Urban v. L. 1549, DC 37, Hale, Collazzo, DOT, et al, 59 OCB 20 (BCB 1997) [Decision No. B-20-97 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	DECISION NO. B-20-97
DIANA L. URBAN,	:	DOCKET NO. BCB-1880-96
Petitioner,	:	
-and-	:	
DC 37, LOCAL 1549, MARTHA HALE, GEORGEANN COLLAZZO; N.Y.C. DOT, EILEEN McGUIRK,	:	
	:	
Respondents.		

DECISION AND ORDER

On July 15, 1996, Diana L. Urban ("Petitioner") filed an Improper Practice Petition pursuant to §12-306 of the New York City Collective Bargaining Law ("NYCCBL"), naming the New York City Department of Transportation ("DOT" or "City") and District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union") as Respondents. In her petition, Petitioner did not set forth a statement of the nature of the controversy but instead, referred only to attached documents, which resulted in a determination by the Executive Secretary[1] that the Petition should be dismissed as procedurally

[1] Decision No. B-48-96 (ES), issued on December 4, 1996.

defective, failing to meet the requirements of Title 61, §1-07(e) of the Rules of the City of New York ("RCNY").[2]

Dismissal of the Petition, however, was without prejudice to re-plead, and on December 13, 1996, Petitioner, filed an Amended Improper Practice Petition against Respondents, alleging that she has,

> "been miss represented (sic) and not adequately informed by my union representatives .... during each grievance step. Such as, on April 17, 1996 a step III decision was made by Labor Relations and I was not

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[2] RCNY 61, §1-07(e) provides, in pertinent part, as follows:

> (e) Petition-contents. A petition filed pursuant to §§1-07(b), (c) or (d) shall be verified and shall contain:
>
> (1) The name and address of the petitioner;
> (2) The name and address of the other party (respondent);
> (3) A **statement of the nature of the controversy**, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
> (4) Such additional matters as may be relevant and material. [Emphasis added.]

In Decision No. B-48-96(ES), the Executive Secretary explained that the "statement of the nature of the controversy" referred to in RCNY §1-07(e)(3) above should consist of a clear and concise statement of the facts constituting the alleged improper practice and should include, but not be limited to, the names of the individuals involved in the particular act alleged and the date and place of occurrence of each particular act alleged. The statement may be supported by attachments which are relevant and material but can not consist solely of such attachments.

> notified of the decision until 5/22/96 because of a letter I wrote Martha Hale dated 5/15/96."

On January 17, 1997, the City filed an Answer, and on January 28, 1997, the Union filed its Answer. Petitioner filed a Reply on February 28, 1997.

BACKGROUND

On May 7, 1993, Petitioner filed a Step I grievance with Georgeann Collazzo, her union grievance representative, grieving out of title work.[3] Petitioner appealed the matter to Step III,[4] wherein a decision was rendered on September 19, 1994, which found that, while Petitioner was performing out of title work between May 7, 1993 and December 21, 1993, the salary range minimums for both titles were identical. It was further determined that after December 21, 1993, she was no longer performing out of title duties. Accordingly, the grievance was denied. Petitioner requested and received a transfer to the Route Structure Unit, and began working there on December 22, 1993.

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[3] Petitioner was a Shop Clerk and Technical Support Aide, and claimed that she had been performing the duties of her former supervisor, whose title was Computer Associate. On June 21, 1993, Petitioner submitted the necessary paperwork to the DOT for an upgrade to Technical Support Aide III, a title which she believed to be in keeping with the out of title work she was performing.

[4] The determinations of the Step I & II grievances were not addressed in the pleadings.

A memo, dated October 17, 1994, was issued by Martha Hale, Council Representative, asking the Union to bring this matter to arbitration. However, by memo dated December 22, 1994, the Union's Legal Department recommended that this matter not go to arbitration, as it was not shown by Petitioner that she had continued to perform out of title work.

