Cappadona v. L. 371 SSEU, 45 OCB 28 (BCB 1990) [Decision No. B-28-90 (ES)]
OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
LINDA F. CAPPADONA,	:	
Petitioner,	:	DECISION NO. B-28-90(ES)
-and-	:	DOCKET NO. BCB-1273-90
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (Gouverneur Hospital),	:	
Respondents.	:	

DETERMINATION OF EXECUTIVE SECRETARY

On April 20, 1990, Linda F. Cappadona ("the petitioner") filed a verified improper practice petition with the Office of Collective Bargaining ("OCB"), in which she alleged that the Social Service Employees Union, Local 371, AFSCME, AFL-CIO ("Local 371" or "the Union") and Gouverneur Hospital, a division of the New York City Health and Hospitals Corporation ("HHC"), violated the New York City Collective Bargaining Law ("the NYCCBL").

The petition was amended on April 27, 1990, to correct and clarify a four page affidavit that petitioner appended to the petition. Therein, petitioner cites the following sections of the NYCCBL alleged to have been violated: §12-306a(1) and (2), §12-306b(1) and §12-306c(1) through (5).[1]

[1] NYCCBL §12-306a, in relevant part, provides that it is an improper practice for a public employer or its agents:

(continued...)

Additionally, this submission was accompanied by a verified document entitled "Remedies for my situation."[2]

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[1](...continued)
(1) to interfere with, restrain or coerce public employees in the exercise in the exercise of their rights granted in section 12-305 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;....

NYCCBL §12-306b, in relevant part, 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;....

NYCCBL §12-306c provides that the duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(1) to approach the negotiations with a sincere resolve to reach an agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

[2] Therein, petitioner enumerates the remedies sought as follows:

(continued...)

On May 17, 1990, petitioner submitted further information and allegations in support of her improper practice claim against HHC.[3]

Based on all of the documentation submitted by petitioner, a Senior Hospital Care Investigator employed by HHC at Gouverneur Hospital, it appears that petitioner's complaints stem from the promotion of another, allegedly less qualified, employee.[4] The instant petition, however, focuses on events occurring subsequent to this promotion, which, petitioner claims, was based on "favoritism" rather than merit.

Initially, petitioner complains of several alleged instances of inappropriate behavior by coworkers and superiors directed towards her.[5]

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[2](...continued)
(1) A transfer and/or promotion to a position in another hospital within HHC.

(2) Recision of HHC's order that petitioner submit to a psychiatric examination

(3) An investigation conducted concerning the promotion granted another employee.

(4) An order that coworkers cease and desist from harassing petitioner.

[3] Petitioner submitted copies of correspondence dated subsequent to the filing of the instant matter. See infra, note 7, at 4-5.

[4] Although the record does not indicate when this promotion took place, petitioner contends that the events which form the basis of the instant petition occurred "[d]uring these past four months and prior...."

[5] For example, petitioner complains of profane language, loud shouting and personal insults directed at her; objects being thrown on her desk; interference and eavesdropping on her telephone; undue criticism for her religious beliefs; inappropriate remarks about her mental state and physical appearance; fears about being surreptitiously taped.

Petitioner claims that these "abuses," which were "meant to thwart [her] performance," were motivated by the employer's need to justify its use of favoritism in making the promotional appointment of a less qualified employee.[6]

Petitioner also complains about a meeting held in April 1990, at which time a representative of management directed that she be examined by a

[6] I note, however, that petitioner does not allege that she filed a formal grievance concerning this promotion.

psychiatrist.[7] Petitioner alleges that a Local 371 representative, who was also present, was remiss in his representative capacity when he stated:

> I usually do not side with management but now I must. You should see a psychiatrist.[8]

Based on the above, petitioner claims that:

"(A) Local 371 has discriminatorily failed to represent me and has arbitrarily and capriciously refused to represent me on matters concerning grievances over my working conditions; and has assisted management in harassing me; and

