Vega v. Morgan, DC 37, Stein, Dep't of Parks & City, 59 OCB 35 (BCB 1997) [Decision No. B-35-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:
--between--	:
JUAN VEGA, Pro Se, Petitioner,	: DECISION NO. B-35-97 : DOCKET NO. BCB-1736-95 DOCKET NO. BCB-1740-95
--and--	:
MARION MORGAN, Council Representative District Council 37, AFSCME, AFL-CIO, and PETER STEIN, City of New York Department of Parks and Recreation, and the City of New York,	:
Respondents.	:

DECISION AND ORDER

On March 23, 1995, Juan Vega ("Petitioner"), appearing pro se, filed a verified improper practice petition, docketed as BCB-1736-95, against Marion Morgan ("Morgan"), Council Representative for District Council 37. In it, Petitioner alleges that Morgan failed to represent him fairly by failing to inform him of the outcome of a Step III grievance and the status of his request that the Union seek arbitration.

On April 5, 1995, Petitioner filed a verified improper practice petition, docketed as BCB-1740-95, against Peter Stein, Lifeguard Coordinator ("Stein"), employed by the City of New York Department of Parks and Recreation ("Department"). In this petition, Petitioner alleges that Stein, who was both Petitioner's supervisor and the President of Local 508, District

Council 37, AFL-CIO ("Union"), had a "conflict of interest" in the underlying grievance, which assertedly constituted an improper practice. He also alleges that the Department improperly failed to notify him that his leave balance was exhausted and that he faced discharge.

The Office of Labor Relations ("OLR"), representing Respondent Stein and the Department, filed a verified answer on June 1, 1995, regarding the petition docketed as BCB-1740-95. Advised by the General Counsel of the Office of Collective Bargaining that the two petitions would be consolidated, OLR filed an amended verified answer on June 13, 1995, addressing both BCB-1736-95 and BCB-1740-95. After requesting and receiving two mutually agreed-upon extensions, District Council 37 submitted a verified answer to both BCB-1736-95 and BCB-1740-95 on June 23, 1995. The Petitioner filed no Reply.

BACKGROUND

At all relevant times Petitioner was employed by the New York City Department of Parks and Recreation in the civil service title Chief Lifeguard, in a Lieutenant Lifeguard detail. Petitioner was also a member of the Union's Local 508. The terms and conditions of Petitioner's employment were described by a collective bargaining agreement ("seasonal agreement") for the period from January 1, 1992 to March 31, 1995.

On December 1, 1993, Petitioner allegedly injured his back in a non-employment-related accident. Due to the injury, Petitioner did not work from that date to April 11, 1994. During this period, Petitioner alleges he maintained contact with the Department, and obtained the required medical documentation to satisfy Department regulations.

Petitioner informed the Department that he was willing and able to return to work on April 11, 1994, and that he could furnish a doctor's note to that effect. Petitioner was informed by the Department personnel office that he should report on that day for reevaluation. At the appointed time, Petitioner was informed that he need not bother to be reevaluated since there was no longer a Chief Lifeguard position available, as his position had been filled by a new appointee.

On April 29, 1994, Petitioner met with Marion Morgan, Council Representative. After the meeting, Morgan filed for a Step I grievance hearing on Petitioner's behalf, alleging a violation of Article XXIII, Section 9, of the collective bargaining agreement, which reads in pertinent part:

> After a Lifeguard, or Chief Lifeguard . . . has exhausted all leave balances, DPR will protect the employee's assignment up to and including two weeks provided the employee who is unable to report to duty as scheduled as a result of job-incurred injury or personal illness has notified the employee's Borough Office of such inability not less than one hour prior to the time the employee was scheduled to report. The employee must fill out leave of absence forms. Doctor lines may be waived if the illness is

less than three days.

Petitioner specifically complained that his position was wrongfully re-assigned even though he produced "doctor's lines." The Department did not respond to the Step I grievance request.

On July 22, 1994, Morgan requested a Step II grievance hearing for Petitioner. The hearing was held on August 1, 1994. Morgan argued on behalf of Petitioner for his reinstatement. On August 8, the hearing officer issued the Step II determination. He found that Petitioner had exhausted his leave time on March 5, 1994, and that since Petitioner's attempt to return to work was more than two weeks after the exhaustion of his leave balances, the Department did not have a duty to rehire Petitioner at his prior level of seniority and wages.

Upon receipt of the Step II determination, Morgan filed a request for a Step III hearing on August 10, 1994. Morgan again represented Petitioner at the hearing held on November 29, 1994. The Step III determination, received by the Union on December 19, 1994, also denied the grievance.

