

Robinson v. L.1180, HRA& CWA, 57 OCB 43 (BCB 1996) [Decision No. B-43-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

JUDY ROBINSON,

Petitioner,

DECISION NO. B-43-96

-against-

DOCKET NO. BCB-1793-95

THE HUMAN RESOURCES ADMINISTRATION
OF NEW YORK AND THE COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 1180,

Respondents.

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DECISION AND ORDER

On November 1, 1995, Judy Robinson ("Petitioner") filed a verified improper practice petition against Communication Workers of America, Local 1180 ("Union"), and the City of New York/Human Resources Administration ("HRA"). The Petitioner alleges that the Union breached its duty of fair representation by not filing a grievance with respect to the termination of Petitioner's employment. The Petitioner alleges HRA committed an improper practice when it terminated Petitioner's employment. After several requests for an extension of time to file, HRA filed an Answer on January 26, 1996. The Union also made several requests for extension of time to file, and, on March 19, 1996, filed its Answer. After the Petition was filed, the Petitioner secured a private attorney, and after several requests for an extension of time, filed a Reply to both Answers on April 20, 1996.

Background

Petitioner was a Principal Administrative Associate with HRA's Office of Legal Affairs for twenty-four years. During that time, her unit was represented for collective bargaining purposes by the Respondent Union. The unit was covered by successive collective bargaining agreements between the Union and the City covering the time periods at issue herein. The City maintains an absence control policy which was applicable to Petitioner.¹ It is not denied that, from 1991 through 1995, Petitioner was often absent from her job without leave ("AWOL"). Pursuant to the City's absence control policy, HRA filed Charges and Specifications against Petitioner for specific absences during the latter half of 1994. On May 26, 1995, HRA and the Union negotiated a stipulation of settlement ("stipulation") concerning these charges. The stipulation provided as follows:

The charges involving AWOL for the periods July 20, 1994, to August 23, 1994 and September 2, 1994 to October 4, 1994, are resolved as follows: the respondent [Petitioner herein] agrees to accept probation for a period of one year. If during the first 6 months there are any violations of time and leave violations that result in charges being drafted against her, the respondent shall be terminated. If a violation occurs in the 2nd six months, the respondent shall be suspended for thirty days. Discretion to determine that a violation has occurred shall be placed exclusively with

¹ HRA Procedure No. 83-4, dated March 31, 1983, revised July 20, 1994.

the employment law division of the Office of Legal Affairs.

In return for Petitioner's agreement to the stipulation, HRA withdrew charges for the first two AWOLs and agreed not to pursue a third pending charge. The Union asserts, without challenge from Petitioner, that the Union representative explained to Petitioner what rights she would be waiving and what obligations she would be undertaking by signing the stipulation.

During Petitioner's meeting with the Union representative on May 26, 1995, she admitted that she had a drug problem. The Union representative then referred her to the Central Labor Rehabilitation Council. As part of Petitioner's rehabilitation, HRA granted her medical leave from June 9, 1995, to on or about June 19, 1995. It is undisputed that, when Petitioner telephoned her Union representative on June 16, 1995, to tell him that she was hospitalized for a subsequent medical problem, he asked if she had reported that fact to her employer as required under the terms of the stipulation. She said that she had done so. It is also undisputed that he reminded her that, if she did not notify her employer prior to being absent, her employment could be terminated.

Petitioner does not deny that, after her discharge from the hospital, she went to her office on June 19, searched for a time-and-leave form at her desk, then left the building. She also does not deny that she attended a meeting with her Union

representative on that same day at which she told him that she had not received a paycheck. She does not deny that he made arrangements for that paycheck to be delivered to her.

Two days later, on June 21, Petitioner asserts, she telephoned a personnel representative in her office to say that she would not return from medical leave as expected due to an injury she sustained on June 20. On June 22, Petitioner called her Union representative to report this injury. She does not dispute that he asked her if she had notified her employer as required under the terms of the stipulation. She also does not dispute that, at first, she told him that she did not need to call her employer because she was on sick leave, but that later, upon his questioning her, she told him that she had contacted her employer on June 20. The Union asserts that the representative ascertained from HRA's Employee Law Department that, in fact, HRA had not heard from Petitioner since June 19. The Union also states, and it is uncontroverted, that the Union representative confirmed with Petitioner's direct supervisor as well that the employer had not heard from Petitioner since June 19 when she appeared in the office briefly to inquire about her paycheck.

On June 22 also, the Union representative phoned Petitioner to advise her to obtain a doctor's note to excuse her absences after June 19, the day she was to return to work. On June 23, the Union representative was informed by the HRA Employee Law

Department that the Petitioner would be brought up on charges for her absences since June 19. The Petitioner does not deny that the Union representative was successful in having the employer drop the charges with respect to Petitioner's absence on June 19; however, charges for the absences between June 20 and 23 were not excused.

Petitioner reported to HRA's Medical Division on June 26 but was told she needed more information on the doctor's note which she had obtained in order for her leave to be authorized. Petitioner secured additional medical documentation, but when she returned to work on June 27, HRA's Deputy Administrator informed her that she had violated the stipulation and her employment was terminated effective that day.

The following facts are also undisputed. Petitioner met with the Union representative on June 28, 1996. He reviewed the stipulation and the doctor's note dated June 26, concluding that Petitioner's absences had violated the stipulation since the doctor's note was dated after the absences occurred. The Union representative determined that it would be futile to pursue a grievance on Petitioner's behalf. The Union asserts, and the Petitioner offers nothing to contradict, that this determination was consistent with the Union's handling of similar grievances in the past. In spite of this determination, however, the Union representative contacted the employer's Employment Law Department

and secured an offer which would permit Petitioner to retire or resign from her position, instead of being discharged, to protect her pension and benefits. The Union representative advised Petitioner to accept this offer. Petitioner said that she wanted time to consider it. The Union representative secured an agreement from the employer to keep the offer open until late in July. On June 29, the representative telephoned the Petitioner to advise her that he had convinced HRA to leave the offer open until July 21. It is undisputed that the Union representative again advised the Petitioner to accept the offer and that Petitioner cursed him at that time. It is likewise undisputed that the representative again telephoned the Petitioner on July 17 to remind her that the offer remained open. She does not deny that he followed up this telephone call with a letter to the same effect, delivered by overnight mail; nor does she deny that he complied with her request for a copy of her file, when she came to his office on July 20. Petitioner refused to accept the offer and filed the instant improper practice petition on November 13, 1995.

Positions of the Parties

Petitioner's Position

Petitioner argues that the Union breached the duty of fair representation when it refused to "tell [her] what could [she] do

to keep [her] job." She claims that the Union's refusal to file a grievance with respect to her employment termination and the Union's recommendation that she resign constitutes an improper practice. Without elaboration, Petitioner states:

A review of the activities of the representatives of the Respondents commencing perhaps on or about June 9, 1995, and continuing through June 27, 1995, clearly indicates that the Respondents, working together, minimized and dismissed out of hand the Petitioner's illness and injury and quite wrongfully acquiesced in a resolution of termination.

Also without elaboration, Petitioner further states:

A review of the actions taken by CWA Local 1180, Representative Albert Van-Lare regarding the Petitioner's employment between June 9, 1995, and June 27, 1995, and the purported Union assistance given to the Petitioner until on or about July 21, 1995, must conclude that the Union engaged in improper labor practices.

Petitioner's Reply "note[s]" that neither Respondent has submitted documentation "making reference to specific times, dates, locations with a notarized explanation of their understanding of the Petitioner's illness and injury as submitted with proper medical documentation."

At the core of Petitioner's argument is her contention that she did not violate the stipulation by which previous AWOL charges were settled. She contends that she was under professional medical care for an injury and, further, that the notification and medical documentation which she submitted to HRA were timely and adequate and that she was not AWOL. Therefore,

she argues, her termination was unwarranted and unlawful. She claims that HRA attempted to force her to resign as part of a "quick fix" to her documented medical problems, and she contends that HRA's action constitutes an improper practice.

Moreover, Petitioner alleges that the Union and HRA discriminated against her on the basis of her drug addiction:

[T]hey conspired to find a "quick fix" to the Petitioner's documented medical problems by attempting to force her to resign. Such a "quick fix" resolution must be deemed to be in blatant violation of the cooperative spirit between labor and management in the consideration of employee relations.

Petitioner seeks only reinstatement.

The Union's Position

The Union maintains: 1) that the Petition is time-barred, filed as it was more than four months after the Union informed the Petitioner that it would not pursue a grievance on the underlying issue regarding a putative breach of the stipulation of settlement; 2) that it fails to allege facts constituting a violation of the Union's duty to represent Petitioner fairly; and 3) that the Union acted fairly, impartially and non-arbitrarily in enforcing the collective bargaining agreement as applied to Petitioner, in that it had determined that Petitioner had violated the stipulation of settlement and it would thus be futile to pursue a grievance to contest her employment termination.

The Union supports its assertion that it treated Petitioner fairly by pointing out that its representative repeatedly advised the Petitioner concerning the pending AWOL charges, that it attempted to avert the AWOL charge that led to Petitioner's dismissal by advising the Petitioner to get a doctor's note to excuse her absences after her authorized medical leave had expired, and that, after Petitioner was in fact discharged, the Union representative persuaded HRA to offer Petitioner the chance to resign or retire in order to protect her pension and benefits.

HRA's Position

HRA maintains that the Petition fails to allege facts sufficient to support an improper employer practice under the NYCCBL. It further asserts that there is no allegation as to management interference, restraint or coercion in the Petitioner's rights to self-organize, form, join or assist in a public employee organization: there is no allegation of any attempt to dominate a public employee organization; there is no allegation of discrimination against any employee for the purpose of encouraging or discouraging membership in a public employee organization; and there is no allegation of any refusal by the employer to bargain collectively.

HRA also argues that the Petition fails to allege facts sufficient to maintain a claim that it has taken any other

actions for the purpose of frustrating the statutory rights of Petitioner in violation of NYCCBL. Barring a determination by the Board of Collective Bargaining ("Board") that it must retain jurisdiction over the employer as a party to a fair representation claim arising from a contractual claim which the Union could have asserted, HRA argues that the instant Petition must be dismissed.

Discussion

Addressing the procedural issue which was raised by the Union, we reject the Union's timeliness defense. Section 1-07(d) of the Rules of the Office of Collective Bargaining requires that a petition alleging improper practice in violation of § 12-306 may be filed within four (4) months thereof. The Union argues that the limitations period began when the Union advised Petitioner it would not pursue a grievance on her behalf, on June 28, 1995. However, the offer to let Petitioner resign, which was negotiated by the Union, was held open until July 21, 1995, and so the actions which are the subject of Petitioner's complaint continued until July 21, 1995. Therefore, the November 13, 1995, filing was timely.

The gravamen of Petitioner's complaint is that the Union and HRA discriminated against her on the basis of her chemical addiction. She claims they conspired to force her to resign as a "quick fix" to her medical problems. Arguing that such action is

violative of the NYCCBL, Petitioner asks the Board to have her reinstated to her position.

A union has a duty to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.² Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,³ but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.⁴

While a union must act fairly towards all employees whom it represents without discrimination, and while it must exercise discretion with complete good faith and honesty, avoiding arbitrary conduct, a union enjoys wide discretion in the handling of grievances which arise under the collective bargaining agreement. That is, a union does not breach its duty of fair representation merely because it refuses to advance a claim as long as the refusal is made in good faith and is neither arbitrary nor discriminatory.⁵

Applying these standards to the present case, we find that

² Decision Nos. B-37-96; B-8-94; B-44-93; B-5-91. B-30-88.

³ Decision Nos. B-37-96; B-24-94; B-21-93; B-35-92.

⁴ Decision Nos. B-37-96; B-24-94; B-21-93; B-35-92.

⁵ Decision Nos. B-37-96; B-21-93; B-35-92; B-32-86.

the Union has not breached its duty of fair representation to Petitioner herein. The record amply shows that the Union represented her on several occasions and attempted to obtain favorable results for her. For instance, the Union attempted to avert Petitioner's final unexcused absence, and, although this attempt failed, the Union did secure an offer from HRA to permit Petitioner to resign or retire to preserve her benefits. Moreover, the Petitioner presents nothing more than conclusory allegations that the Union engaged in improper employee organization practices. Petitioner makes no attempt to dispute the numerous, specific instances cited by the Union of its representative's attempts to inform the Petitioner of the consequences of her actions in advance of them and to mitigate the detrimental consequences after she acted.

Nowhere in the Petitioner's pleadings is any evidence offered that Petitioner's medical condition was "minimized and dismissed out of hand" by the Union, as Petitioner's Reply suggests in conclusion. To the contrary, the actions taken by the Union and not disputed by the Petitioner indicate that the Union, in fact, acted in good faith when it decided not to file a grievance over the termination of Petitioner's employment. The Union asserts that it believed it would be futile to proceed with a grievance based on the terms of the stipulation in the underlying matter. Petitioner has offered nothing from which we

may infer that the Union's decision not to pursue the grievance was arbitrary, perfunctory, grossly negligent, or in bad faith. The terms of the stipulation are clear on its face: the employer is empowered to exercise its discretion in regard to determining whether the stipulation has been violated:

If during the first 6 months there are any violations of time and leave violations that result in charges being drafted against her, respondent shall be terminated . . . Discretion to determine that a violation has occurred shall be placed exclusively with the employment law division of the Office of Legal Affairs.

Furthermore, Petitioner has pointed to no legal authority on which we may rely to find that the Union does not enjoy the wide latitude which we have long accorded employee organizations in the handling of contractual grievances. Nor has Petitioner offered any evidence to counter the Union's assertion that its action herein was consistent with its handling of similar grievances in the past.

With regard to Petitioner's allegation that the Union conspired with HRA to terminate her employment, we find this claim conclusory and unsubstantiated by any allegations of fact.

Since Petitioner has not sustained the burden with respect to the Union's duty of fair representation, no consequential liability may be found on the part of HRA. Furthermore, Petitioner has failed to state an independent claim of improper practice against HRA since she fails to specify how the actions of HRA are violative of Petitioner's rights under the NYCCBL.

For these reasons, the improper practice petition must be dismissed in its entirety.

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-1793-95 be, and the same hereby is, denied in its entirety.

DATED: New York, New York
November 26, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER