Page v. L.2021, DC37, 53 OCB 31 (BCB 1994) [Decision No. B-31-94 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

BETTYE PAGE,

Petitioner, DECISION NO. B-31-94

-and- DOCKET NO. BCB-1447-91

LOCAL 2021, DC 37,

Respondent.

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DECISION AND ORDER

On December 23, 1991, Bettye Page ("the Petitioner") filed an improper practice petition alleging that Local 2021, District Council 37, AFSCME, AFL-CIO ("the Union" or "Respondent") breached its duty of fair representation in violation of Section 12-306b. of the New York City Collective Bargaining Law ("NYCCBL").[1] The Petitioner accuses the Union of failing to properly dispose

[1] NYCCBL §12-306b. (formerly §1173-4.2), which has been held to prohibit violations of the judicially recognized fair representation doctrine, provides as follows:

> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
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> (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 that the public employee organization is a certified or designated representative of public employees of such employer.

See e.g., Decision Nos. B-26-81; B-13-81; B-16-79.

of "at least seven" grievances. Appended to the petition were well-over 100 pages of documents.

The Union submitted its answer on January 24, 1992. The Union admitted that the Petitioner filed a grievance in October 1988. As for the remaining grievances, the Union maintained that those were not identified with any particularity so as to enable it to respond to the allegation.

The Petitioner did not submit a formal reply. However, on March 9, 1992, this office received from the Petitioner a copy of a letter dated February 29, 1992, addressed to the Union's counsel. Appended to this letter were copies of the various grievances that the Petitioner allegedly filed with the Union between October 1988 and November 1991.

BACKGROUND

Petitioner Bettye Page is employed by the New York City Off Track Betting Corporation ("OTB") as a Racing Data Coordinator. According to Petitioner, she has been a member of the Union for fifteen and one-half years and has worked in OTB's Programming Department for the past eight years.

The Petitioner complained that she was reassigned to work in the FAX area of the Operations Center ("Opcen"), in October 1988, as part of an "on-going tactic of harassment [by] management." The Petitioner maintains that she filed a grievance with the
Union on October 5, 1988, which she amended on October 25, 1988, concerning the reassignment. In her grievance, the Petitioner alleged, among other things, that she would be forced to work odd rotating hours and lose her seniority.

On October 26, 1988, the Petitioner wrote to her Union Representative and the Union's President, complaining about the issues raised in her grievance and about a lack of responsiveness on the Union's part.[2] On November 2, 1988, the Union submitted the grievance to OTB management on behalf of the Petitioner. Additionally, in a letter dated November 11, 1988, the Union advised the Petitioner that an appointment was being arranged for her to meet with a member of its Legal Department to discuss the issues raised in her letter.

In a letter to the Union dated November 10, 1988, the Senior Director of Opcen explained that the Petitioner had not been transferred out of her Department and that there was no intention to change her schedule or to rotate her hours. In another letter to the Union, dated January 23, 1989, OTB stated that the Petitioner's grievance had been reviewed by the Senior Director of Racing Operations and found to be without merit.

Pursuant to the contract between OTB and the Union, a conference to review the subject grievance was held on March 15, 1989. In a written decision dated April 3, 1989, the Hearing Officer found that OTB had not violated any contractual agreements with the Petitioner. In support of its conclusion, the Hearing Officer stated that the Petitioner was "still in the same department, albeit, a different section and performs duties that fall well within her job description." The Hearing Officer further found no area in which Ms. Page had been treated unfairly and dismissed the grievance.

In a letter dated May 2, 1989, the Petitioner was advised that after a thorough review of the circumstances, which included a personal interview with

[2] According to the record, the Union Representative claimed to have never received the original grievance.

the grievant, the Union's Legal Department had concluded that her grievance was "without merit and should not proceed to arbitration."

Unsatisfied with these results, on May 5, 1989, the Petitioner wrote another letter to the Union President, stating that her Union Representative was not handling her case properly. At this point, the Petitioner also alleged a conflict of interest on the part of OTB's Hearing Officer, claiming that he was biased against her, stemming from a negative evaluation he gave her eleven years ago. On May 24, 1989, the Union advised the Petitioner that the Director of the White Collar Division would look into the issues raised in her letter.

