Carmichael v. HHC,North Central Bronx Hospital, DC37, 49 OCB 21 (BCB 1992) [Decision No. B-21-92(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

LOREENE CARMICHAEL,

Petitioner,

-against- DECISION NO. B-21-92

NORTH CENTRAL BRONX HOSPITAL, a Division of NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, DOCKET NO. BCB-1357-91

Respondent,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On January 14, 1991, Loreene Carmichael ("petitioner"), filed, pro se, an improper practice petition against North Central Bronx Hospital ("NCB Hospital"), a division of the New York City Health and Hospitals Corporation ("HHC"). The petition alleged a violation of §12-306a of the New York City Collective Bargaining Law ("NYCCBL"). On the same day, petitioner filed another improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37" or "the Union"), alleging a violation of §12-306b of the NYCCBL. Both petitions were docketed as BCB-1357-91.

On February 22, 1991, HHC moved to dismiss the petition filed against it, claiming that Carmichael failed to state a cause of action under §12-306a of the NYCCBL. On the same day, DC 37 submitted an answer to the petition

filed against it. Petitioner filed separate responses to HHC's motion and DC 37's answer on March 21, 1991.

On October 23, 1991, the Board of Collective Bargaining ("Board") issued Interim Decision and Order No. B-48-91, which was limited to the question whether petitioner, given every favorable inference, sufficiently set forth the material elements of a claim of improper public employer practice under §12-306a of the NYCCBL. Therein, the Board denied HHC's motion to dismiss and ordered it to file an answer. HHC filed its answer on November 29, 1991. Carmichael filed a reply on December 18, 1991.

Background

The record shows that the following facts are not in dispute:

Petitioner Loreene Carmichael was hired by NCB Hospital as a provisional Office Associate for the HIV Counseling, Education and Testing Program ("HIV Program") on May 1, 1989. On July 3, 1990, Carmichael returned from a two-week vacation to discover that the HIV Program clinic had moved and that her desk had been placed in the patient waiting area of the new location.

Carmichael did not report to work on July 9-13, 1990. A physician's note indicates that petitioner was seen on July 11, 1990 for hypertension, anxiety and stress.

On July 17, 1990, the Union submitted a formal Step I grievance on petitioner's behalf, alleging a violation of Article XIV, §2 of the 1985-87 Citywide Agreement ("Agreement").[1] Appended to the form was a document that

[1] Article XIV, §2 of the Agreement provides that:

a. Adequate, clean, structurally safe and sanitary

(continued...)

petitioner had written on July 5, 1990, describing the conditions she alleged as violations of the Agreement. Petitioner complained, inter alia, of excessive noise and overcrowding caused by clinic patients and their children, fumes caused by patients polishing their nails, poor ventilation, and the lack of a typewriter in her work area. Carmichael also complained that patients of other clinics would come into the HIV Program waiting area and constantly ask her questions that do not concern the HIV Program.

Also on July 17, 1990, petitioner's supervisor, Ms. Nyda Morales, received a memorandum from Mr. Jeff Perez, the supervisor of an adjacent clinic (the Special Care Unit). Therein, Perez stated that it had been brought to his attention that Carmichael "refuses" to leave open the door to the HIV Program and then fails to answer it promptly when patients knock. As a result, Perez complains, HIV Program patients look for assistance in the Special Care Unit, placing an unnecessary burden on his staff.

Carmichael did not report to work on July 20-27, 1990. A physician's note indicates that petitioner was seen on July 26, 1990 for hypertension and anxiety.

On July 31, 1990, Morales issued a written response to the Step I grievance. In essence, Morales deemed Carmichael's complaints unfounded. Unsatisfied with this response, petitioner requested a meeting to discuss her grievance.

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[1](...continued)
working facilities shall be provided for all employees.

Carmichael did not report to work on August 6-7, 1990. Petitioner states that the days were taken as bereavement leave, on account of her father's death.

A meeting between petitioner, representatives of DC 37 and NCB Hospital was held on or about August 8, 1990.[2]

Carmichael did not report to work on August 13-15, 1990. Petitioner did not offer any specific explanation or provide a physician's note for these absences.