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[7] Petitioner's supplemental submission of May 17, 1990, included copies of the following correspondence between petitioner and HHC:

1) A letter to petitioner dated May 7, 1990, from Mr. Howard Kritz, Labor Relations Specialist of HHC, which stated, in pertinent part:

> Arrangements are <u>again</u> being made to have you examined by Dr. E. Gerald Dabbs, an independent specialist approved by the Personnel Review Board.... Upon receipt of this letter, you are directed to telephone his office ... to arrange a mutually agreeable time and day for your examination. Failure to telephone Dr. Dabbs' office ... by May 25, 1990, may result in disciplinary action [emphasis added].
>
> Dr. Dabbs has been asked to advise us, as to whether or not, on the basis of his examination, you are medically fit to continue to perform the duties of your position as a Senior Hospital Care Investigator at Gouverneur Hospital....

2) A copy of petitioner's response, dated May 11, 1990, in which she alleged that the action by HHC constitutes retaliation for her having filed the instant petition. Petitioner also claimed this action was further retaliation for her having filed two prior complaints against Gouverneur Hospital with the New York State Human Rights Commission, concerning unrelated charges.

3) A copy of a memo from petitioner to her supervisor in which she claimed that she was wrongfully docked pay for personal time taken to file the instant petition and to go on a job interview.

[8] Petitioner alleges further that this Union representative was not always responsive to her requests for help on grievances.

(B) Gouverneur Hospital has interfered with, restrained, coerced and harassed me in my working conditions and has threatened me in violation of the [NYCCBL]."

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition, as amended and supplemented on April 27, 1990 and May 17, 1990, and has determined that the improper practice claims asserted therein must be dismissed because petitioner has not alleged facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL.

With respect to the complaint that Local 371 has violated NYCCBL §12-306b(1), which prohibits violations of the judicially recognized fair representation doctrine,[9] I find that petitioner has failed to offer any evidence to show that the Union treated her in an arbitrary, discriminatory or bad faith manner.

It is well established that the duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[10] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory manner may constitute a violation of the duty of fair representation.[11] It does not, however, require a union to advance every alleged grievance, so long

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[9] See Decision Nos. B-24-86; B-14-83; B-13-81; B-16-79.

[10] Decision Nos. B-13-82; B-11-82.

[11] Decision Nos. B-27-90; B-72-88; B-50-88; B-30-88.

as the decision not to pursue a particular claim is made in good faith and not in an arbitrary or discriminatory manner.[12]

In the instant case, petitioner believes that she is being coerced by her employer to undergo a psychiatric evaluation, and, that the Union assisted management in this endeavor rather than pursue a grievance concerning working conditions on her behalf. It is apparent from petitioner's documentation that she asked for help from her Union representative on several occasions. It is also apparent that on many occasions she was told by her Union representative that her complaints did not constitute grievances. Absent an allegation that the Union declined to represent petitioner for reasons prohibited by the NYCCBL, i.e., that the Union acted arbitrarily or discriminatorily in not pursuing grievances on petitioner's behalf, the mere failure to process grievances, without more, does not state a violation of the NYCCBL.

Moreover, the fact that the Union representative may have agreed with HHC's recommendation that petitioner undergo a psychiatric evaluation does not in and of itself constitute unlawful assistance within the meaning of NYCCBL §12-306b(1). Rather, to establish a violation of NYCCBL §12-306b(1), petitioner must show that the Union's decision was improperly motivated so as to cause, or attempt to cause, the employer to deprive petitioner of her rights to form, join or assist public employee organizations, or to refrain from such activities.[13] Clearly, petitioner has not made such a showing.

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[12] Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; B-30-88; B-34-86; B-25-84; B-2-84; B-16-83; B-16-79.

[13] See Decision No. B-11-87.