The Union received a letter dated December 4, 1989, from Councilwoman Mary Pinkett, on behalf of the Petitioner. On December 12, 1989, the Union advised Councilwoman Pinkett that: "the grievance of Ms. Page was thoroughly investigated by the Union. This investigation included a face-to-face interview of Ms. Page by the DC 37 Legal Department. Our conclusion was that the grievance had no merit and should not be pursued. She was advised by the Union of our conclusion."[3]

On January 8, 1990, the Petitioner filed a grievance with the Union, alleging that she was marked AWOL when her absence should have been excused. On January 10, 1990, the Petitioner filed another grievance, alleging that she was denied work on a holiday because her schedule had been changed. On May 21, 1990, the Union informed the Petitioner that a hearing at Step II had been scheduled for May 30, 1990. In preparation for the hearing, the Union asked the Petitioner for her comments regarding the response from Step I. The

[3] The record indicates that a copy of the Union's letter to Councilwoman Pinkett was sent to the Petitioner.

record reveals that the Step II hearing was held on May 30, 1990. The result of the hearing is unknown.

According to documentation provided by the Petitioner, she was suspended for two weeks in June 1990, for misconduct. The charges and specifications indicate that despite prior warnings regarding engaging in disruptive behavior, the Petitioner got into a heated argument with a co-worker. Both employees were disciplined, however the Petitioner complains that she was disciplined more severely. According to the Petitioner, she grieved the suspension and, in setting forth her complaint, reiterated her original complaint concerning her reassignment in October 1988. At this time, the Petitioner also complained about obnoxious odors allegedly emanating from fellow employees.[4]

An Informal Conference on the charges which gave rise to the Petitioner's two week suspension was held on August 8, 1990. The recommendation of the Informal Conference Leader was "four weeks suspension without pay, two weeks served." This recommendation was accepted by the Petitioner and the remaining two weeks of her suspension were served in late August - early September, 1990.

According to a grievance form dated October 3, 1990, the Petitioner again alleged that she was being marked AWOL instead of sick. A few days later, the Petitioner reported to work on a holiday despite the fact that she was scheduled to be off duty. An argument between Petitioner and her supervisor ensued, which resulted in another verbal altercation and the

[4] According to a handwritten notation by the Petitioner, the Union informed her on July 24, 1990 that it did not consider the matter a grievable issue.

alleged use of foul language. The Petitioner was again suspended without pay, effective October 12, 1990, for misconduct. On November 9, 1990, the Petitioner executed a waiver and release, electing to engage the services of her own, independent attorney to represent her and waiving her right to union and legal representation. The record reveals that the Petitioner was returned to payroll on March 15, 1991.

Between May 9, 1991 and October 25, 1991, the Petitioner sent several letters to OTB management, complaining about various working conditions including the hostile attitude of a supervisor and offensive odors from co-workers. None of these letters indicate that copies were sent to the Union.[5]

The Petitioner alleges that on November 4, 1991, she filed another grievance with the Union. Therein, the Petitioner reiterated all of her prior complaints and maintained that her suspensions could have been avoided if her prior grievances were properly disposed of. Buried within a recitation of all her past grievances, the Petitioner complained that her supervisor is continuing to mark her AWOL instead of absent with an excuse.

Dissatisfied with the results of all the proceedings and the way all of her grievances were handled by the Union, the Petitioner filed the instant improper practice petition on December 23, 1991, alleging, in sum: "My complaints and grievances [have] gone unanswered and ignored."

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[5] One of the letters indicated that a copy was sent to the Petitioner's attorney.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner contends that the Union has breached its duty of fair representation by failing to completely resolve the issues raised in her original 1988 grievance concerning her reassignment to the Fax area and by failing to answer or respond to all of her subsequent grievances.[6] The Petitioner argues that she never received a formal hearing on certain issues and that the decision regarding her reassignment was "inconclusive, without explanation and somehow manipulated by management." The Petitioner maintains that she is entitled to "some form of assistance from the Union."

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[6] The following is a summary of these alleged grievances:

1) January 8, 1990 - Marked AWOL when absence should have been excused.
2) January 10, 1990 - Denied work on a holiday pursuant to change in schedule.
3) June 28, 1990 - Wrongful suspension.
4) July 23, 1990 - Reiteration of October 15, 1988 grievance concerning reassignment; Reiteration of June 28, 1990 grievance concerning suspension; Complaint about working conditions, i.e., unpleasant odors emanating from co-workers.
5) October 3, 1990 - Marked AWOL when absence should have been excused.
6) November 4, 1991 - Reiteration of all prior grievances; New complaint about not being paid for time requested as an emergency day off.

Union's Position

In arguing that the improper practice petition should be dismissed, the Union outlines four affirmative defenses in its answer. The Union maintains that it breached no duty owed to the Petitioner. It also argues that the petition fails to state a cause of action. The Union further maintains that the Petitioner has failed to timely file her claim within the four month statutory time limit as provided by §1-07(d) of the Rules of the City of New York ("RCNY").[7] Finally, the Union argues that the Petitioner has failed to exhaust her internal union remedies.

