Thomas v. L.1549, DC37, et. al, 43 OCB 18 (BCB 1989) [Decision No. B-18-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

LILLIAN THOMAS, DECISION NO. B-18-89

Petitioner, DOCKET NO. BCB-1008-87

-and-

LOCAL 1549, DISTRICT COUNCIL 37
and NAOMI AUGUSTUS as CHIEF
SHOP STEWARD,

Respondents.
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DECISION AND ORDER

On November 18, 1987, Lillian Thomas (hereinafter "petitioner") filed a verified improper practice petition charging that Local 1549, District Council 37 (hereinafter "the Union") and Naomi Augustus as Chief Shop Steward (hereinafter collectively referred to as "respondents") "interfered with the proper handling of the complaint" she had lodged against her supervisor. Because the supervisor and respondent Augustus were sisters, petitioner states "it was improper for her to involve herself in the matter. I was fired three days after the complaint was made."[1] Petitioner alleges violations of §12-306a (1) and (3) (former §1173-4.2a (1) and (3)) of the New York City

[1]Petitioner also filed an improper practice charge against Bronx Municipal Hospital Center and her supervisor, Beverly Augustus Carrington, at the same time the instant petition was filed. That petition was dismissed in its entirety by the Executive Secretary who, after reviewing the petition pursuant to §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining, found that it failed to allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective Bargaining Law. Decision No. B-22-88(ES).

Collective Bargaining Law ("NYCCBL").[2]

After receiving several extensions of time, respondents filed a verified answer to the petition on January 15, 1988, in which they denied that Ms. Augustus involved herself in and interfered with the proper handling of petitioner's complaint, and further denied that petitioner was deprived of proper representation. Petitioner filed a verified reply on February 18, 1988.

There is no dispute between the parties as to the material facts of this matter.

Factual Background

On June 8, 1987, petitioner was provisionally appointed as an Office Aide in the Messenger Department of Bronx Municipal Hospital. Her supervisor was Beverly Augustus Carrington. Petitioner became unhappy working for Ms. Carrington and wished to transfer to another department at the same or a higher title. At the time of the events central to the dispute, notices of the

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[2]Although petitioner refers to §12-306a, which deals with improper public employer practices, it is clear that she is alleging a breach of the duty of fair representation. The duty of fair representation, while not expressed directly in the statute, has long been recognized by the Board as arising from the language of §12-306b (former §1173-4.2b):

> 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 [(former §1173-4.1)] of this chapter, or to cause, or attempt to cause, a public employer to do so.

availability of such positions allegedly were posted at the hospital.

On or about October 5, 1987, petitioner completed a form entitled "Application for a Posted Position."[3] The form required her supervisor's signature which Ms. Carrington initially threatened not to give. Petitioner reported this threat to shop steward Pauline Lowery who, it is alleged, reported petitioner's complaint to chief shop steward, Naomi Augustus. Ms. Augustus is Ms. Carrington's sister. Ms. Carrington eventually did sign the form on October 5, 1987. The parties agree that, that matter was resolved to their mutual satisfaction.

The next day, however, respondent Augustus called the Messenger Department and asked to speak with petitioner about her problem with Ms. Carrington. Petitioner refused, as she was aware that Ms. Augustus was Ms. Carrington's sister and did not trust her. Ms. Augustus then asked to speak with Ms. Carrington. The same day, petitioner alleges, she observed Ms. Augustus entering the Messenger Department and speaking privately with Ms. Carrington. According to petitioner, it was rumored that the sisters did not get along.

Thereafter, on October 8, 1987, petitioner received a letter informing her that her services were being terminated. She brought this matter to the attention of Ms. Anna Etheridge, a Local 1549 grievance representative. on October 14, 1987, Ms.

[3]Petitioner refers to the form as a transfer request, while respondents contend that the form merely enables an employee to apply for a posted position. The purpose of the form, though disputed, is not relevant to this inquiry.

Etheridge and respondent Augustus met with Mr. Rodney Parker, Assistant Director of Labor Relations at Bronx Municipal Hospital, and requested that petitioner be reinstated. Mr. Parker refused, informing them that petitioner's services had been terminated due to unsatisfactory work performance.

Positions of the Parties

Petitioner's Position

Petitioner contends that the Union and Ms. Augustus acted in a way that constituted interference, restraint and coercion which discriminated against her for the purpose of discouraging her participation in the activities of the Union. Petitioner asserts that respondent Augustus represented her sister's interests rather than the interests of petitioner, with the result that petitioner was terminated.

Petitioner maintains that Ms. Carrington never told her that her work performance was unsatisfactory. According to petitioner, it was Ms. Carrington who caused the difficulty between them because of her "yelling and unprofessional approach and her indecisiveness in office procedure." These caused petitioner to want to leave the department and also caused her to complain to the Union when Ms. Carrington threatened not to sign the form that petitioner presented. Petitioner asserts that her termination was a result of her having filed a complaint against Ms. Carrington. As a remedy, she seeks reinstatement to her position and back pay.

Respondents' Position

The Union maintains that Ms. Augustus did not interfere with

the proper handling of the complaint, nor did respondents deny petitioner proper representation. Respondents point out that, as a provisional employee with less than one year's service, petitioner was not eligible for a transfer. According to the union, petitioner's "Application for a Posted Position" only entitled her to consideration for a reassignment, pursuant to the provisions of the New York City Health and Hospitals Corporation Rules and Regulations (hereinafter "HHC Rules") §7:2:2. Section 7:2:2 states that "[a] reassignment may be made at the discretion of the Appointing Officer in the interest of managerial effectiveness." Since Article VI(1)(b) of the agreement between the Union and HHC expressly excludes disputes involving the HHC Rules from the grievance and arbitration procedures, the Union concludes that it was not obligated to assist petitioner in her attempt to change departments. Nonetheless, respondents point out, the complaint was resolved, as Ms. Carrington signed the form.

With respect to petitioner's termination, respondents note, no remedy was available to her under the collective bargaining agreement.[4] As a provisional employee, the Union asserts, petitioner could be terminated without charges and without a hearing. Notwithstanding this, the Union set up an informal

[4]Respondents cite Article VI, Section I(e) of the agreement which defines a grievance, inter alia, as:

> a claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law... [emphasis added].

meeting on petitioner's behalf; however, it was unable to persuade the hospital to reinstate her. Respondents cite prior Board decisions to the effect that there is no right to grieve the termination of provisional or special class employees.[5]

Respondents assert that petitioner has failed to allege any facts to establish that they interfered with, restrained or coerced petitioner in the exercise of rights granted in NYCCBL §12-305 (former §1173-4.1),[6] or that they caused her employer to do so. Accordingly, respondents conclude, petitioner has failed to state a cause of action for breach of the duty of fair representation.

Discussion

The duty of fair representation obliges a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[7] A union breaches this duty when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.

In the instant case, petitioner alleges that the fact that

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[5]The Union cites Decision Nos. B-49-86; B-14-86; B-5-86; B-18-84; B-10-84; B-13-82; B-16-79.

[6]NYCCBL §12-305 provides that:

> [p]ublic employees shall have the right to self organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the rights to refrain from any or all of such activities.

[7]Decision Nos. B-30-88, B-15-83, B-42-82, B-13-82, B-12-82, B-13-81 and B-16-79.

the Union designated the sister of the management agent involved in her complaint as its representative to resolve the complaint constituted arbitrary, discriminatory and bad faith conduct. We recognize that while a sibling relationship between a union representative and a bargaining unit member's supervisor does not establish per se a bias on a union's part, the existence of such a relationship may give rise to partiality, bias and conflict of interest. Therefore, we have closely examined the facts of the instant matter to determine whether they are sufficient to establish a causal relationship between respondent Augustus, meeting with her sister, petitioner's supervisor, and petitioner's termination a few days later. We find that no such connection has been demonstrated. In fact, the only evidence offered to support petitioner's charge is circumstantial, and is so slight as to require us to speculate concerning the meaning of alleged events and outcomes. Accordingly, there is no basis for further inquiry into the motivation underlying these alleged facts. We note that petitioner's conclusion that her dismissal was the result of some collusive arrangement between the chief shop steward and the supervisor is not only unsupported by allegations of probative fact, but that petitioner's assertion concerning rumored ill will between the sisters would tend to undermine her theory. Accordingly, we shall order that the petition be dismissed.

In any event, as a provisional employee, petitioner's rights were restricted by New York State Civil Service Law §65 ("Provisional appointments") and §75 ("Removal and other

disciplinary action"), by HHC Rules and by the collective bargaining agreement between the Union and HHC. We note that the Citywide Agreement was amended, effective July 15, 1988, to provide that a provisional employee with two years service in the same or a similar title shall have a right to grieve a wrongful discharge. However, the petitioner in this matter, appointed in June 1987 and terminated in October 1987, clearly was not eligible for the benefit of this provision. Therefore, we may conclude that petitioner's termination was not a matter concerning which the Union had a duty of representation. Nevertheless, we note that the Union did arrange for an informal meeting with the Assistant Director of Labor Relations at Bronx Municipal Hospital to review the issue. In this regard, it is not alleged that petitioner was accorded any less consideration by the Union than other persons similarly situated.

Since petitioner has proceeded in this matter on a pro se basis, and has raised the serious question of collusion, we have scrutinized the allegations of the petition closely. We find, however, that petitioner has failed to establish that respondents' conduct with respect to her termination was arbitrary or discriminatory, or in bad faith. We therefore conclude that there is no basis for a finding of improper public employee organization practice under the NYCCBL.

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 Lillian Thomas in the matter docketed as BCB-1008-87 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
April 27, 1989

MALCOLM D. MacDONALD
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