Flood & Albrecht v. NYSNA & HHC, 59 OCB 5 (BCB 1997) [Decision No. B-5-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	DECISION NO. B-5-97
RENEE FLOOD and BARBARA ALBRECHT,	:	DOCKET NO. BCB-1848-96
Petitioners,	:	
-and-	:	
NYSNA and HEALTH & HOSPITALS CORP.,	:	
Respondents.	:	

DECISION AND ORDER

On July 22, 1996, Renee Flood and Barbara Albrecht, Petitioners pro se, filed a verified improper practice petition against the New York State Nurses Association ("NYSNA" or the "Union") and against the New York City Health and Hospitals Corporation (the "HHC" or the "Corporation"). The petition was amended on August 7, 1996. Petitioners allege that the Corporation terminated their employment improperly because it did not abide by contractual seniority provisions during a June 1996 layoff of registered nurses, and implies that the NYSNA did not defend them, in violation of the statutory rights of employees under § 2-306 of the New York City Collective Bargaining Law ("NYCCBL").[1]

[1] NYCCBL §12-306 provides, in pertinent part, as follows:

> **Improper practices; good faith bargaining.**
> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:

(continued...)

The Union filed an answer and motion to dismiss the improper practice petition on August 12, 1996. The HHC, appearing by its Labor Relations Counsel, filed an answer and a motion for summary judgment on August 30, 1996. The Petitioners filed a reply on September 30, 1996. By letter dated October 3, 1996, the HHC requested that the Board rule on both motions together, or, in the alternative, that it be allowed to join in the Union's motion to dismiss the petition.

(...continued)

> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representa-tive of public employees of such employer.

NYCCBL §12-305 provides, in pertinent part, as follows:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all such activities. * * * A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

BACKGROUND

Nurse Referrals, Inc. ("NRI") was an HHC subsidiary, incorporated to provide registry nurses to hospitals and health service centers of the Corporation as needed. In 1984, Petitioners, both Registered Nurses, registered with NRI to work at HHC facilities. Nurses working through NRI received no benefits other than straight compensation for work performed. Payroll deductions were not taken from their paychecks, and, at the end of each year, they received IRS 1099 Miscellaneous Income tax forms from the Corporation instead of IRS W-2 Wages forms, which regular staff employees receive. Petitioner Flood worked exclusively as a registry nurse from 1984 through 1993, averaging about 35 hours per week; Petitioner Albrecht worked exclusively for the registry from 1984 through 1991, averaging about 20 hours per week.

In 1992, NRI began reducing its complement of registry nurses. Both Petitioners applied for staff positions at Jacobi Medical Center, an HHC facility, where they sought regular employment. In early Spring, 1993, the Petitioners were offered and accepted positions as staff nurses at Jacobi.

In 1996, budgetary reductions forced the Corporation to order a system-wide reduction in its regular workforce. It was up to individual HHC facilities to decide the titles and numbers of employees on staff to be separated, according to an inverse seniority layoff formula consistent with corporate personnel rules and union contract restrictions. In Jacobi's case, management decided to dismiss nurses whose date of hire with HHC began after January 1, 1993. The Petitioners' lack of seniority as HHC staff employees

exposed them to the reduction in force, and, in June, 1996, their employment was discontinued.

Positions of the Parties

Petitioners' Position

The Petitioners maintain that per diem employees of NRI actually were bona fide employees of the Corporation, and thus should be entitled to full seniority credit for the time that they worked through the registry. They support their claim with evidence including picture I.D. cards, which refer to NRI as "a subsidiary (not registry) of HHC"; the Bronx Municipal Hospital Handbook, which states that NRI is one of two subsidiaries owned by the Corporation; corporate pay stubs, which show that per diem nurses' salaries were paid out of Corporation funds; and IRS 1099 Miscellaneous Income forms issued by the HHC. They also note that work assignments and scheduling was done by Jacobi Hospital, and not at the offices of NRI. In the Petitioners' view, per diem nurses who worked in the same unit at the same hospital, and who were subject to Corporation rules and regulations for nine years, cannot be independent contractors, as Respondents argue. They ask to be granted employee status for the years 1984 through 1993, and to be reinstated as staff nurses at Jacobi Hospital.

NYSNA's Position

According to the Union, nurses who worked through NRI were considered "agency nurses" and not Corporation employees. It points out that the Association never represented these nurses during their NRI affiliation, nor

were they ever covered by the collective bargaining agreements between the HHC and the NYSNA. In support of this position, the Union cites two disciplinary arbitration cases where both arbitrators viewed infractions allegedly committed by HHC nurses while they were working through NRI as "off-duty misconduct." The Union further points out that NRI nurses did not pay NYSNA membership dues or agency shop fees; they did not receive health insurance benefits or participate in the public employees' retirement system; and they were not covered by the Union's welfare plan. In addition, NRI nurses had no monies withheld from their pay for federal, state and local income taxes or social security, and were issued IRS 1099 miscellaneous income tax forms instead of W-2 employment income tax forms. Finally, the Union notes that NRI nurses were never listed among the titles represented by the Union in the recognition article in the HHC-NYSNA collective bargaining agreement. According to Union records, Petitioner Albrecht's first agency shop deduction occurred effective February 26, 1993, and Petitioner Flood's first deduction occurred effective March 12, 1993, corresponding to the commencement of their employment as HHC staff nurses at Jacobi.

In the Union's view, this Board lacks jurisdiction to decide the instant dispute. It contends that the issue raised by the Petitioners involves their original appointment date as Corporation employees, which requires the application and interpretation of HHC personnel rules and regulations. The Union maintains that application of these rules is solely within the jurisdiction of the Corporation's Personnel Review Board.

Health and Hospital Corporation's Position

The HHC asserts similar grounds in moving for a dismissal of the Petitioners' claim. It contends that all nurses who registered with NRI were required to sign a "Confirmation of Status" form, which reads as follows:

> This will confirm my understanding that any work I perform through referral by HHC Nurse Referrals, Inc. (NRI), I will perform in the capacity of Independent Contractor. I accept that no deduction and/or payment for Income Tax, Social Security, Unemployment Insurance or similar items will be made by NRI on my behalf. I understand my full responsibility for these obligations. I also understand that NRI will issue an IRS 1099 form to me at the end of each calendar year, as required by law.

According to the Corporation, Petitioners, as registry nurses, were not employees between 1984 and 1993. Thus, they were not included in collective bargaining, nor were they entitled to any rights or benefits, including seniority or union representation during that time. Because the NYSNA allegedly lacked standing to represent the Petitioners until they became regular employees at Jacobi in 1993, they assertedly cannot claim that their service time as registry nurses be included in their seniority date for layoff purposes.

Discussion

When deciding a motion to dismiss a petition that alleges a violation of the NYCCBL, we deem the moving party to concede the truth of the facts alleged by the petitioner. In addition, we will accord the petition every favorable

inference, and we will construe it to allege whatever may be implied from its statements by reasonable and fair intendment.[2]

Although imprecisely articulated, the Petitioners' claims sound as allegations that their Union breached its duty of fair representation by not defending their putative employment rights. No independent improper practice allegations are charged against the HHC,[3] but Section 209-a.3 of the Civil Service Law (the Taylor Law) requires that the public employer be joined as a party when the Union is alleged to have breached its duty of fair representation in processing or failing to process a claim that the public employer has breached its agreement with the Union.[4]

The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under both the Railway Labor Act and the National Labor Relations Act (NLRA). The

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[2] Decision Nos. B-15-94; B-4-93; B-17-92; B-36-91; B-34-91; B-32-90; and B-34-89.

[3] Although Petitioners provide evidence of a seniority clause in the 1987-1990 NYSNA/HHC collective bargaining agreement, alleged contractual violations may not be rectified through the filing of improper practice charges. Section 205.5.(d) of the Taylor Law precludes this Board from exercising jurisdiction over a claimed contractual violations that do not otherwise constitute an improper practice. (Decision Nos. B-8-96; B-14-95; B-36-93; B-46-92; B-51-90; and B-61-89.) Similarly, Petitioners' arguments that various tax codes and statutory corporate laws were violated are misplaced. This Board's authority does not extend to the administration of any statute other than the NYCCBL. Petitioners may not seek to redress alleged violations of statutory rights arising under a statute other than the NYCCBL in this forum. (Decision Nos. B-8-96; B-14-95; B-38-92; B-10-89; and B-39-88.)

[4] Decision No. B-13-95.

earliest cases were decided under the Railway Labor Act.[5] The Supreme Court balanced the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right, and held that a union must act "fairly" toward all employees that it represents. Subsequently, the Supreme Court recognized and adopted the duty of fair representation under the NLRA.[6] A breach of the duty "occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[7]

New York State courts imposed a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives under the Taylor Law and related local laws such as the New York City Collective Bargaining Law.[8] In 1990 the State Legislature recognized this judicial doctrine by enacting an amendment to the Taylor Law that codified the duty of fair representation.[9] The law makes it an improper practice for an employee organization deliberately to breach its duty of fair

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[5] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 65 C.Ct. 226, 89 L.Ed. 173 (1944), and Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

[6] Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

[7] Vaca at 190.

[8] Matter of Civil Service Bar Association, Local 237, I.B.T. v. City of New York, 64 N.Y.2d 188, 196, 485 N.Y.S.2d 227, 230 (Ct.App., 1984).

[9] Laws of 1990, Ch. 467, adding new subdivisions 2.(c) and 3. to Section 209-a. of the Public Employees' Fair Employment Act.

representation to public employees. The pivotal issue in a duty of fair representation case is whether the Union acted arbitrarily, discriminatorily, or bad faith in the negotiation, administration, and enforcement of the collective bargaining agreement.[10]

In light of this standard, we find that the Union did not breach its duty. Under the NYCCBL, public employees have the right to organize and bargain collectively through certified employee organizations of their own choosing. If NRI agency nurses had ever been certified by our companion board, the Board of Certification, to be included in the bargaining unit which is represented by the NYSNA, the Union would have a duty to negotiate with the employer over wages, hours and working conditions, such as seniority rights and accrual. However, neither the NRI agency nurses nor the NYSNA ever sought such a certification, and none was granted.

We conclude that the NYSNA made a reasonable assessment of the facts and determined that nurses working under the aegis of NRI had not accrued contractual seniority credit because their title was not included in the recognition article of the HHC-NYSNA labor agreement, nor were they covered by any other collective bargaining agreement to which the NYSNA was a party. Since the title covering NRI nurses was not part of a NYSNA bargaining unit, there is no obligation on the Union's part to prosecute complaints that had their origin in the context of NRI employment. This is consistent with a well-developed principle in labor law, which holds that although an employee

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[10] Decision Nos. B-21-94; B-22-93; B-5-91; and B-53-89. Also see Decision Nos. B-51-88; B-42-87; B-32-86; B-9-86; B-5-86; B-23-84; B-15-84; B-16-83; B-15-83; and B-13-81.

organization has a Taylor Law duty to represent all employees in the negotiating unit fairly, both in negotiations and in the administration of grievances, for whom it is the recognized or certified negotiating representative, there is no such duty owing to employees who are not within that unit.[11]

In sum, because people serving exclusively as NRI agency nurses were not covered by a collective bargaining agreement, were never part of the NYSNA-HHC bargaining unit, and their title was not certified as part of any other bargaining unit within our jurisdiction, we find that the NYSNA breached no duty to the Petitioners. We therefore shall grant the Respondents' motions to dismiss the instant improper practice petition in its entirety and without deciding whether Petitioners were public employees during the period 1984 through 1993.

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 filed herein by Renee Flood and Barbara Albrecht, and docketed as BCB-1848-96 be, and the same hereby is, dismissed.

DATED: New York, New York
February 25, 1997

[11] See, City of Buffalo, 12 PERB ¶4521 (1979), citing Somers Faculty Association and Somers Central School District, 9 PERB ¶3014 (1976). See also, Herberger and City of Lockport, 22 PERB ¶3059 (1989).

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