Jiminez v. HHC, Cumberland D & TC & DC 37, 61 OCB 25 (BCB 1998) [Decision No. B-25-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

Victor Jiminez, *pro se*,

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, CUMBERLAND DIAGNOSTIC & TREATMENT CENTER and DISTRICT COUNCIL 37,

Respondents.

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Decision No. B-25-98
Docket No. BCB-1799-95

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"), [1]

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[1] Section 12-306 of the NYCCBL provides, in part:

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 § 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public organization;

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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 § 12-305 of this chapter , or to cause, or attempt to cause, a public employer to do

Victor Jiminez ("Petitioner" or "Jiminez") filed a Verified Improper Practice Petition, on December 11, 1995, against District Council 37, AFSCME, AFL-CIO ("Union," "DC 37" or "Respondent"). Petitioner also named the New York City Health and Hospitals Corporation, Cumberland Diagnostic and Treatment Center ("HHC," "Cumberland" or "Respondent") as Co-Respondent.[2] The petition alleges that the Union breached its duty of fair representation in the handling of his complaints regarding out-of-title work he was allegedly performing at his place of employment. The Union filed an answer on April 1, 1996. The City filed an answer on April 2, 1996. The petitioner did not submit a reply.

BACKGROUND

Petitioner was employed as an Institutional Aide at Cumberland Diagnostic and Treatment Center ("Cumberland") from December 1993 to July 7, 1995. The petitioner participated in Severance II, by which he agreed to leave service in exchange for lump sum payment and to remain covered by health and Union trust fund benefits through December 1995. As an Institutional Aide and Local 420 member,[3] petitioner was covered by the Institutional Services Unit Collective Bargaining Agreement ("agreement").

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[2] Civil Service Law, § 209-a, provides, in pertinent part, as follows:
[I]mproper employee organization practices.

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(3) The public employer shall be made a party to any charge filed under subdivision two [improper employee organization practices] 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.

[3] Local 420 is a constituent local of DC 37.

In June 1995, petitioner and a co-worker, Jean Maxilien, approached Norbert Harry, Council Representative for the Hospitals Division servicing Cumberland, concerning their assignment to a moving crew. In response to this complaint, the Union arranged for a labor-management meeting to discuss Cumberland's obligation to pay the petitioner and Maxilien a moving crew differential. As a result of this meeting, Cumberland determined that it was obligated to pay each member the moving crew differential, which amounted to $ 902.83.

At or after the June 30, 1995 meeting, petitioner told Harry that as an Institutional Aide he had been performing out-of-title duties since his date of hire until the present. At this point, Harry suggested that petitioner and Maxilien be given a Position Analysis Questionnaire ("PAQ") to determine if, in fact, they had been performing duties that were substantially different from those stated in his job description in violation of Article VI, § 1(c) of the Agreement.[4]

The Union alleges that Harry then asked petitioner to forward the PAQ, including his supervisor's comments, as soon as possible because Harry would not file a grievance on petitioner's behalf until he was given a copy of the PAQ. They next allege that, although petitioner did complete the PAQ on July 5, 1995, he did not obtain his supervisor's comments, and despite numerous requests, petitioner did not forward his PAQ to Harry until October 1995.

Petitioner alleges that he gave the PAQ almost immediately to Robinson in the Personnel Department, and she told him that she would forward the PAQ to Harry. Petitioner also alleges that Harry told him that he would be receiving a letter in the mail once Harry received the PAQ. Petitioner next contends that he never received a letter confirming the receipt of the PAQ, and in the

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[4] Article IV, §1(c) defines the term "grievance" as, "[a] claimed assignment of employees to duties substantially different from those stated in their job specifications."

following weeks, his phone calls were not returned or he had altercations with Harry. Petitioner then asked to speak to Ms. Brooks, Harry's supervisor, and he states that she promised that "the matter would be looked into."

