

Howard v. L.144, SEIU, et. al, 51 OCB 38 9BCB 1993) [Decision No. B-38-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding
--between--

DENISE C. HOWARD,
Petitioner,

DECISION No. B-38-93

--and--

DOCKET No. BCB-1484-92

LOCAL 144, Hotel, Hospital, Nursing
Home and Allied Health Service
Employees Union, SEIU, and Cardinal
Sandiford, Vice President/Director of
Civil Service, Local 144, SEIU,
Respondents.

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DECISION AND ORDER

On April 3, 1992, Denise C. Howard, appearing pro se, ("the Petitioner"), filed a verified improper practice petition with the Office of Collective Bargaining ("OCB"), alleging that Local 1440, SEIU ("the Union") and its Vice President and Director of Civil Service, Cardinal Sandiford ("Sandiford"), violated Section 12-306b of the New York City Collective Bargaining Law ("NYCCBL").¹ A letter, dated April 13, 1992, and a three-page

¹ Section 12-306b of the NYCCBL provides, in pertinent part, as follows:

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 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

(continued...)

attachment, were filed April 16, 1992, by the Respondent. The attachment consisted of a Step 1A Determination, dated October 3, 1991, signed by Larry A. Woods, Associate Director/Labor Relations Officer of the Queens Hospital Center. We deem the letter and attachment to be the Union's Answer.

BACKGROUND

Petitioner was employed as a laboratory assistant at the hospital. On August 20, 1991, she and Yolanda Peraza, a laboratory assistant and co-worker, were involved in what was described as a "physical altercation."² This was the second such incident between Petitioner and Peraza. On August 23, 1991, Petitioner was suspended from her duties pending an investigation of the incident and a hearing. Following a Step 1A informal conference and a determination by the Associate Director of Labor

1 (... continued)
organization is a certified or designated representative of public employees of such employer.

Section 12-305 of the NYCCBL provides, in relevant 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 of such activities ..

² See Respondents' Answer.

Relations at the hospital, Petitioner's employment was terminated on October 3, 1991.

POSITIONS OF THE PARTIES

Petitioner's Position

In the Petitioner's statement of the nature of the controversy which is the basis of the instant proceeding, Petitioner alleges the following:

That on September 11, 1991, an informal Conference was held at Queens Hospital and the witness to [the] incident wasn't introduce(d as per] requested. Had ask[ed] for [an] appeal or Collective Bargaining hearing but was deni[ed]. Dated 01-13-92. Due to my waiting to hear from the Union #144 and my constant phoning with no reply from the union time had elapsed, leaving me in this predicament. Termination was on October 3, 1991.

As the remedy, the Petitioner seeks reinstatement with benefits.

Respondents' Position

In the Union's letter, which we have deemed the Answer, Respondents state that Petitioner had informed Sandiford "that she had a witness who would appear at her Step 1A informal conference. The witness failed to appear on September 11, 1991, at Queens Hospital Center." The Answer adds that the Petitioner did not deny that she was involved in the incident for which she was disciplined and that she admitted there was a previous incident between her and a co-worker, for which Management allegedly failed to take action.

The Step IA determination, attached to the Answer, states that Sandiford had presented testimony at the Step 1A hearing "indicating that Management's recognition and failure to appropriately address the on-going tension between the two employees produced the inevitable physical altercation."

DISCUSSION

Under 61 RCNY Section 1-07(d) (formerly Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining, hereinafter referred to as "the OCB Rules"), a four-month statute of limitations is prescribed for commencing improper practice proceedings under the NYCCBL.³ Specific claims for relief are time-barred to the extent a petitioner seeks a remedy for wrongful acts which occurred more than four months before the petition was filed.⁴ Allegations relating to events which occurred more than four months before the filing of an improper practice petition may be considered only in the context of background information and not as specific violations of the

³ Section 1-07 (d) of the OCB Rules, in pertinent part, provides:

A petition alleging that a public employer 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 [of Collective Bargaining) within four months thereof

⁴ Decision Nos. B-37-92 and B-59-88.

NYCCBL.⁵ We have consistently held this to be so,⁶ even where the delay in filing has not prejudiced the party charged.⁷ The application of the four-month limitation period is not discretionary with the Board.⁸ A petitioner's failure to comply with this time requirement precludes us from reaching the actual merits of the complaint.⁹ When a petition states a violative course of conduct which began more than four months before the petition was filed, we may reach the merits of the complaint only when the petition alleges a continuing violation of the NYCCBL.¹⁰

The Petition is unclear as to the specific action which is the subject of the complaint. We, therefore, reach our findings based on the totality of the pleadings and attachments as well as on the nature of the relief requested.

Petitioner states, "Termination was on October 3, 1991. As relief, she requests reinstatement. We might conclude that the action of which she complains is the termination of her employment. If so, then the action is time-barred.

⁵ Decision No. B-37-92.

⁶ Decision Nos. B-37-92, B-30-88, B-9-88, B-47-86, B-1886, B-24-83, B-11-83, B-5-83, B-11-82, B-26-80.

⁷ Decision Nos. B-37-92, B-26-80 and B-16-80.

⁸ Decision No. B-59-88.

⁹ Decision Nos. B-9-84, B-24-83 and B-11-83.

¹⁰ Decision Nos. B-37-92 and B-61-91.

Petitioner also states that she requested an appeal, presumably of the Step 1A conference and determination, or "Collective Bargaining hearing" which she indicates was denied, "[d]ated 01-13-92." She does not specify of whom she made that request, who denied it, and whether any reason was given for the denial. However, she states, "Due to my waiting to hear from the Union #144 and my constant phoning with no reply from the union time had elapsed, leaving me in this predicament." A petition filed April 3, 1992, would not be time-barred if it were founded upon an action which occurred on January 13, 1992. But the Petition as constituted fails to specify the nature of the "predicament" of which she complains and fails to allege that the Respondents acted towards her in a way that could support an improper practice petition that alleges, in essence, a breach of the Union's duty of fair representation.

The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.¹¹ 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

¹¹ Decision No. B-18-93.

grievance.¹² While 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, non-perfunctory manner,¹³ the burden is on the petitioner to plead and prove that the union has engaged in such proscribed conduct.¹⁴ The Petitioner here has failed to allege facts that make out a prima facie claim of a breach of the duty of fair representation insofar as the Respondents' handling of her employment termination, the Step 1A conference and the request for appeal of the Step 1A determination are concerned. The Petitioner has simply failed to allege that the Union's actions were undertaken arbitrarily, discriminatorily, perfunctorily, or in bad faith.

Petitioner pleads deprivation of due process regarding the hearing on her employment termination. She pleads unequal treatment as well. We have addressed the Respondents' handling of her employment termination and Step 1A conference and request for appeal and found no violation of Petitioner's collective bargaining rights there. As to disparate treatment or deprivation of due process by the employer, that is the subject

¹² Id.

¹³ Id.

¹⁴ Id.

of a companion case¹⁵ dismissed for insufficiency under the NYCCBL per Section 1-07(d) of the OCB Rules.

For all the foregoing reasons, we dismiss the instant improper practice Petition in its entirety.

O R D E R

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, docketed as BCB-1484-92, be, and the same hereby is, dismissed.

**Dated: New York, New York
September 22, 1993**

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS GIBLIN
MEMBER

STEVEN H. WRIGHT
MEMBER

¹⁵ Decision No. B-30-93.