Morales issued three memoranda that were dated August 13, 1990: The first was addressed to Perez, requesting that a sign be posted outside the Special Care Unit in order to minimize the flow of its staff and patients through Carmichael's work area; the second was a requisition for the removal and replacement of a desk in petitioner's work area; the third was addressed to Carmichael. The latter memorandum was entitled "Falsified Time Documentation" and it provided:

> On August 1, 1990, you complained that you could not work due to the presence of a patient asleep in the waiting area. You were about to leave our designated work area when I asked you for a specific reason explaining why the patient's presence bothered you, you could not give me a detailed reply. You left for a period of 27 minutes. Later, you stated you were not taking a break because you had taken it earlier.
>
> On August 3, 1990, you returned from lunch 15 minutes past the hour and a half granted to employees to enable them to cash their checks. No explanation was given by you.
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> On August 9, 1990, you arrived to work at 9:10 a.m. yet signed in as having arrived at 0900, and on August 10, 1990, you arrived to work at 9:15 a.m. yet signed in as having arrived at 0905.

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[2] Whether anything was resolved at the meeting is in dispute.

> These sign-ins with inaccurate time are in violation of operating procedure No. 20-2.

Morales then issed two more memoranda to Carmichael. One was dated August 14, 1990, and it provided:

> On August 14, 1990, you arrived to work at 9:10 a.m. yet signed in as having arrived at 0905. As previously stated on memo dated August 13, sign-ins with inaccurate time are in violation of operating procedure No. 20-2.

The other was dated August 15, 1990, and it provided:

> On [August 6 and August 7, 1990], you took two (2) days without pay due to your father's death. When I questioned you as to the date of your father's death, your reply was payroll and personnel are aware of this. On August 14, 1990 you stated that as soon as the death certificate arrived you would provide documentation.
>
> You are entitled to a maximum of four (4) days with pay for a death in the immediate family. The four (4) days **should** directly follow the death. For any person who is not an immediate family member, absence [may] be charged against annual leave or taken without pay [emphasis in original].

On August 17, 1990, Carmichael received a form entitled: "Notice to Report for Counselling Session/Warning Notice" from Morales. This document provided:

> You are directed to report to Nyda Morales, Senior Health Care Program Planner, NCB Hospital, Rm. 4M-08, August 23, 1990 - 10:00 AM, for a counselling session/warning notice concerning the following:
>
> 1) Absences
> 2) Lateness
> 3) Patient Complaints
> 4) Staff Complaints
>
> Your Union representative may be present with you.

On August 17, 1990, Carmichael submitted a written "Rebuttal" to each of Morales' memoranda and the notice to report for counselling. Therein, petitioner categorically denied the sign-in infractions and claimed to have

been unjustly accused of falsifying the date of her father's death. Carmichael stated that until now she "never" was absent, "always" was punctual, and she blamed all her recent absences on "harassment, unnecessary stress and anxiety." As for any patient and staff complaints lodged against her, Carmichael offered in rebuttal a work performance evaluation, which described her as a "courteous and responsive" employee.[3] In closing, petitioner asked for "a meeting with all appropriate disciplines for the resolution of the present situation" and a transfer.

On August 21, 1990, two days prior to the counselling session, Carmichael states that she was given an urgent typing assignment by Morales. According to petitioner, Morales directed her to use a typewriter that was located in a small storage room. Carmichael claims:

> "[W]hile I was typing the report ... the door to the room was opened, suddenly someone sprayed something into the room and closed the door. At this point I began to choke and felt weak ...."

Petitioner was escorted to NCB Hospital's Employee Health Service ("EHS"), where she received medical attention. There is no dispute that Morales called the EHS to alert them that petitioner was en route. The EHS physician, who relieved Carmichael from duty that day, informed her that she would need to bring in a letter from her personal physician before receiving clearance to return to work.[4]

On September 4, 1990, Morales sent a memorandum to the Director of Labor Relations at NCB Hospital, regarding "Non-receipt of medical assessment from

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[3] Petitioner referred to a performance evaluation covering the period of May 1, 1989 to August 1, 1989.

[4] Whether petitioner also was ordered to bring in a note from a psychiatrist is in dispute.

Ms. Carmichael." Morales stated that because petitioner failed to produce a doctor's note indicating her date of return to work, she has not demonstrated an interest in maintaining her employment and, thus, should be terminated. Morales cited HHC Operating Procedure No. 20-10 which, according to her, provides:

> Generally speaking, provisional employees do not have any tenure rights in their provisional title. They may be terminated without a statement of reason and the action is not reviewable under law or contract.

