Cromwell v. L.237, NYCHA, 51 OCB 29 (BCB 1993) [Decision No. B-29-93 (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-29-93

MICHAEL CROMWELL, DOCKET NO. BCB-1493-92

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY
and TEAMSTERS LOCAL 237,

Respondents.
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DECISION AND ORDER

On May 18, 1992, Michael Cromwell, pro se, filed a verified improper practice petition against the New York City Housing Authority and against City Employees Union Local No. 237, International Brotherhood of Teamsters, AFL-CIO ("Local 237" or "the Union"). The petition alleges that the Housing Authority improperly subjected the Petitioner to a physical examination, and that the Union, instead of protecting him, sanctioned the employer's alleged improper conduct, thereby breaching its duty of fair representation, and interfering with the statutory rights of employees under Section 12-306 of the New York City Collective

Bargaining Law ("NYCCBL").[1]

Local 237 filed its answer on May 29, 1992. The Housing Authority, appearing by its Law Department, did not answer, but, instead, submitted a motion to dismiss the petition on June 23, 1992, on jurisdictional and procedural grounds. On January 12, 1993, the Board of Collective Bargaining, in Interim Decision No. B-4-93, noted that joinder of the employer as a party in a duty of fair representation case is mandated by subdivision 3. of Section 209-a. of the Taylor Law. The decision held that the Petitioner had stated a claim of an improper public employee organization practice within the meaning of NYCCBL Section

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

> **Improper practices; good faith bargaining.**
> **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 their rights granted in section 1173-4.1 (now re-numbered as section 12-305) 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 representa-tive of public employees of such employer.

NYCCBL §12-305 provides, in pertinent part, as follows:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all such activities. * * * A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

12-306b. sufficient to withstand the Authority's motion to dismiss. The Board ordered the Authority to serve and file an answer to the Petitioner's charge, which it did on February 8, 1993. The Petitioner filed a reply on February 22, 1993.

On February 24, 1993, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing began on April 27, 1993. On May 4, 1993, the Petitioner concluded the presentation of his case. Thereupon, the Union moved to dismiss the petition on the ground that the Petitioner had failed to present evidence to make out a prima facie case that the action of Local 237 constituted an improper practice as defined by the NYCCBL. The Housing Authority joined the motion, asserting that the Petitioner had not made out a prima facie case against it either. The Trial Examiner gave the Petitioner the opportunity to reply to the Respondents' motions in writing, which he did on June 14, 1993.

Petitioner's Evidence

The Petitioner was the only witness who testified. He established that he has worked as a Housing Assistant at various Housing Authority properties since mid-1989. The Petitioner's improper practice allegations stem from his tenure at the Kingsborough Houses project, where he served from January, 1991 to May 31, 1992.

On the afternoon of April 7, 1992, the Petitioner was summoned to the Manager's office and questioned about whether he had threatened to shoot the Manager and everyone in the management office. According to the Petitioner, this was related to an incident involving a prospective tenant that had

occurred in early February. Because of that incident, he had received an unsatisfactory job performance memo on March 31, to which he submitted a written reply addressed to the Housing Authority Personnel Director on April 3, 1992. He strenuously denied threatening to harm anyone, although he said that he recalled hearing a co-worker make such a statement several months earlier. Nevertheless, the Manager ordered him to report to Authority's Employee Assistance Program (EAP) the next morning. The Petitioner decided that he wanted to seek advice from his Union before proceeding any further, because he feared that the Manager was attempting to "build a paper trail" to establish that he was a problem employee.

The Petitioner telephoned the Local 237 offices and spoke with Norris Jackson, a Union Director. The Director listened as the Petitioner described his situation and then spoke with the Kingsborough Manager. After a short conversation during which the Petitioner was asked to leave the room, the Union Director resumed the telephone conversation with the Petitioner and advised him to report to the EAP as ordered. He refused the Petitioner's request for a Union official to accompany him.

The next morning the Petitioner reported to the EAP. Once there, he again was asked whether he had threatened the Manager, which he denied. He then was ordered to report to the Housing Authority's medical office located in a building on the opposite side of Broadway for a urinalysis. The test was negative, and the Petitioner returned to the EAP. He was excused from work for the remainder of the day.

