

Jenkins v. DC37 & DOT, 57 OCB 34 (BCB 1996) [Decision No. B-34-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

- between -

Russell B. Jenkins,

Petitioner,

Decision No. B-34-96
Docket No. BCB-1738-95

- and -

District Council 37, American
Federation of State, County &
Municipal Employees, AFL-CIO, and
New York City Department of
Transportation,

Respondents.

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DECISION AND ORDER

On February 10, 1995, Russell Jenkins ("petitioner"), pro se, attempted to file an improper practice petition against the New York City Department of Transportation ("Department"), which was returned to him for failure to submit proof of service upon the Department. The petitioner filed a verified improper practice petition against the Department, docketed as BCB-1727-95, on March 7, 1995. In Decision No. B-3-95 (ES), the Executive Secretary of the Board of Collective Bargaining dismissed the petition on the grounds that the petitioner had not made an arguable claim of a violation of the New York City Collective Bargaining Law ("NYCCBL").

On March 29, 1995, the petitioner filed the instant verified improper practice petition, docketed as BCB-1738-95, against

District Council 37, American Federation of State, County & Municipal Employees, AFL-CIO ("Union"). He alleged that the Union breached its duty of fair representation by failing to file grievances on his behalf when the Department terminated his employment as a Parking Meter Service Worker without due process. He also asserts that he received no assistance from the Union in other employment-related matters. On December 18, 1995, Jenkins submitted a copy of a March 1994 Unemployment Compensation Review Board decision which held that the petitioner's tardiness and absenteeism were due to previously-diagnosed alcoholism and did not constitute misconduct for the purpose of obtaining unemployment insurance benefits.

The Union requested two extensions of time in which to file an answer, which were granted. It filed an answer on December 18, 1995.

The petitioner was represented by counsel at a conference held on March 22, 1996. He was permitted to file a reply and instructed to join the Department as a party in the instant case, pursuant to §209a of the Taylor Act. The City was joined as a party on March 27, 1996 and the petitioner filed a reply on April 17, 1996.

Background

The petitioner was employed by the Department beginning in April 1987 and was a member of Local 1455 of the Union. He

suffered from alcoholism during the time that he worked for the Department.

In a proceeding in August 1993 in which the petitioner was represented by the Union, the Department brought disciplinary charges against him for insubordination and excessive lateness on dates between December 1992 and March 1993. The petitioner signed a probationary agreement as a disciplinary penalty for these charges. He agreed to serve disciplinary probation for nine months, retroactive to July 1, 1993 and ending on April 1, 1994, and to document leaves and absences. The Department retained the right to terminate the petitioner's employment if he violated any condition of the probationary agreement and to have sole discretion as to whether the conditions of the probationary agreement had been violated.

The petitioner also signed an Agreement of Penalty and Waiver of Rights. He acknowledged his misconduct, accepted the penalty, and declared that he understood that he was waiving "any and all rights that I have pursuant to the Civil Service Law and other applicable statute, regulation or agreement which pertains to disciplinary action against New York City employees."

On December 8, 1993, the petitioner was arrested along with other Department employees, and was indicted for enterprise corruption, grand larceny and tampering with public records. When he did not report or call in to work for two days, the Department determined that he had violated the probationary

agreement. According to the Department, the petitioner "engaged in unscheduled leaves without pay 2 or more times, unexcused latenesses 30 or more times and undocumented sick leave 2 or more times since [he] entered into the agreement," without documentation. It terminated his employment as of December 10, 1993. The petitioner received treatment in a rehabilitation program in the early part of 1994.

The petitioner requested assistance from the Union in challenging his termination and pursuing reinstatement. He alleges that the President of Local 1455, Wilson Fenty, promised to help him if the criminal charges were dismissed. Dissatisfied with Fenty's answer, the petitioner wrote a letter dated January 9, 1994 to Stanley Hill, the Union's Executive Director. In the letter, he denied wrongdoing and asked that the Union help him with matters related to his termination while criminal charges were pending. The Union did not assist him.

The indictment against the petitioner was dismissed on all counts in November 1994. The petitioner wrote to Fenty in January 1995, asking for help in getting reinstated. According to the petitioner, the Union did not respond; he again appealed to Hill for assistance in a letter written in January 1995. Again, the petitioner says, the Union did not respond to his letter.

Petitioner's Position

The petitioner contends that the Union breached its duty of fair representation. He claims that, although it knew he was an alcoholic, the Union failed to refer him to an Employee Assistance Program ("EAP") to treat his disability, or to the Merit System Protection or Human Resource Boards since alcoholism is a protected disability. The petitioner also claims that the Union failed to explain adequately the terms of the probationary agreement.

He contends that the Union failed to verify the conditions of the probationary agreement, and accepted without question the Department's unilateral and mistaken determination that he had violated that agreement. After all criminal charges against him were dismissed, the petitioner says, the Union arbitrarily and in bad faith refused to challenge his termination or seek his reinstatement.