After receiving the Step III decision, Morgan requested that the Union's Legal Department review the file to determine whether to pursue the grievance at arbitration. On December 22, 1994, the Union's Legal Department by memo recommended against arbitration. Morgan received the recommendation on December 28, 1994. On that same day, Morgan forwarded a packet of information

to Petitioner by certified mail. The packet included the Legal Department's recommendation, Morgan's request that the Legal Department review Petitioner's file, the Step III decision, the Step II decision, the request for the Step II hearing, and the request for the Step I hearing. It is uncontroverted that Petitioner signed for the packet upon receipt. At no time did the Petitioner complain about Morgan's representation. It is also undisputed that at no point did Respondent Stein have any control over the re-assignment of Petitioner's job or the manner in which his grievance was processed by the Union.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union committed an improper practice by (i) allowing Stein to hold a position that assertedly created a conflict of interest to Petitioner's detriment, and (ii) by Morgan's alleged failure to inform Petitioner of the outcome of the Step III hearing and his request for arbitration.

Petitioner also alleges that the Department's actions were an improper practice by failing to give him notice that his leave balances were exhausted and that that exhaustion had serious implications for the terms and conditions of his employment.

Union's Position

The Union argues that Petitioner has failed to state a claim of a breach of the duty of fair representation under §12-306(b)(1) of the New York City Collective Bargaining Law ("NYCCBL").[1] Alternatively, it argues that in the negotiation, administration, and enforcement of the applicable collective bargaining agreement, Petitioner has failed to specify any discriminatory, arbitrary, or bad faith conduct on the part of the Union or its agents in his Step II and Step III hearings.

As to Petitioner's only other allegation, i.e., failure to notify him of the outcome of the Step III grievance hearing, the Union asserts that, while it did in fact notify him, even if it had not, failure to notify was not arbitrary, discriminatory, or in bad faith and therefore does not constitute a breach of the duty of fair representation.

The Union concluded its arguments with an assertion that the Petitioner's allegations were wholly conclusory and "devoid of any facts which would support a finding that the Union or its agents committed an improper practice."

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[1] Section 12-306(b) of the NYCCBL states, in relevant part:

> b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in Sec. 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so....

Department's Position

The Department argues that since Petitioner was given notice of his employment termination on April 11, 1994, the statute of limitations for such a claim expired on August 11, 1994, four months after the incident and therefore Petitioner's claims are time-barred. In the alternative, the Department also argues that Petitioner has failed to allege facts sufficient to constitute an improper practice under §12-306(a) of the NYCCBL.[2] It argues that Petitioner has failed to sustain his burden of demonstrating that Respondents violated a statute, executive order or collective bargaining agreement. The Department points out that Petitioner has failed to show that the loss of assignment was the result of his participation in protected activity.

As to Petitioner's claim that he did not receive advance warning of his exhausted leave benefits and of his dismissal two

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[2] NYCCBL Sec. 12-306 provides, in relevant part, as follows:

> 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;
> ***
> (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....

weeks after the exhaustion of benefits, the Department argues that adequate notice is a matter of contract interpretation not within this Board's jurisdiction.

As to the claim that Respondent Stein has a conflicting role in both the Department and the Union, the Department argues that Stein's dual role is not improper for two reasons: (i) Petitioner has failed to allege any facts which would demonstrate that Stein had acted improperly, and, (ii) Stein's dual role, in the Department's view, cannot, per se, amount to an improper practice since a holding to that effect would destroy multi-level certification of bargaining units, a policy which the Department contends would be contrary to the intent of the drafters of the NYCCBL.

DISCUSSION

In the petition docketed as BCB-1736-95, the Petitioner claims the Union committed an improper practice by, in Petitioner's view, breaching the Union's duty of fair representation in the course of pursuing a contractual grievance alleging wrongful termination. Specifically, the Petitioner contends that the Union failed to keep him informed of the progress of his claim at Step III and and declined to pursue the grievance at arbitration. In the petition docketed as BCB-1740-95, the Petitioner claims the Department committed an improper practice by not holding his position while he was absent due to

injury.

As a preliminary matter, the instant petitions have been consolidated for decision, because they are based on the same facts, involve the same incidents, were brought by the same petitioner, and challenge the actions of both respondents in the same process which led to termination of his employment.[3] In any event, with respect to the claim against the Union, we would have required the Department to be joined as a necessary party pursuant to the requirements of Section 209-a(3) of the Civil Service Law ("the Taylor Law").[4]

The United States Supreme Court recognized the duty of fair representation when it held that where a union is the exclusive bargaining agent for a unit, it has a correlative duty to treat all members fairly.[5] The criterion for deciding whether a union has breached that duty is a determination that the union's

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[3] See Decision Nos. B-45-95, B-15-93, B-6-91.

[4] The Civil Service Law, Section 209-a(3), provides, in pertinent part, as follows:

> The public employer shall be made 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.

[5] Steel v. Louisville & Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Vaca v. Sipes, 386 U.S. 171 (1967).

actions were "arbitrary, discriminatory, or in bad faith."[6] Mere negligence on the part of a union is insufficient to demonstrate a breach of the duty of fair representation.[7] The scope of this duty extends to the negotiation, administration, and enforcement of collective bargaining agreements.[8] Under the rubric of enforcement of collective bargaining agreements fall grievance procedures and the duty to inform.[9] Therefore, the claim against the Union in the instant proceeding is assertedly a claim of breach of the Union's duty of fair representation.

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 because the outcome of a settlement does not satisfy a grievant.[10] The U.S. Supreme Court determined, in Vaca v. Sipes, 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

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[6] Vaca v. Sipes, 386 US 171, 64 LRRM 2369 (1967)

[7] See Decision Nos. B-11-95, B-8-94, B-21-93, B-21-92.

[8] Decision Nos. B-20-97, B-8-94, B-44-93, B-92-93.

[9] See Decision Nos. B-20-97, B-31-94, B-51-90, B-42-87.

[10] Decision Nos. B-20-97, B-8-94, B-29-93, B-21-93.

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

In the instant proceedings, the Petitioner alleges that the Union failed adequately to represent him due to the alleged

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[11] Decision Nos. B-20-97, B-8-94.

[12] Decision Nos. B-20-97, B-21-93, B-35-92.

[13] Decision Nos. B-20-97, B-21-93, B-35-92.

[14] Decision Nos. B-20-97, B-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).

[15] Id.

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

conflict of interest of Stein and failed to inform him of the outcome of his Step III grievance hearing. However, Petitioner does not deny any of the following assertions: Union Representative Morgan filed for a Step I hearing on Petitioner's behalf, filed for a Step II hearing, represented the Petitioner at the Step II hearing, appealed the Step II determination at Step III, again represented Petitioner at Step III, and asked the Legal Department of the Union to investigate whether the grievance should proceed to arbitration when it was denied at Step III. When the Legal Department recommended against arbitration, Morgan communicated a history of the proceedings, including the determination of the Step III hearing officer and the Legal Department's recommendation to the Petitioner by certified mail.

As Petitioner did not file a reply, facts alleged by the Union and the Department in their answers have been deemed admitted as true.[17] Thus, the Union's evidence that it acted in good faith on the Petitioner's behalf by processing his grievance to Step III and in keeping Petitioner informed of the progress of the grievance is undisputed. Even if we were to conclude that the Union was somehow remiss in its duty to inform Petitioner of

[17] See Decision Nos. B-17-94, B-23-87.

the outcome of his grievance,[18] 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.[19] We, therefore, find that Petitioner has not met his burden of demonstrating any violative conduct on the part of the Union.

As for the allegation that Peter Stein, Petitioner's supervisor and the President of Local 508, had a conflict of interest in the processing of Petitioner's grievance, both the Union and the Department allege in their unrefuted answers (i) that Stein did not have any control over the decision not to reinstate Petitioner and (ii) that Stein did not have any direct control or indirect influence over the grievance process. The Union further alleges, without contradiction by Petitioner, that Stein never interfered nor took interest in Petitioner's grievance. We, therefore, find that Petitioner has not met his burden of demonstrating any violative conduct on the part of Peter Stein as an agent of either the Union or the Department.

As we have found the Union to have violated no duty with

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[18] We note that the Union received notice of the Step III determination on December 19, 1994, requested an opinion of its legal counsel on December 22, 1994, and informed Petitioner on December 28, 1994, of the recommendation of legal counsel not to pursue arbitration, all in a period of less than ten days.

[19] See Decision Nos. B-20-97, B-31-94, B-8-94, B-29-93, B-32-92, B-51-90, B-12-82.

respect to the enforcement of the applicable collective bargaining agreement, Petitioner's allegations that the Department breached the seasonal agreement by lack of notice of his dismissal is a matter of contract interpretation which is beyond the jurisdiction of this Board, pursuant to Section 205.5(d) of the Taylor Law,[20] and controlling precedent.[21]

Accordingly, for the above mentioned reasons, the instant improper practice petitions are dismissed in their 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 petitions docketed as BCB-1736-95 and BCB-1740-95 be, and the same hereby are, dismissed.

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[20] Section 205.5(d) of the Taylor Law provides, in pertinent part, as follows:

> [PERB] shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[21] See, e.g., Decision Nos. B-8-96 and B-53-89.

Dated: New York, New York
July 31, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

DENNISON YOUNG, Jr.
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER