Nelson v. L.1199, HHC, 41 OCB 51 (BCB 1988) [Decision No. B-51-88 (IP)]

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

VALERIE R. NELSON,

DECISION NO. B-51-88

Petitioner,

DOCKET NO. BCB-1063-88

-and-

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU AFL-CIO,

Respondent.
- x

DECISION AND ORDER

On June 13, 1988, Valerie R. Nelson ("the petitioner") filed an improper practice petition charging Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU AFL-CIO ("the Union") with a breach of the duty of fair representation by failing to represent her in connection with her removal from the civil service title of "Administrative Dietitian" and her return to the title of "Food Service Supervisor" which she had previously held as a permanent employee.[1] After this Board

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[1] Section 12-306b(1) of the New York City Collective Bargaining Law ("NYCCBL") is the statutory basis of a union's duty of fair representation. Although petitioner does not cite any section of the NYCCBL, it appears that she relies on the duty section 12-306b(l) of the NYCCBL imposes on a union to fairly represent members of its bargaining unit. It provides, in relevant part that:

> [i]t shall be an improper practice for a public employee organization

(continued...)

granted an extension of time, the Union served and filed its answer on August 24, 1988. We later requested additional information from the petitioner and the Union which was received on September 26, 1988, and October 4, 1988, respectively.

Background

Petitioner began working for the Health and Hospitals Corporation ("HHC") on October 15, 1984. It appears that she was hired into the title of "Food Service Supervisor."[2] On or about the end of March or early April, 1987, petitioner was placed into the title of "Administrative Dietitian."[3]

(...continued)

> or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 1173-4.1 of this chapter [now codified as section 12-305], or to cause, or attempt to cause, a public employer to do so; . . .

[2] We take administrative notice of the fact that the title of "Food Service Supervisor" is jointly represented by Locals 237 and 832 of the International Brotherhood of Teamsters. Cert. No. 14-80, as amended.

[3] Although petitioner does not set f orth an actual date of entry into the title, we can infer when she entered the title from the facts presented by her pleadings. Petitioner alleges that the HHC evaluated her in or about December, 1987, eight months after she entered the new title. Thus, we can reasonably infer from her pleadings that she became an "Administrative Dietitian" in or about April, 1987. This approximate date is confirmed by the Union's response to this Board's request for supplemental information in which it alleges that she became a probationary dietitian on or about March 30, 1987.

The petitioner makes the following allegations to which the Union has interposed a general denial:

The probationary period for petitioner's new title lasted for one year from the date she commenced service in the title. In addition, the HHC was obligated to evaluate her twice during her probationary period in her new title, yet she was only evaluated in December, 1987, eight months after she entered the title.

The Union's shop steward and its organizer engaged in several acts of harassment including insults which were made to her by the shop steward on or about July 7, 1987. The Union also failed to assist her at "counselling" sessions held on July 7, 1987, and November 4, 1987, which the HHC apparently conducted with respect to her.

Further, on or about November 5, 1987, after being counseled by the HHC, petitioner alleges that a Union organizer told her that she "had no rights" under the collective bargaining agreement. Later, on January 12, 1988, she allegedly contacted the Union with respect to the problems she was having with the shop steward and the lack of assistance she was getting with her counsellings.

On January 26, 1988, petitioner allegedly received notice that she was being removed from the "Administrative Dietitian" title and returned to her former permanent title of "Food Service Supervisor." According to the Union, she was returned to the

"Food Service Supervisor" title on February 22, 1988.

Petitioner claims to have immediately contacted the executive vice president of the Union, Mr. Marshall Garcia, who promised "that he would do everything. . within his power to help."

On March 1, 1988, Mr. Garcia allegedly "assured" her that "even if it meant finding [her] a job at Lincoln Hospital, he would." Finally, on April 5, 1988, he allegedly told her "that there was nothing the union could do."

Petitioner relies on "7.4 of the Policy and Procedure Manual"[4] which she claims states that "No Permanent Competitive Employee shall be demoted without written consent." She also relies on 7:5:3 of the HHC Rules, which she claims entitled her to a hearing on demotion. Finally, she refers to a provision of an unspecified collective bargaining agreement that she claims provides that "in the case of Probationary Employees in a Non-Competitive title with more than three (3) months of service whose performance is not satisfactory, an employee may be terminated only after a hearing is held, . . ." We take administrative notice that the collective bargaining agreement between the Union and HHC does not contain any such provision nor any other similar provision.

[4]Although not specified by petitioner, we assume she is referring to the "Health and Hospitals Corporation, Rules and Regulations ("the HHC Rules.")

Positions of the Parties

Petitioner's Position

Petitioner claims that, contrary to the Union's assertion, she was a permanent competitive employee at the time of her removal, not a probationary employee. She generally alleges that the Union "failed and refused to represent [her], concerning counselling warnings, harassment and discharge by the employer for arbitrary and invidious and discriminatory reasons."

She claims the Union failed to act in her best interests by not assisting her in being evaluated in a timely manner, by not contesting the 11counsellings and warnings" she received and not grieving her demotion.

As relief, she asks this Board to order the Union to file a grievance on her behalf with respect to her removal from the "Administrative Dietitian" title.

The Union's Position

The Union denies petitioner's allegations of fact. It claims to have properly represented petitioner but asserts that at the time of her removal from the dietitian position, she was still a probationary employee in that title and, therefore, "had no rights under the collective bargaining agreement to have a grievance filed on her behalf."

The Union relies on section 5:2, "Terms of Probationary

Service," of the HHC Rules which, according to the Union provides, in relevant part:

> Every appointment and promotion in the competitive or non-competitive class shall be made subject to the successful completion of a probationary period.
>
> The probationary period shall be twelve months and with extensions shall not exceed 18 months.

The Union claims it is unaware of any requirement that a probationary employee receive two evaluations during her probationary period. It refers to section 6:1:2 of the HHC Rules which it claims provides that "there shall be at least one appraisal during the probationary period, to be conducted not later than midway through the [probationary] period." It asserts that petitioner admits that she was evaluated "approximately midway" in her probationary period.

Finally, the Union claims that "Union representatives have appeared on behalf of [petitioner] on a number of occasions to represent her during counseling sessions and warnings."

Discussion

This Board has held that the duty of fair representation requires only that the Union act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing

collective bargaining agreements.[5] An employee organization cannot be expected, nor is it empowered, to create or enlarge rights of employees whose rights are already limited by law such as probationary employees.

In the instant proceeding, the Union alleges that petitioner was a probationary employee who had no right under the collective bargaining agreement to have a grievance filed on her behalf upon her removal from a position. Despite petitioner's contention that she was a permanent competitive employee, the facts as pleaded by both the petitioner and the Union demonstrate that petitioner was a probationary employee in the title from which she was removed, although she may have been a permanent employee in the title from which she was originally transferred and to which she was eventually returned. Her status as a permanent employee in the title of "Food Service Supervisor" did not afford her the protection of permanent status in the dietitian title.

The Union's assertion that petitioner became a probationary dietitian in or about March 30, 1987, is consistent with petitioner's allegation that she was evaluated eight months after she entered the title. From these alleged facts we may conclude that when petitioner was removed from the dietitian title in either January or February, 1988, she had not completed her probationary period in the title of "Administrative Dietitian."

[5]See Decision Nos. B-1-88; B-13-82; B-16-79.

Because she was a probationary employee, petitioner's removal was a matter as to which she had no rights under the applicable collective bargaining agreement.[6]

We take administrative notice that contrary to petitioner's assertion, the applicable collective bargaining agreement between HHC and the Union does not vest probationary employees with any additional rights in respect to demotion or transfer, although the Union does claim to have assisted petitioner with respect to her counsellings and warnings. We consider Mr. Garcia's representation that he "would do everything . . . within his power to help" in the context of the Union's prior representation and her status as probationary employee. Nevertheless, Mr. Garcia's statement on its face and in the context of the Union's earlier statement, cannot be viewed as any formal undertaking by the Union that it would grieve her demotion. It certainly does not create an obligation under a collective bargaining agreement.

Moreover, the provisions of the HHC Rules to which petitioner refers, apply, by her admission, only to permanent competitive employees. Thus, they are inapplicable to her.

Under these circumstances, we conclude that no duty of fair representation was implicated by the removal of petitioner from one position in which she was a probationary employee to another

[6]Decision Nos. B-1-88; B-14-86; B-18-84; B-13-82; B-16-79.

position in which she may have been a permanent employee. Absent an allegation that other employees in the bargaining unit were accorded greater or different representation than petitioner, we find no basis for a finding of improper practice.

ORDER

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 Valerie R. Nelson be, and the same hereby is, dismissed.

Dated: New York, New York
October 25, 1988

MALCOLM D. MacDONALD
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