In early October, petitioner spoke with Harry and they mutually agreed that petitioner should bring the PAQ in personally. The Union alleges that, although petitioner said he mailed the PAQ in September, Harry never received it. Upon giving the PAQ to Harry, Harry called Robinson at Cumberland that day, in the presence of petitioner, to attempt to set up a Step I meeting, but was informed that Ms. Robinson was in a meeting. Petitioner alleges that Harry told him that he would be notified by mail once a conference was set up. Petitioner again contends that the Union delayed in getting back to him, and that he persisted in contacting the Union until the Union allegedly told him that he could pick up the letter regarding the grievance on October 23.

In the first week of November, petitioner alleges that he spoke with Harry regarding his receipt of the letter in the mail and to inquire about whether Cumberland had gotten back to him. At this point, petitioner alleges that Harry called him a nuisance a couple of times and then hung up on him. Petitioner then contacted Brooks, who stated that she would set up a conference between petitioner, herself and Harry to resolve the situation and discuss the merits of petitioner's grievance. She also allegedly stated that she would call him in a few days. Petitioner again contends that he had to take it upon himself to call Brooks. However, a meeting was set up for November 30th. On November 30th, petitioner was handed a letter from Cumberland, by Sonia Dell-Robinson, associate Director of Human Resources, denying petitioner's out-of-title claim. The letter was dated November 13, 1995.

Petitioner alleges that, upon hearing that Maxilien had been compensated for out-of-title work with a near-duplicate PAQ, the Union decided to file a Step II grievance. The Union denies these allegations, but agrees that it filed a Step II grievance on December 14, 1995. On March 29, 1996, a Step II conference was held. A union representative attended the conference. The grievance was denied through Step III of the procedure, at which time the Union concluded that the grievance should not proceed to arbitration. The Union stated that it felt that it could not sustain its burden of proof that grievant was assigned to duties "substantially" different from those in grievant's job specifications. The Union also stated that the out-of-title duties had ceased at the time the grievance was filed, and, therefore, there is no remedy available to the grievant.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner's allegations are as outlined above, the essence being that the Union breached its duty of fair representation by failing to pursue his grievance with due speed, and that Harry was rude to him on several occasions over the five month period that his grievance was being processed. Petitioner also alleges that the Union did not furnish him with his job description for Institutional Aide ("IA") in the department in which he worked. Instead, he claims he was shown a job description for IA in Housekeeping.

Union's Position

The Union asserts that petitioner has failed to state a cause of action for the breach of the duty of fair representation. The Union agrees that it must refrain from arbitrary, discriminatory or bad faith conduct in the negotiation, administration and enforcement of the collective bargaining

agreement.[5] They also agree that it is well established that arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[6] However, the Union asserts that petitioner bears the burden of pleading and proving that the Union has engaged in prohibited conduct, and that it is not enough for petitioner to allege mere negligence, mistake or incompetence on the part of the Union. Rather, in order for the petitioner to state a cause of action for breach of the duty of fair representation, it must be alleged that the conduct intended to harm or evinced reckless disregard for the rights of petitioner.[7]

The Union argues that petitioner has not alleged any arbitrary, discriminatory or bad faith conduct on the part of the Union and that he has merely alleged that he is unhappy with the Union's handling and pace of the grievance process. They also assert that even if one were to assume, arguendo, that the Union was slow in processing petitioner's grievance, any delay on the Union's part was directly caused by the petitioner's failure to provide the Union with a copy of his PAQ. The Union asserts that they requested the PAQ as a means of investigating petitioner's alleged claim of out-of-title work.

Moreover, the Union states that petitioner has not alleged that the Union's actions were intended to harm petitioner or that the Union evinced a reckless disregard for his rights. They argue that, in fact, the Union afforded petitioner the opportunity to discuss his grievance with his representative and the Division Director and that it pursued petitioner's grievance through the

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[5] The Union cites several Board decisions: Decision Nos. B-8-94; B-44-93; B-29-93; B-22-93; B-5-91; and B-53-89.

[6] The Union cites Decision Nos. B-11-95; B-24-94; B-35-92; and B-21-92.

[7] The Union cites Decision Nos. B-24-94; B-8-94; and B-15-93.

contractual grievance procedure.

Finally, the Union argues that the duty of fair representation extends to administering and enforcing the collective bargaining agreement, and that the Union is not required to provide its members with job specifications. They also allege that petitioner acquired his job description from Joe Frazier, the Chapter Chairperson at Cumberland.

