Allcot,III, v. L.211, et. al, 49 OCB 35 (BCB 1992) [Decision No. B-35-92(IP)]

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

-between-

DECISION NO. B-35-92
DOCKET NO. BCB-1470-92

WILLIAM T. ALLCOT, III,

Petitioner,

-and-

LOCAL 211, ALLIED BUILDING
INSPECTORS, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO,

Respondent.
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DECISION AND ORDER

On February 28, 1992, the Petitioner, William T. Allcot, III, appearing Pro Se, filed a verified improper practice petition against Local 211, Allied Building Inspectors, International Union of Operating Engineers, AFL-CIO ("the Union"), in which he alleged that the Union had breached its duty of fair representation by refusing to assist him with his longevity pay grievance. The Union filed a verified answer on March 16, 1992, and the Petitioner filed a reply on March 30, 1992.

Background

The Petitioner has been employed by the City of New York for

approximately 25 years. Prior to 1978, the Petitioner served in an inspector title in the Department of Housing Preservation and Development ("HPD"). In 1978, he was transferred to the Inspector General's Office where he served as a Confidential Investigator.[1] Approximately 2-1/2 years later, the Petitioner was transferred back to the title of Associate Inspector; since then he has remained in that title.

Section 9 of the collective bargaining agreement between the City and the Union provides for longevity pay.[2] This agreement covers several inspector titles, including Associate Inspector, but does not cover the Confidential Investigator title.[3] The City's Office of Payroll Administration issued a bulletin entitled "USI-17/89" in 1989 which stated that in order to be

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[1] It appears that the Petitioner is referring to the Inspector General's office within HPD. It should be noted that the Union claims that this transfer took place in 1979 rather than 1978.

[2] Section 9, which is entitled "Service Increments," provides:

a. Effective January 1, 1989, employees with six years or more of service in any title covered by this Agreement or any similar title shall receive a service increment in the pro-rata annual amount of $300.

b. Effective July 1, 1989, employees with nine years or more of service in any title covered by this Agreement or any similar title shall receive an additional service increment in the pro-rata annual amount of $300.

c. Effective July 1, 1989, employees with twelve years or more of service in any title covered by this agreement or any similar title shall receive an additional service increment in the pro-rata annual amount of $400.

[3] The Confidential Investigator title is, and always has been, an unrepresented title.

eligible for the contractual service increment, an employee must have been in continuous active service for the specified period.[4]

In 1989, the Petitioner complained to the Union after HPD refused to grant him a 12 year longevity payment. Thomas McLoughlin, President of Local 211, contacted the labor relations department at HPD to discuss the Petitioner's complaint. HPD informed the Union that the longevity payment had been denied because the 2-1/2 years that the Petitioner spent in the Confidential Investigator title constituted a "break in service." Consequently, HPD stated, the Petitioner's continuous service period did not begin to accrue until he became an Associate Inspector in 1982. According to HPD, the Petitioner would receive his initial six year longevity payment on January 1, 1989 and his nine year payment on April 1, 1991.

Shortly thereafter, Mr. McLoughlin and Adam Ira Klein, the Union's attorney, met with Michael McDonald from the City's Office of Labor Relations ("OLR") in an attempt to solve the Petitioner's problem. Mr. McDonald reiterated HPD's position on the issue and added that the intent of negotiating this service increment was to supplement the relatively low salaries received by the Inspectors. According to Mr. McDonald, the salaries

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[4] The USI defines "continuous" service as "without a break in excess of 31 consecutive calendar days arising from resignation, retirement, or termination. However, if the employee was placed on a preferred list or subsequently returned to full service with a full restoration of rights, no break in service will be deemed to have taken place."

received by the Confidential Investigators are substantially higher.

Following this meeting, the Union asked Klein for his opinion on the likelihood of success were the Union to pursue this matter. The attorney reviewed the case and concluded that the time spent by the Petitioner in the Confidential Investigator title constituted a break in continuous service which postponed the accrual of the Petitioner's entitlement to the service increment. Based on this opinion, in November of 1989, the Union informed the Petitioner that it would not pursue the matter any further.

Positions of the Parties

Petitioner's Position

The Petitioner contends, in essence, that the Union has breached its duty of fair representation by "steadfastly [refusing] to file a grievance or take any other action" on his behalf. The Petitioner argues that because his grievance was clearly meritorious, the Union's decision not to pursue it cannot be justified. According to the Petitioner, a simple transfer from one title to another within the same agency cannot be considered a break in service. In support of this position, the Petitioner points out that the definition of the term "continuous" found in USI-17/89 does not specifically mention a

break in service due to a transfer or leave of absence.[5]

In his reply, the Petitioner argues that "[the Union], knowing it had several of its members on withdrawal and at least two who had returned from withdrawal status, should have had the foresight to have the title of Confidential Investigator covered in the negotiation of the contract." He further maintains that the Union "acted with poor judgement in not foreseeing that several of their members had been and were on the confidential Investigator's line when dealing with longevity in the contract." According to the Petitioner, the problem could have been resolved had the Union been more diligent. In this connection, the Petitioner states that "DC 37 had the same problem with the Mortgage Analysts, and through negotiation and/or grievance the problem [was] resolved and they are receiving their full longevity money."

The Petitioner also disputes the claim made by Mr. McDonald that the intent of negotiating this service increment was to supplement the low salaries received by the Inspectors.

Addressing the Union's argument that the Petitioner "sat on his claim" for more than two years, the Petitioner asserts that during this period, through his Union delegate, he contacted the Union regarding this matter on several occasions. Furthermore,

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[5] In his original improper practice petition, the Petitioner refers to his change in title as a "transfer." In his reply, by contrast, the Petitioner refers to it as a "leave of absence" from his inspector title.

he contends, he communicated with several other entities during this period, such as the National Labor Relations Board and City's Office of Payroll Administration, in an effort to resolve the problem.

Union's Position

Noting that the Petitioner was informed of the Union's decision not to pursue the grievance in November of 1989, the Union argues that the instant improper practice petition, filed more than two years later, is untimely.

In the alternative, the Union argues that the improper practice petition is barred by the doctrine of laches. The Union argues that the Petitioner "sat on his claim" for over two years.

In any event, the Union contends, the Petitioner has failed to state a claim upon which relief may be granted. The Union argues that by discussing the matter with both HPD and OLR, it acted fairly and in good faith, and has complied with its duty of fair representation.

DISCUSSION

Upon review of the pleadings in this case we find that the claim is barred by the four month statute of limitations found in 61 RCNY §1-07(d) (Formerly § 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining hereinafter referred

to as "the OCB Rules".)[6] The Petitioner does not dispute that he was informed of the Union's decision not to pursue his grievance in November of 1989. Yet the petition was not filed until February of 1992, more than two years later. The mere fact that the Petitioner continued to contact the Union concerning the matter cannot serve to toll the statute of limitations. The Petitioner has not alleged that, at any time during that two year period, the Union gave him any reason to believe that it was reconsidering its decision. Similarly, the Petitioner's complaints to various outside agencies did not serve to toll the statute; the fact remains that the Petitioner failed to file a timely petition with the Office of Collective Bargaining.[7]

Moreover, even if we could deem this matter to have been timely filed, based on the record before us, we would find no basis for the substantive claim of a breach of the duty of fair representation. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating,

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[6] Section 1-07(d) of the OCB provides, in relevant part, that:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof...

[7] Since we find that the petition was untimely filed, it is unnecessary to address the Union's argument that the petition is barred by the doctrine of laches.

administering and enforcing collective bargaining agreements.[8] 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.[9] 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.[10] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[11] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[12]

The Petitioner contends that the Union violated its duty of fair representation when it refused to pursue his grievance. We reject this contention on the ground that the Petitioner has failed to establish that the Union's determination was effected arbitrarily, discriminatorily or in bad faith.

It is clear that the Union's determination to refrain from

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[8] See e.g., Decision Nos. B-21-92; B-56-90; B-30-88; B-13-81.

[9] Decision Nos. B-21-92; B-58-88; B-30-88; B-32-86; B-25-84; B-2-84.

[10] Decision Nos. B-21-92; B-56-90; B-27-90; B-72-88; B-58-88; B-50-88.

[11] Decision Nos. B-21-92; B-56-90; B-27-90; B-72-88; B-58-88; B-50-88.

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

pursuing the Petitioner's grievance was in no way improperly motivated. Rather, the evidence presented in this case establishes that the Union's determination was reached in good faith, after it assessed the circumstances of the Petitioner's situation, made efforts to resolve the problem informally, and consulted its attorney. As we have noted in the past, a union's decision not to pursue a grievance based on the good faith advice of counsel does not constitute a breach of the duty of fair representation even if such reliance amounted to poor judgement.[13]

The Petitioner contends that in negotiating the contract, the Union should have seen to it that individuals serving in the Confidential Investigator title were made eligible for longevity pay. This aspect of the petition also fails to state a basis for a charge of improper practice against the union. In matters of contract negotiation, it has been held that, absent a showing of hostile discrimination, a union does not breach its duty of fair representation simply because the contract fails to satisfy all persons represented by the union.[14] In the instant case, the Petitioner has made no showing of discrimination or improper motivation. The fact that another union may have found a way to resolve a similar problem is irrelevant; it does not help to

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[13] Decision Nos. B-56-90; B-27-90; B-50-88; B-20-88; B-2-84.

[14] Decision Nos. B-9-86; B-15-83; B-13-81.

establish discrimination or improper motivation on the part of the union involved in the instant case.

For all of the above reasons, we conclude that the petition fails to establish any improper practice, and we shall direct that it be dismissed.

ORDER

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

ORDERED, that the improper practice petition of William T. Allcot, III be, and the same hereby is dismissed.

DATED: New York, New York
September 30, 1992

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Steven H. Wright
MEMBER