

Walker v. COBA & DOC, 59 OCB 22 (BCB 1997) [Decision No. B-22-97 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding :

-between- : DECISION NO. B-22-97

ROBIN WALKER, : DOCKET NO. BCB-1865-96

Petitioner, :

-and- :

CORRECTION OFFICER'S BENEVOLENT :
ASSOCIATION and N.Y.C. DEPT. OF :
CORRECTION, :

Respondents. :
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DECISION AND ORDER

On October 11, 1996, Robin Walker ("Petitioner") filed an improper practice petition, naming the New York City Department of Corrections ("DOC" or "City") and the Correction Officer's Benevolent Association ("COBA" 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 Secretary¹ that the petition should be dismissed as procedurally defective because it failed to meet the requirements of Title 61,

¹ Decision No. B-47-96 (ES), issued November 29, 1996.

§1-07(e) of the Rules of the City of New York ("RCNY").²

Dismissal of the petition, however, was without prejudice to petitioner's right to re-plead, and on January 13, 1997, Petitioner, filed an amended improper practice petition against respondents, alleging that, (i) the DOC has failed to observe the written procedures pertaining to personnel transfers; (ii) the Union is aware of the failure of the DOC to observe the written procedures pertaining to personnel transfers, and wilfully does nothing about it; and (iii) the Union has failed in its duty of

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.]

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.

fair representation by refusing to pursue Petitioner's grievance.

On February 6, 1997, the Union filed its answer, and on March 5, 1997, the City filed its answer. On March 13, 1997, Petitioner filed a reply.

BACKGROUND

Petitioner, a Corrections Officer currently assigned to the Queens House of Detention for Men ("QHDM"), was appointed to the Department of Correction ("DOC") on March 1, 1990. Between August 2, 1993 and December 3, 1995, Petitioner submitted at least four requests to the DOC to be transferred to the Queens Court Division,³ which went unfulfilled.

Petitioner arranged an interview with the COBA President, Norman Seabrook, on February 2, 1996. She informed him of the DOC's failure to transfer her to the Queens Court Division, despite having more seniority than other Officers who were assigned there, and that this was the result of the allegedly improper practice by the DOC of transferring Officers based on favoritism. Petitioner was allegedly informed that, without a "hook up," i.e. a connection or sympathetic friend at the DOC, she would never get into the Queens Court Division.

³ Petitioner alleges that the Queens Court Division is a preferred command, offering a five day work week, Monday through Friday, with weekends and holidays off and, therefore, a much sought after assignment among Correction Officers.

On June 28, 1996, Petitioner was transferred to the Queens Court Division, and on September 9, 1996, she was transferred back again to the QHDM, ostensibly due to overstaffing at the Queens Court Division.

Petitioner submitted a formal grievance to the COBA on September 20, 1996, claiming that her transfer was in violation of Departmental Rules and Regulations pertaining to intra-departmental transfers.⁴ Petitioner maintains that, despite having more seniority with the DOC than other Correction Officers who were assigned to the Queens Court Division on September 9, 1996, she was transferred out ahead of them. By letter dated September 25, 1996, the Union informed Petitioner that it would not process her claim, stating that the allegations contained therein did not fall within the category of "grievance" as defined in the parties' collective bargaining agreement.⁵

⁴ In her pleadings, Petitioner did not specifically state which Rule or Regulation was violated.

⁵ Article XXI of the parties' collective bargaining agreement, **GRIEVANCE AND ARBITRATION PROCEDURE**, states, in pertinent part,

For the purpose of the this Agreement the term, "grievance" shall mean:

- a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
- b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of

(continued...)

⁵(...continued)

employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters;

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the DOC has failed to adhere to written procedures pertaining to intra-departmental transfers, instead granting said transfers on the basis of favoritism and personal relationships. Petitioner asserts that the written policy states that departmental transfers are to be based on seniority, attendance, tardiness, job record and any pertinent skills possessed by the individual seeking the transfer.

Petitioner claims that, due to her failure to curry favor with the DOC, she was transferred out of the Queens Court Division on September 9, 1996, ahead of others with less seniority than she, in contravention of the aforementioned written policy. Moreover, it is asserted that those less senior Officers at the Queens Court Division who were not transferred, either do not possess, or are not using, special skills in the area in which they work, nor do they have a better attendance or overall job record than she. In addition, Officers with less seniority are working the preferred "5 and 2 rotations," i.e. five days on, two days off, allowing them to accumulate compensatory time, and to have weekends and holidays off. Petitioner alleges that she has made several requests to be transferred back to the Queens Court Division, but these requests

have been denied, despite vacancies arising there.

Petitioner claims that the Union is aware that the DOC regularly engages in the improper practice of transferring Officers out of seniority, but that the Union does nothing about it. In this way, Petitioner views the Union as being in league with the DOC, failing to work for the benefit of the members and allowing the DOC to run roughshod over the Union's members.

Petitioner recognizes that the final transfer selection lies with the Commissioner, but feels the process is being effected in an improper and unfair method, based on favoritism. Petitioner points to the fact that, despite being transferred back to the QHDM for the legitimate reason of overstaffing, Officers have been transferred in and out of the Queens Court Division since September 1996. Thus, as there is allegedly space available at that facility, she should be able to transfer back without difficulty. In her reply, Petitioner claims that she is now being denied a transfer in retaliation for her filing the instant Petition and speaking out against alleged inequities.

Lastly, Petitioner claims that she requested an interview with Division Chief, Edward Reilly, on September 26, 1996, in an effort to rectify this situation. She states that she was denied the opportunity to speak with him by Assistant Deputy Warden Parson, who was assigned to the Chief's Office at that time, and this was done in an effort to thwart her attempts to seek redress

for the alleged "improper practice" of transferring Officers in abrogation of the written regulations.

Respondents' Positions

DOC

The DOC contends that the Petition must be dismissed because (i) it fails to state a cause of action against the DOC pursuant to City of Salamanca⁶; (ii) the allegations are speculative and conclusory⁷; and (iii) the "right to assign, reassign and transfer employees falls within the scope of management rights under the [New York City Collective Bargaining Law] NYCCBL."⁸

COBA

_____The Union claims that Petitioner has failed to state a cause of action against it for breach of the duty of fair representation. It states that on September 20, 1996, the COBA Corresponding Secretary, Guy Anderson, received a proposed grievance from Petitioner, alleging that the DOC followed a practice of transferring Officers not in order of seniority, and

⁶ 18 PERB 3012 (1985). The City points out that the Salamanca test requires that Petitioner meet the burden of making made out a prima facie case of improper practice, showing that: 1) the employer's agent responsible for the discriminatory act had knowledge of the employee's union activity; 2) the employee's union activity was a motivating factor for the employer's discriminatory acts.

⁷ The City cites Decision Nos. B-24-90; B-28-89; B-28-86.

⁸ The City cites Decision No. B-47-88.

that that was in violation of Rules and Regulations governing intra-departmental transfers. After careful review, the Union determined that the transfer being grieved therein would be considered an exercise of the DOC's management rights, pursuant to NYCCBL §12-307(b). According to the Union, the only work assignment limitations in the parties' collective bargaining agreement are the "Recall after Tour" and "Hours and Overtime" sections; it contains no provision limiting management's right to transfer Officers. The Union concedes that the collective bargaining agreement does contain a provision which deals with seniority, however, the agreement expressly excludes disputes relating to the filling of vacancies based on seniority from the grievance procedure.⁹

The Union also asserts that Petitioner has failed to allege facts which would sustain any improper practice charge pursuant to NYCCBL §12-306(b). It states that there has been no allegation of Union interference with respect to Petitioner's

⁹ Article XV of the parties' collective bargaining agreement states,

SENIORITY

The Department recognizes the importance of seniority in filling vacancies within a command and shall make every effort to adhere to this policy, providing the senior applicant has the ability and qualifications to perform the work involved. While consultation on such matters is permissible, the final decision of the Department shall not be subject to the grievance procedure.

right to participate, or not, in collective bargaining activities.

Lastly, the Union states that Petitioner's claims are "vague, speculative and conclusory," and that the statute of limitations bars any claim by Petitioner against the COBA with respect to her requests to be transferred to the Queens Court Division, made prior to June 28, 1996, the date she was reassigned to the Queens Court Division.

DISCUSSION

At the outset, we will address the allegations which raise the issue of whether the Union has breached its duty of fair representation with respect to the handling of Petitioner's grievance regarding transfers within the DOC. 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.¹⁰

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

¹⁰ Decision Nos. B-8-94, B-44-93, B-29-93 and B-21-93.

refuses to advance a grievance.¹¹ The U.S. Supreme Court determined, in Vaca v. Sipes,¹² 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

A union does not breach its duty of fair representation merely by refusing to advance a grievance, nor does it breach this duty because the outcome of a settlement does not satisfy a grievant.¹³ 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. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,¹⁴ but the burden is on the petitioner to plead and prove that the union has engaged

¹¹ Decision Nos. B-8-94, B-29-93, B-21-93 and B-27-90.

¹² 386 U.S. 171, 64 LRRM 2369 at 2377 (1967).

¹³ Decision Nos. B-8-94, B-29-93 and B-21-93.

¹⁴ Decision Nos. B-21-93, B-35-92 and B-21-92.

in such conduct.¹⁵ It is not enough for a petitioner to allege negligence,¹⁶ mistake,¹⁷ or incompetence on the part of the union.¹⁸

We find that Petitioner has failed to allege facts which would establish that the Union's handling of the matter was done arbitrarily, in bad faith, or in a way that discriminates against her insofar as her rights under the NYCCBL are concerned. Nor has Petitioner presented evidence that the Union's decision not to pursue her grievance was improperly motivated, within the meaning of the NYCCBL. The grievance was reviewed by Corresponding Secretary Anderson, who, under the parties' collective bargaining agreement, determined that this matter was not grievable. Moreover, we note that Petitioner has failed to identify what rule or regulation of the DOC has been violated by the agency's transfer actions. For the foregoing reasons, the improper practice petition against the Union is dismissed in its

¹⁵ Decision Nos. B-21-93, B-35-92 and B-56-90.

¹⁶ 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).

¹⁷ 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).

¹⁸ Id.; see, also, Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dept., 1992).

entirety. Thus, we will not address the merits of the remaining defenses raised by the Union.

As for the claim against the DOC, we find that the Petitioner has not established a prima facie case of improper public employer practice. Petitioner has not shown a causal connection between the DOC's alleged failure to reassign her and protected activity. While Petitioner alleges retaliation for filing a grievance in the instant improper practice petition, conclusory allegations, without more, cannot sustain a claim of improper practice against the DOC. Indeed, throughout Petitioner's travails, the DOC has acted consistently: it has not transferred Petitioner to her preferred assignments as quickly as Petitioner would have liked, either before or after her filing of the instant improper practice petition. We therefore find that Petitioner has failed to establish any causal connection between protected activity and the DOC's failure to comply with her request to be returned to the Queen's Court Division. The record as to the retaliation is thus confined to conclusory allegations based upon Petitioner's speculations. In the absence of any probative evidence indicating that the failure of Petitioner to be transferred back to the Queens Court Division was in reprisal for her having complained to her Union and filing a grievance and improper practice petition, the DOC cannot be found guilty of retaliating against Petitioner for engaging in

protected activity in this matter.

As for Petitioner's assertions that the policy regarding transfers followed by the DOC is violative of "Rules and Regulations," and that she was denied an interview with Division Chief, Edward Reilly, in abrogation of the written regulations, we dismiss that portion of her claim. In the absence of evidence of improper motive under NYCCBL §12-306, i.e. anti-union animus, or retaliation against protected activity, there can be no improper practice.

Accordingly, the instant improper practice petition is 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 improper practice petition docketed as BCB-1865-96 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 14, 1997

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Richard A. Wilsker
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

MEMBER