Jenkins asserts that a union breaches the duty of fair representation it owes to its members when its actions are arbitrary, discriminatory, or taken in bad faith. He alleges that the Union failed to represent him in matters relating to his termination while criminal charges were pending, neglected his due process rights, and refused to challenge the merits of his termination once the criminal charges had been dismissed.

The petitioner argues that his petition is timely because it was filed within four months of the alleged improper practices

and the Union committed a "continuing violation" of his rights. He maintains that he filed the improper practice petition against the Union within four months of his correspondences with Hill and Fenty, requesting union assistance, and within four months and six days after the dismissal of all criminal charges against him. In addition, since the petitioner filed his improper practice petition without the assistance of counsel, he requests that the timeliness requirement be construed liberally in his favor.

Jenkins argues that, because he originally appeared pro se, he failed to join the Union as a party to the first improper practice petition against the Department. For this reason, he maintains, the Board should consolidate the petitions and the instant petition relates back to March 7, 1995.

The Union's Position

The Union asserts that the petitioner failed to state a claim upon which relief may be granted, and that the petition lacks factual allegations of bad faith, hostile, discriminatory or arbitrary conduct. It claims that the petitioner bears the burden of proving such allegations and has failed to do so. It maintains that it represented Jenkins diligently, fairly and in good faith.

The Union maintains that by signing the probationary agreement, the petitioner knowingly and irrevocably waived his right to appeal. It contends further that the Department documented

the petitioner's unexcused latenesses and absences sufficiently to justify his termination, and that the petitioner has no right to appeal the decision.

The Union argues that the instant petition must be dismissed on procedural grounds because it is unverified. In addition, the Union claims, the petitioner was discharged on December 10, 1993, but did not file an improper practice petition against the Union until March 29, 1995; therefore, his claims concern Union conduct which occurred more than four months before the petition was filed and are untimely.

Discussion

The petitioner alleges that the Union breached the duty of fair representation owed to him. The United States Supreme Court established the duty of fair representation when it held that where a union is the exclusive bargaining agent for a unit, it has a correlative duty to treat all members fairly.¹ The Court clarified this obligation in Vaca v. Sipes², in which it stated:

the exclusive agent's ... statutory obligation is 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

¹Steel 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); Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

²386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 [64 LRRM 2369] (1967).

arbitrary conduct.³

It is well-established that a union under our jurisdiction must refrain from arbitrary, discriminatory or bad faith conduct in the negotiation, administration and enforcement of a collective bargaining agreement.⁴

The petitioner claims that the Union failed to explain adequately the terms of the August 4, 1993 probationary agreement, presumably putting him at a disadvantage. A union does not breach its duty of fair representation because of negligence, mistake or incompetence, or because the outcome of a settlement does not satisfy a member, unless its conduct was improperly motivated.⁵ Since the petitioner did not show that the Union's representation of him during settlement was improperly motivated, we must dismiss that part of his claim.

The petitioner also claims that the local president promised to assist him in pursuing reinstatement, but that the Union did not do so. Although the Union makes no representation concerning the alleged promise, it contends that, in its judgment, the petitioner's case was not worth pursuing. A union is given wide latitude to serve the unit it represents, as long as it exercises

³Id. at 177.

⁴Decision Nos. B-23-94; B-44-93, B-29-93; B-5-91; B-53-89.

⁵Decisions Nos. B-8-94; B-29-93; B-51-90; B-15-83.

its discretion honestly and in good faith.⁶ The petitioner does not claim that the Union's action was taken in an arbitrary manner or in bad faith, nor does he claim that the Union makes a practice of representing other members in similar circumstances. Without such a showing, this part of the petitioner's claim does not rise to the level of a breach of the duty of fair representation.⁷

To the extent that a union's status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, the union owes a duty to represent fairly the interests of an employee who is unable to act independently to protect his or her own interests. The duty of fair representation, however, does not reach into and control all aspects of a union's relationship with its members; it concerns only the negotiation, administration and enforcement of a collective bargaining agreement.⁸

The petitioner complains that the Union, knowing that he is an alcoholic, should have referred him to a substance abuse program. It is clear that the Union did not breach its duty of fair representation by failing to refer him. Not only is this not a matter relating to the negotiation, administration or

⁶Decision Nos. B-23-94; B-2-90.

⁷Decision No. B-23-94; see also, Decision Nos. B-11-87; B-34-86.

⁸Decision Nos. B-23-94; B-44-93; B-29-93; B-15-93.

enforcement of the contract, it is certainly one in which the petitioner may act independently to protect his own interests.

Since we must dismiss all of the petitioner's substantive claims, we will not discuss the procedural issues raised by the parties. For the reasons stated above, the instant 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 petition docketed as BCB-1738-95 be, and the same hereby is, dismissed.

Dated: New York, New York
September 26, 1996

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER

Robert G. Bogucki
MEMBER

Jerome E. Joseph
MEMBER