Krumholz v. L.300, SEIU & City, 51 OCB 21 (BCB 1993) [Decision No. B-21-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Improper Practice Proceeding
-between-

MARTIN KRUMHOLZ,
Petitioner,

DECISION NO. B-21-93

-and-

DOCKET No. BCB-1530-92

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 300, AFL-CIO, and THE CITY OF NEW YORK,
Respondents.

In the Improper Practice Proceeding
-between-

MARTIN KRUMHOLZ,
Petitioner,

DOCKET NO. BCB-1532-92

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 300, AFL-CIO, and, THE CITY OF NEW YORK,
Respondents.

DECISION AND ORDER

On October 8, 1992, Martin Krumholz ("Petitioner") filed three verified Improper Practice Petitions against the Service Employees International Union, Local 300 ("the Union"). Each petition alleged that the Union had breached its duty of fair representation, thereby violating Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1] On November 25,

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[1]NYCCBL Section 12-306 provides, in pertinent part, as follows:

b. Improper public employee organization practices. It shall be 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

(continued...)

1992, the Union submitted a letter addressing the charges. On December 14, 1992, Petitioner submitted a letter in reply.

Advised of the requirement pursuant to Section 209-a(3) of the Civil Service Law ("the Taylor Law")[2] that the public employer be joined as a respondent when a petition alleges an employee organization's breach of its duty of fair representation, Petitioner filed three amended petitions joining the City of New York ("the City") as Co-Respondent on March 8, 1993. The City took no position with regard to the instant petitions.

The two instant improper practice proceedings concern the Union's handling of grievances with regard to an allegation of out-of-title work and the other, with regard to an allegation

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1 (... continued)
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.

[2]Civil Service Law, Section 209-a, provides, in pertinent part, as follows:

Improper employer practices; improper employee organization practices.

(3) 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.

of religious discrimination. The instant Petitions also allege that the Union and the City have breached Articles I ("Union Recognition on Citywide Matters") and XV ("Adjustment of Disputes") of the Citywide Agreement.[3] They have been consolidated for decision, as they involve the same parties, events and underlying factual circumstances. A third petition concerns events and factual circumstances which differ somewhat from those involved in the consolidated proceedings, and, therefore, is considered separately from the petitions herein.

BACKGROUND

Out-of-Title Work

The Petitioner is a permanent civil service employee in the title of Purchasing Agent--Level I. He has held that position in the Department of General Services of the City of New York ("DGS") since June, 1973. He has served as an Acting Supervisor since January, 1982.

In August, 1984, the Union instituted a Step I grievance proceeding on Petitioner's behalf regarding his work as an Acting Supervisor without commensurate pay. In September, 1987, Petitioner filed another grievance protesting his failure to be promoted. Dated October 21, 1987, a letter from Roy Cosme,

[3]Citywide Agreement between the City of New York and D.C.37, AFSCME, AFL-CIO, July 1, 1985, -- June 30, 1987, as amended September 4, 1991, effective October 1, 1990.

then DGS Director of Labor Relations, to Union President Salvatore Cangiarella, enclosed a decision on a Step II grievance proceeding which denied the requested relief, i.e., "promotion to supervisor." In January, 1988, the Union appealed the unfavorable decision in the Step II proceeding. In August, 1990, the Petitioner initiated another grievance proceeding, alleging, "Based on my present level of work performance, experience, and proven history of work performance, my being promoted is justified." A letter dated October 31, 1990, from the DGS Director of Labor Relations to the Union rejected the appeal on the grounds that the grievance failed to allege any violation of law.

In June, 1992, the Petitioner allegedly was told that he would be included in a group grievance concerning the out-of-title matter. By letter dated July 23, 1992, to Ralph Zinzi at the New York City Office of Labor Relations ("OLR"), Union Counsel formally requested the Step III hearing:

> Pursuant to Section 6 of the contract between Local 300 of the Service Employees International Union and the City of New York, we hereby file a Step III grievance to present out of title grievances on behalf of the following individuals:
>
> Rochelle Raso
> Myron Bursky
> Geishon Balin
> Sandra Whitfield
> **Martin Krumholz**
> Walter Laporate
> Ted Centkowski
> Rocco Melchione
> Judith Rhodes

> Please schedule a Step III hearing at your earliest convenience. (Emphasis added.).