Upon leaving the EAP, the Petitioner telephoned Local 237 and asked to speak with Mr. Jackson. The Director was unavailable throughout the day, but

late in the afternoon the Petitioner finally reached him. He related the events that had transpired at the EAP that morning, and demanded that "something [be] done about this." The Director instructed the Petitioner to call back the following morning.

The next morning, the Director arranged for a Union trustee to meet with the Petitioner. After speaking briefly with him and then with the Manager of Kingsborough Houses, the parties agreed to reconvene on April 21, 1992 to review and discuss the entire matter.

At the April 21 meeting the Union trustee questioned whether the Manager had the right to order an employee to undergo a urinalysis. By the meeting's end, the Manager agreed that, from now on, she would not send any of her subordinates to the EAP for urinalysis examinations. Despite the Petitioner's objection, the trustee accepted her pledge as a satisfactory settlement of the dispute.

Under cross-examination, the Petitioner acknowledged that when he was sent to the EAP, neither he nor the Union had any reason to think that he would be ordered to undergo a urinalysis examination. He also acknowledged that while walking across the street he could have called the Union, but explained that he feared that if he deviated from the order he would have been charged with insubordination. He said that he felt the Union was not supporting him, and thought that "maybe they were in agreement with what the Housing Authority was doing at that time." The Petitioner confirmed that his permanent personnel file contained no references to his visit to the EAP or related disciplinary memoranda, and that he suffered no lost days at work or other punishment. He testified, however, that when management sends employees

to the EAP, a certain stigma attaches to their reputation. He said that he served previously as a delegate in another unrelated labor organization in the private sector, and he thought that a union official from Local 237 should have accompanied him to the EAP. He believed that his current union should follow the same practice as had the predecessor.

It is the Union's refusal to have someone accompany him to the EAP, and the settlement of Petitioner's urinalysis complaint, that is the gravamen of the Petitioner's improper practice claim.

Positions of the Parties

Local 237's Position

According to the Union, the Petitioner did not make out a prima facie case during his testimony. Further, it argues that it did nothing in its representation of the Petitioner that would constitute a violation of the NYCCBL.

The Union points out that the Petitioner, at critical times, took it upon himself to act without seeking assistance from Local 237; he drafted and submitted his own rebuttal to the unsatisfactory job performance memo that he received on March 31 without informing the Union that he was doing so, and he did not call Local 237 to tell anyone that he was being sent to undergo a urinalysis before submitting to it. In addition, the Union emphasizes that after the Petitioner contacted the Director and told him what had happened, the Director assigned a trustee to the case. According to the Union, the trustee took appropriate action and caused the references to unsatisfactory job performance to be removed from the Petitioner's file.

Housing Authority's Position

The Housing Authority asserts similar grounds in moving for a dismissal of the Petitioner's claim. It notes that even the Petitioner recognized that, under the circumstances, there was no choice but to refer him to the EAP. It also argues that the remedy he is seeking, the termination or transfer of the Petitioner's former manager, is both inappropriate and beyond the jurisdiction of this Board. If anything, in the Authority's view, the Petitioner may have a grievance, which assertedly should be processed through the parties' contractual grievance procedure, and not as a violation of the NYCCBL.

Petitioner's Position

The Petitioner argues that he has made out a prima facie case against both Local 237 and the Housing Authority. With respect to the Union, he contends that it acted in bad faith when it refused to accompany him to the EAP, thereby breaching its duty of fair representation. He also contends that the Union improperly refused to help him prepare a reply to the unsatisfactory job performance memo that he received on March 31, 1992, and that it waited two weeks until after the urinalysis was conducted "to hold a step I grievance hearing on [my] behalf."

With respect to the Housing Authority, the Petitioner contends that he was sent for a "physical, psychological, and illegal substance abuse urinalysis" in retaliation for his having filed a reply to the job performance

memo with the Authority's Personnel Director. This retaliation also assertedly violates the NYCCBL.

Discussion

In his reply to the respondents' current motions, the Petitioner raises two new issues: one being management's alleged retaliation for union-related activity, and the second being the Union's alleged failure to help him prepare a grievance. Whatever the merits of these claims may be, they cannot be introduced at this late stage of the proceeding.