The Union urges that, since the petition is devoid of any facts which would support a finding that the Union has committed an improper practice, the petition should be dismissed in its entirety as it fails to state a cause of action for which relief may be granted.

HHC's Position

The City asserts that petitioner has failed to show, or even allege, any action of the respondent which has constituted an improper practice within the provisions of the NYCCBL.

DISCUSSION

The allegations in the petition raise the issue of whether the Union has breached its duty to fairly represent the petitioner in violation of NYCCBL § 12-306(b). A breach of the duty occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. The applicable standard permits a union wide discretion in reaching grievance settlements.[8] A union does not breach its duty of fair representation merely by refusing to advance a grievance, nor does it breach that duty because the outcome of a settlement does not satisfy a grievant.[9] It is only when a union arbitrarily ignores a meritorious grievance or processes

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

[9] Decision Nos. B-8-94; B-29-93; and B-21-93.

a grievance in a perfunctory fashion that the Union violates the duty of fair representation.[10] The burden is on the petitioner to plead and prove that the union has engaged in such conduct,[11] and it is not enough for the petitioner to allege negligence,[12] mistake,[13] or incompetence on the part of the union.[14]

We find that the Union herein has not failed in its duty of fair representation. Here, petitioner alleges that the Union failed to respond adequately to his complaints about performing out-of-title work and failed to provide him with a job description. Petitioner also alleges that he was treated rudely at times. However, even if petitioner's allegations are true, the NYCCBL does not empower us to remedy or even consider every perceived wrong or inequity which may arise out of the employment relationship; it mandates only that we administer and enforce procedures designed to safeguard employee rights under the Collective Bargaining Law.[15]

Petitioner has failed to allege facts which would establish that the Union's handling of the matter was done arbitrarily, or in a way that discriminates against him insofar as his rights are concerned, or in bad faith. Petitioner presents no evidence that the Union's pursuit of the grievance, although perhaps not to the petitioner's satisfaction, was improperly motivated in a way that would

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10 Decision Nos. B-21-93; B-35-92; and B-21-92.

11 Decision Nos. B-21-93; B-35-92; and B-56-90.

12 Decision No. B-8-94 and B-24-94.

13 Id.

14 Id.

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

constitute an improper practice as defined in case law. An overview of the record shows that the Union had no history of animosity towards grievant, as indicated by the Union's pursuit of a prior grievance to the apparent satisfaction of the petitioner, in a timely manner. Upon receiving the PAQ from petitioner, Harry attempted to arrange for a Step I meeting in the presence of the petitioner, on the very day he received it. Also, when petitioner complained to another Union officer about Harry's alleged conduct, a meeting was set up to attempt to resolve the situation and discuss the merits of petitioner's grievance.

We have long held that as long as a Union's decision not to pursue a grievance to arbitration was made in good faith, it does not breach the duty of fair representation.[16] The Union pursued the grievance through the process, until it was ultimately determined that the grievance should not proceed to arbitration. There is no evidence that the grievance was processed in a perfunctory fashion or that petitioner was treated any differently than other Union members. The petitioner's allegation, disputed by the Union, that another employee was compensated for out-of-title work based upon a "near-duplicate PAQ" is not supported by the evidence in the record, and is not sufficient to call into question the Union's good faith in determining that it could not sustain its burden of proof that the grievant was assigned to duties "substantially" different from those in his job specification.

Finally, the petitioner alleges that the Union failed to provide him with the correct job description. Even assuming arguendo, a "correct" job description for petitioner's title exists, the Union is under no duty to provide him with documents over which it has no custody or control. The

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[16] Decision Nos. B-35-92; B-50-88; B-25-84.

Union's duty of fair representation extends only so far as to administer and enforce the parties' collective bargaining agreement. Since the petition against the Union fails, the derivative claim brought against the City, pursuant to § 209-a(3) of the NYCCBL, can not stand. Accordingly, the instant improper practice petition is hereby 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-1799-95 be, and the same hereby is, dismissed in its entirety.

DATED: July 30, 1998
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

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