In its answer, the Union specifically addresses the Petitioner's October 1988 grievance, the gravamen of which was that she was involuntarily transferred. The Union maintains that based on its investigation of the matter, which included an interview between the Petitioner and a member of its Legal Department, it concluded the grievance had no merit. The basis of this conclusion was (1) there was no involuntary transfer (in that she remained in the same department); (2) her essential duties, hours or pay remained unaffected; and (3) there was no basis to substantiate the claim that the Petitioner had lost time or pay. The Union alleges that the Petitioner was advised of its decision that her grievance should not proceed to arbitration on or about April 27, 1989. Pointing out that the instant petition was filed two and one-half years after it advised the Petitioner that it would not

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[7] RCNY §1-07(d), formerly Rule 7.4 of the Office of Collective Bargaining, provides, in pertinent part:

> **Improper practices.** A petition alleging that a ... public employee organization or its agents has engaged in or is engaging in an improper practice in violation of §12-306 of the statute may be filed with the board within four (4) months thereof....

pursue her October 1988 grievance further, the Union argues that the claim is time-barred.

DISCUSSION

As a preliminary matter we address whether the allegations before us are time-barred. The Union argues that because its decision not to pursue further the Petitioner's October 1988 grievance occurred more than four months before the improper practice petition was filed, the petition must be dismissed. The Petitioner maintains that the Union has been engaging in improper conduct on a continuous basis by failing to satisfactorily address and dispose of all of her complaints, beginning with the October 1988 grievance.

We have consistently held that the four-month limitation period contained in Section 1-07(d) of the RCNY will bar consideration of an untimely filed improper practice petition.[8] However, when a petition alleges a continuing violation of the NYCCBL, even though the allegedly violative course of conduct commenced more than four months prior to the filing of the petition, the allegation may not be time-barred in its entirety.[9] In such cases, although a specific claim for relief is time-barred to the extent 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

[8] Decision Nos. B-37-92; B-30-88; B-9-88; B-47-86; B-18-86; B-24-83; B-11-83; B-5-83; B-11-82; B-26-80.

[9] Decision Nos. B-37-92; B-7-84.

admissible for purposes of background information when offered to establish an ongoing and continuous course of violative conduct.[10]

In the instant matter, it is clear from the record that the Union did address the Petitioner's October 1988 grievance and pursued prosecution of it through the steps of the contractual grievance procedure. It is also clear that the Union, with advice from its Legal Department, made a reasoned judgment not to submit the matter to arbitration. There is no question that the Petitioner was informed of the Union's decision on or about May 2, 1989, and again on or about December 12, 1989.

We find that the time to challenge the Union's decision concerning the October 1988 grievance ran from the time the Petitioner was informed of the Union's decision not to submit the matter to arbitration. Giving the Petitioner the benefit of the latter date, the instant petition was filed more than two years after the fact. Thus, we find that the instant petition, as it relates to the October 1988 grievance, is time-barred.

Even assuming, arguendo, that the improper practice petition had been filed in a timely manner, we would not find that the Union's handling of the matter constituted a breach of its 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, it is well settled that a union does not breach its duty of fair

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

[11] Decision Nos. B-24-94; B-23-94; B-22-94; B-8-94; B-29-93; B-21-93.

representation merely because it refuses to advance a grievance,[12] or because the outcome of a settlement does not satisfy a grievant.[13] A union is permitted wide discretion in its handling of grievances.[14]

It is not enough for a petitioner to allege negligence, mistake, incompetence or even error in judgment on the part of the union.[15] A decision by a union not to process a grievance must be made in good faith and in a manner that is neither arbitrary nor discriminatory as to collective bargaining rights under the NYCCBL.[16] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[17] but the burden is on the petitioner to plead and prove that the union has engaged in such prohibited conduct.[18]

Here, the Petitioner alleges that the Union has failed to satisfactorily resolve the October 1988 grievance and has ignored others that stemmed from it. However, the Petitioner failed to present evidence that the Union's handling of her grievance was done arbitrarily, in bad faith or in a way that

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[12] Decision Nos. B-24-94; B-22-94; B-8-94; B-44-93; B-29-93; B-21-93.

[13] Decision Nos. B-24-94; B-22-94; B-8-94; B-29-93; B-21-93; B-5-91; B-27-90; B-2-90; B-72-88; B-58-88; B-50-88; B-34-86; B-32-86; B-9-86; B-25-84; B-2-84; B-13-81; B-16-79.

[14] Decision Nos. B-24-94; B-22-94; B-8-94; B-29-93; B-21-93; B-5-91.