Carmichael was sent a letter from the Director of Labor Relations, dated September 19, 1990, advising her that her services as a provisional Office Associate were being terminated effective September 21, 1990.

On January 14, 1991, Carmichael filed the instant improper practice charges against respondents NCB Hospital and DC 37. In the petition filed against NCB Hospital, the nature of the controversy was set forth as follows:

> On May 1, 1989, I the Petitioner began working with NCB Hospital, the department in which I work was the HIV Program which was a new program. From the beginning I got harassed by the department which caused me to file a grievance. After filing the grievance over poor working conditions, harassment and discrimination the Respondent retaliation was termination without verbal or written reasons.

In the petition filed against DC 37, the nature of the controversy was set forth as follows:

> The above named organization has failed and refused to process Loreene Carmichael's grievance with the NCB Hospital concerning poor working conditions, harassment from the Supervisor/Department.
>
> Since in or around September 21, 1990, the above-named Labor Organization has failed and refused to process Loreene Carmichael's grievance with NCB Hospital over her discharge from employment on September 21, 1990.

Positions of the Parties

Petitioner's position against NCB Hospital

Carmichael claims that she was discriminated against and discharged for reasons prohibited by the NYCCBL. Specifically, petitioner alleges that her supervisor retaliated against her because she filed a grievance complaining about her working conditions.

In support of this claim, Carmichael alleges that she started receiving unfounded warning notices, based on false accusations, soon after the grievance was filed. In contrast, Carmichael submits that she worked for the HIV Program for the preceding 15 months without receiving any verbal or written warnings.

Carmichael also alleges that Morales is responsible for her having been relieved of duty on August 21, 1990. Petitioner claims that Morales caused the EHS physician to wrongfully suspect that she was under the influence of drugs or otherwise not in control. Why else, Carmichael surmises, would the doctor treat her in such an "unprofessional manner," relieve her from duty and require that she bring a note from both her personal physician and a psychiatrist before allowing her to return to work.[5]

Finally, Carmichael denies that she abandoned her job. Petitioner maintains that Morales knew at all times relevant that she was interested in maintaining her employment at NCB Hospital. As proof of this, Carmichael

[5] In Carmichael's account of what transpired at EHS, she claims that the doctor approached her with disbelief, asked her inappropriate questions, threatened to have her restrained by security, and insisted that she see a psychiatrist before leaving the hospital.

alleges that her husband hand-delivered two doctor's notes to Morales, for the purpose of extending her sick leave.[6]

HHC's Position

HHC contends that Carmichael has failed to allege facts which establish that the hospital's actions were in retaliation for protected activity. On the contrary, it argues, NCB Hospital responded to petitioner's grievance in a positive manner and took steps to resolve the issues that were raised by her working conditions grievance.[7]

In further support of its claim of good faith, HHC points out that it was under no obligation to agree to meet with Carmichael and the Union on November 5, 1990, but it did so anyway. As evidence of this, HHC submits a letter dated December 7, 1990, from NCB Hospital's Director of Labor Relations to petitioner's Union representative, which provides:

> This letter is to affirm that on November 5, 1990 a meeting was scheduled between Local 1549, [DC 37]; Director of Labor Relations, NCB Hospital; and former employee, Loreene Carmichael. This meeting was to be held at 3:00 PM in room 14B-03. Ms. Carmichael had been notified by the Union as to the date and time of the meeting. The Union and Labor Relations were present, however, Ms. Carmichael did not show up nor did she send any messages to NCB Hospital as to her unavailability. We waited

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[6] One physician's note states that petitioner was seen on August 22, 1990 for possible allergic reaction, possible bronchospasm, and anxiety. The note also states that petitioner could return to work on September 10, 1990.

Another physician's note states that petitioner was seen on September 16, 1990 for hypertension, anxiety, and possible allergic reaction. The note also states that petitioner could return to work on September 24, 1990.

[7] In this connection, HHC refers to the posting of a sign outside the Special Care Unit and replacement of the desk in petitioner's work area. See "Background", supra, at 4.

> until approximately 3:30 PM to no avail. This meeting was being held to discuss some concerns expressed by Ms. Carmichael to Local 1549.
>
> If additional information is required, please contact me.