To the extent the petition complains that HHC has restrained, coerced, harassed and threatened petitioner in violation of NYCCBL §12-306a(1) and (2), this claim also must be dismissed. Apparently, petitioner would have the Board of Collective Bargaining ("the Board") infer that HHC ordered her to submit to a psychiatric examination in an attempt to justify passing her over for a promotion. Even if such an inference were to be drawn, petitioner has failed to allege facts which would establish a relationship between the promotion alluded to and HHC's subsequent action. More importantly, unless petitioner can demonstrate that HHC, by ordering her to submit to this examination, intended to, or did, interfere with or diminish her rights under the NYCCBL, such an allegation does not constitute a prima facie claim of improper practice pursuant to NYCCBL §12-306a.

The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees that are created by the statute, i.e., the right to organize, to form, to join and assist public employee organizations, to bargain collectively through certified public employee organizations, and the right to refrain from such activities.[14] Absent an allegation that HHC's actions were intended to, or did in fact, affect any of petitioner's rights that are protected by the NYCCBL, the petition should be dismissed under Section 7.4 of the OCB Rules.

Moreover, I am not persuaded that HHC's letter of May 7, 1990 was in retaliation for petitioner having filed the instant petition, as she alleges. In this connection, I note that this letter did not initiate the process but

[14] NYCCBL §12-305.

rather was a follow-up to petitioner's having failed to comply with HHC's initial request in April 1990. In any event, even assuming, arguendo, that HHC's order that petitioner undergo an examination to determine medical fitness constitutes harassment, coercion and intimidation, as petitioner alleges, she does not allege that the employer's action is based on any of the reasons proscribed by the NYCCBL. Therefore, the petition fails to state a claim for which relief may be granted under NYCCBL §12-306a.

Petitioner also claims that she was wrongfully docked pay for personal time taken on April 20, 1990 to file this petition, and on April 23, 1990, to go on a job interview.[15] First, I note that these allegations involve matters of contract violation, i.e., a dispute concerning time and leave rules, and should be addressed via the contractual grievance procedure. Inasmuch as petitioner also states that she referred this matter to her Union representative, I note that alleged contract violations may be subject to various forms of redress, but they may not be rectified in the improper practice forum.[16]

Furthermore, I note that these allegations were made subsequent to the filing of the instant petition. The Board will permit amendment of an

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[15] See supra, note 7, at 4-5.

[16] Section 205.5(d) of the Taylor Law, which applies to the City of New York pursuant to Section 212 of that law, provides in relevant part:

> the board shall not have the authority to enforce an agreement between an employer and an 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.

improper practice petition where the new matter involves allegations of additional incidents claimed to be a part of a continuing pattern of harassment, interference and discrimination arising out of the cause of action set forth in the original pleading.[17] However, inasmuch as the underlying charge against HHC does not state a prima facie claim of improper practice within the meaning of the NYCCBL, these additional allegations fail to constitute a continuing pattern of improper conduct.

Finally, with respect to petitioner's allegations that respondents have violated the duty to bargain in good faith pursuant to NYCCBL §12-306c(1) through (5), it is well-settled that the duty to bargain in good faith runs between the employer and the certified or designated representative of its employees. It is not a duty owed to individual members of the bargaining unit.[18] Thus, as an individual, petitioner lacks standing to advance this claim.

In summary, it does not appear that the events which form the basis of the instant improper practice petition are, in any way, related to statutorily protected employee rights. Since the petition does not appear to involve a matter within the jurisdiction of the OCB, it must be dismissed. Of course, dismissal of this petition is without prejudice to any rights the petitioner may have in another forum, including but not limited to the complaints that

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[17] See Decision No. B-2-83.

[18] See Decision No. B-5-86.

petitioner allegedly has filed with the New York State Commission on Human Rights.[19]

Dated: New York, New York
June 25, 1990

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Loren Krause Luzmore
Executive Secretary
Board of Collective
Bargaining

[19] See supra, note 7, on 4-5.