When we denied the Housing Authority's initial motion to dismiss and ordered it to file an answer in Decision No. B-4-93, we presumed that all the allegations made in the petition were true. These all related to the Petitioner's claim that by allowing the employer to refer him to a urinalysis and a physical and psychiatric examination, the Union arguably breached its duty of fair representation. We made clear our understanding of the scope of case: "the Petitioner's charge is directed toward conduct by the Union, not the employer," and we explained that the sole reason for compelling the Housing Authority to remain in the case was because joinder of the employer as a party is mandated by subdivision 3. of Section 209-a. of the Taylor Law. After the Housing Authority filed its answer defending its referral, the Petitioner's reply continued to focus upon alleged union misconduct. It made no mention of employer retaliation. Thus, the Petitioner's belated contention that the Housing Authority's motive for sending him to the EAP was retaliatory raises a whole new issue. We will not permit the Petitioner to interject a new cause of action into his case at this point.

Likewise, now being raised for the first time is the Petitioner's contention that Local 237 refused to help him prepare a reply to the unsatisfactory job performance memo that he received on March 31, 1992. Again, regardless of merits of this claim, it represents a new issue not within the scope of the current proceeding.

What remains to be considered, therefore, is whether the Petitioner placed enough evidence in the record to withstand the respondent's motions to dismiss his allegations that by refusing to have someone accompany him to the EAP, and, by settling, over his objection, his subsequent complaint concerning his involuntary submission to a urinalysis examination, the Union breached its duty of fair representation.

The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under both the Railway Labor Act and the National Labor Relations Act (NLRA). The earliest cases were decided under the Railway Labor Act.[2] The Supreme Court balanced the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right, and held that a union must act "fairly" toward all employees that it represents. Subsequently, the Supreme Court recognized and adopted the duty of fair

[2] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 65 C.Ct. 226, 89 L.Ed. 173 (1944), and Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

representation under the NLRA.[3] The Court, in Vaca v. Sipes,[4] defined the duty of fair representation as:

> the exclusive agent's . . . statutory obliga-tion to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[5]

A breach of the duty "occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[6]

New York State courts imposed a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives under the Taylor Law and related local laws such as the New York City Collective Bargaining Law.[7] In 1990 the State Legislature recognized this judicial doctrine by enacting an amendment to the Taylor Law that codified the duty of fair representation.[8] The new law makes it an improper practice for an employee organization deliberately to breach its duty of fair representation to public employees. To satisfy its obligation, a union must refrain from arbitrary, discriminatory, or bad faith conduct in the

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[3] Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

[4] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[5] Vaca at 177.

[6] Vaca at 190.

[7] Matter of Civil Service Bar Association, Local 237, I.B.T. v. City of New York, 64 N.Y.2d 188, 196, 485 N.Y.S.2d 227, 230 (Ct.App., 1984).

[8] Laws of 1990, Ch. 467, adding new subdivisions 2.(c) and 3. to Section 209-a. of the Public Employees' Fair Employment Act.

negotiation, administration, and enforcement of the collective bargaining agreement.[9]

However, while a union must not act arbitrarily or in bad faith, it enjoys wide discretion in reaching grievance

[9] Decision Nos. B-22-93; B-5-91; and B-53-89. Also see Decision Nos. B-51-88; B-42-87; B-32-86; B-9-86; B-5-86; B-23-84; B-15-84; B-16-83; B-15-83; and B-13-81.

settlements.[10] A union does not breach its duty of fair representation merely because it refuses to advance a grievance,[11] or because a settlement outcome does not satisfy a grievant,[12] or because a union decision may have an adverse effect upon a member or members of the bargaining unit,[13] provided its decision on whether to carry a grievance forward is not "in bad faith, arbitrary or discriminatory," [14] or "deliberately invidious, arbitrary or founded in bad faith."[15] Therefore, even where a union may have been guilty of an error in judgment, there is no violation, provided the evidence does not suggest that the union's conduct was improperly motivated.[16]

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[10] Decision B-5-91, citing Barry v. United University Professions, 22 PERB ¶3013 (1989), Faculty Association of Hudson Valley Community College v. Dansereau, 15 PERB ¶3080 (1982), and Nassau Educational Chapter of Syosset School District CSEA v. Marinoff, 11 PERB ¶3010 (1978).

[11] Decision Nos. B-51-90; B-27-90; B-72-88; B-58-88; B-50-88; B-34-86; B-32-86; B-25-84; B-2-84; and B-16-79.

[12] Decision Nos. B-5-91; B-2-90; B-9-86; and B-13-81.

[13] Decision Nos. B-5-91 and B-42-87.

[14] Albino v. City of New York, 80 A.D.2d 261, 438 N.Y.S.2d 587 (2nd Dept., 1981).

[15] Standard narrowly reiterated by the Third Department (CSEA v. PERB and Diaz, 132 A.D.2d 430, 522 N.Y.S.2d 709 [1987]), rejecting the "gross negligence" standard that the PERB had applied below (18 PERB ¶3047 [1985]). The Court of Appeals affirmed the Third Department decision on other grounds, without comment on the appropriateness of the standard that it had applied (sub nom. CSEA v. PERB, 73 N.Y.2d 796, 537 N.Y.S.2d 22 [1988]).

[16] Decision Nos. B-51-90; B-27-90; B-9-86; B-15-83; and B-26-81.

In light of this standard, we find that Local 237 neither abused its discretion nor acted in bad faith when it settled the Petitioner's urinalysis complaint. A span of two weeks between April 9, 1992, when the Union's trustee met with the Petitioner, and April 21, when the trustee and the Petitioner met with the Kingsborough Manager, clearly does not represent an unreasonable delay. In agreeing to the settlement, the trustee accepted a pledge that would be beneficial to all the unit members under the Manager's control, not merely one. Moreover, it is doubtful that the Union could have accomplished more in any event, since management agreed to expunge his negative job performance records from the Petitioner's personnel file, and there were no other actual damages easily amenable to a remedy. In view of the wide discretion given to the Union, the Petitioner's contention that the settlement did not do justice to his complaint and that Local 237 abused its discretion in settling the case has not been established.

With respect to the EAP, we find that, here too, the Petitioner did not meet his burden of proving that the Union acted arbitrarily, discriminatorily, or in bad faith when it refused to have someone accompany him during his visit. Neither the Petitioner nor the Union knew beforehand that he would be asked to undergo a urinalysis examination. The Petitioner did not tell the Union of the drug test until after the fact. Under these circumstances, we cannot find that the Union's refusal to accompany the Petitioner to the EAP, without more, constitutes a breach of the duty of fair representation. The burden is on the Petitioner to show that the refusal was arbitrary, discriminatory, or in bad faith, which, in this case, he failed to do.

In conclusion, based upon the record before us, we find that the Petitioner has not sustained his burden of showing that the Union handled his grievances in an arbitrary, perfunctory or prejudicial fashion. He did not prove that the Union committed an improper practice when it declined to have someone accompany him to the EAP, or when it settled his subsequent urinalysis complaint.

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 improper practice petition filed herein by Michael Cromwell, and docketed as BCB-1493-92 be, and the same hereby is, dismissed.

DATED: New York, New York
July 29, 1993

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

EAP's are intended to provide troubled employees with counseling and treatment services that will help restore them to full working potential. To be effective, a program must assure and uphold a standard of strict confidentiality, without which the necessary trust and honesty would be absent. This standard of confidentiality is founded upon federal law, which provides that records of the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any program relating to alcoholism or alcohol abuse,[17] or drug abuse prevention,[18] shall be confidential. The restrictions on disclosure apply to any local governmental substance abuse program that is federally assisted.[19] A program is considered to be federally assisted even if it is supported by federal funds indirectly, such as through general or special revenue sharing that could be, but are not necessarily, spent for the alcohol or drug abuse program.[20] Unauthorized disclosure of confidential records subjects a violator to criminal penalties.[21] In view of these regulations, if a union believed that it was inappropriate to accompany a unit member on an EAP visit

[17] 42 U.S.C. §290dd-3(a).

[18] 42 U.S.C. §290ee-3(a).

[19] 42 CFR Ch.I, §2.12(a).

[20] 42 CFR Ch.I, §2.12(b).

[21] 42 U.S.C. 290dd-3(f) and U.S.C. 290ee-3(f).