From June, 1992, and continuing to the time he filed the instant petitions, Petitioner allegedly made several unsuccessful attempts to verify that his name was included in the grievance. On January 22, 1993, a Step III conference was held at OLR. On February 25, 1993, a prehearing conference was held in the instant matter.

Discrimination

On January 14, 1992, Petitioner filed an Informal Complaint of Discrimination with the DGS Equal Employment Opportunity representative on his floor, alleging "various" unspecified acts of religious discrimination against him by "A" Unit Purchase Director Donald Conaty, DMS Assistant Commissioner Charlotte Frank, and DMS Deputy Commissioner Cecile Pace on "specific dates (which) can be specified." On a date not specified in the pleadings, Petitioner states that he was told by his agency Equal Employment Opportunity officer that the Informal Complaint had been set aside. Petitioner further states that he asked the EEO officer to re-submit it. At an unspecified date, Petitioner also states that he told Judith Rhodes, president of intra-union Council 182, about the EEO officer's handling of the discrimination complaint. At her direction, Petitioner drafted a grievance about it, which she agreed to refer to Counsel for the

Union. On dates unspecified in the pleadings, Petitioner spoke with the President of the Union as well as to Rhodes to inquire as to the processing of his grievance concerning the discrimination claim. On February 25, 1993, a prehearing conference was held in the instant matter.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner'-s complaint against the Union, docketed as BCB-1530-92, concerns its alleged failure to respond to his requests for information about a class-action Step III grievance concerning out-of-title work. The Petition states:

> In early June, 1992, 1 asked [Judith] Rhodes[, President of intraunion council 182] for a copy of the grievance and to see that my name was on it as I didn't recall signing anything. She said that she couldn't show it to me but it was sent and my name was signed on a list. I called Local 300's lawyer who refused to give me any information. I called OCB and OLR and was told no records existed on this. I spoke to Sal Cangiarella, President of Local 300 who told me that Rhodes got carte blanche from S.E.I.U. to handle that grievance, and that Rhodes and the lawyers knew all about it -- he didn't. He contacted Rhodes and called me back. He said she told him that the grievance would soon be sent and my name would be on it, and I would get a copy when it was sent. Around mid-September, 1992, Rhodes again enthusiastically told me and others that the grievance was over at OLR and just awaiting a hearing date. I again said I wanted to see it and was told I couldn't -- it was somewhere on her desk but she couldn't locate it just then.

The Petition asks us to "remove the Union obstructions to the grievance procedure; implement the submission of the grievance without delay [and] force union restitution to [him]."

With regard to the Petition docketed as BCB-1532-92, Petitioner alleges unspecified acts of religious discrimination by supervisors, which he contends have resulted in, inter alia, loss of income, unequal treatment and loss of status--injuries which he contends can be remedied in part by his promotion to Purchasing Agent--Level III. As to which facts have led Petitioner to believe that certain acts, policies or practices of his employer discriminated against him, the Petitioner states that he was "[i]ntentionally denied promotions over [a] 9-year period" and that "another employee [was) promoted to my supervisor without qualifications." He also alleges without specificity "harassment" and "deliberate actions damaging to (his] future chances for promotion." The Petitioner contends that the mechanism set up within his agency to respond to such claims failed him and that his Union likewise failed to represent his interests. For relief, the Petition asks us to "force Union action to redress [the discrimination] complaint" and to give "Union restitution to the Petitioner."

Union's Position

The Union contends that it has included Petitioner in a class-action Step III grievance proceeding at OLR on the out-of-title matter. The Union also maintains that the claim of religious discrimination is related to the out-of-title grievance

because the remedy sought by Petitioner with regard to both claims is promotion. On this basis, the Union has included the religious discrimination claim in its Step III group grievance. The Union supports its contention by reference to correspondence showing Union involvement in the Petitioner's various grievances which underlie the instant Petitions.

City's Position

The City took no position on either of the instant Petitions.

