioner alleges that he became agitated because of the discussion and, as a result, his ulcer "acted up." He claims that he needed a new prescription from his doctor and told Supervisor Richmond during the meeting that he was leaving to renew the prescription for his ulcer medication.

Richmond, however, alleged that petitioner simply became agitated, said he was leaving and walked out of the building to his car. Richmond recalls that he warned petitioner at that time that he could not walk out without being subject to disciplinary action. In the memorandum, he alleged that petitioner returned shortly thereafter, said he was sick and going to his doctor and left the work site.

On June 25, 1987, petitioner vas notified that he was being docked 3 1/2 hours of pay because he had walked off the job on June 23, 1987. On July 14, 1987,.respondent wrote to the Director of Personnel of the Authority on petitioner's behalf requesting that the pay dock be rescinded. On July 28,, 1987, however, a Step 11 grievance hearing vas held, after which the Authority determined that the pay dock vas a reasonable response to petitioner's allowing himself to become highly emotional

during the course of the meeting with Supervisor Richmond.

On December 3, 1987, a Step III grievance hearing was held at which time the Authority reaffirmed the decision to dock petitioner 3 1/2 hours of pay.

By letter dated February 8, 1988, the Union informed petitioner that it had forwarded pertinent information regarding his grievance to its attorneys for their evaluation. By letter dated March 14, 1988, the attorneys advised the Union of their conclusions and recommendations:

> Mr. Cosentino was not disciplined pursuant to Civil Service Law Sect. 75, he was not suspended, fired, denoted or terminated, but he was not allowed leave time for the hours he left work the afternoon of June 23, 1987. So the only issue is whether an Arbitrator would find that the Housing Authority had abused its discretion in denying Mr. Cosentino leave time. It is the position of this office that an Arbitrator will not find the Authority abused its discretion herein. Since this is not a disciplinary arbitration, the burden to prove abuse of discretion is on the grievant. There were three witnesses to the discussion. Considering the memo to file dated 6/24/87 a copy of which is enclosed, it appears that two of those three witnesses [referring to Messrs. Richmond and Nash], will testify favorably to the Authority. The memo basically claims that Mr. Cosentino refused assignment, made disparaging remarks, arbitrarily took time off, was insubordinate and walked out in the middle of a discussion with his supervisor and further that Mr. Cosentino claimed he was nick only after Mr. Richmond directed him not to leave. Added to the above is the doctors note submitted which provides no diagnosis and a prescription for medication that does not appear to be unique to an illness of 6/23/87, but appears to be medication Mr. Cosentino continuously takes.

> Copy of doctors note and prescription are enclosed.
>
> With credibility being such an important issue, with 2 of 3 witnesses testifying against Mr. Cosentino and with the limited medical note, we do not believe that Mr. Cosentino can sustain his burden to prove the Authority abused its discretion. It is the recommendation of this office that this matter not be taken to arbitration.

Thereafter, the Union advised the petitioner of its decision not to pursue his grievance to arbitration by letter dated May 18, 1988.

Positions of the Parties

Petitioner's Position

Petitioner claims that respondent did not take his case to arbitration because he was an agency fee paying employee. In support of his position, he relies on what he deems to be valid justification for his leaving the job site on June 23, 1987, i.e. a medical condition, and his conclusion that such conduct did not warrant the Authority docking his pay. Petitioner also cites section 12-302 of the New York City Collective Bargaining Law ("NYCCBL")[1] and sections 21.3 and 28.3 of the Rules and

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[1]Section 12-302 reads as follows:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

Regulations of the Department of Civil Service ("Civil Service Rules") which address the subject of absences of management and non-management employees, in support of his argument that the Union should have taken his case to arbitration.

As a remedy, petitioner seeks a "[s]uspension of the Agency Shop Fee, and the refund of one year, or the equivalent to be turned over to a charity of [his] choice, or be given to the federal government to reduce the federal debt."

Respondent's Position

Respondent denies petitioner's allegations. In support of its decision not to process petitioner's grievance further, it submits a copy of the letter from its counsel, quoted at length supra, which "express[ed] valid reasons on the merits why respondent should not [have proceeded] to arbitration on petitioner's grievance." Thus, the Union asks this Board to dismiss the petition.

Discussion

The duty or fair representation obligates a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.[2] It is well-settled that a union does not breach its duty or fair representation merely by refusing to bring a grievance to arbitration.[3] Nonetheless, it may not refuse to process a grievance for arbitrary or discriminatory reasons. The burden is on the petitioner to plead and prove that the Union has engaged in such conduct. In the instant matter, petitioner has entirely railed to support his conclusory allegation that the Union discriminated against him because he vas an agency fee paying employee.[4]

Moreover, the papers upon which petitioner relies, i.e. the memoranda, minutes of the grievance hearing and the Union's correspondence, belie any claim or discriminatory treatment. They establish that the Union vas aware of petitioner's complaint, assessed the facts, consulted an attorney and, on this basis, decided not to take the grievance to arbitration, without

[2]Decision Nos. B-30-88; B-13-81.

[3]Decision Nos. B-30-88; B-32-86; B-25-84; B-13-82.

[4]See Decision No. B-18-86 (where we dismissed an improper practice petition, inter alia, on the grounds that petitioner had pleaded no facts to support her conclusory allegation that the Union had failed to provide her with information concerning the collective bargaining agreement.)

consideration of the petitioner's status as an agency shop fee paying employee.[5] As we have held in the past, a union's decision not to arbitrate a grievance based on the advice of counsel does not constitute a breach of the duty of fair representation even if such reliance amounted to poor judgment.[6]

Even if the Civil Service Rules cited by petitioner give him certain rights, their relevance to his claim against the Union is not apparent.[7]

For all of the above reasons, we conclude that the petition fails to establish any improper practice, and we shall direct that it be dismissed.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[5]See Decision No. B-2-84.

[6]Decision No. B-12-82.

[7]The two sections appear in articles of the Civil Service Rules entitled "Attendance for Nonmanagement/Confidential Employees in New York State Departments and Institutions" and "Attendance for Management/Confidential Employees in New York State Departments and Institutions."

ORDERED, that the improper practice petition of Jerry Cosentino be, and the same hereby is, dismissed.

Dated: New York, New York
October 25, 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGENICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER