

Borgese v. PBA, HPD & City, 59 OCB 34 (BCB 1997) [Decision No. B-34-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper :
Practice Proceedings :
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 - between - :
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 Dorothy Borgese, :
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 Petitioner, : Decision No. B-34-97
 : Docket No. BCB-1766-95
 - and - :
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 Police Benevolent Association, :
 Inc., Housing Police Department, :
 City of New York, and the :
 Patrolmen's Benevolent Association :
 of the City of New York, :
 :
 Respondents. :
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In the Matter of the Improper :
Practice Proceedings :
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 - between - :
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 Peter Thron, :
 :
 Petitioner, :
 : Docket No. BCB-1767-95
 - and - :
 :
 Police Benevolent Association, :
 Inc., Housing Police Department, :
 City of New York, and the :
 Patrolmen's Benevolent Association :
 of the City of New York, :
 :
 Respondents. :
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DECISION AND ORDER

On July 3, 1995, Dorothy Borgese filed an improper practice petition docketed as No. BCB-1766-95 and Peter Thron filed an

improper practice petition docketed as No. BCB-1767-95.¹ Borgese and Thron ("petitioners") alleged that the Police Benevolent Association of the Housing Police Department ("Housing PBA") breached the duty of fair representation owed to them.

Thron asserted that the Housing PBA failed to represent him adequately in disciplinary and criminal proceedings, resulting in the loss of six days' pay. Borgese alleged that the Housing PBA failed to process her claims of harassment and lost pay.

Both petitions also named the Patrolmen's Benevolent Association of the City of New York ("PBA") as a respondent. They asked that the PBA, which now represents the former Housing Authority Police, be held liable for the violations committed by the Housing PBA. As a remedy, they seek restitution of an unspecified amount of union dues and personal leave time.

On July 26, 1995, the Housing PBA filed an answer. On August 9, 1995, the PBA filed an answer. By letters dated August 9, 1995, August 24, 1995 and September 28, 1995, Borgese requested extensions to file replies in both cases, saying that her requests for copies of the By-Laws from both of the respondents' attorneys had not been answered.

By letter dated January 12, 1996, Borgese asked the Office of Collective Bargaining ("OCB") to help her obtain the By-Laws.

¹ Thron and Borgese live together as domestic partners with their two children. Although they filed separate petitions, they refer to each others' claims in some of their pleadings.

By letter dated February 20, the attorney for the PBA told Borgese that he would send her copies of the By-Laws.

Unverified replies filed by the petitioners on March 25, 1996 were returned to them. They filed verified replies on April 12, 1996.

At a pre-hearing conference on September 30, 1996, the Housing PBA asked to be allowed to file the instant motions to dismiss, which were filed on October 25, 1996. Borgese filed an answer to the motion to dismiss on December 6, 1996. The PBA did not respond to the Housing PBA's motion to dismiss.

Background

On April 30, 1995, the Housing Authority Police force merged with the New York City Police Department ("NYPD") and former Housing Authority officers became members of the NYPD. As a result, the PBA became the representative of the former Housing Authority officers and the Housing PBA ceased to represent them.

The petitioners were members of the New York City Housing Authority Police force and of the Housing PBA. After the merger, Borgese became a member of the NYPD.² Thron was terminated from his position as a Housing Authority Police Officer on May 24, 1995 and did not become a member of the NYPD.

The events on which Borgese bases her claims began in 1994

² There is no dispute that the PBA has represented Borgese in some claims since May 1995.

and continued into May of 1995. She alleges that the Housing PBA failed properly to address her claims of harassment, which were allegedly intended to force her to transfer, and that it did not respond to her telephone calls and letters. She asserts that the Housing PBA's failure resulted in the loss of personal leave days and that she was ordered to return from maternity leave too early. She also maintains that the Housing PBA failed to help her in matters relating to her health care plan. Borgese claims that "matters after 4/30 were in limbo because members did not know who to call and when the HAPBA were called they addressed themselves as Housing Police PBA."

Thron maintains that the Housing PBA promised, but failed, to refer him to the Employee Assistance Program in early 1994 and to get him a transfer in late 1994. In addition, he contends, the Housing PBA did not help him when, as he alleges, he was forced to admit to departmental disciplinary charges.

Thron also asserts that after promising to be "behind him all the way," the Housing PBA failed adequately to represent him during criminal court proceedings on May 23, 1995. According to Thron, a Housing PBA representative who was present at Thron's arraignment appeared in shorts and a T-shirt, read Soldier of Fortune magazine, insulted people in the courthouse, and asked the petitioners how to perform his responsibilities as Thron's representative. Although the Housing PBA promised to represent him at other proceedings in March, April and May of 1995, Thron

alleges, no representative appeared.

Positions of the Parties

Petitioners' Position

Thron argues that the Housing PBA denied him promised representation during his criminal proceedings and failed properly to address his other work-related complaints, resulting in the loss of six leave days. The Housing PBA also allegedly failed to address Borgese's complaints concerning pregnancy-related harassment, reassignment, and problems with her health care benefits, resulting in lost leave days. In addition, Borgese contends that the Housing PBA failed to represent her fairly, impartially, and non-arbitrarily in the negotiation, administration, and enforcement of the collective bargaining agreement.

The petitioners request the return of an unspecified amount of union dues, because they maintain that the services for which they paid were not provided. They ask that the PBA, which currently represents the former Housing Authority Police, be held accountable for remedying the violations of its predecessor, the Housing PBA.

The Housing PBA's Position

The Housing PBA claims that the petitioners have not stated

claims upon which relief can be granted under the statute. It contends that there have been no contract violations and, therefore, it had no obligation to represent the petitioners.

The Housing PBA maintains that the Board lacks jurisdiction over alleged violations of the Housing PBA constitution, which are internal union matters. Moreover, it contends, resolving a disciplinary matter by accepting a six-day fine is neither protected by contract nor within the jurisdiction of the Board.

The Housing PBA argues that the petitioners' claims are time-barred. It claims that none of the petitioners' complaints are ongoing matters, and all have dates and time periods that are well before March 4, 1995, the date on which the statutory limitations period began. It also maintains that the allegations are time-barred because "none of the claims of complaints alleged by [the petitioners] in the instant matter after April 29, 1995, can be asserted against the Housing PBA as the Housing PBA was no longer the petitioner[s'] collective bargaining agent nor employee organization for the purposes stated in the instant matter."

Thron's requested remedies may not be granted by the Board, the Housing PBA asserts. It is well-established, it maintains, that the return of dues is an internal union matter which is beyond the scope of the Board's jurisdiction. In addition, it says, there is no right under the statute to a remedy for pain and suffering.

The Housing PBA claims that the petitioners have not shown that its acts were improperly motivated, irresponsible or grossly negligent. In fact, it asserts, it represented the petitioner in the same manner as it represented other unit members.

PBA's Position

_____The PBA maintains that the petitioner's claims should be denied for failure to state a cause of action. In addition, it asserts, the petitioners' claims were not timely filed, and therefore should be denied.

The PBA asserts that the petitioners have failed to establish that they ever refused to provide Thron with representation or that he was, in fact, entitled to such representation. As well, the PBA alleges that Borgese was provided with proper representation once she became a New York City Police Officer.

The petitioners, allege the PBA, have failed to establish that the action by the respondent was, in any way, arbitrary, discriminatory or improperly motivated. In addition, the PBA argues, the petitioners request relief for events which occurred before the respondents began representing the petitioners. The PBA also argues adds that returning union dues is beyond the scope of the Board's authority.

The PBA maintains that the petitioners have not specified provisions of the statute, executive order or collective

bargaining agreement that have been violated. It also claims that the petitioners have failed to allege complaints which involve activities of the respondent relating to the negotiation, administration or enforcement of the collective bargaining agreement.

Discussion

The Unions argue that the Petitioners' claims were untimely. Before considering the timeliness of the claims, we will determine whether any of the allegations constitute an arguable claim of a breach of the duty of fair representation.

The Supreme Court, in Vaca v. Sipes³, defined the duty of fair representation as:

the exclusive agent's ... statutory obligation to serve the interest of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.⁴

The duty of fair representation concerns only the negotiation, administration and enforcement of a collective bargaining agreement.⁵ Unlike federal laws that protect the rights of union members in the private sector, neither the NYCCBL nor the Taylor law regulate the internal affairs of unions. They mandate only that we administer and enforce procedures designed

³ 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed.2d 842 (1967).

⁴ Vaca, at 177.

⁵ Decision Nos. B-23-94; B-44-93; B-29-93; B-15-93; B-21-92; B-53-89; B-59-88; B-14-83.

to safeguard employee rights under the Collective Bargaining Law.⁶

The petitioners have not identified any rights under the collective bargaining agreement that they claim have been violated, and have relied solely on the union's By-Laws⁷ to substantiate their claims. If a union voluntarily elects to provide a service which it is not statutorily or contractually required to provide, the Union assumes a duty of fair representation for all of its members that are similarly situated.⁸ The decision to deny that service to a unit employee may breach that duty if the union's refusal was arbitrary, discriminatory, or made in bad faith.⁹ However, the petitioners here did not allege that the Unions made it a practice to consistently or perhaps ever represent other employees in similar circumstances pursuant to those By-Laws, and, even if so, that those others were represented in any different manner than Thron or Borgese.

To have grounds for a claim of a breach of the duty of fair representation, the petitioners must first prove that it was a common practice of the union to carry out those By-Laws in

⁶ Decision Nos. B-24-94; B-21-93; B-59-88.

⁷ This Board was not furnished a copy of the Unions' By-Laws.

⁸ Decision No. B-11-87.

⁹ Decision Nos. B-11-87; B-23-94.

question. It is not enough for a petitioner to allege a union's arbitrary or hostile behavior if it relates only to issues that are not part of the collective bargaining agreement. Without such a showing of discriminatory action, these claims do not rise to the level of a breach of the duty of fair representation.¹⁰ Accordingly, the improper practice petitions are dismissed in their entirety.

DECISION AND 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 petitions docketed as BCB-1766-95 and BCB-1767-95 be, and the same hereby are, dismissed.

Dated: New York, New York
July 31, 1997

STEVEN C. DECOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

DENNISON YOUNG, JR.
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

¹⁰ Decision Nos. B-11-97; B-23-94; B-34-86.

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