Gaud v. L.983, DC37, 41 OCB 58 (BCB 1988) [Decision No. B-58-88 (IP)]

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

LOUIE GAUD,

Petitioner,

DECISION NO. B-58-88

DOCKET NO. BCB-1009-87

-against-

DISTRICT COUNCIL 37, Local 983,

Respondent.
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DECISION AND ORDER

On November 19, 1987, Louie Gaud ("petitioner") filed an improper practice petition charging that District Council 37, Local 983 ("the Union" or "respondent") breached its duty of fair representation and thereby violated Section 12-306b (formerly 1173-4.2b) of the New York City Collective Bargaining Law ("NYCCBL").[1] After several extensions of time

[1]Section 12-306b of the NYCCBL states as follows:

> 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 rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> (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.

to respond to the petition, respondent filed an answer on January 6, 1988. Petitioner filed a reply on January 22, 1988. On March 7, 1988, the Trial Examiner assigned to the case wrote to the parties and requested documentation on the number of days petitioner was absent from work because of sick leave and annual leave during the period July 2, 1986 through July 23, 1987. Petitioner submitted the requested information March 15, 1988. Thereafter, on May 9, 1988, respondent filed a sur-reply.

BACKGROUND

Petitioner commenced employment with the New York City Department of Parks and Recreation ("the Department") on or about August 12, 1985 as a provisional Urban Park Ranger. Sometime after his employment began, he took a competitive examination for that title. The results of the Civil Service examination were published on July 2, 1986. Petitioner was notified that he passed the examination; and on March 9, 1987, he was permanently appointed to the title Urban Park Ranger. Throughout petitioner's term of employment with the Department, he was assigned to the Park Enforcement Patrol.

On July 23, 1987, petitioner was called to a conference with his supervisor, at which time he was charged with several violations of the Departmental rules and regulations. At the conclusion of the conference, petitioner's supervisor determined that he "did not pass [the] probation period" and

therefore, recommended that he be terminated immediately.

Soon after he was terminated, petitioner contacted the Union and spoke to Anthony Stone, Assistant Director of the Blue Collar Division of District Council 37. He told Stone that he had been "verbally terminated and had not been given the reasons for his termination." According to respondent, Stone explained to petitioner that since he was still serving his probationary period,[2] he did not have a right to a hearing pursuant to Section 75 of the Civil Service Law;[3] nor did he have a right to grieve his termination under the contractual grievance procedure.[4] Although Stone agreed to

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[2]Petitioner maintains that contrary to respondent's assertion, Stone did not indicate any knowledge of his probationary status when they discussed his termination.

[3]Section 75 of the Civil Service Law provides that the only persons who "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges....are:

> (a) a person holding a position by permanent appointment in the competitive class .....

[4]Article VI, Section 1 of the collective bargaining agreement defines the term "grievance" as follows:

> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
>
> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written

(continued...)

(Footnote 4/ continued)

> 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

call representatives of the Department and ask that petitioner be provided with a written notice of termination as well as the reasons for his termination, he advised petitioner that the Department generally does not state the reasons for the discharge of an employee who is still serving his probationary period. Instead, the employee is provided with a general statement. Stone indicated, however, that if the Department did provide a specific reason for his termination, the Union would be able to argue the facts of the matter "even though the termination was [not] otherwise attackable."

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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;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

(D) A claimed improper holding of an open-competitive rather than a promotional examination;

(E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals

(more)

Respondent submits that Stone told petitioner that he was going on vacation, and suggested that he contact Louis Addesso, a Council Representative in the Blue Collar Division of District Council 37, when he received the written notice of termination. As per Stone's suggestion, on or about August 3, 1987, petitioner called Addesso to tell him that he had received a copy of the notice of termination. Addesso told petitioner that he would call representatives of the Department and try to convince them to reconsider his termination. Thereafter, Addesso called William Dalton, Director of the Urban Park Rangers, who agreed to investigate the matter. Subsequent to his investigation, Dalton called Addesso and informed him that "he was upholding Petitioner's termination."

(Footnote 4/ continued)

> Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status;
>
> (F) Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation upon a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed. (Emphasis added)

Respondent maintains that upon receiving Dalton's decision, petitioner again contacted the Union. This time he spoke to James Welsh, a grievance representative in the Blue Collar Division of District Council 37.[5] Like Addesso, Welsh called representatives of the Department and tried to convince them to reconsider petitioner's termination. The Department refused; and petitioner's termination was upheld.

Although respondent claimed that petitioner was not covered by the contractual grievance procedure because he was not a permanent employee, on August 31, 1987, an informal grievance was filed on his behalf at Step I of the grievance procedure, which alleged that petitioner's termination violated the Park Enforcement Operation Manual. As a remedy, petitioner sought reinstatement to his position as a Park Enforcement Ranger and the removal of the "false violations" from his personnel file.

[5]Before his case was turned over to Welsh, petitioner alleges that he spoke to Frank Morelli, President of Local 983 and Richard Ferreri, Associate General Counsel of District Council 37. Respondent claims that Morelli and Ferreri have no recollection of meeting or speaking with petitioner. Since petitioner maintains that Ferreri advised him that the Union does not handle "this type of representation" and respondent asserts that if Ferreri had spoken to petitioner he would have advised him that, as a matter of policy, District Council 37 does not file lawsuits on behalf of individuals unless it would benefit a large number of Union members, we need not decide this factual dispute.

The Department denied the grievance on September 14, 1987. Respondent asserts that Welsh subsequently informed petitioner of the Department's decision, and indicated that District Council 37 would not pursue the matter further because his termination was not grievable. Petitioner claims that Welsh initially agreed to file a grievance at Step II of the grievance procedure. However, when he called Welsh a few weeks later, Welsh advised him that the Union did not intend to take any further action on his behalf.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that the Union breached its duty of fair representation by failing to represent him properly in the resolution of his grievance with the Department. As a remedy, petitioner seeks an order directing respondent to fulfill its duty to represent his interests fairly in seeking reinstatement to his position as an Urban Park Ranger.

Petitioner asserts that pursuant to the New York Court of Appeals' decision in Montero v. Lum,[6] his probationary period commenced on July 2, 1986 - the day the results of the Civil Service examination for the title Urban Park Ranger were published. Petitioner argues that he thus had already completed his probationary period when he was terminated on

[6]508 N.Y.S. 2d 397 (N.Y. 1986).

July 23, 1987. He maintains that he therefore had rights under the Civil Service Law and the collective bargaining agreement "which the Union should have sought to enforce." Petitioner alleges that if he was "accorded a hearing prior to termination as required by Section 75 of the Civil Service Law and the Due Process clause of the federal and state constitutions, he would [have been] able to establish that his termination was improper."

Petitioner claims that the Union knew or should have known that he had attained the status of a permanent employee prior to the day he was terminated. He maintains, however, that the Union representatives who handled his case "made no independent investigation to determine whether he was in fact a probationary employee." According to petitioner, they "merely assumed that he was still a [probationary] employee and made no attempt to ascertain his actual status."

Petitioner argues that even if he was a probationary employee at the time he was terminated, he was entitled to a hearing to contest the Department's charges against him because they impeached his character and reputation. Inasmuch as the Union failed to arrange such a hearing, petitioner contends that it breached its duty of fair representation.

Additionally, petitioner charges that respondent failed to inform him of conversations held with representatives of the Department or to provide him with a copy of the Department's

response to his Step I grievance. Petitioner alleges that he did not see the Department's response to his Step I grievance until he received the respondent's answer to the instant petition. Petitioner claims that contrary to respondent's assertion, Welsh did not inform him that the Union would not pursue his grievance at Step II of the grievance procedure. Rather, he asserts that "only after [he] again telephoned Welsh several weeks later did [Welsh] acknowledge that the Union did not intend to take any further action."

Respondent's Position

Respondent argues that petitioner has alleged no facts to substantiate his claim that District Council 37 failed to represent him fairly. On the contrary, respondent claims that it fulfilled its duty to petitioner in meeting with representatives of the Department and attempting to convince them to reconsider his termination.

The Union notes that pursuant to Section 63 of the Civil Service Law and Rule 5.2.1 of the Rules and Regulations of the City Personnel Director, an employee of the City of New York must serve a one year probationary period before he or she attains the full rights of a permanent civil servant. Respondent claims that contrary to his contention, petitioner was still serving his probationary period when he was terminated. Respondent maintains that as a consequence "no legal or contractual remedy existed which the Union could have

pursued on Petitioner's behalf."

Respondent submits that Montero v. Lum does not stand for the proposition asserted by petitioner. Therefore, it disputes petitioner's contention that his probationary period commenced on July 2, 1986 - the day the results of the competitive examination for the title Urban Park Ranger were published. In any event, respondent contends that "even if Petitioner's probationery period did begin on July 2, 1986, it would not have been completed on July 2, 1987...." Respondent notes that Rule 5.2.8 of the Rules and Regulations of the City Personnel Director provides that:

> "...the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: leave without pay, or use of compensatory time earned in a different job title; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period."

Since the time card obtained by petitioner from the Department shows that he used 12.5 sick leave days and 4 annual leave days between July 2, 1986 and July 2, 1987, respondent asserts that petitioner's probationary period was extended by sixteen and one half days. As a result, respondent argues that "Petitioner's probationary period would not have been completed

by July 23, 198[7], the date on which he was terminated; but rather, on or about July 24, 1987."

The Union also disputes petitioner's assertion that even if he was a probationary employee when he was terminated, he had a right to a hearing on the Department's charges against him because they impeached his character and reputation. Instead, respondent claims that when an employee is terminated for reasons that may reflect upon his or her characterand reputation, the employee may, under certain circumstances, initiate a legal proceeding to clear his or her name.[7] Respondent asserts, however, that District Council 37 does not represent individual employees in such proceedings. Thus, the failure to bring such an action on petitioner's behalf does not constitute a breach of the duty of fair representation.

For all of the above stated reasons, the Union contends that petitioner has failed to state a cause of action for breach of the duty of fair representation. Accordingly, it requests that the improper practice petition be dismissed.

DISCUSSION

The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing

[7]See, Board of Regents v. Roth, 408 U.S. 564 (1972).

collective bargaining agreements.[8] In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance.[9] Rather, the duty of fair representation requires only that the refusal to advance a claim must be made in good faith and in a non-arbitrary, non-discriminatory manner. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[10]

Applying these principles to the instant case, we conclude that petitioner has failed to establish a breach of the duty of fair representation. In reaching this conclusion, we note that the rights of probationary employees are limited by law, and consequently the scope of a union's duty to such employees also is limited. In prior cases, this Board has recognized that while a union owes a duty of non-discriminatory, evenhanded treatment to all members of its bargaining unit, it cannot be

[8]Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Decision Nos. B-30-88; B-13-81.

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

[10]64 LRRM at 2377.

expected, nor is it empowered, to create or enlarge the rights of special classes of employees, such as probationary employees, whose rights are limited under the Civil Service Law and the collective bargaining agreement.[11]

The uncontested facts show that the Union followed standard procedures in acting on behalf of petitioner. After learning of petitioner's termination, Stone contacted representatives of the Department and requested that petitioner be provided with a copy of the written notice of termination. Upon receipt of the written notice of termination, the Union again contacted representatives of the Department and, on more than one occasion, tried to convince them to reconsider petitioner's termination. When it became apparent that the Department would not reverse its decision, the Union filed a grievance at Step I of the grievance procedure; which later was denied. Even if Welsh did agree initially to file a grievance at Step II, as petitioner asserts, the Union's decision subsequently not to pursue the matter further was not improper since it was based upon a finding that petitioner was a probationary employee and that his termination therefore was not grievable. Inasmuch as petitioner presented no evidence to show that respondent treated him differently from any other similarly situated unit member, we find that no violation of the duty of fair representation has been stated.

[11]Decision Nos. B-14-86 (ES); B-10-84 (ES); B-13-82; B-16-79.

Petitioner asserts, and we find, that his probationary period commenced on July 2, 1986 - the day the results of the Civil Service examination for the title Urban Park Ranger were published. We note in this connection that in Montero v. Lum, the court held that the probationary period of an employee already performing the duties of the job by virtue of his temporary or provisional status should be measured from the date he passed the Civil Service examination; not the date he was permanently appointed to the title by the employer. We therefore conclude that on July 2, 1986, the day on which the results of the Civil Service examination for the title Urban Park Ranger were published, petitioner was already employed in the performance of the duties of that title and that his probationary period in the title consequently began on that day. However, the fact that petitioner was terminated more than one year after his probationary period commenced does not in itself establish that he had attained the status of a permanent employee prior to his termination.

As noted by respondent, Rule 5.2.8 of the Rules and Regulations of the City Personnel Director requires that the probationary period be extended by the number of days the probationer does not perform the duties of the position. Since the record in the instant case establishes that petitioner used a total of 16.5 sick leave and annual leave days between July 2, 1986 and July 2, 1987, it follows that petitioner's proba-

tionary period also was extended by 16.5 work days - to July 24, 1987. Thus, we find that contrary to his claim, petitioner had not yet completed his probationary period when he was terminated on July 23, 1987; and that he was, therefore, not entitled to the legal and contractual rights granted to permanent civil service employees.

We take administrative notice of the fact that our determination in the instant matter is supported by the decision of the Appellate Division, lst Department, in Reis v. New York State Housing Finance Agency,[12] which was issued just a few weeks after petitioner was terminated. In Reis, the court noted that the expressed rationale for the probationary period is "to enable the appointing officer to ascertain the fitness of the probationer and to give the probationer a reasonable opportunity to demonstrate the ability to perform the duties of the office." According to the court:

> The Civil Service Rules (4 NYCRR §4.5), recognizing that the employer should be afforded a full 52 week period for this purpose, eliminates from the probationary term any absences during the period. Concomitantly, the one year probationary period should begin to run once the agency learns that the employee is qualified to become permanent, which, under the rationale of Montero, is the time when the agency learns that the employee has passed the examination, and not the artificial date adopted by

[12]519 N.Y.S. 2d 355 (Sept. 10, 1987); motion for leave to appeal dismissed, 527 N.Y.S. 2d 771 (1988).

> the employer for its own bookkeeping purposes."[13]

In any event, we note that even if petitioner had completed his probationary period on or before July 23, 1987, the day he was terminated, the Union's handling of his case still would not rise to the level of a violation of the duty of fair representation. As evidenced by the Montero and Reis cases, at the time petitioner was terminated the law in this area was unsettled. We find, therefore, that contrary to petitioner's contention, it was reasonable for the Union to assume that petitioner was still a probationary employee.

Finally, we reject petitioner's assertion that even if he was a probationary employee at the time he was terminated, he was entitled to a hearing to contest the Department's charges against him. It is well-settled that a public employee has a constitutional right to a name-clearing hearing where the circumstances of his discharge are such as to constitute a "stigma".[14] To warrant such a hearing, however, there must be a showing that the charges were disseminated to the public, and in some manner depreciated the employee's good name, reputation, honor or integrity so that he is foreclosed from

[13]Id. at 357.

[14]Board of Regents v. Roth, 408 U.S. 564 (1972); Codd v. Velger, 429 U.S. 624 (1977). See also Matter of Singleman (Koehler), N.Y.L.J. 8-8-88, p. 20, col. 3.

taking advantage of other employment opportunities.[15] Termination in and of itself is insufficient to warrant a name-clearing hearing.

Although petitioner alleged that the Department's charges against him impeached his character and reputation, he did not present any facts or evidence to support his allegation. We find, therefore, that petitioner failed to establish that he was entitled to a name-clearing hearing. Moreover, we note that even if petitioner was entitled to such a hearing, the Union's failure to arrange it would not establish a breach of its duty of fair representation. Rather, to establish a breach of the duty of fair representation, petitioner also would have to show that the Union arranged these hearings for other employees under similar circumstances and, therefore, its conduct toward petitioner was arbitrary, discriminatory, or in bad faith.

Since petitioner has not established that respondent acted in an arbitrary, perfunctory or discriminatory manner with respect to the resolution of his grievance, and since petitioner has failed to demonstrate that respondent's conduct toward him in any other respect constitutes a basis for a

[15]See, Gray v. Director of Bronx Developmental Services, 62 N.Y. 2d 729, 476 N.Y.S. 2d 817 (N.Y.1984); Lutwin v. Alleyne, 58 N.Y. 2d 889, 460 N.Y.S. 2d 498 (N.Y. 1983); Petix v. Connelie, 47 N.Y. 2d 457, 418 N.Y.S. 2d 385 (N.Y. 1979); Matter of Singleman, N.Y.L.J. 8-8-88, p. 20, col. 3.

finding of improper public employee organization practice under the NYCCBL, we shall dismiss the petition in its entirety.

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 Louie Gaud in the case docketed as BCB-1009-87 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 29, 1988

MALCOLM D. MacDONALD
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