

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B-31-91
DOCKET No. BCB-1338-90

CAIPHIA ROLLE,
Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,
Respondent.

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DECISION AND ORDER

On November 15, 1990, Caiphia Rolle ("Petitioner") filed a verified improper practice petition against the New York State Nurses Association ("NYSNA" or "Union") . The petition alleges that NYSNA, in violation of the New York City Collective Bargaining Law ("NYCCBL"), failed to bargain in good faith and breached its duty of fair representation.

NYSNA filed an answer to the improper practice petition on December 7, 1990. The Petitioner filed a reply on December 20, 1990.

BACKGROUND

On October 15, 1990, Arbitrator Eleanor Glanstein issued an arbitration award¹, which found in favor of the City and against NYSNA and Petitioner. At the arbitration hearing, Petitioner grieved her discharge from the Department of Health ("DOH"), which occurred within three months of her commencing employment there.

¹ Case No. A-3261-89.

Petitioner had previously been employed by the Health and Hospitals Corporation ("HHC") .

According to Article VI, §9 of the parties' collective bargaining agreement, an employee with less than three months of "service" could not grieve a wrongful disciplinary action. At the arbitration hearing, the Union contended that the word "service," under Article VI, §9, meant all time worked for the City and/or any City agency covered by the parties' collective bargaining agreement. NYSNA argued that since a single collective bargaining agreement covered all registered professional nurses employed by the City and related public employers, there was no basis for the City to treat employees of each agency differently with regard to service. The Union further argued that Petitioner should have been returned to her former position at HHC, if her performance at DOH was unsatisfactory.

The City maintained that Petitioner was terminated during her probationary period and, therefore, had no right to reinstatement at DOH. The City argued that DOH and HHC are separate entities with separate rules and regulations for their personnel. Thus, when Petitioner became a new employee at DOH, she was required to be on probation for three months no matter how long she had worked at HHC. Finally, the City argued that because Petitioner resigned from HHC to work for another agency, she had no automatic right to reinstatement at HHC.

The Arbitrator agreed with the position argued by the City.
She stated:

To treat "service" under Article VI, Section 9 in the manner advocated by the Association would negate the purpose of a probationary period as well as the specific rules of HHC and the City If all time worked for the City and related public employers covered by the collective bargaining agreement counted toward the three (3) month period, employees who went to a different job could frequently have worked at the prior agency more than three (3) months and would, in effect, be able to circumvent the possibility of summary discharge contemplated by Section 9.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that NYSNA breached its duty of fair representation during the course of the arbitration resulting in an award adverse to Petitioner. In her improper practice petitioner, Petitioner alleges the following:

The prima facie tort through negligence and the (conducting] of a frivolous type defense of petitioner's case in a manner which [suggests) fraud, deceit and misrepresentation of truth in the case of Rolle ... thus violating (New York City] Collective Bargaining Law §1173-4.2(c) (1,4) (recodified as §12-306c(1) and (4)). Failed to provide data upon which arbitrator decided case, failed to take note of fact that rules applied to all, i.e. Nursing Directors follow rules as given, however rules don't seem to apply to Executive Administration; Director of Nurses did not terminate, thus implying neglect.

Petitioner requests a remedy of monetary damages "for the injury to both professional and personal life, for mental anguish, duress and loss of income."

In documents attached to the improper practice petition, Petitioner further sets forth her allegations. She alleges that the Union did not provide "the information of former contracts which state who has the right to terminate an employee of the Nursing Department based on job performance." Noting that Ms. Szaprio, who terminated Petitioner, is not a member of the Department of Nursing, Petitioner contends that, according to the former contracts, only a Nursing Director, who has the requisite "skills" and "knowledge," could terminate a Nursing supervisor, such as Petitioner. Petitioner alleges that the Union is at fault for not including language in the current contract regarding who has the right to terminate.

Petitioner further alleges that the word "service" in the contract should have been better defined. According to Petitioner, it should have been clear from the contract that "service" referred to all "service with the City of New York." Petitioner alleges that the Union "failed the body of persons they represent by not changing the wording of the contract."

Throughout the petition, Petitioner alleges that the Union was negligent in not providing sufficient data in support of its arguments. Petitioner alleges that the Union failed to provide "anything to the arbitrator in writing which states the position taken," did not provide data "about returning grievant to [her] former position," and did not provide DOH's personnel policies at the arbitration so that "a comparison [could be] made."

In her reply, Petitioner alleges that the length of time it took for her grievance to proceed to arbitration indicates a "failure (by NYSNA) to protect its members in good faith."

Union's Position

The Union argues that the petition is "baseless" because it voices Petitioner's "dissatisfaction with an arbitration award that was duly issued." The Union discusses the arguments it and the City made at the arbitration. The Union notes that Arbitrator Glanstein found in favor of the City and contends that

(w]hile the Association disagrees with Arbitrator Glanstein's award, she decided the issue that was submitted to her by the parties based upon her interpretation of the collective bargaining agreement. By processing Ms. Rolle's grievance to arbitration, the Association represented her fairly and properly. Her dissatisfaction with the award does not constitute a violation of the New York City Collective Bargaining Law.

DISCUSSION

In the petition, Petitioner alleges violations of § 1173-4.2 (c) [recodified as §12-306(c)] of the NYCCBL, which deals with the duty to bargain in good faith. It is well settled that the duty to bargain in good faith runs between the public employer and the certified representative of its employees; it is not a duty owed to an individual member of the bargaining unit.² Thus, as an individual, Petitioner lacks standing to advance a claim of violation under §12-306(c). However, as Petitioner's allegations

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Decision Nos. B-9-86; B-5-86; ,B-15-83; B-13-81.

also appear to present a claim of breach of the duty of fair representation,³ we will examine the merits of that claim as well. We note that NYSNA has responded to the allegations and contends that it "represented [Petitioner] fairly and properly."

It is well settled that, unless its decision was made arbitrarily, discriminatorily, or in bad faith, a union does not breach its duty of fair representation when it refuses to advance an employee grievance to a higher step in the grievance procedure,⁴ when it refuses to bring a grievance to arbitration that, was processed through the lower steps,⁵ or when it refuses to advance a particular grievance.⁶ As the cited cases indicate, a union has no obligation to advance a particular grievance or to bring it to arbitration.

In the instant case, NYSNA not only represented Petitioner at the lower steps of the grievance procedure, it brought Petitioner's grievance to arbitration. In order for the Union's conduct to constitute a breach of the duty of fair representation, Petitioner must show that NYSNA represented her in an arbitrary, discriminatory, or bad faith manner.

³ Such a breach, if proven, would constitute a violation of §12-306(b) of the NYCCBL, a section not cited in the petition.

⁴ Decision Nos. B-51-90; B-27-90; B-12-82.

⁵ Decision Nos. B-56-90; B-72-88; E-50-88; B-25-84.

⁶ Decision Nos. B-58-88; B-2-84; B-13-82; B-16-79.

In Decision No. B-16-79, a probationary employee, who was terminated, alleged the union breached its duty of fair representation in not utilizing the grievance procedure on his behalf. Noting that the contract precludes probationary employees from utilizing the grievance procedure with respect to disciplinary matters, the Board found that the union's inquiry into the facts of the case and its reasonable interpretation of the pertinent contract language demonstrated that its conduct in the matter was not arbitrary. The Board, further noting that a union official arranged for and accompanied the Petitioner to a meeting with a Department of Transportation official and tried, albeit unsuccessfully, to get the Department to reverse its decision to terminate Petitioner, stated that "(Petitioner) introduced no proof whatsoever that the union was in a position to do more for him than it did." Similarly, the Board found no violation of the duty of fair representation in a case where the union did not file a grievance on behalf of a probationary employee who had no rights under the collective bargaining agreement to grieve her removal from a position.⁷

As the above cases demonstrate, probationary employee's generally are not able to grieve disciplinary matters. At Petitioner's arbitration, NYSNA argued that the term "service" in the collective bargaining agreement included all service with the

⁷ Decision No. B-51-88; See also, Decision Nos. B-58-88; B-30-88.

City and related public employers. NYSNA contended that Petitioner's length of service removed her from probationary status, enabling her to grieve her discharge from the Department of Health. Thus, NYSNA made a reasonable, good faith argument which, if accepted by the arbitrator, would have allowed Petitioner to grieve her termination. It is clear that NYSNA acted fairly and impartially in bringing Petitioner's grievance to arbitration and in presenting credible arguments in support of Petitioner at the arbitration hearing.

In Decision No. B-13-81, a Petitioner alleged that his union breached its duty of fair representation by not bargaining over the issues of caseloads and training, and, further, that even if these issues were discussed, the union was negligent for not taking proper action to ensure that these topics would be covered in the new contract. Noting that during contract negotiations, the failure to obtain all objectives cannot be equated with incompetence, we stated that there is no breach of the duty of fair representation merely because the contract fails to satisfy all persons represented by the union. Similarly, in Decision No. B-15-83, a Petitioner alleged that his union did not adequately challenge an employer proposal to recoup three "heat days" from certain employees. Finding no breach of the duty of fair representation, we stated that a union does not breach its duty of fair representation simply because all employees are not satisfied

with the results of representation.⁸ As we stated in Decision No. B-9-86, "[i]n matters of contract negotiation, the exclusive bargaining representative is allowed considerable latitude."

In the instant case, Petitioner alleged that NYSNA breached its duty of fair representation because it did not define the term "service" in the contract to include all service with the City and related public employers, and because it did not include language in the current contract regarding who has the right to terminate Nursing Supervisors. Applying the above referenced cases to the instant matter, we find that NYSNA did not breach its duty of fair representation. As a considerable amount of give and take is involved in the negotiation process, a union cannot be faulted for failing to obtain language that is completely favorable to its side.

Petitioner also alleges that NYSNA breached its duty of fair representation by not providing sufficient data in support of its arguments. We have previously stated that "[a] union is recognized as having the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it

⁸ See also, Decision No. B-32-86 wherein we dismissed allegations that the negotiation of an agreement foreclosing arbitration of disputes involving the Rules and Regulations of the Personnel Director constituted a violation of the duty of fair representation.

is entitled."⁹ Thus, even assuming the truth of Petitioner's allegation that the Union did not provide sufficient data in support of its arguments, we find no breach of the duty of fair representation.

Finally, Petitioner alleges that the length of time it took for her grievance to proceed to arbitration indicates that NYSNA breached its duty of fair representation. We have previously held that in the absence of allegations of improper motive, the mere fact that a delay occurred during the grievance procedure does not, by itself, constitute a breach of the union's duty of fair representation.¹⁰ Thus, as Petitioner has not alleged any improper motive on the part of NYSNA concerning the way in which it brought her grievance to arbitration, we find no breach of NYSNA's duty of fair representation.

In effect, Petitioner has attempted to use allegations of union improper practice as a means of appealing an adverse arbitration award. This conduct cannot be condoned. The duty of fair representation does not guarantee a favorable outcome for the grievant. Where, as in the instant case, a union brings a grievance to arbitration and presents credible arguments before the arbitrator, no violation of the duty of fair representation

⁹ Decision No. B-51-90; See also, Decision No. B-16-83 at 11. Similarly, we have found no breach of the duty of fair representation when it is alleged that the union failed to provide information about the contract or about contract negotiations. See, Decision Nos. B-18-86; B-9-86.

¹⁰ Decision Nos. B-20-84; B-21-82.

will be found.

We further take note of the recent amendments to the Taylor Law,¹¹ which require a public employer to be made a party to any duty of fair representation charge that involves an alleged breach of the collective bargaining agreement. Although the instant case fits within the category of cases affected by the amendments, we conclude that the addition of the City as a party at this point in time would be an exercise in futility. We base this conclusion upon our ultimate finding that no breach of the duty of fair representation occurred, as well as the obvious fact that the addition of the City as a party would further extend an already lengthy proceeding. In future cases, however, a public employer will be made a party to any duty of fair representation charge involving an alleged violation of the collective bargaining agreement.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby

¹¹ Civil Service Law ("CSL") §209-a.3, as amended by the duty of fair representation legislation, provides as follows: The public employer shall be made a party to any charge filed under subdivision two of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

ORDERED, that the improper practice petition filed by Caiphia Rolle be, and the same hereby is, dismissed.

Dated: New York, NY
May 23, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE BENJAMIN DANIELS
MEMBER

CAROLYN GENTILE
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