

Farjam v. HHC & L.144, Hotel Hospital Hospital, 57 OCB 35 (BCB 1996) [Decision No. B-35-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceedings

- between -

Parvaneh Farjam,

Petitioner,

Decision No. B-35-96
Docket No. BCB-1591-93
BCB-1592-93

- and -

New York City Health and
Hospitals Corporation, Lincoln
Medical and Mental Health Center,
and Local 144, Hotel, Hospital,
Nursing Home & Allied Services
Union, Service Employees
International Union, AFL-CIO,

Respondents.

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DECISION AND ORDER

_____ On July 7, 1993, Parvaneh Farjam ("petitioner") filed verified improper practice petitions against the New York City Health and Hospitals Corporation ("HHC"), Lincoln Medical and Mental Health Center ("Hospital") and Local 144 of the Hotel, Hospital, Nursing Home & Allied Services Union, Service Employees International Union, AFL-CIO ("the Union"). She alleges that the Union committed an improper practice by breaching the duty of fair representation owed to her, and that HHC committed improper practices by permitting discrimination, sexual harassment and sabotage of her work, and by terminating her employment.

By letter dated August 2, 1993, to the Union, HHC denied the petitioner the right to proceed with a Step II grievance on the

grounds that she was a provisional employee with less than two years of service, and not entitled to contractual due process procedures.¹ The letter stated that the petitioner had been denied overtime because she was not authorized to work overtime by the agency head or a representative of the agency head, as required by Citywide Contract Article IV, Section I.

On August 12, 1993, HHC filed a verified answer to the petition, and on August 17, the Union filed a verified answer. The petitioner filed replies on September 30, 1993. The Union, HHC, and the petitioner each requested extensions of time to file additional submissions, with the petitioner's final request of October 1, 1993 becoming the deadline.

A pre-hearing conference was held on September 26, 1994. The Trial Examiner explained that the only issue to be decided was whether the Union had treated the petitioner differently than other members in similar circumstances.

On October 19, 1994, the Union was permitted to file an amended answer to the petition. The petitioner's amended reply was received on November 22, 1994. A hearing was held on June 5

¹Article VI, Section 1. g. of the collective bargaining agreement provides, in relevant part:

The term "Grievance" shall mean: ... A claimed wrongful disciplinary action taken against a provisional employee who has served continuously for two years in the same or similar title or related occupational group in the same agency.

and 6, 1995. HHC filed a post-hearing brief on August 14, 1995, and the Union submitted a post-hearing brief on August 21, 1995. On August 31, 1995, the petitioner submitted post-hearing briefs.

As a remedy, the petitioner requests reinstatement with back pay, overtime pay, and unused sick leave. She also requests punitive damages and compensation for pain and suffering.

Background

The petitioner was hired by HHC in the title Microbiologist, Level A at the Hospital in 1992.² Her employment was terminated on March 12, 1993. She has a bachelors' degree in biology, a masters' degree in pathobiology, and medical technologist licenses in hematology, microbiology and chemistry.

The petitioner testified that her work-related difficulties began shortly after she began to work at Lincoln Hospital, when Dr. Lue, the physician who had recruited her, resigned. She said that the Hospital expected her to do the work of technologists with considerably more experience, even though she was not adequately trained in those areas. According to the petitioner, Hyacinth Moore, the supervisor who was assigned to train her in the areas with which she was unfamiliar, refused to instruct her

²The actual date of the petitioner's hiring is in dispute, with the petitioner alleging May 1, and the Hospital alleging April 17, but the date is not relevant to the outcome of the instant matter.

properly.

The petitioner related that she worked hours of unpaid overtime each day for several months to finish her assignments. When she complained to Trevor McLean, another supervisor, about working unpaid overtime, he responded that she had to finish her assignments each day and that she was slow in completing her work. McLean told her that she was responsible for completing 300 specimens each day.

The petitioner said that she spoke to a Union Vice President and told him that she was being harassed by co-workers and management. She alleges that he told her that she had rights and she should not let anyone step on her. She said that he gave her his business card and told her to call with any questions.

The petitioner testified that she was harassed by some of her co-workers and managers but when these people were absent, the laboratory was congenial and she finished her work accurately and on time. She stated that her co-workers hid items so that she was unable to do her job, and that when she told this to Moore, her supervisor, Moore responded that she should handle the situation herself.

The petitioner testified that McLean attempted to force her to accept responsibility for mistakes she did not make, and to follow the orders of senior technologists without question, even when she showed him that a dangerous mistake had been made. The

petitioner submitted evidence, unrefuted by the Hospital, of such instances which had jeopardized the health of patients.

The petitioner stated that McLean made sexual advances towards her, and that a co-worker warned her that McLean would make things difficult for her if she did not have "friendly relations" with him. She testified that Eric Mayr, the business representative for the Union, told her that she did not have to have such relations with anyone; he also told her that the Union would defend her, but that she should work overtime to complete her assignments and not make any mistakes and she would eventually get paid for the overtime work. However, she said, Mayr failed to stop McLean from retaliating against her because she had rejected his alleged sexual advances.

The petitioner received two unsatisfactory performance evaluations. They describe her performance as slow and inaccurate. The petitioner, however, testified that the evaluations are false, that she submitted documents into evidence which prove that she did not make the alleged mistakes, and that she worked a considerable number of unpaid overtime hours to complete her assignments. She testified that she signed the evaluations, even though she disagreed with them, because McLean forced her to sign them and gave her less than fifteen minutes to do so.

Two counseling sessions were held, one in December 1992 and the other in February 1993, at which the petitioner's attitude,

performance, and punctuality were discussed. The petitioner, McLean, Mayr, a second union representative, and Dr. Suciano, the Chief of Microbiology and Director of the laboratory were present at both sessions. The petitioner said that she brought up her allegations of sexual harassment and discrimination, but that McLean denied the former and Dr. Suciano told her that her examples of discriminatory language were common language taught in colleges.

A third counseling session was scheduled for March 1, 1993. When the petitioner was the only one to arrive for the meeting, she phoned Mayr, who told her that he had received a copy of her letter of termination dated February 24, 1993. Since she had been terminated, the meeting was cancelled.

The petitioner testified that Mayr told her to keep working until she received a copy of the termination letter. She says that she did not receive one, so she continued to perform her duties and even received work schedules. However, on March 13, the day after the petitioner's official termination date, the co-worker in charge of the laboratory on that day told her to go home because she would not get paid for her work that day. McLean called the laboratory and told her that she was terminated. She was escorted from the Hospital by security guards.

The petitioner said that Mayr told her he had four jobs available, and that she would get one of them. However, she

testified, the Union only gave her the names of potential employers and she was not hired by them. The petitioner testified that on April 1, 1993, Mayr told her not to call him anymore, that he had already given her more time than she deserved and she should file an unemployment claim. Although she has had promising job interviews, she said, she has been told that she would not be hired because of negative references from the Hospital.

Positions of the Parties

Petitioner's Position

The petitioner alleges that the Union failed to represent her fairly when she requested assistance concerning her employment situation, failed to prevent her termination, and failed to find her employment after her termination. In addition, she charges that the Union told her that it did not have an attorney when it had in-house counsel, and that it provided negative employment references, making it difficult for her to obtain employment.

She claims that she was hired as a "permanent but trainable" provisional employee, not as a probationary, provisional employee. She alleges that the posting for the position did not mention provisional employment, an eligibility list, or a Civil Service examination. Therefore, she maintains, she should not have been terminated.

The petitioner contends that the Hospital's evaluations of her performance and her personality are false. She claims that she never wasted time, worked unpaid overtime hours frequently, and made efforts beyond those specified in her job description, such as isolating a pathogen others were unable to detect. She maintains that she attempted to get along with her co-workers, but that they disliked her because of her religion and national origin, continually sabotaged her work efforts and refused to help her. Since her termination, the petitioner maintains, HHC has given potential employers negative references so that she has been unable to find employment.

HHC's Position

The Hospital argues that it had the right to discharge the petitioner and, because she was a provisional employee with less than two years of service, she was not entitled to contractual due process procedures. Although her "Conditions of Employment" form lists her as "permanent" and "provisional," the Hospital claims, the petitioner also signed a form stating she was a provisional employee, and that she had to pass a Civil Service examination and be appointed from an eligibility list to become a "permanent" employee.

The Hospital contends that even if the petitioner's claims are true, they do not constitute a basis to sustain an improper

practice complaint because she has not shown that the Union treated her differently than any other similarly situated employee. Even if the charges constituted a valid claim under the NYCCBL, it argues, the petitioner has failed to prove that the Hospital's actions interfered with, restrained, or coerced her in the exercise of protected rights. The Hospital claims that it did not discriminate against her to encourage or discourage membership in or participation in the activities of any public employee organization and the petitioner has not alleged that involvement in protected union activity was a motivating factor in the decision to discharge her.

The Hospital notes that the claims of harassment and discrimination are based on national origin and religion. HHC contends that such claims cannot constitute the basis of an improper practice claim.

The Union's Position

The Union maintains that the petitioner never proved that it had a duty to her, that it breached such a duty, or that it treated her differently than any other similarly situated employee. It asserts that the petitioner was a provisional and probationary employee, and that she knowingly signed her evaluations as a probationary employee. Since provisional, probationary employees in the petitioner's circumstances do not have

contractual rights, the Union argues, no breach of the duty exists unless the petitioner can prove that an employee in a similar situation and position was treated differently by the Union.

The Union acknowledges that it was apprised of the petitioner's complaints concerning unfair treatment, sexual harassment, and unpaid overtime, but it denies that it failed to represent the petitioner. The Union also denies that the petitioner informed anyone at the Union that an agent of the employer had touched her inappropriately, but claims that after it investigated the incident, it advised the petitioner that she could also file a complaint with the ("EEOC").³

The Union claims that it assisted the petitioner in dealing with her employer and supervisor, and arranged counseling sessions. In addition, it says, it advised her concerning her working environment, attempted to prevent her termination, and subsequently referred her to several potential employers. Had the Union not assisted the petitioner, it contends, although it had no obligation to do so, the petitioner would have justifiably

³The State Division of Human Rights decided against the petitioner in her claims against the Union and HHC in decisions on April 25 and 26, 1995, respectively. It held that there was no probable cause to believe that either the Union or HHC engaged in alleged unlawful discriminatory practices against the petitioner because she opposed discrimination in the Union's case, or because of her creed, national origin, or her opposition to discrimination and sexual harassment in HHC's case.

been terminated even sooner than she was. The Union admits that it arranged several job interviews for the petitioner but denies that it guaranteed her any particular position.

Discussion

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.⁴ The Court clarified this obligation in Vaca v. Sipes⁵, 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 arbitrary conduct.⁶

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.⁷

⁴Steel 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).

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

⁶Id. at 177.

⁷Decision Nos. B-23-94; B-44-93, B-29-93; B-5-91; B-53-89.

The duty of fair representation encompasses only matters relating to the negotiation, administration, or enforcement of the collective bargaining agreement.⁸ It may choose to handle other, unrelated matters for its members; if it elects to do so, however, it must do so for all members who are in similar circumstances.⁹

The petitioner was a probationary, provisional employee and as such, and whether or not she was aware of her status, not entitled to disciplinary due process rights under the contract between the employer and the Union. Indeed, the Union has neither the duty nor the ability to enlarge or to create rights for special classes of employees which have been restricted by the Civil Service law or the collective bargaining agreement.¹⁰

For this reason, the only issue to be heard here was whether the Union violated its duty of fair representation to the petitioner by engaging in discriminatory conduct. The petitioner was made aware many times during the course of the conferences and hearings in this case that her charge would only be sustained if she could prove that the Union treated her differently than it

⁸Decision Nos. B-11-95; B-8-94; B-44-93; and B-29-93.

⁹See Decision Nos. B-16-79; B-14-83; B-11-87; B-21-93.

¹⁰Decision Nos. B-27-90; B-58-88; B-30-88; B-1-88; B-5-86; B-18-84; B-42-82; and B-13-82.

treated other members who were similarly situated.¹¹ She failed to do so.

The petitioner's assertion that the Union committed an improper practice by failing to find her a new job is without merit. Obtaining employment for members who have been discharged is unrelated to the negotiation, administration or enforcement of the collective bargaining agreement. Since the petitioner has not proven that the Union found employment for other members who are similarly situated, this claim must be dismissed.

The petitioner alleges that the Union failed to stop sexual harassment and discrimination based on religious and national origin at her workplace. To the extent that a union's status as the exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, it 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,¹² unless the union creates

¹¹Decision No. B-16-79.

¹²Decision Nos. B-23-94; B-44-93; B-29-93; B-15-93.

such a duty by engaging in the kind of disparate treatment discussed above. Here, the petitioner had standing to file these complaints in the appropriate forum and, in fact, did so. Since the petitioner has not proven that the Union deliberately ignored her complaints or that it represented employees in similar circumstances, this part of the claim is also dismissed.

The record does not establish that the Union acted arbitrarily and in bad faith by deliberately ignoring the petitioner's complaints, or that it processed these complaints differently than it would have for other, similarly situated members. Accordingly, the instant improper practice claims are 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 charges docketed as BCB-1591-93 and BCB-1592-93 be, and the same hereby are, dismissed.

Dated: New York, New York

Steven C. DeCosta

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Docket No. BCB-1591-93
BCB-1592-93

September 26, 1996

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