Edwards & McCoy v. Communications workers of America, L 1181, 53 OCB 22 (BCB 1994) [Decision No. B-22-94]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
- between-	
Mary Edwards and Daisy V. McCoy, Petitioners,	
-and-	Decision No. B-22-94 Docket No. BCB-1609-93
Local 1181, Communications Workers of America, and Samuel Rock as President of Local 1181, Communications Workers of America, Respondents.	

DECISION AND ORDER

On October 14, 1993, Mary Edwards and Daisy V. McCoy filed a verified improper practice petition against Local 1181, Communications Workers of America ("the Union") and Samuel Rock, President of the Union. The petition alleged that the Union and its President violated § 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] by failing to file grievances. The

[1] Section 12-306 of the NYCCBL provides, in relevant part:

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 of this chapter, or to cause, or attempt to cause, a public employer to do so . . .

Section 12-305 of the NYCCBL provides, in relevant part:

(continued...)

Union filed an answer on February 18, 1994. On May 16, 1994, the petitioners filed two documents in reply to the Union's answer. The petitioners were advised to join the City as a party, pursuant to § 209-3.a of the Taylor Act,[2] but did not do so.

Background

The petitioners are employed by the Department of Transportation ("the Department"). The record does not indicate which titles the petitioners currently hold. In December 1990, the Union filed a Step I grievance on behalf of Edwards and five other Department employees. McCoy was not named in the grievance. The grievance alleged that the grievants were more qualified for promotion under Posting Notice 90/004 than other employees who had been promoted.

Positions of the Parties

Petitioners' Position

The petitioners claim that the Union has failed in its duty properly to represent and assist the petitioners because it did not correctly file grievances for them or assist them during interviews for open and available positions as Captain and

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[1](...continued)
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....

[2] Laws of 1990, Ch. 467.

Inspector. The petitioners claim further that "[r]espondents have failed to enumerate the criteria by which the Department of Transportation ... would select for promotion from the available list those persons seeking a position above the rank of Lieutenant."

The petitioners allege that the Union incorrectly filed a grievance on their behalf in December 1990. Edwards states:

> [t]he posting stated the qualification required you to have a rating of 'Very Good' or 'Outstanding' (which I had). [The Department] responded [to the Step I grievance], stating that none of the above applicants meet the criteria. Management amended the requirement to 'Outstanding' after the posting and interviews had taken place. None of the applicants were notified of the change. I spoke to Samuel Rock (President) and requested he file a Step II grievance. He did not get back to me on the matter. When the last eligible list was posted ... and my name did not appear ... I spoke to [Union] Vice President Madeleine Hall. Miss Hall informed me I will have to wait until the permanent list was established.

Union's Position

The Union claims that when Edwards advised Rock that she wished to file a grievance, Rock asked her to put her allegations in writing, but the petitioner did not do so. Further, the Union maintains, McCoy never advised Rock of her interest in filing a grievance. The Union cites Article VI, § 1 of the collective bargaining agreement[3] and maintains that, depending on the

[3] Article VI, § 1 of the collective bargaining agreement provides, in relevant part:

DEFINITION: The term "Grievance" shall mean:

(continued...)

specifics of the petitioners' grievances, it is possible that the grievances may not be pursued because of the limitations contained therein.

Discussion

The allegations in the petition raise the issue of whether the Union has breached its duty fairly to represent the petitioner. The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under the Railway Labor Act[4] and the

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[3](...continued)
(A) A dispute concerning the application or interpretation of the terms of this Agreement;

(B) A claimed violation, misrepresentation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment . . .;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

(D) A claimed improper holding of an open-competitive rather than a promotional examination;

(E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

(F) A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

[4] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, (continued...)

National Labor Relations Act ("NLRA").[5] The Supreme Court balanced the Union's right as exclusive bargaining representative against its correlative duty arising from possession of this right, and held that a union must act "fairly" toward all employees that it represents. The Supreme Court, in Vaca v. Sipes,[6] defined the duty of fair representation as:

> the exclusive agent's ... statutory obligation 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.[7]

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."[8]

A union enjoys wide discretion in its handling of grievances.[9] A union does not breach the duty of fair representation merely because it refuses to advance a

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[4](...continued)
65 S.Ct. 226, 89 L.Ed. 173 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

[5] Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. (1948).

[6] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[7] Vaca, at 177.

[8] Vaca, at 190.

[9] Decision Nos. B-29-93; B-5-91.

grievance,[10] or because the outcome of a settlement does not satisfy a grievant,[11] provided that the decision not to process the grievance was not made in bad faith, and is neither arbitrary nor discriminatory.[12] It is not enough for a petitioner to allege negligence,[13] mistake,[14] or incompetence[15] on the part of the union, nor does the union have to pursue every grievance.[16] Even where a union's failure to advance a grievance is due to an error in judgment there is no violation, provided that the evidence does not suggest that the union's conduct was improperly motivated.[17]

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[10] Decision Nos. B-29-93; B-27-90; B-72-88; B-58-88; B-50-88; B-34-86; B-32-86; B-25-84; B-2-84; B-16-79.

[11] Decision Nos. B-29-93; B-5-91; B-2-90; B-9-86; B-13-81.

[12] Albino v. City of New York, 80 A.D.2d. 261, 438 N.Y.S.2d 587 (2d Dep't 1981).

[13] Smith v. Sipe, 109 A.D.2d 1034, 487 N.Y.S.2d 153 (3d Dep't 1985), rev'd for reasons stated in dissenting memo, 67 N.Y.2d 928, N.Y.S.2d 134, 493 N.E.2d 237 (1986); Shah v. State, 140 Misc.2d 16, 529 N.Y.S.2d 442 (3d Dep't 1988).

[14] Trainosky v. Civil Service Employees Association, Inc., 130 A.D.2d 827, 514 N.Y.S.2d 835 (3d Dep't 1987); Civil Service Employees Association, Inc. v. PERB, 132 A.D.2d 430, 522 N.Y.S.2d 709, 127 LRRM 3122 (3d Dep't 1987), aff'd, 73 N.Y.2d 796, 533 N.E.2d 1051, 537 N.Y.S.2d 22 (1988), 533 N.E.2d 1051 (1988).

[15] Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dep't 1992).

[16] Margolin v. Newman, 130 A.D.2d 312, 520 N.Y.S.2d 226, 42 Ed.Law Rep. 837 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 522 N.E.2d 1056, 527 N.Y.S.2d 758 (1988).

[17] Decision Nos. B-29-93; B-51-90; B-27-90; B-9-86; B-15-83; B-26-81.

New York courts recognize the duty of fair representation[18] and have permitted its assertion in state court by public employees.[19] In 1990, the State Legislature enacted an amendment to the Taylor Law, codifying principles recognized in the decisions of the Public Employment Relations Board, which makes it an improper practice for a public employee organization to breach its duty of fair representation.[20] A union must refrain from arbitrary, discriminatory or bad faith conduct in the negotiation, administration and enforcement of a collective bargaining agreement.[21]

It is well-established that a union does not breach its duty of fair representation merely because it refuses to process every complaint made by a unit member; the law requires only that the refusal to advance a claim be made in good faith and in a manner

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[18] Gosper v. Fancher, 49 A.D.2d 674, 371 N.Y.S.2d 28, 90 LRRM 2336 (4th Dep't 1975), aff'd in part, dismissed in part, 40 N.Y.2d 867, 356 N.E.2d 479, 387 N.Y.S.2d 1007, 94 LRRM 2032, 80 Lab.Cas. P 53,940 (1976), cert.den'd, 430 U.S. 915, 97 S.Ct. 1328, 51 L.Ed.2d 594, 94 LRRM 2798, 81 Lab.Cas. P 55,013 (1977); DeCherro v. Civil Service Employees Assn., 60 A.D.2d 743, 400 N.Y.S.2d 902 (3d Dep't 1977).

[19] Civil Service Bar Association, Local 237, IBT v. City of New York, 99 A.D.2d 264, 472 N.Y.S.2d 925 (1st Dep't 1984); aff'd, 64 N.Y.2d 188, 474 N.E.2d 587, 485 N.Y.S.2d 227 (1984).

[20] Laws of 1990, Ch. 467, § 209-a., subd. 2.(c) and 3.

[21] Decision Nos. B-44-93; B-29-93; B-5-91; B-53-89.

that is not arbitrary or discriminatory.[22] Here, the Union filed a grievance on behalf of one of the petitioners in 1990 and declined to act further. The petitioners have made conclusory allegations of a breach of the duty of fair representation, but have not demonstrated that the Union committed such a breach of its duty. Although McCoy was named as a petitioner, there are no facts or allegations in the petition or the document characterized as a reply which pertain specifically to her.

The record contains little to indicate whether the petitioners failed to exhaust their remedies under the contract or whether the Union neglected to file or follow up on grievances, as the petitioners claim. As the Union correctly maintains, however, depending on the subjects of the grievances, the specifics of which are not alleged by the petitioners, it is possible that they might have been pursued through the grievance process. If that were the case, the Union would have had the duty to investigate the claims, decide whether to proceed further, and communicate to the petitioners the reasons for its decision. The petitioners also have the right to submit a grievance and advance it to Step III of the grievance and arbitration procedure without assistance from the Union. It is

[22] Decision Nos. B-32-92; B-21-92; B-35-91; B-56-90; B-27-90; B-72-88; B-58-88; B-50-88; B-25-84; B-2-84; B-12-82.

solely the Union's right, however, to decide whether any grievance will proceed to Step IV of the grievance procedure.[23]

The petitioners also claim that the Union failed to assist them during interviews for open and available positions as Captain and Inspector and to enumerate the criteria by which the Department of Transportation would select for promotion from the available list those persons seeking a position above the rank of Lieutenant. The Union does not answer this allegation.

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[23] Section 12-312 of the NYCCBL provides, in relevant part:

g. An employee may present his own grievance either personally or through an appropriate representative, provided that:

(1) a grievance relating to a matter referred to in paragraph two [matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules], three [matters which must be uniform for all employees in a particular department] or five [matters involving pensions for employees other than those in the uniformed forces], of subdivision a of section 12-307 of this chapter may be presented and processed only by the employee or by the appropriate designated representative or its designee, but only the appropriate designated representative or its designee shall have the right to invoke and utilize the arbitration procedure provided by executive order or in the collective bargaining agreement to which the designated representative is a party; and provided further that:

(2) any other grievance of an employee in a unit for which an employee organization is the certified collective bargaining representative may be presented and processed only by the employee or by the certified employee organization, but only the certified employee organization shall have the right to invoke and utilize the arbitration procedure provided by executive order or in the collective agreement to which the certified representative is a party.

See also, Decision Nos. B-16-93; B-45-91; B-19-75; B-12-71.

The petitioners do not claim that the Union treated them differently from any other members, or in a hostile or discriminatory manner, when it allegedly failed to take the actions described above. It also appears that it would have been the responsibility of the employer, not the Union, to enumerate its criteria for selecting employees to be promoted. Although the petitioners may have wished for more assistance from the Union, they have not set forth a claim of improper practice on these grounds.

We find that the petitioners have not satisfied the requirements for a successful claim of a breach of the duty of fair representation against the Union. Since we have found no basis upon which to sustain the petitioners' claim, it unnecessary for us to address the issue of joinder of the employer. Accordingly, the instant improper practice petition is dismissed.

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 docketed as BCB-1609-93 be, and the same hereby is, dismissed.

Dated: New York, New York Malcolm D. MacDonald

October 26, 1994

CHAIRMAN

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MEMBER

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MEMBER

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