[15] Decision Nos. B-24-94; B-22-94.

[16] Decision Nos. B-24-94; B-21-93; B-35-92; B-21-92.

[17] Decision Nos. B-24-94; B-21-93; B-35-92; B-21-92.

[18] Decision Nos. B-24-94; B-22-94; B-21-93; B-35-92; B-56-90.

discriminates against her insofar as her rights under the NYCCBL are concerned. On the contrary, the Petitioner's own documentation demonstrates that the Union submitted the grievance to OTB management on her behalf, represented her in a hearing, arranged an interview for the Petitioner with its Legal Department, and informed the Petitioner of its decision not to pursue the matter to arbitration.

On the basis of these undisputed facts, the record establishes no actions rising to the level of bad faith in the way the Union handled the October 1988 grievance. Accordingly, the October 1988 grievance will not be considered as an independent violation of the NYCCBL nor for purposes of background information to establish an ongoing and continuous course of violative conduct.

As for the remaining allegations concerning the other six grievances, even if they could individually or collectively constitute a basis for a timely claim, the record does not support a finding that the Union has failed in its duty of fair representation. There is no evidence that the Petitioner's two grievances in January 1990, concerning her being wrongfully marked AWOL and other scheduling problems, were handled in a manner violative of the NYCCBL. The record demonstrates that the Union neither ignored nor disposed of these grievances in a perfunctory fashion. Rather, it shows that the Union reviewed the Petitioner's claims and scheduled a Step II grievance hearing to deal with them.

As for the grievance that was filed in connection with the Petitioner's first suspension in June 1990, there is no allegation that she was deprived of union representation at the hearing that was held in August 1990. It should be noted that during that hearing, the Petitioner accepted the penalty

recommendation of the Hearing Officer.[19] The Petitioner does not allege that she requested the Union to pursue the matter beyond that stage. Although the Petitioner may not be satisfied with the outcome of the hearing, she has not set forth a claim of improper practice.

As for the only new allegation that was raised in the July 23, 1990 grievance, concerning alleged odors emanating from co-workers, the record reveals that the Union considered this complaint, decided that the issue was "non-grievable," and advised the Petitioner of its conclusion.

The only purported new matter that was raised in the two remaining grievances (dated October 3, 1990 and November 4, 1991) concerns OTB's alleged failure to pay the Petitioner for days that her absence should have been excused. Although an allegation that the Union failed to prosecute the latter grievance could arguably constitute a basis for a timely claim of improper practice, under the facts of this case an improper practice has not been established. Rather, we find that the two remaining grievances essentially are similar to complaints which were previously addressed by the Union in that they deal with management's determination as to what constitutes an acceptable excuse for an absence. Apparently, not pleased with the disposition of those prior grievances, the Petitioner continues to attempt to relitigate this issue. Whether disposition of her prior complaints were satisfactory to the Petitioner is not an element of an improper practice claim against the Union.

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[19] We note that the Petitioner waived union representation during the hearing for her second suspension, electing to have the matter handled by her own attorney. The Union, however, does not mention the waiver or raise it as an affirmative defense in its answer. Accordingly, we will not address any issues pertaining to this waiver nor speculate as to its scope.

A union does not breach its duty of fair representation merely because the outcome of a grievance does not satisfy a grievant.[20]

Moreover, a union is permitted wide discretion in its handling of grievances.[21] If the Union exercised its discretion in refusing to relitigate this issue, we would not, on the facts of this case, find this conduct to constitute a breach of the duty of fair representation. It is well settled that a union does not breach this duty merely because it refuses to advance a grievance.[22] To establish a cognizable claim of improper practice, the Petitioner bears the burden of proving that the Union arbitrarily ignored a meritorious grievance, a burden that has not been met in this case.

In summary, we find that the Petitioner has 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 Petitioner's claim of such a breach, it is unnecessary for us to address the issue of joinder of the employer.[23] Accordingly, the instant improper practice petition shall be dismissed in its entirety.

ORDER

[20] Supra, fn. 13, at 12.

[21] Supra, fn. 14, at 12.

[22] Supra, fn. 12, at 12.

[23] In cases where it is alleged that the union breached its duty of fair representation in the processing of or failure to process a claim that the employer has breached its agreement with the union, the Taylor Law requires that the employer be made a party to the proceeding. See Section 209-a.3 of the Taylor Law, as amended by the Laws of 1990, chapter 467. See also, Decision No. B-22-93.

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-1447-91 be, and the same hereby is, dismissed.

Dated: New York, New York
December 22, 1994

MALCOLM D. MacDONALD
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