James v. HHC, DC37, 43 OCB 57 (BCB 1989) [Decision No. B-57-89 (ES)]

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

VERNA JAMES,

Petitioner,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

DECISION NO. B-57-89(ES)
DOCKET NO. BCB-1177-89

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.
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DETERMINATION OF THE EXECUTIVE SECRETARY

On June 15, 1989, Verna James (the "petitioner") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation (the "HHC") and District Council 37, AFSCME, AFL-CIO (the "Union") violated her rights under Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL"). Specifically, petitioner alleges that she was denied "the right to a fair hearing before termination."

The petitioner, a provisional Office Associate employed in the HHC's Office of Construction Management since October 6, 1980, was on an approved 48-month combined Maternity/Child Care Leave of Absence which commenced on March 7, 1985. On January 10, 1989, petitioner duly notified the City of her intent to return to duty on March 8, 1989.

In a letter dated February 15, 1989, HHC notified petitioner that due to a reorganization in her department, her position was no longer available and that her employment was terminated effective February 14, 1989, pursuant to HHC Operations Procedure No. 20-21, Section 4(e).[1] Petitioner represents that immediately prior to her receipt of this letter, she was informed of the employer's decision in a telephone conversation with an employee of HHC's Personnel Office. Petitioner asserts that during this conversation, she argued that the employer's decision was not only unfair but also in violation of a provision of the 1978-80 Citywide Agreement.

In a letter addressed to Ms. Rene Gainer, Union Representative, District Council 37, AFSCME, AFL-CIO, dated February 23, 1989, petitioner sought the Union's intervention on her behalf.

No satisfactory response having been received from either HHC or the Union, petitioner filed the instant petition seeking to be reinstated and made whole.

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), a copy of

[1] I take administrative notice that HHC Operating Procedure No. 20-21, effective June 25, 1981, provides that a child care leave of absence without pay shall be granted to an employee (male or female) who becomes the parent of a child up to four years of age, either by birth or by adoption, for a period of up to forty-eight (48) months. I further note that a while a provisional employee is eligible for leave under this policy, his/her employment may be terminated by HHC during the period of the leave of absence because of "business necessity or by operation of law," upon reasonable advance notification to the employee.

which is annexed hereto, the undersigned has reviewed the petition and has determined that it does not contain facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL.[2]

The petitioner fails to allege that the HHC has committed any acts in violation of Section 12-306a of the NYCCBL, which defines improper public employer practices. Petitioner has not demonstrated that HHC's alleged failure to hold a hearing prior

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[2] NYCCBL Section 12-306a provides that it is an improper practice for a public employer or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

NYCCBL Section 12-306b provides that it is 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 her termination was intended to, or did, deprive her of any rights protected by the statute. Moreover, I note that unlike permanent competitive employees, provisional employees are not entitled to a hearing prior to the termination of their employment under the Civil Service Law.[3]

It should also be noted that the NYCCBL does not provide a remedy for every perceived wrong or inequity. The NYCCBL is intended to guarantee public employees the right to organize, to form, join and assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from such activities. Since the instant petition does not allege that HHC's actions were intended to, or did, affect any of these protected rights, it must be dismissed.

Even if, as the petitioner allegedly argued in a conversation with an employee of HHC's Personnel Office, her termination violated a provision of the 1978-80 Citywide Agreement, such a violation could not be remedied in this forum.

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[3] Civil Service Law §75. However, the law does not prohibit the City and a public employee representative from contractually expanding the rights of provisional employees. For example, on December 22, 1987, the City of New York and the Union entered into a Letter Agreement as an amendment to the July 1, 1987 Citywide Agreement, which extends to certain provisional employees procedural safeguards with respect to claimed wrongful disciplinary actions. In any event, even an arguable violation of the Letter Agreement, under the circumstances alleged in the instant matter, does not state an employer improper practice under the NYCCBL.

Pursuant to Section 205.5(d) of the Taylor Law,[4] which is applicable to the Board of Collective Bargaining ("Board"), the resolution of a contractual dispute is beyond the jurisdiction of the Board unless such dispute would constitute, independent of the contract, an improper practice. As noted above, the petitioner has failed to state an improper practice under the NYCCBL.

Turning to the allegations of union improper practice, NYCCBL Section 12-306b(1) has been recognized as prohibiting violations of the duty of fair representation owed by a certified employee organization to represent bargaining unit members with respect to negotiation, administration and enforcement of collective bargaining agreements.[5] In order to state a claim of breach of the duty of fair representation, however, the petitioner must show that the union's conduct toward her was arbitrary, discriminatory or in bad faith.[6] It is well-settled that a union does not breach its duty of fair representation merely by refusing to advance a particular grievance, provided

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[4] Section 205.5(d) of the Taylor Law provides, in relevant part, that:

> the board shall not have authority to enforce an agreement between a public employer and employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[5] Decision Nos. B-24-86; B-14-83.

[6] Decision Nos. B-9-88; B-9-86; B-2-84.

that the decision is not made in an arbitrary or discriminatory manner.[7] Accordingly, it is not enough for the petitioner to allege that the Union failed to provide representation; it is necessary further to allege the existence of some improper motive for the failure to act. The petitioner has not made such allegations in the instant case.

In the absence of any allegations that the respondents' actions were intended to, or did, affect any of petitioner's rights that are protected by Section 12-306 of the NYCCBL, the petition cannot be entertained by the Board. Of course, dismissal of this petition is without prejudice to any rights the petitioner may have in another forum.

Dated: New York, New York
October 10, 1989

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Marjorie A. London
Executive Secretary
Board of Collective
Bargaining

[7] Decision Nos. B-2-84; B-16-83.