DISCUSSION

We are called upon to decide whether the Union breached its duty of fair representation of the Petitioner with respect its handling of an out-of-title grievance and a grievance concerning the public employer's handling of a complaint of religious discrimination by supervisory personnel. The two instant Petitions are consolidated, because they involve the same employer and allege violation of the same section of the NYCCBL and because the acts are alleged to be part of a common scheme.[4]

Two preliminary matters must be addressed. First, we note that the NYCCBL does not empower us to attempt to remedy or even consider every perceived wrong or inequity which may arise

[4]Decision No. B-25-81.

out of the employment relationship. It mandates only that we administer and enforce procedures designed to safeguard employee rights under the Collective Bargaining Law.[5] One such right derives from a certified employee organization's duty of fair representation of its unit members.

This duty has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[6] In the area of contract administration, which includes processing employee grievances, however, it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance a grievance.[7] We note that the U.S. Supreme Court determined, in Vaca v. Sipes,[8] that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures . . . If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be

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[5] Decision No. B-59-88.

[6] Decision Nos. B-35-92, B-21-92, B-34-91, B-5-91, B-27-90, B-51-88, B-1-88, B-53-87, B-11-87, B-49-86.

[7] Decision Nos. B-35-92, B-21-92, B-34-91, B-5-91, B-27-90, B-72-88, B-58-88, B-50-88, B-30-88, B-34-86, B-32-86, B-25-84, B-18-84, B-2-84, B-42-82, B-16-79.

[8] 386 U.S. 171, 64 LRRM 2369 at 2377 (1967).

substantially undermined . . . .

The applicable standard, then, permits a union wide discretion in reaching grievance settlements. A union does not breach its duty of fair representation simply because the outcome of a settlement does not satisfy a grievant.[9] The latitude that a union may exercise is not unlimited. The duty of fair representation mandates that a union's refusal to advance a member's grievance be made in good faith, and in a non-arbitrary, non-discriminatory manner.[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, however, is on the petitioner to plead and prove that the union has engaged in such conduct.[12]

Second, the Petition describes certain acts as occurring before June, 1992. We have consistently held that the four-month limitation period prescribed in Title 61 of the Rules of the City of New York, Section 1-07(d), will bar the consideration of an untimely filed improper practice petition. Nor is a defective petition cured by the belated assertion of relevant evidence

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[9] Decision Nos. B-21-92, B-31-91, B-5-91.

[10] Decision Nos. B-35-92, B-21-92, B-34-91, B-5-91, B-27 90, B-72-88, B-58-88, B-50-88, B-30-88, B-2-84.

[11] Decision No. B-35-92, B-21-92, B-34-91, B-5-91, B-27-90, B-72-88, B-58-88, B-50-88, B-30-88.

[12] Decision Nos. B-35-92, B-56-90, B-50-88.

which was available to the petitioner upon the initial filing of the matter. It is true, however, that when a petition alleges a continuing course of conduct commenced more than four months prior to the date of filing the petition, the allegation may not be time-barred in its entirety. In such cases, although a petitioner seeks damages for wrongful acts which occurred more than four months before the petition was filed, evidence of the wrongful acts may be admissible for purposes of background information when offered to establish an on-going and continuous course of violative conduct.[13] Therefore, those matters cited in the instant petition which allegedly occurred before June, 1992, i.e., before the instant claims accrued, are considered only as background information.

The Petitioner here contends that the Union violated its duty of fair representation in its handling of the out-of-title and discrimination grievances at issue. we reject this contention on the grounds that the Petitioner has failed to establish that the Union's handling of the matters were done arbitrarily, discriminatorily or in bad faith. The Union's pursuit of the grievances, although not to the Petitioner's satisfaction, was not improperly motivated in a way that would constitute an improper practice under the NYCCBL. Rather, the record establishes no actions rising to the level of bad faith in

[13] Decision No. B-37-92.

the way the Union assessed the circumstances of the Petitioner's situation. The Union made efforts to resolve the problems informally and consulted its attorney. The Union added the Petitioner's claims to a formal class grievance which it submitted and has pursued. That grievance is still pending. The Union's action has caused the City to undertake desk audits so that it can ascertain the merit of the grievant's claims. Clearly, the Union has been an active participant in the effort to resolve the Petitioner's claims.