Petitioner filed a second out of title grievance on April 28, 1995.[5] Again, Petitioner appealed this matter to Step III, and on April 17, 1996, a determination was issued, denying that grievance. The Step III determination was submitted to the Union's Legal Department by the Council Representative for a decision as to whether it should go to arbitration. On May 22, 1996, the Step III decision was sent to Petitioner, and on August 14, 1996, the Union filed a Request for Arbitration on behalf of Petitioner, which was scheduled to be heard on March 17, 1997.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that she has been misrepresented by the Union and has not been adequately apprised of progress during each step of the grievance procedure, since filing her first grievance on May 7, 1993, alleging out of title work. She states

[5] The grievance alleged a violation of Article 6, §1(c) of the Clerical contract, in that, as a Shop Clerk, she was performing the duties of a Technical Support Aide level III.

that, at one point during the pendency of the grievance hearings, she received a call from her grievance representative, asking her if she was aware of a hearing that had been scheduled. Petitioner stated that she was not aware, whereupon she was informed that it did not matter because the hearing had been cancelled. This upset Petitioner because she had been uninformed; had the hearing been held at that time, she would not have been prepared. Petitioner alleges that her representation in the first grievance was further jeopardized because her representative did not arrive until just prior to the commencement of the grievance proceeding. She believes, had the representative arrived earlier, that they could have better prepared, and that she suffered as a result of the lack of preparation. Petitioner claims that this grievance proceeding was further compromised by the fact that she failed to inform her grievance representative as to the nature of the duties she performed with regard to her job description, duties which were consistent with those of Assignment Level III, and it was based on this lack of communication that Petitioner received an unfavorable Step III determination. Petitioner believes that if this grievance had gone to arbitration, she would have prevailed.

On or about February 9, 1994, Petitioner sent a memo to Carlton Hardee, A/Chief, Meter Maintenance, stating that her life was being threatened by a co-worker. At about that same time,

Petitioner states that she informed her grievance representative of the threats, but was told, "it would not be right to start another grievance with one already in the works," referring to the first grievance. Petitioner claims that, on November 22, 1994, as a result of violence done to her by the aforementioned co-worker, she filed a Workers' Compensation claim and took a leave of absence from work.

On March 23, 1995, Petitioner felt obliged to write to her grievance representative, in order to obtain the Step III determination of her original grievance. At that time, she discovered it was issued on September 19, 1994. Again, on May 15, 1996, Petitioner inquired of Martha Hale as to the Step III determination of her second grievance, and learned that it was issued on April 17, 1996.

Respondents' Positions

DOT

The DOT contends that the Petition must be dismissed as it fails to state a cause of action against the DOT. The City maintains that 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 DOT, the Petition against the DOT should be dismissed.

DC 37

The Union claims that Petitioner has failed to state a cause of action which rises to the level of a breach of the duty of fair representation. In both grievances, the Union argues it represented Petitioner up to and through the Step III grievance appeals process.[6] In the first grievance filed by Petitioner, the Union argues, it was decided that that claim lacked merit which would warrant pursuing it to arbitration.[7] The Union points out that the second grievance was submitted for arbitration.

The Union argues that because the Petitioner bears the burden of pleading and proving prohibited conduct on the part of

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[6] The Union states that it further assisted Petitioner in the first grievance with the filing of all required paper work to obtain a promotion to the position of Technical Support Aide III. Due to new hiring procedures directing that only promotions necessary to fill vacancies were to be submitted, the Agency was not permitted to promote Petitioner because there were no vacancies. The Union did not contest this as it was seen as a legitimate exercise of management prerogative.

[7] The Union claims that the Step III determination was unfavorable for Petitioner because she failed to inform her Union representative that she had been transferred to the Route Structure Unit at the time she was alleging out of title work, and that the work she was performing in that Unit was clearly in title.

The determination found that the grievance had two time periods: Period 1: May 7, 1993 - December 21, 1993.
Period 2: December 22, 1993 - September 19, 1994.

During period 1, it was found that Petitioner was performing out of title work commensurate with that of Assignment Level II. During period 2, it was found that she was performing the duties of a Shop Clerk.

the Union, the Petition must fail because it has not been alleged that the Union has engaged in bad faith, or arbitrary or discriminatory conduct. As for the delay in informing Petitioner of the outcome of the Step III hearing, the Union argues that there are no time limits with regard to informing members of the results of grievance hearings, and that it was the result of the Union's internal mechanism of transferring the Step III decision to the Legal Department for review.

DISCUSSION

The allegations in the Petition raise the issue of whether the Union has breached its duty of fair representation with respect to its handling of Petitioner's grievances. The duty of fair representation has been recognized as an obligation on the part of a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[8]

In the area of contract administration, which includes processing employee grievances, it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance a grievance, nor does it breach this duty

[8] Decision Nos. B-8-94, B-44-93, B-29-93 and B-21-93.

because the outcome of a settlement does not satisfy a grievant.[9]

The U.S. Supreme Court determined, in Vaca v. Sipes,[10] that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures . . . If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . . .

The only condition limiting a union's discretion is that a decision not to process a grievance must be made in good faith and in a manner that is neither arbitrary nor discriminatory as to collective bargaining rights under the NYCCBL.[11] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[12] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[13] It

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[9] Decision Nos. B-8-94, B-29-93, B-21-93 and B-27-90.

[10] 386 U.S. 171, 64 LRRM 2369 at 2377 (1967).

[11] Decision No. B-8-94.

[12] Decision Nos. B-21-93, B-35-92 and B-21-92.

[13] Decision Nos. B-21-93, B-35-92 and B-56-90.

is not enough for a petitioner to allege negligence,[14] mistake,[15] or incompetence on the part of the union.[16]

Here, Petitioner alleges that the Union failed to adequately represent her and inform her of the decisions in her grievance proceedings, that she was advised not to commence a second arbitration with one presently unresolved, and that the Union refused to proceed to arbitration in one of her grievances.

We find that the Union herein has not failed in its duty of fair representation. Rather, Petitioner has failed to allege facts which would establish that the Union's handling of the matters were done arbitrarily, in bad faith, or in a way that discriminates against her insofar as her rights under the NYCCBL are concerned.

Petitioner presents no evidence that the Union's pursuit of the first grievance, although perhaps not to Petitioner's satisfaction, and its subsequent failure to proceed to arbitration, was improperly motivated. The Union's counsel

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[14] Decision No. 8-94; see also, Smith v. Sipe, 109 A.D.2d 1034, 487 N.Y.S.2d 153 (3d Dept., 1985), rev'd, 67 N.Y.2d 928, 502 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).

[15] Id.; see, also, Trainosky v. Civil Service Employees Association, Inc., 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).

[16] Id.; see, also, Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dept., 1992).

evaluated the claim and decided that the Union could not succeed. Nor has petitioner presented any evidence which would suggest that the recommendation not to file a grievance "with one already in the works" was improperly motivated.

We also find no actions which rise to the level of bad faith with regard to the time frames involved with informing Petitioner as to the outcome of her grievance hearings. Even if we were to conclude that the Union was remiss in waiting to inform Petitioner of the Step III appeals of her grievance hearings, poor judgment on the part of the Union is not an act which will rise to the level of a breach of the duty of fair representation.[17] In sum, 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. Additionally, for the foregoing reasons, since the DOT was named as a party Respondent to this action pursuant to §209-a(3) of the Taylor Law[18], we dismiss the Improper Practice Petition against it.

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[17] See, Decision Nos. B-31-94, B-8-94, B-29-93, B-32-92, B-51-90, B-12-82.

[18] The Taylor Law §209-a(3) provides,

> 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 or failure to process a claim that the public employer has breached its

(continued...)

As to Petitioner's allegations and submissions pertaining to the substantive issues of out of title work, those are matters outside the purview of this Board; we cannot exercise jurisdiction over alleged violations of a collective bargaining agreement that would not otherwise constitute an improper practice.[19]

Accordingly, the instant improper practice Petition is dismissed in its entirety.

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[18](...continued)
agreement with such employee organization.

[19] See, Decision No. B-59-88.

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-1880-96 be, and the same hereby is, dismissed.

DATED: April 24, 1997
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER

MEMBER