In any event, HHC maintains that Carmichael's poor attendance record provided a more than sufficient cause to terminate her provisional employment. In support of this argument, HHC submits that Carmichael's attendance before the grievance was filed was "atrocious,"[8] and that it did not improve following July 17, 1990. According to HHC:

> [D]uring petitioner's 16 months of employment, she was absent a total of 71 full days, most of which occurred on the day preceeding or following a regularly scheduled day off. In addition, petitioner was absent from work for partial days on 8 occasions, totalling 18 hours.

HHC also maintains that petitioner had, in effect, abandoned her job. This conclusion, HHC contends, was reasonable in view of the fact that Carmichael never submitted a doctor's note after she was relieved from duty on August 21, 1990 and, further, that she never attempted to return to work. As additional support for its claim that Carmichael did not demonstrate an interest in maintaining her position, HHC points to her failure to attend the meeting that was scheduled for her benefit on November 5, 1990.

Petitioner's position against DC 37

Carmichael does not deny that DC 37 assisted her in filing a working conditions grievance in July 1990. She alleges, however, that the Union

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[8] There is no dispute that from May 1, 1989 to July 17, 1990, petitioner's unexcused absences totalled 23 days (17 full days and six partial days). Whether petitioner's absences on nine other occasions during this period of time were excused absences is in dispute.

breached its duty of fair representation by failing to move the matter forward to the next step after "nothing was resolved" at Step I.

In support of her charges against DC 37, Carmichael submits that the Union also failed to process a grievance for her in August 1989, concerning "verbal abuse and harassment" by Morales. Petitioner claims, for example, that Morales used to set unreasonable deadlines for the completion of work and threaten to discharge her when she couldn't meet them. According to Carmichael, the Union representative refused to bring a grievance and, instead, advised petitioner to take care of the problem herself by writing a letter to Morales' superior. In relation to the instant matter, Carmichael claims that after the Union filed the working conditions grievance, Morales "began to harass [her in this way] even more."

Finally, Carmichael alleges that the Union failed to represent her after she was discharged. According to petitioner, she denies having been informed of any meeting that was scheduled by the Union on her behalf, claiming that the only thing she was told when she called DC 37 for assistance was that provisional employees with less than two years of service are not entitled to a hearing.

DC 37's Position

DC 37 submits that at no time did it fail or refuse to process Carmichael's working conditions grievance. Rather, the Union argues, the record reveals that it did assist petitioner in the presentation of her grievance and, in fact, was successful in making some changes in petitioner's working environment.

To the extent Carmichael claims that the Union failed to represent her when she was terminated, DC 37 asserts that as a provisional employee with less than two years of service, the Union was not entitled to assert any legal or contractual right of continued employment on her behalf.[9] Despite this limitation, however, the Union submits that it made a good faith attempt to informally assist petitioner by arranging a meeting with NCB's Director of Labor Relations on November 5, 1990. The mere fact that its informal efforts were unsuccessful, DC 37 argues, does not constitute proof that the Union treated petitioner differently from any other similarly situated unit member. Moreover, the Union maintains, it was Carmichael who failed to appear or to call to reschedule the meeting.

Discussion

Allegations against NCB Hospital

Although Carmichael fails to identify which subsection(s) of the statute she claims was violated, the nature of her charge against NCB Hospital relates to an alleged violation of NYCCBL §12-306a(3), to wit:

> It shall be an improper practice for a public employer or its agents: ... to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any public employee organization; ....

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[9] The Union cites §75 of the Civil Service Law (which does not apply to provisional appointees); Articles I and VI of the 1984-87 Clerical Agreement (which limits the Union's ability to assert a claim of wrongful disciplinary action to permanent employees); the HHC Personnel Review Board appeal procedure and the December 22, 1987 Letter Agreement between DC 37 and the City of New York (both of which grants certain due process rights only to provisional employees who have served for at least two years).

