Moore v. L.1549, 51 OCB 41 (BCB 1993) [Decision No. B-41-93 (ES)]

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

-between- DECISION NO. B-41-93 (ES)

REGINALD MOORE DOCKET NO. BCB-1590-93
Petitioner,
-and-

LOCAL 1549,
Respondent.
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DETERMINATION OF EXECUTIVE SECRETARY

On July 1, 1993, Reginald Moore (the "Petitioner"), attempted to file a verified improper practice petition with the Office of Collective Bargaining ("OCB"), asserting that his Union, Local 1549, an affiliate of District Council 37, AFSCME, AFL-CIO, breached its duty of fair representation. Later that day, the OCB Deputy Chairman/General Counsel returned the petition to the Petitioner via first class mail. In his accompanying cover letter, the Deputy Chairman/General Counsel explained to the Petitioner that he was required to file proof that a copy of the petition had been served upon the other party to the proceeding, which he had not done. On July 7, 1993, the Petitioner re-submitted the petition, together with the required proof of service. Both were accepted for filing by the OCB as of that date. On July 26, 1993, the Petitioner filed a supplement to his petition that included a copy of a letter addressed to him from District Council 37, dated July 14, 1993.

The Petitioner, formerly employed by the Human Resources Administration as an Eligibility Specialist, Level III, alleges in his petition that he had been terminated on January 29, 1993, after four months of employment, with no reason given. He claims that when he spoke to a Union representative on February 1, 1993, the representative told him that "nothing could be done since I was still on probation." Not satisfied with the representative's assessment, the Petitioner wrote letters to two of Local 1549's officers expressing his dissatisfaction with the way that his case was being handled. By letter dated April 16, 1993, the Director of District Council 37's Clerical

Administrative Division informed the Petitioner that he had not supplied enough information to enable the Union to conduct a complete investigation. The letter asked the Petitioner to call for "an appointment to discuss your problem."

On April 29, 1993, the Petitioner attended a conference where he met with three officials of District Council 37. He asserts that during the meeting he gave them "all the information that I have in my possession." By letter dated July 14, 1993, the Assistant Director of District Council 37's Clerical Administrative Division advised the Petitioner that he was contractually ineligible to file a grievance over his discharge. The letter reads, in pertinent part, as follows:

> A thorough review of your employment situation disclosed the following facts:
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> You were hired 9/92 as a probationary employee ES III on 10/14/92 were assigned to [T]remont and reassigned to Willis 11/29/92 terminated 1/29/92 you received an unsatisfactory performance and were AWOL two weeks without appropriate documentation or approval. [sic]
>
> Contractually you are ineligible to grieve the issue due to time constraints. However, if you feel that you were treated unfairly or discriminated against you may file a complaint with the Human Rights Commission. [sic]

Pursuant to Section 1-07(d) of the Rules of the City of New York, a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that the improper practice claim asserted therein must be dismissed because it fails to state an improper practice under the New York City Collective Bargaining Law ("NYCCBL").

Eligibility Specialists, Level III, are covered by the terms of a collective bargaining agreement between the City of New York and District Council 37, known as the "1990-91 Clerical Agreement." Although the Agreement has expired, the status quo provisions contained in Section 12-311d. of the NYCCBL require that its terms remain in effect until negotiations on a successor contract have been completed.

Article VI of the Clerical Agreement contains the parties' grievance procedure. The definition of the term "grievance" includes, among other things, "a claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law." [emphasis added]. Rule 5.2.1. of the City Personnel Director's Rules provides that every appointment to a position in the competitive class shall be for a probationary period of one year, unless otherwise specified by the Personnel Director.[1] Permanent employment does not occur until the period of probationary employment has been completed successfully. In other words, probationary employees are not covered by the contractual grievance procedure in matters concerning discipline. Neither they nor their union has standing to challenge termination of employment in the grievance and arbitration forum. In addition, although probationary employees are subject to the Personnel Director's Rules concerning their employment, the parties' grievance procedure specifically excludes coverage of disputes involving the "Rules and Regulations of the New York City Personnel Director." These are the provisions to which District Council 37's Assistant Director of the Clerical Administrative Division was referring when he stated, in his letter dated July 14, 1993, that the Petitioner was contractually ineligible to grieve the issue of his termination.

The focus of the Petitioner's complaint is that his Union did not assist him properly in seeking to overturn his termination. Under the duty of fair representation, codified by the State Legislature in 1990,[2] a union must serve the interest of all members without hostility or discrimination toward any, must exercise its discretion with complete good faith and honesty, and must

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[1] See Appendix A to Title 59 of the Rules of the City of New York, where the City Personnel Director's Rules are reprinted.

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

avoid arbitrary conduct.[3] To satisfy this obligation, a union must refrain from arbitrary, discriminatory, or bad faith conduct in the negotiation, administration, and enforcement of the collective bargaining agreement.[4]

However, while a union must not act arbitrarily or in bad faith, it enjoys wide discretion in processing grievances and reaching grievance settlements.[5] A union does not breach its duty of fair representation merely because it refuses to advance a grievance,[6] provided its decision on whether to carry a grievance forward is not "in bad faith, arbitrary or discriminatory,"[7] or "deliberately invidious, arbitrary or founded in bad faith."[8] Even if a union makes an error in judgment, there is no violation, provided the evidence does not suggest that the union's conduct was improperly motivated.[9]

In light of this standard, the Petitioner has not established his claim that District Council 37 or its affiliate Local 1549 failed to assist him properly in seeking to overturn his termination. The burden is on the Petitioner to show that his Union's refusal to file a grievance was arbitrary, discriminatory, or in bad faith, which he did not do.

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[3] Decision No. B-29-93, quoting from Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[4] 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.

[5] Decision Nos. B-29-93 and B-5-91.

[6] 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.

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

[8] Decision No. B-29-93.

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

The NYCCBL does not provide a remedy for every perceived wrong or inequity. Although the Petitioner contends that he wrongfully was terminated, he has not sustained his burden of showing that the Union handled his grievances in an arbitrary, perfunctory or prejudicial fashion, thereby affecting any of the rights protected by the statute. Since the petition does not appear to involve a matter within the jurisdiction of the OCB, it must be dismissed. Of course, dismissal is without prejudice to any rights that the Petitioner may have in another forum.

DATED: New York, New York
September __, 1993

Wendy E. Patitucci
Acting Executive Secretary
Board of Collective Bargaining