Ferrell v. L. 2021, DC 37 & OTB, 63 OCB 22 (BCB 1999) [Decision No. B-22-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
NADINE S. FERRELL,	:	
	:	Decision No. B-22-1999
Petitioner,	:	Docket No. BCB-1975-98
	:	
-and-	:	
	:	
DISTRICT COUNCIL 37, LOCAL 2021 and the NEW YORK CITY OFF-TRACK BETTING CORPORATION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"), [1] Nadine Ferrell ("Petitioner" or "Ferrell") filed an Amended Verified Improper Practice Petition, on

[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:

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(3) to breach its duty of fair representation to public employees under this chapter;

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April 15, 1998, against the New York City Off-Track Betting Corporation ("City," "OTB" or "Co-Respondent") and District Council 37, Local 2021 ("DC 37" or "Co-Respondent"). A Determination by the Executive Secretary dismissed the petition as procedurally defective, without prejudice to resubmit within ten days.[2] The petitioner was granted an extension to refile until July 24, 1998. OTB received service of the amended petition on that date and the petition was filed with the Office of Collective Bargaining on July 30, 1998. The amended petition was not found insufficient or untimely so as to warrant summary dismissal by the Executive Secretary. DC 37 filed its answer on September 22, 1998. OTB filed its answer on October 5, 1998. The petitioner filed a reply on November 18, 1998.

BACKGROUND

DC 37 is the exclusive certified bargaining representative of employees in the title of Office Aide who are employed by the OTB. Until January 7, 1998, the petitioner held the title of Office Aide and worked for the Facilities Department. In June of 1997, petitioner contacted L. 2021 Vice President Leonard Allen by telephone. She informed Allen that the employer was stating that she had used profanity and that she had threatened Senior Director Dawn Mascoll. On June 13, 1997, the petitioner was suspended for an indeterminate period of time without pay by OTB. The petitioner again contacted Allen, who referred her to the Personnel Services Unit ("PSU") at DC 37 for counseling when she stated that she was under a great deal of stress. Allen, along with the PSU assisted in getting short term disability benefits from DC 37. These benefits entitled petitioner to approximately $200.00 per week and provided her with medical benefits for eight weeks, from June

[2] Decision No. B-19-98(ES), dated June 23, 1998.

26, 1997 - August 22, 1997. According to the Union, Allen also thoroughly investigated the matter of the threats.

Although a Section 75 hearing pursuant to NYS Civil Service Law was opted for originally, OTB determined that the petitioner did not satisfy the guidelines entitling her to such a hearing. The petitioner proceeded, instead, under the grievance procedure. On June 30, 1997, an informal conference was held and on October 28, 1997 a formal conference was held. On both occasions, petitioner was represented by the union. In September, the petitioner returned to work in a new department. By letter dated January 26, 1998, petitioner was sent the formal conference determination which stated that the petitioner's employment was terminated effective January 7, 1998. According to the Union, Allen referred the matter to the Union's Legal Department for consideration of possible arbitration. However, by memorandum dated January 26, 1998, the Legal Department recommended that the case should not proceed to arbitration. One of the reasons given for not pursuing the grievance was the petitioner's overall disciplinary history.

Petitioner's Position

The petitioner argues that her June 13, 1997 suspension was never investigated and that constituted an illegal suspension. She also argues that when the union changed her suspension to a medical leave it was without her knowledge or permission and that it constituted an illegal medical leave. She states that the union lawyers denied her arbitration without official "write ups and two charges" and that the union allowed another union member to testify against her at one of the hearings. Petitioner also states that the union was unprepared for the hearing on October 28, 1997 and that she was suspended without having been fined first. Petitioner also alleges that she was

illegally terminated because the OTB did not follow proper procedure and that OTB put her on or accepted medical leave with no medical benefits.

Petitioner contends that OTB employees harassed her at work on four separate occasions - June 5, and 13, 1997 and two occasions on June 12, 1997. She also states that, although her employment was terminated on January 7, 1998, her benefits were canceled on January 2, 1998. She states that she called Personnel for a termination letter, but was told that they had no record of her termination and that she should talk to payroll. Payroll also told her they had no record of her termination. She states that a termination letter is necessary to release the money in her OTB savings plan.

Petitioner argues that she tried numerous times to reach Allen, but that he was not around, and when she did speak to him, Allen would tell her that he gave her papers to the DC 37 lawyers and that he was waiting for the results. On February 12, 1998, petitioner alleges that Allen called her home and told her that this would be the last time he would talk to her, and then read to her the letter from the Legal Department recommending that a grievance not be filed. She states that she only had two charges against her in the past and that she had never been fined or offered a stipulation. She states that the only reason she took the formal hearing was because Allen told her that if the formal hearing did not go well, she still had another chance with arbitration. She states to date she has not received anything from OTB personnel in reference to her termination from employment, nor the reason why she was denied arbitration.

OTB's Position

The OTB argues that petitioner has failed to meet the minimum pleading requirements set

forth in Title 61, §1-07(d) of the Rules of the City of New York ("RCNY").[3] It argues that while the petitioner does attempt to set forth certain provisions of law and of the collective bargaining agreement, she does not present a clear and concise statement of facts constituting the alleged improper practice or breach of the provisions she attempts to set forth.

OTB also argues that petitioner's allegations are speculative and unsubstantiated and that the Board has held that allegations based on speculation and surmise rather than probative fact must be dismissed.[4] It argues that in the instant matter, petitioner has made numerous vague allegations including those concerning the investigation of a certain incident leading to her suspension stating, "the June 13, 1998 suspension was never investigated. Illegal suspension." However, the petitioner has not established with any reliability that she possesses any knowledge concerning the "investigation" performed (or lack thereof), by the parties involved. Consequently, the OTB argues, these allegations are speculative, unsubstantiated and lack any identifiable factual basis.

The OTB argues that assuming *arguendo* that the petition is procedurally sufficient and the contentions are supported by an identifiable factual basis, the petitioner's claim is time-barred. It argues that the Executive Secretary stated in her original decision, dated June 23, 1998, that the petitioner's improper practice petition was dismissed as procedurally defective, and that the petitioner had ten days to re-file. The petitioner was granted an extension to re-file until July 24,

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[3] Section 1-07(d) of the RCNY reads, in pertinent part, that the petition shall contain a "statement of the nature of the controversy specifying the provisions of the statute, executive order of collective agreement involved . . . If the controversy involves contractual provisions, such provisions shall be set forth; . . ."

[4] The OTB cites Decision Nos. B-18-93; B-55-87; B-18-86; B-12-85; B-35-82; B-30-81 and B-33-80.

1998. It argues that, although OTB received service of the amended petition on July 24, 1998, the petitioner did not file with the Office of Collective Bargaining until July 30, 1998. Thus, it argues, the petition cannot be deemed timely.

Finally, it argues that OTB cannot be found to have committed an unfair practice as a result of disciplining petitioner. It argues that petitioner's union, signatory to a collective bargaining agreement with OTB, was extended all the rights and opportunity to challenge the discipline imposed on its member and chose for reasons unrelated and unconnected with OTB's administration of the agreement between the union and OTB not to institute arbitration to challenge the discipline imposed.

Union's Position

The Union argues that NYCCBL § 12-306(b)(1) imposes upon a public employee organization the duty to treat its members fairly and impartially. A union must refrain from arbitrary, discriminatory or bad faith conduct in negotiation, administration and enforcement of the collective bargaining agreement.[5] It argues that petitioner bears the burden of pleading and proving that the union or its agents have engaged in prohibited conduct.[6] Here, the Union argues that the petitioner has pled no facts demonstrating arbitrary, discriminatory or bad faith conduct on the part of the Union.

The Union argues that assuming *arguendo* that the petitioner's allegations state a cause of action, the petitioner's claim concerning her representation at the October 28, 1997 hearing is time-

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[5] The Union cites Decision Nos. B-29-93; B-22-93; B-5-91 and B-53-89.

[6] The Union cites Decision Nos. B-38-93 and B-18-93.

barred and that 61 RCNY § 1-07(d) requires that an improper practice claim be commenced within four months of the alleged improper conduct.

DISCUSSION

As a preliminary matter, we shall discuss the issue raised by the OTB, that the claim is time-barred because the petitioner did not file with the OCB until July 30, 1998 when the deadline for filing was July 24, 1998. We will not dismiss the amended petition on that basis because the return receipt shows that OTB received service of the amended petition on July 24, 1998, the date it was due, and the OCB was not prejudiced by the tardy filing.

A number of the petitioner's allegations are time-barred by 61 RCNY § 1-07(d), which requires that an improper practice claim be commenced within four months of the alleged improper conduct. In Decision No. B-19-98(ES), the Executive Secretary allowed petitioner to refile with the proviso that the charges will be timely only as to conduct which occurred within four months of April 15, 1998, the date the original improper practice petition was filed. Therefore, those claims that concern her June 1997 suspension and its change to medical leave, the October 1997 hearing and the alleged June 1997 harassment by OTB employees, whether they apply to the OTB or the Union, are dismissed.

We find that those allegations in the amended petition which pertain to the failure of OTB to provide petitioner with a termination date and documents fails to state a claim which may be remedied by the provisions of § 12-306(a) of the NYCCBL. Although we do not require technical precision in pleadings from petitioners, 61 RCNY §1-07(d) requires that a petitioner allege that the OTB has engaged in or is engaging in an improper practice in violation of § 12-306. Failing to

provide the information in and of itself is not a violation of any of the provisions of §12-306(a), and the petitioner alleges nothing further in the way of discrimination against her for union activity or anything else which may be deemed to violate § 12-306(a). Therefore, the claims against the OTB are dismissed.

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) by refusing to submit petitioner's claim to arbitration. 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.[7] 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.[8] It is only when a union arbitrarily ignores a meritorious grievance or processes a grievance in a perfunctory fashion that the Union violates the duty of fair representation.[9] The burden is on the petitioner to plead and prove that the union has engaged in such conduct,[10] and it is not enough for the petitioner to allege negligence, mistake, or incompetence on the part of the union.[11]

Petitioner has failed to allege facts which would establish that the Union's handling of the

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

[8] *Id.*

[9] Decision Nos. B-21-93; B-35-92; and B-21-92.

[10] Decision Nos. B-21-93; B-35-92; and B-56-90.

[11] Decision Nos. B-8-94 and B-24-94.

matter was done arbitrarily, or in a way that discriminates against her insofar as her 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 constitute an improper practice as defined in case law. 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.[12] In this case, the Union pursued the grievance through the lower steps of the grievance 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. Accordingly, the petition is dismissed in its entirety.

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

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-1975-98 be, and the same hereby is, dismissed in its entirety.

DATED: July 13, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

SAUL G. KRAMER
MEMBER

ROBERT H. BOGUCKI
MEMBER

CAROLYN GENTILE
MEMBER