A request for information or an appeal of a union's decision deserves a response if the request is not merely redundant or onerous, and the absence of such a response may establish a charge of arbitrariness sufficient to require the union to explain its failure to respond.[14] However, once a union has offered an explanation about a decision whether to handle a member's grievance, it is not obligated to repeat the explanation simply because the member requests that it do so, nor is the union obligated to provide its explanation in the form requested by the member, so long as its explanation is communicated in a

[14]Grassel v. UFT and Board of Education of the City School District of the City of New York, 23 PERB 3042 (1990) (where the union failed to respond to Petitioner-employee's written request that it reconsider his grievance or pursue an appeal, his claim of arbitrariness in the union's handling of the matter is established and requires the union to explain its failure to respond).

reasonably understandable fashion.[15] Here, Petitioner acknowledges that each grievance was referred by the Union to its counsel for review. The record is devoid of any evidence which would demonstrate arbitrariness or bad faith in the Union's decision as to how to pursue the grievances regarding out-of-title work and the agency's processing of the discrimination complaint. On the contrary, the record indicates that Counsel made a rational determination concerning the merits of the grievances and chose to pursue them in a Step III group grievance. The fact that the Union chose, in fact, to include Petitioner here with other grievants in the out-of-title grievance indicates that the Union did not treat Petitioner in a discriminatory fashion with respect to the claims in the instant Petitions. The record also indicates that the Petitioner's union representative discussed the instant grievances with him on several occasions and kept him apprised of the Union's position regarding his grievances. If the Petitioner is heard to contend that the Union violated its duty of fair representation by failing to fully investigate the underlying circumstances of his grievances, we note that the extent to which a union investigates

[15] McLaughlin v. UFT. L.2, AFT, AFL-CIO, 24 PERB 3002 (1991) (per them teacher failed to establish that union was improperly motivated when it gave him incorrect information about the viability of his contract grievance and its timeliness immediately following his termination from employment; subsequent correction of that advice, timely filing of the grievance, and efforts to resolve the grievance negate inference of improper motive).

the basis of its members' grievances is an internal union affair which we will not evaluate absent the presentation of evidence supporting a claim that the grievance was treated arbitrarily, perfunctorily, or in bad faith.[16]

A word must be said here about Petitioner's claim as to religious discrimination. It is true that, in order to evaluate an allegation that an employee organization has failed to pursue a grievance, we must also give limited consideration to the merits of that underlying grievance. It is not our function, however, to determine the ultimate merit of the underlying grievance.[17] Our authority does not extend to the administration of any statute other than the NYCCBL.[18] Whether acts of religious discrimination occurred, as Petitioner alleges, remains for another body to decide.

A union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do. Where it assumes such an obligation, the union breaches its duty of fair representation if a petitioner alleges and proves that the union denied the service to him and that the union's decision to deny that service was

[16] Decision Nos. B-27-90, B-9-86, B-15-83, B-26-81, B-18-79.

[17] Decision No. B-32-92.

[18] Decision Nos. B-20-83, B-1-83, B-2-82.

improperly motivated, irresponsible or grossly negligent[19] Here, the Union is not contractually obligated to pursue Petitioner's claim of religious discrimination by his supervisors, and its duty of fair representation ordinarily would not extend to the handling of such a claim. Here, however, since Petitioner's union representative offered the services of the Union in pursuing the manner in which his agency EEO representative was handling his claim, the Union assumed a duty to pursue the grievance in a way that meets the above-described standard. We find that the Union here has met its duty. The Union representative advised Petitioner to write a grievance; she forwarded it to the Union's attorney; the Union's attorney has informed Petitioner that the matter has been included in the Step III grievance under way at the time of this decision.

As to Petitioner's claim that the Union has breached the collective bargaining agreement, we note that an improper practice petition which merely alleges violation of a collective bargaining agreement does not state an independent improper practice. It is beyond our jurisdiction.[20] In fact, we are specifically precluded from enforcing a collective bargaining agreement by means of an improper practice proceeding.[21]

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[19] Decision No. B-11-87.

[20] Decision Nos. B-55-88 and B-53-87.

[21] Decision No. B-17-86.

Petitioner's claims that the Union has breached the applicable contract are misplaced in the instant petition.

In sum, because of Petitioner's failure to allege fac to support the claim of a breach of the duty of fair representation has not been met here. Accordingly, we dismiss the consolidated improper practice petitions asserted herein.

ORDER

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

ORDERED, that the consolidated improper practice petitions, docketed as BCB-1530-92 and BCB-1532-92, be, and the same hereby are dismissed.

Dated: May 26, 1993
New York, New York

MALCOIM D. MacDONALD
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