Where the employer is accused of discriminating against an employee on account of union activity, the petitioner has the burden of proving that the act complained of was improperly motivated. In cases involving a claim of improperly motivated management action, the test which this Board has applied since our adoption, in Decision No. B-51-87, of the standard set forth by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985), provides that initially the petitioner must sufficiently show that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

If the employer does not refute the petitioner's showing on one or both of these elements, then the employer must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[10]

In the Interim Decision and Order we issued in this case (Decision No. B-48-91), we were satisfied that for purposes of disposing of HHC's motion to dismiss, petitioner's allegations, if deemed true, stated a cause of action under the NYCCBL. Drawing every reasonable inference from petitioner's unrebutted account of the events surrounding her claim, we found that a causal connection between her participation in protected activity and the claim that NCB Hospital retaliated against her on account of it had been established. Accordingly, we ordered HHC to submit an answer to the petition, in which it could either: attempt to refute the petitioner's showing on the elements of the above-test; attempt to prove that its actions would have occurred even in the absence of protected activity; or do both.

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[10] See also, Decision Nos. B-59-91; B-21-91; B-4-91; B-50-90.

Upon joinder of issue in this matter, all inferences drawn below are set aside and both party's versions of the events surrounding the elements of Carmichael's improper practice claim against NCB Hospital are examined to determine whether the facts alleged demonstrate that adverse action was taken on account of petitioner's protected activity. Based upon the record now before us, we find that the evidence neither establishes that the employer's acts were improperly motivated nor that there is sufficient reason to warrant further inquiry into the employer's motivation. We reach these conclusions for the following reasons:

First, we find that the weight of the evidence clearly supports HHC's contention that Carmichael had an attendance problem prior to July 17, 1990, the date the grievance was filed. Even giving petitioner the benefit of the doubt for the nine days that are in dispute, there can be no question that a record of 23 unexcused absences over 15 months (several occurring before or after a day off) rebuts her earlier assertion that she was "never" absent before July 1990. Furthermore, the fact that petitioner did not report to work for an additional 11 days during the month between the date that her grievance was filed (July 17th) and the date she received the notice to report for a counselling session (August 17th) to discuss, among other things, her absences, weakens the inference that the management action contemplated may have been a pretext for retaliation.

Second, we find that other than Carmichael's self-serving assertion that her manner of dealing with patients and co-workers was beyond reproach, her only offer of proof is a performance evaluation covering the first three months of her employment. In contrast, Perez's memorandum of July 17, 1990, complaining about petitioner's practice of refusing to keep open the door to

the HIV Program and then failing to answer it, which was written contemporaneously with the events which form the basis of the instant matter, provides a better measure of Carmichael's deportment at the time in question. We note that Perez was not Carmichael's supervisor, and that it has not been suggested that he had any improper motive regarding the petitioner. According-ly, the record fails to support petitioner's allegation that Morales fabricated patient and staff complaints as a pretext for disciplinary action.

Third, Carmichael has not demonstrated that the alleged hostile relationship that existed between her and Morales after the grievance was filed is attributable to petitioner's participation in protected activity. In this regard, it is significant that one of petitioner's claims against DC 37 is that the Union did not assist her in August 1989, when she first complained about Morales' alleged verbal abuse, harassment and threats. Clearly, Carmichael and Morales did not enjoy an amiable working relationship well before Morales became aware of petitioner's working conditions grievance. Moreover, hostility between a superior and a subordinate, in and of itself, is not a basis for a claim of improper practice under the NYCCBL.[11]

Fourth, we do not find that the facts alleged support the conclusion that the decision to terminate Carmichael's employment was retaliatorily motivated. In reaching this conclusion, we note that action was taken after petitioner was unable to perform her duties for an additional four weeks, amounting to a total of 61 unexcused absences in less than 17 months of employment. Although the parties dispute whether petitioner kept Morales apprised of her status during this period of time, the resolution of this

[11] Decision Nos. B-28-89; B-30-81.

question is not relevant to our determination herein.[12] Petitioner claims that her absences were due to "harassment, unnecessary stress and anxiety" caused by her working conditions. Even assuming that petitioner's working conditions did violate Article XIV, §2 of the Agreement as she alleges, disciplinary action taken on account of excessive absenteeism will not constitute discrimination within the meaning of §12-306a(3) of the NYCCBL absent proof of improper motivation. The mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity, does not state a violation where no causal connection has been demonstrated.[13]

A conclusion that NCB Hospital's actions were taken for the purpose of retaliating against petitioner simply is not supported by the weight of the evidence. Rather, the record establishes that there was ample basis throughout petitioner's seventeen months of employment at NCB Hospital for classifying her as an unsatisfactory employee. As previously noted, the services of a provisional appointee with less than two years of employment may be terminated for any reason or no reason, as long as it is not for a prohibited reason.[14] Therefore, petitioner's assertion that her employment was terminated "without verbal or written reasons," without more, does not

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[12] As a provisional employee with less than two years of service, Carmichael had no expectation of tenure and rights attendant thereto and, thus, was subject to termination at any time without charges proffered, a statement of reasons given or a hearing held. See Decision Nos. B-59-91; B-41-91; B-1-91; B-39-89; B-17-89.

[13] Decision Nos. B-1-91; B-53-90; B-28-89; B-2-87; B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

[14] See note 12, supra, at 18.

constitute evidence sufficient to satisfy her burden of proving improper motivation.

Allegations against DC 37

Carmichael contends that the Union violated the NYCCBL by failing to zealously pursue her working conditions grievance beyond Step I and by failing and refusing to represent her in connection with the termination of her employment. These charges against the Union relate to §12-306b(1) of the NYCCBL,[15] which has been recognized as prohibiting violations of the judicially recognized fair representation doctrine.

The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[16] 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 process every complaint made by a unit member.[17] The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and non-discriminatory.

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[15] NYCCBL §12-306b(1) provides:

> It shall be an improper practice for a public employee organization or its agents ... 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; ...

[16] See e.g., Decision Nos. B-56-90; B-30-88; B-13-81; B-16-79.

[17] Decision Nos. B-58-88; B-30-88; B-32-86; B-25-84; B-2-84; B-13-82.

However, arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[18]

Applying these principles to the instant case, we conclude that petitioner has failed to establish a breach of the duty of fair representation. With respect to Carmichael's allegation that DC 37 failed to advance her working conditions grievance to the next step, petitioner has not even alleged, let alone shown, that the Union was aware that she wished to pursue the grievance beyond Step I. In fact, the record reveals that both the Union and NCB Hospital believed that the remedial steps taken by the employer after the Step I hearing on August 8, 1990, had resolved petitioner's complaints.

As for petitioner's claim that the Union refused to challenge the unlawful termination of her employment, we note that the rights of provisional employees are limited by law and, consequently, the scope of a union's duty to such employees also is limited. An employee representative cannot be expected, nor is it empowered, to create or enlarge the rights of such a class of employees.[19] We have gone so far as to hold that the termination of a provisional employee is not a matter with respect to which the obligation of fair representation arises.[20] Nevertheless, such employees may have rights to which the duty of fair representation attaches, and we have held that a union

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[18] Decision Nos. B-56-90; B-27-90; B-72-88; B-58-88; B-50-88; B-30-88.

[19] Decision Nos. B-58-88; B-30-88. See also, Decision Nos. B-72-88 (per diem employees); B-58-88 and B-16-79 (probationary employees); B-13-82 (CETA workers).

[20] Decision Nos. B-30-88; B-18-84; B-42-82.

has an obligation to represent employees, including provisional employees, in a non-arbitrary and non-discriminatory manner.[21]

In the instant case, however, Carmichael has neither pleaded nor proved that other similarly situated employees in the bargaining unit were accorded greater or different representation than she. On the other hand, the record clearly supports the Union's contention that it did make an attempt to assist petitioner, albeit informally, by scheduling a meeting with the Director of Labor Relations on November 5, 1990.

A breach of the duty of fair representation cannot lie in the absence of any facts that tend to establish arbitrary, discriminatory or bad faith conduct on the part of the public employee organization. Moreover, the burden is on the petitioner to plead and prove that a union has engaged in such conduct.[22] In the instant matter, not only has Carmichael failed to allege any arbitrary, discriminatory or bad faith conduct on the Union's part, but the facts in this case fail to establish any such conduct. Accordingly, we find that no violation of the duty of fair representation has been stated.

* * *

For all these reasons, we shall dismiss both improper practice petitions, filed against NCB Hospital and DC 37, in their entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

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[21] Decision Nos. B-14-86; B-26-84; B-42-83; B-14-83; B-16-79.

[22] Decision Nos. B-56-90; B-50-88.

ORDERED, that the improper practice petitions of Loreene Carmichael be, and the same hereby are, dismissed.

DATED: New York, New York
April 30, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER