Lasky v. DC 37 & HHC, 59 OCB 10 (BCB 1997) [Decision No. B-10-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	DECISION NO. B-10-97
SHARON L. LASKY,	:	DOCKET NO. BCB-1864-96
Petitioner,	:	
-and-	:	
DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and N.Y.C. HEALTH and HOSPITAL CORPORATION,	:	
Respondents.	:	

DECISION AND ORDER

On September 18, 1996, Sharon L. Lasky ("the Petitioner"), acting pro se, filed an Improper Practice Petition against District Council 37, Local 768, AFSCME, AFL-CIO ("DC 37" or "the Union"), which was returned to her because she failed to supply proof of service of the Petition on the named respondents, pursuant to 61 RCNY §1.07(f).[1] The Petition was re-submitted, along with proof of service, on October 10, 1995. Deputy Chairperson Patitucci issued a letter to Petitioner, informing

[1] 61 RCNY §1.07(f) states:
Petition-service and filing. One copy of the petition shall be served upon the respondent and the original and three (3) copies thereof, with proof of service, shall be filed with the board.

her that, in citing the Union for failing in its duty of fair representation, she was required to name her employer as a party respondent, pursuant to Civil Service Law §209-a(3) ("Taylor Law").[2] On November 6, 1996, Petitioner filed an Amended Improper Practice Petition against DC 37 and the New York City Health and Hospital Corporation ("HHC"). The Petition alleges that the Union "Fail[ed] to inform me of my rights and time frames regarding private causes of action ... [and] to inform me of administrative appeals provisions/procedures." The Petition seeks an arbitration hearing.

The Union filed its Answer on December 2, 1996, and on December 3, 1996, the HHC, through the Office of Labor Relations, filed its Answer. By letter dated January 7, 1997, it was inquired of Petitioner whether she would submit a Reply to the Answers from Respondents. By tele-fax dated January 10, 1997, Petitioner stated that she would rely on the information previously submitted in her petition.

BACKGROUND

[2] Section 209-a(3) of the Taylor Law states:
> The public employer shall be made a party to any charge filed under subdivision two of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

Petitioner had been on a leave of absence from her permanent civil service position of Supervisor I (Social Work), at the King's County Hospital, in order to work in a position in a managerial class. Funding for this class was provided from a grant and not by the Hospital. During this leave of absence, she continued working at the King's County Hospital. When the grant was discontinued, in or about January, 1995, Petitioner's position in that managerial class was terminated. Upon returning from her leave of absence, Petitioner was informed by Ms. Barbara E. Johnson, Senior Associate Director, Human Resources Department, Kings County Hospital Center, in a letter dated February 3, 1995, that she would be returned to her permanent title of Supervisor I (Social Work) at the HCC at a salary of $45,239.00, along with longevity monies of $3,017.00. On February 6, 1995, Petitioner allegedly was offered a position in a private program which paid $45,000.00 per year, but she turned this down in anticipation of, and reliance on, the offer of February 3, 1995, from the HHC.

Upon Petitioner's return to work at the King's County Hospital Center, she was paid an annual salary of $36,029.00, which was within the parameters established for the title Supervisor I (Social Work). Petitioner was informed by the HHC, that the Human Resources Department letter of February 3, 1995,

was erroneous and could not be used as a basis for entitlement to the higher salary.

Petitioner informed the Union of the HHC's actions and a Step I grievance was filed on May 8, 1995. A Step III conference was held on September 27, 1995, at which time Petitioner was represented by her Union. On April 2, 1996, the Step III decision was issued, which found that there was no applicable contract clause, violation of which could be redressed in the grievance procedure. Moreover, it found that Petitioner was being paid the correct salary for her title. By letter dated May 3, 1996, Petitioner was informed by the Union that they would not pursue arbitration on her behalf. Petitioner then filed the instant Improper Practice Petition.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner argues that she was not informed by the Union as to her rights and time frames in the event she chose to pursue a private cause of action, nor was she made aware of provisions and procedures regarding any possible administrative resolutions to her predicament. In support of this contention, submitted as Attachments to Ms. Lasky's Petition filed October 10, 1996, is (i) a letter from Barbara E. Johnson, Senior Associate Director, Human Resources Department, Kings County Hospital Center, with reference to Petitioner's employment status upon her return to

King's County Hospital Center, stating that her salary would be $45,239.00, as well as $3,017.00 in longevity monies; (ii) a copy of the pay rates for persons working in the position of Supervisor I (Social Work), pursuant to the Executed Contract between the Commissioner of Labor Relations and the HHC on behalf of the City of New York and DC 37. The maximum pay rate indicated for Supervisor I (Social Work), as of December 1, 1994, is $45,239.00; (iii) a copy of the Step III decision, finding no contractual right to the higher salary sought by Petitioner; (iv) a copy of a memo from Richard J. Ferreri, Esq., attorney for DC 37, to Hector Coto, Petitioner's Council Representative, recommending that the grievance not be taken to arbitration; (v) a copy of a letter from Mr. Coto to Petitioner, informing her that the matter would not be taken to arbitration; and (vi) proof of service of the petition on all parties. Ms. Lasky's amended Petition, naming the HHC as a party respondent, filed November 6, 1996, included (i) a letter from Deputy Chairperson Patitucci, dated October 21, 1996, directing Petitioner to name the HHC as a party respondent, pursuant to Section 209-a(3) of the Taylor Law; and (ii) proof of service.

Nowhere in the correspondence between the Union and Petitioner does the Union mention any independent cause of action or recourse available to Petitioner in any other fora. Nor is

Petitioner apprised of time frames pertinent to the filing deadlines for any course she may choose to pursue.

Respondents' Positions

HHC

The HHC contends that the Petition must be dismissed as being untimely. It points to the fact that the Step III decision was issued on April 2, 1996, followed by the recommendation from DC 37's legal department not to pursue this matter to arbitration being sent to Petitioner on May 3, 1996, and that Petitioner filed her improper practice procedure against the HHC on November 6, 1996. As this represents a gap of more than five months, the HHC views Petitioner in violation of Title 61 of the Rules of Collective Bargaining ("RCNY" or "Rules"), §1-07(d), which states that an alleged improper practice charge must be filed within four months of an alleged violation.[3]

The HHC continues by maintaining that it has taken no action against the Petitioner, purposefully frustrating the statutory rights of the Petitioner, nor has Petitioner alleged any

[3] 61 RCNY §1-07(d) states in pertinent part that, "A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violaiton of of the statute may be filed with the Board within four (4) months thereof ..."

statutory violation, specifically, violations of NYCCBL §12-306(a): Improper practices.[4]

Because no facts have been put forth which would constitute a violation by the HHC of the statutory rights of the Petitioner, unless a claim is established against DC 37 for breach of its duty of fair representation which would require jurisdiction to be maintained over the HHC, it believes that the Petition against the HHC should be dismissed.

DC 37

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[4] HHC specifically refers to NYCCBL §12-306(a)(1), (2), (3) and (4), which states:

> **Improper practices; good faith bargaining.** 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 their rights granted in section 12-305 of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (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;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

DC 37 claims that it did represent Petitioner up to and through the Step III grievance hearing, where it defended Petitioner's right to receive the higher salary promised her by the HHC. The Union argues that, despite an unfavorable determination at that hearing, Petitioner is still receiving the contractually appropriate salary for her title. Having taken Petitioner through the Step III hearing phase, the Union claims it has fulfilled its representative duties and Petitioner has therefore failed to state a cause of action. Moreover, Petitioner has failed to state a claim upon which relief can be granted in that she has not alleged any factual allegations relating to bad faith, hostile, arbitrary or discriminatory conduct on the part of the Union, which must be proved by Petitioner in order to sustain a breach of the duty of fair representation[5], which the Union claims Petitioner has failed to do.

The Union further maintains that it is under no obligation to inform Petitioner of any possible private causes of action, or other methods of recourse available to Petitioner.

DISCUSSION

[5] See, Vaca v. Sipes, 386 US 171, 190 (1967); Civil Service Employees Association, Inc. v. Public Employees Relations Board, 132 AD 2d. 43, aff'd 73 NY 2d. 796 (1988); See also, Decision Nos. B-18-91; B-30-88; B-41-82; B-12-82; B-15-81; B-16-79.

It is apparent that the instant proceeding, initiated on October 10, 1996, was commenced in excess of four months after the Union informed her of its decision not to pursue arbitration on her behalf, by letter dated May 3, 1996. Even if we adopt the date of the first submission to the Office of Collective Bargaining, which was received on September 18, 1996, the Petition would still be untimely. In the absence of any evidence or argument that the Union's letter was received within four months of the filing of the petition herein or that the four month limitation period should be measured from the date of some other subsequent event, we must dismiss the petition as time-barred, pursuant to 61 RCNY §1-07(d). We also note that §1-07(i) of the Rules permits a party, at its option, to submit a reply to a respondent's answer which "shall contain admissions or denials of any additional facts or new matter alleged in the answer."[6] In its answer in the instant matter, respondent HHC raised the issue of the untimeliness of the Petition, but Petitioner did not

[6] 61 RCNY §1-07(i) states in pertinent part that, "Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

submit a reply.[7] In light of the finding of untimeliness, we will not consider the merits of the controversy.

[7] Because Petitioner was acting pro se, she was informed by the Trial Examiner as to her right to Reply to the Answers filed by Respondents, and that factual allegations contained in an Answer are deemed admitted if they are not denied. It was in response to that letter that Petitioner submitted her tele-fax in lieu of a Reply.

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-1864-96 be, and the same hereby is, dismissed.

DATED: February 25, 1997
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

George NIcolau
MEMBER

Daniel C. Collins
MEMBER

Richard A. Wilsker
MEMBER

Carolyn Gentile
MEMBER

Robert H. Bogucki
MEMBER

MEMBER