Oberhauser, Jr. v. DEP, City & L.376, DC37, 53 OCB 8 (BCB 1994) [Decision No. B-8-94 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

- between-

Lawrence Oberhauser, Jr., pro se,

Petitioner,

Decision No. B-8-94
Docket No. BCB-1583-93

- and -

New York City Department of Environmental Protection, City of New York, and Local 376, District Council 37, AFSCME, AFL-CIO,

Respondents.

DECISION AND ORDER

On March 21, 1993, Lawrence Oberhauser, Jr. ("petitioner") filed a verified improper practice petition against the New York City Department of Environmental Protection ("the Department"), alleging that he was required to perform out-of-title work without compensation, and against Local 376, District Council 37 ("the Union"), alleging that the Union committed an improper practice by discriminating against members working outside New York City. Both the Union and the City requested extensions of time in which to file an answer. The Union filed an answer on September 27, 1993. The City, by its office of Labor Relations, filed an answer on September 1, 1993.

Background

The petitioner was employed by the New York City Department of Environmental Protection as a Water Plant Operator beginning

in November 1980. Pursuant to Department of Personnel Resolution 84/16, the titles Water Plant Operator and Watershed Inspector were broadbanded in June 1984, to create the new title of Watershed Maintainer. The petitioner's title was changed to Watershed Maintainer at that time and he has remained in the title. A job specification for Watershed Maintainer was written in 1984[1] and modified in 1986[2]. Before 1984, the Department also hired employees in the Laborer title to perform related duties in the areas outside of the five boroughs of New York City ("upstate region"). The City did not include Laborers when it created the broadbanded Watershed Maintainer title. Instead, it stopped hiring Laborers in the upstate region. The only Laborers

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[1] The General statement of Duties and Responsibilities for Watershed Maintainer, Title Code 91011 of the Water Plant Maintenance Occupational Group, dated June 20, 1984, provides:

> Under supervision, operates and maintains a chlorination, coagulation, water treatment or filtration plant consisting of chlorine or coagulation machines and auxiliary equipment used in fluoridation, purification, and other chemical treatment of water; performs work to enforce rules and regulations for the protection of the water supply in the watershed area. Performs related work.

[2] The General Statement of Duties and Responsibilities for Watershed Maintainer, Title Code 91011 of the Water Plant Maintenance Occupational Group, dated September 17, 1986, provides:

> Under supervision, performs duties related to the operation, maintenance, repair and inspection of facilities, equipment and lands in the watershed areas and reservoir and aqueduct systems of the City of New York; operates motor vehicles and motor-powered equipment; performs related work.

currently employed in the upstate region are those who were hired before June 1984.

Wages and benefits for the title Watershed Maintainer are determined through collective bargaining between the City and the Union. The title Laborer, however, is covered by §220 of the New York State Labor Law, which provides that the prevailing rate of wages and benefits be paid as determined by the New York City Comptroller. The Laborer title is in a different bargaining unit, which is represented by Local 924, District Council 37, AFSCME, AFL-CIO.

The petitioner asserts that he has been compelled to perform work which should be assigned to a Laborer.[3] He claims:

> [f]or over 5 years I and others have worked with Laborers in the field for less pay doing the same work. I had grieved this in the past, but it did not correct this practice. In 1991, the two Laborers I work with made over $11,000 more than I. Our Local 376 starts new Laborers in the boroughs at a salary that takes state employees up to 5 years to reach, which is at our top pay. They (376) use upstate members as a bargaining chip. They do not represent us equally. In addition, our new dated Sept. 25, 1985 job description is illegal. Upstate members regret our Local does not hire, nor have any apprentice (new) Laborers upstate.

One of the petitioner's claims in his reply is that "we were and are discriminated against . . . because we don't work in the

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[3] Duties and Responsibilities of the title Laborer, Title Code 90753 of the Skilled Craftsman and Operative Service, dated November 14, 1988, provides:

> To do common laboring work exclusively, which requires little skill or training but for which physical strength is essential; may be required to operate motor vehicles in connection with the performance of laboring duties.

boroughs. . . Upstate members should make what their Brothers make in the same Local."

The petitioner filed out-of-title grievances in July 1984, December 1986 and January 1987, the dispositions of which are not apparent from the record. Out-of-title grievances filed by the petitioner in June 1986 and March 1988 were dismissed at Step I. The Department has no record of the grievances submitted into the record by the petitioner and is unaware of their outcome, although it was able to find a copy of the 1988 grievance.

As a remedy, the petitioner seeks "retroactive pay, plus [the] opportunity for these members and I to become Laborers with the same pay. I and these people are doing the same physical[ly] taxing work and wish the same benefits." He also requests "protection for any reprisals in filing this claim."

POSITIONS OF THE PARTIES

Petitioner's Position

The petitioner argues that he performs out-of-title work without additional compensation. He claims that as a Watershed Maintainer, he does the same work as a Laborer but is paid less. The petitioner states that he believed that "when broadbanding takes place all employees are supposed to go to the top pay of affected groups. This did not happen . . . The Sept. 25, 1986 job specifications the City adopted did not give employees any monetary benefit for this extra work."

The petitioner alleges that the Union committed an improper practice by discriminating against its members based upon location. He asserts that the Union does not represent Upstate members with the same vigor with which it represents its members who work within the City of New York. The petitioner maintains that "the Upstate members believe the Union has not improved our salary, training or conditions with these added duties."

City's Position

The City argues that the petitioner's claim is untimely. The positions of Laborer and Watershed Maintainer, it asserts, have existed in their present form since 1984, and the instant petition is well outside the scope of the four-month statute of limitations.

The City maintains that it has not committed an improper practice. An action that would frustrate the statutory rights of its employees or any employee organization, it claims, is an improper employer practice. The City states that an improper practice charge lies only against the Union here, and that the City as an employer is not responsible for the alleged failure of. a union adequately to represent its employees.

Lastly, the City maintains that it has the right to determine job specifications and decide which titles to employ in

any location. The City cites both NYCCBL Section 12-307(b)[4] and previous Board Decisions[5] to support this position. The City claims further that it has the right unilaterally to broadband titles, redefine duties assigned to a title, and change existing job classifications.

Union's Position

The Union argues that the petitioner's claim of improper practice is untimely. The positions of Laborer and Watershed Maintainer, it asserts, have existed in their present form since 1984, and the instant petition is well outside the scope of the four-month statute of limitations.

Regarding the petitioner's complaints about "out-of-title" work, the Union states:

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[4] Section 12-307 (b) of the NYCCBL provides, in relevant part:
It is the right of the City, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means, and, personnel by which government operations are to be conducted; determine the content of job classifications; . . . exercise complete control and discretion over its organization and the technology of performing its work.

[5] The Board has "repeatedly construed Section 12-307(b) of the NYCCBL to guarantee the City the unilateral right to assign and direct its employees, to determine what duties employees will perform during work time, and to allocate duties among unit and nonunit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement." Decision No. B-37-87 at p. 4-5.

> [t]he petitioner has failed to exhaust the grievance procedures set forth in the collective bargaining agreement. Assuming arguendo, that the performance of Laborers work by a Watershed Maintainer constitutes an "out-of-title" grievance, then the petitioner has failed to properly file or follow up on such an alleged grievance. Nor has the petitioner sought to file a grievance within the last four months.

The Union asserts that the overall duties of Laborer and Watershed Maintainer are not identical, although they may overlap in some areas. Further, the Union maintains, it is the employer's prerogative to write job specifications and determine the initial salary for a newly created title such as Watershed Maintainer. The Union maintains that, since being certified to represent the Watershed Maintainer title, it has sought to improve the salary levels of employees in the title. Nevertheless, the Union argues, where there are two different titles, each with its own historical development and salary structure, the Union has the right to negotiate and agree upon contract provisions giving varying benefits to different groups of workers. In any event, the Union submits that it does not have the right to determine job specifications or hiring practices. The Union asserts that the employment practices at issue here may not form the basis of a claim of improper practice, since they fall within the rights accorded to management. The Union maintains further that the petitioner has not demonstrated that it acted in bad faith, or in an arbitrary, discriminatory, or hostile manner.

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[6] and the National Labor Relations Act ("NLRA").[7] 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 Court, in Vaca v. Sipes,[8] 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.[9]

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."[10]

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[6] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 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).

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

[8] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[9] Vaca, at 177.

[10] Vaca, at 190.

A union does, however, enjoy wide discretion in its handling of grievances.[11] A union does not breach the duty of fair representation merely because it refuses to advance a grievance,[12] or because the outcome of a settlement does not satisfy a grievant,[13] provided that the decision not to process the grievance was not made in bad faith, and is neither arbitrary nor discriminatory.[14] It is not enough for a petitioner to allege negligence,[15] mistake,[16] or incompetence[17] on the part of the union, nor does the union have to pursue every grievance,[18] as long as it can show that such failure or refusal was the result of plain error or a decision not to pursue the

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

[12] 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.

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

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

[15] Smith v. Sipe, 109 A. D. 2d 1034, 487 N. Y. S. 2d 153 (3d Dept. 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 Dept., 1988).

[16] Trainosky v. Civil Service Employees Association, Inc., 130 A.D.2d 827, 514 N.Y.S.2d 835 (3d Dept., 1987); Civil Service Emnloyees Association. Inc, v. PERB, 132 A.D.2d 430, 522 N.Y.S.2d 709, 127 LRRM 3122 (3d Dept., 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).

[17] Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dept., 1992).

[18] Margolin v. Newman, 130 A.D.2d 312, 520 N.Y.S.2,d 226, 42 Ed.Law Rep. 837 (3d Dept., 1987), appeal dismissed, 71 N.Y.2d 844, 522 N.E.2d 1056, 527 N.Y.S.2d 758 (1988).

grievance on the merits. A union's failure to act on a grievance is a breach of the duty when the failure to act results from more than ordinary negligence; the conduct must intend to harm, or evince reckless disregard for the rights of, the individual employee.[19] 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.[20]

New York courts recognize the duty of fair representation[21] and have permitted its assertion in state court by public employees.[22] In 1990, the State Legislature enacted an amendment to the Taylor Law which makes it an improper practice for a public employee organization to breach its duty of fair representation.[23] A union must refrain from arbitrary,

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[19] Ruzicka v. General Motors, et. al., 649 F.2d 1207, 107 LRRM 2726 (6th Cir. 1981).

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

[21] Gosper v. Fancher, 49 A.D.2d 674, 371 N.Y.S.2d 28, 90 LRRM 2336 (4th Dept., 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 Dept., 1977).

[22] Civil Service Bar Association, Local 237, IBT v. City of New York, 99 A. D. 2d 264, 472 N. Y. S. 2d 925 (1st Dept., 1984); aff'd 64 N.Y.2d 188, 474 N.E.2d 587, 485 N.Y.S.2d 227 (1984).

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

discriminatory or bad faith conduct in the negotiation, administration and enforcement of a collective bargaining agreement.[24]

In the instant proceeding, the Union argues that the original petition did not expressly allege that the Union acted in bad faith or in an arbitrary, capricious or otherwise invidious manner. We do not require a petitioner, particularly one who is appearing pro se, to execute technically perfect or detailed pleadings. If a criterion for viable improper practice claims were the use of certain customary words or phrases such as "arbitrary, discriminatory or in bad faith," it is likely that many otherwise valid claims would never receive a hearing.[25] In the instant case, the petitioner claims that the Union failed adequately to represent him with respect to certain identified employment-related matters. It is enough that the petitioner place the respondent on notice of the nature of the claim; our rules require no more at the pleading stage of the proceeding.[26]

The duty of fair representation reaches only to the negotiation, administration and enforcement of a collective bargaining agreement, and not to every aspect of the employment relationship.[27] The petitioner asserts that the Union "starts

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

[25] Decision No. B-15-93.

[26] Decision Nos. B-15-93; B-21-87; B-8-85; B-23-82.

[27] Decision Nos. B-15-93; B-59-88; B-18-86; B-26-84; B-23-84.

new Laborers in the boroughs at a salary that takes state employees up to 5 years to reach, which is at our top pay.... Upstate members regret our Local does not hire, nor have any apprentice (new) Laborers upstate." The suggestion implicit in this language, that the Union exercises some control over the City's hiring practices, is erroneous. Section 12-307b of the NYCCBL gives the City the unilateral right to assign and direct its employees, determine what duties employees will perform during work time, and allocate duties among unit and non-unit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement.[28] In addition, the City has the right unilaterally to broadband job classifications and titles, change existing job classifications, and determine which titles will be used at specific locations.[29]

The Union correctly maintains that it is the City's right to determine job specifications and initial salaries for newly created titles. We agree with the Union that the fact that it negotiates and agrees upon contract provisions giving different benefits to different groups of workers does not, by itself, constitute a violation of the duty of fair representation.[30] The failure of a contract to satisfy all unit members does not

[28] Decision Nos. B-37-87; B-23-87; B-4-83; B-16-81.

[29] Decision Nos. B-47-88; B-14-83; B-37-82; B-70-88.

[30] See, e.g., Decision Nos. B-2-90; B-42-87; B-6-86; B-13-81.

establish a violation of the duty of fair representation.[31] Furthermore, it was the City, not the Union, that decided not to continue to hire Laborers for watershed work in the upstate region. Such a decision is within the City's statutory rights. For these reasons, the instant claim that the Union did not fairly represent the petitioner, because of what the petitioner perceives to be inadequate collective bargaining efforts or results, must fail.

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 that is not arbitrary or discriminatory.[32] Here, the Union argues that any claims relating to actions which it took, or failed to take, more than four months before the instant petition was filed with the Board must be dismissed because they are time-barred. It also claims that the petitioner failed to exhaust the grievance procedures available to him, failed properly to file or follow up on grievances, and had not filed a grievance within four months of the time when he filed the instant petition.

The petitioner's charge against the City concerns out-of-title claims which properly should be deemed to be contractual grievances. It appears that the petitioner attempted previously

[31] Decision Nos. B-9-86; B-13-81.

[32] 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.

to have his out-of-title claims heard through the grievance procedure. The Union and the City are correct in maintaining that the petitioner is barred by the four-month statute of limitations from asserting the out-of-title grievances in the record as an underlying basis of a cause of action. An improper practice claim based on the Union's handling, or alleged mishandling, of these grievances is time-barred.

It is not clear to us, however, whether the petitioner failed to exhaust his remedies under the contract or neglected to file or follow up on grievances, as the union claims. The record contains five grievances filed within the space of four years, none of which advanced beyond Step I of the grievance procedure. Since these matters were not timely raised by the petitioner, we need not consider them. We note, however, that if the petitioner were to file a new out-of-title grievance, the Union would have the duty to investigate the claim, decide whether to proceed further, and communicate to the petitioner the reasons for its decision. The petitioner also has 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 solely the Union's right, however, to decide whether any grievance will proceed to Step IV of the grievance procedure.[33]

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[33] 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:
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> (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:
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> (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.

Finally, the petitioner requests "protection for any reprisals in filing this claim." Such protection is afforded the petitioner in § 12-306 of the NYCCBL;[34] any perceived

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

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

a. **Improper public employer practices.** It shall be an improper practice for a public employer 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;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization....

b. **Improper public employee organization practices.** It shall be an improper practice f or 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:

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....

retaliation may be addressed by filing a timely improper practice petition before this Board and producing evidence supporting such a claim.

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, and that he has failed to state an independent claim of improper practice against the City. 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-1583-93 be, and the same hereby is, dismissed.

Dated: New York, New York
April 21, 1994

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

ANTHONY COLES
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MEMBER