Lein v. UPOA, 63 OCB 27 (BCB 1999) [Decision No. B-27-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	
-between-	
ERWIN LEIN, Petitioner,	Decision No. B-27-1999 Docket No. BCB-2032-99
-and-	
UNITED PROBATION OFFICERS ASSOCIATION represented by DOMINIC COLUCCIO, PRESIDENT and DEPARTMENT OF PROBATION	
Respondents.	

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] Erwin Lein ("Petitioner") filed a verified improper practice petition on January 4, 1999, against the United Probation Officers Association ("UPOA" or "Union") alleging , in essence, a breach of the duty of fair representation. Pursuant to § 12-306(d), Petitioner also named the Department of Probation as a respondent ("City").[2] The Union filed a verified answer on January 22, 1999

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[1] Section 12-306(b) of the NYCCBL provides in pertinent part:
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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[2] Section 12-306(d) of the NYCCBL provides:
d. Joinder of parties in duty of fair representation cases. The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee

and the City filed a verified answer on January 27, 1999. Petitioner then filed verified replies on February 25, 1999.

Background

Petitioner is a probation officer employed by the New York City Department of Probation. On July 22, 1996, Petitioner was served with disciplinary charges which resulted in the Petitioner signing a stipulation of settlement in which he agreed to relinquish five days of annual leave and to serve on five additional assignments of late-day PENS duty.[3]

On October 17, 1996, Petitioner initiated a Step I grievance arguing that the Department violated Article IV, § 3(d) of the Citywide Agreement which states that, "There shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation." In his grievance, Petitioner claimed that management directed him to arrive to work at 9:00 A.M. on the days of his late PENS duty instead of his regular 8:00 A.M. arrival time in order to avoid compensating him for overtime. Petitioner then filed a Step II grievance on December 3, 1996 and a Step II conference was held on March 26, 1997. UPOA Vice President Jeph Oyeku accompanied Petitioner to the conference. On April 18, 1997, the Department issued a Step II decision which denied the grievance and stated that, "The Department has the authority to determine both the hours of operation for its locations and the work hours for the employees who work at such locations."

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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] PENS duty refers to the requirement that probation officers interview incarcerated individuals at their places of incarceration.

In a letter dated April 28, 1997, counsel for the UPOA demanded a Step III conference. At the conference, Petitioner was represented by Howard Wien ("Wien"), an attorney at the law firm that represents the UPOA. During the conference, Petitioner informed Wien that he was alleging a violation of flex-time arrangements between UPOA and the Department in addition to his overtime allegation. In a letter dated August 7, 1997, the Step III hearing officer denied the grievance and found that the schedule change was not made to avoid overtime compensation, rather, it was to "ensure operational efficiency."

On August 27, 1997, counsel for the UPOA filed a request for arbitration. The UPOA also obtained authorization from DC 37 to proceed to arbitration under the Citywide Agreement. The parties then chose an arbitrator and on November 6, 1997, the arbitrator confirmed that the arbitration hearing would take place on November 24, 1997. After agreeing to the hearing date, UPOA President Dominic Coluccio ("Coluccio") asked Joel C. Glanstein ("Glanstein"), UPOA counsel, to render an opinion on the likelihood of succeeding in arbitration. After reviewing Board of Collective Bargaining ("Board") decisions as well as arbitration decisions, Glanstein advised Coluccio that success was unlikely because in his opinion the grievance lacked merit. Glanstein also told Coluccio that Petitioner's waiver in the settlement of his 1996 disciplinary charges was another impediment to a successful result in arbitration. As a result, in a letter dated November 7, 1997, Glanstein informed the arbitrator that he was withdrawing the request for arbitration and was canceling the November 24, 1997 hearing.[4]

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[4] At the bottom of the letter addressed to the arbitrator, Milton Rubin, there is a "cc" to Austin Bender, Assistant General Counsel of OLR, Dominic Coluccio, UPOA President, and Marlene Gold, Deputy Director of OCB.

Almost a year later, on October 15, 1998, Petitioner contacted Wien to find out whether an arbitration date had been scheduled. Wien informed Petitioner that the grievance had been withdrawn the prior November and sent Petitioner a copy of the withdrawal letter. Petitioner then filed an improper practice petition on January 4, 1999 in which he seeks a Step IV arbitration hearing.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union committed an improper practice when it canceled the Step IV arbitration hearing without informing him. Petitioner argues that the Union is obligated to see his case through and that canceling the hearing without notifying him violates the Union's duty of fair representation.

Petitioner maintains that after the Step IV documents were submitted in August 1997, Glanstein told him that it could take a year or more to schedule an arbitration hearing. Petitioner contends that when he telephoned Wien on October 15, 1998, to find out the status of his case, he was told for the first time that a Step IV hearing had been scheduled for the prior November and that the Union had canceled the hearing and had withdrawn the request for arbitration. Furthermore, Petitioner argues that he timely filed the improper practice petition on January 4, 1999, which was within four months of his being notified about the alleged improper practice.

Petitioner also asserts for the first time in his reply that on another occasion in 1997 the Union did not assist him. He attempted to file a grievance three times, each of which was filed improperly; when he finally filed it correctly, the Department disallowed the grievance because it

was untimely. The Union told him that it could not help him, however, the Office of Labor Relations successfully helped him. On another occasion, in April 1998, he received a case where he had to go to the subject's home. Petitioner told his superiors that home visits were no longer permitted and that the Field Services Unit, a group of trained armed probation officers, should have received the assignment. His requests were ignored and he was informed on May 21, 1998, that if he failed to make the home visit he would be charged with insubordination.

Union's Position

The Union contends that the improper practice petition fails to allege facts sufficient to state a claim of improper practice by the UPOA under § 12-306(b)(3) of the NYCCBL in that it fails to allege any facts that would demonstrate that a UPOA official bore the Petitioner animus or that he was treated differently from other UPOA members.

The UPOA argues that it diligently represented Lein through a Step III grievance and even set a hearing date for arbitration. The Union explains that after agreeing to a hearing date, Coluccio asked Glanstein to render an opinion on the likelihood of succeeding in arbitration. Glanstein researched Board decisions as well as arbitration awards and found in an arbitration decision that as opposed to "*ad hoc* changes in individual schedules," a "uniform" change is generally a "type of managerial decision which the City must be free to make." Since the change alleged by Lein is a uniform one, Glanstein told Coluccio that success was unlikely. Glanstein also advised Coluccio that Lein's waiver in the settlement of his disciplinary charges was another impediment to success in arbitration. Coluccio thus instructed Glanstein to withdraw the request for arbitration and to cancel the November 24, 1997 hearing.

The Union also maintains that on several occasions, Coluccio informed Petitioner verbally of the withdrawal of the request for arbitration and the reasons for withdrawal. The Union also contends that when Petitioner spoke to Wien on October 15, 1998, Wien informed Petitioner that his grievance was withdrawn. He also mailed a copy of the withdrawal letter to the Petitioner and instructed Petitioner to contact Coluccio. The Union contends that Petitioner did not contact Coluccio.

The Union disputes Lein's allegation that it failed to inform him of the withdrawal and maintains that even if the Union failed to timely notify the Petitioner, such alleged delay is not a breach of the duty of fair representation. Moreover, the Union asserts that even if Lein was not notified, Lein took no steps to contact UPOA and inquire about the status of his grievance for eleven months and, therefore, must share the blame.

The Union further claims that the charge was untimely filed and should be dismissed. The Union contends that Lein filed the improper practice petition on January 4, 1999, which was over thirteen months after the alleged improper practice which took place on November 7, 1997. The Union concludes that the improper practice petition must be dismissed.

City's Position

The City asserts that Petitioner has failed to allege facts sufficient to support an improper practice within the provisions of § 12-306 of the NYCCBL. Furthermore, the City argues that the petition should be dismissed as untimely because more than four months had passed between the time that Petitioner's grievance was withdrawn and his filing of the improper practice petition. It argues that even if the Petitioner was not notified that the Step IV arbitration was

canceled, he had a duty to inquire about the status of his case. Furthermore, the City states that it bears no responsibility for any damage incurred by the Petitioner should Petitioner's claims against the Union be sustained.

Discussion

The threshold issue we must address is whether the Petitioner's improper practice petition was timely filed. Section 1-07(d) of the Rules of the Office of Collective Bargaining provides that a petition alleging an improper practice in violation of § 12-306 may be filed within four (4) months of the improper practice. The Union argues that the limitations period began running on November 7, 1997, the date it withdrew Petitioner's request for arbitration and canceled the scheduled arbitration hearing. The Union, therefore, contends that the improper practice petition which was filed on January 4, 1999, was clearly beyond the four month limitations period. On the other hand, Petitioner claims that October 15, 1998 was the date that he received notice that the Union had withdrawn his request for arbitration and, therefore, his January 4, 1999 filing was indeed timely.

We find that the January 4, 1999 improper practice petition was timely filed. The parties dispute whether Petitioner received notice of the withdrawal of the request for arbitration before October 15, 1998. The Union, however, does not present any evidence indicating that Petitioner was contacted prior to October 15, 1998. The Union merely alleges that Petitioner was verbally informed of the withdrawal on an earlier date and does not supply dates or documentation to support its allegation. Copies of the letter withdrawing the request for arbitration were sent to the UPOA, the Office of Labor Relations and the Office of Collective Bargaining. However,

there is no indication that a copy was sent to the Petitioner.[5] Because the record supports Petitioner's contention that October 15, 1998 was the first time that he became aware that the Union had canceled the hearing, the January 4, 1999 filing was timely.

The petition alleges that the Union breached its duty of fair representation when it canceled the Petitioner's Step IV hearing without notifying the Petitioner. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[6] In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to process every complaint made by a unit member.[7] The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and non-discriminatory. 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.[8] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[9]

In the instant matter, the Petitioner has failed to establish that the Union's decision to

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[5] *See* note 4, *supra.*

[6] *Perlmutter v. Uniformed Sanitationmen's Assoc. et al.,* Decision No. B-16-97 at 5; and *Allcott v. Local 211 et al.*, Decision No. B-35-92 at 7.

[7] *Id.*

[8] *Jiminez v. New York City Health and Hospitals Corp. et al.*, Decision No. B-25-98 at 8; *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11-12; and *Allcot v. Local 211 et al.*, Decision No. B-35-92 at 7.

[9] *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11.

withdraw the request for arbitration and cancel the hearing was effected arbitrarily, discriminatorily or in bad faith. Petitioner does not establish that the Union's determination to withdraw the request was in any way improperly motivated. Rather, the evidence indicates that the Union's determination was reached in good faith, after it assessed the circumstances of the Petitioner's situation. The UPOA represented Petitioner through a Step III grievance and even scheduled a Step IV arbitration hearing. It was only after UPOA counsel researched the legal issues involved in Petitioner's case and discovered that success in arbitration was unlikely, that the Union decided to withdraw the grievance and cancel the Step IV hearing. Where, as here, the evidence does not suggest that the union was improperly motivated,[10] there is no violation of the duty of fair representation.[11]

In addition, there is no breach of the duty of fair representation, "where a petitioner cannot establish that he has been, or will be, prejudiced or injured by any failure to inform."[12] Since the Petitioner did not have recourse in any other forum, the Union's delay in notifying him about the withdrawal of the request for arbitration and the cancellation of the Step IV hearing did not prejudice Petitioner in any way. We, therefore, conclude that the Union did not violate § 12-306 of the NYCCBL and the petition must be dismissed.

Since the Petition against the Union fails, the derivative claim brought against the City

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[10] We note that the new allegations delineated in Petitioner's reply are neither timely asserted nor support a claim of improper motivation.

[11] *See, Cromwell v. New York City Housing Authority et al.,* Decision No. B-29-93 at 13-14.

[12] *Beverly Whaley, Pro Se v. City Employees Union Local 237 International Brotherhood of Teamsters et al.,* Decision No. B-41-97 at 21.

pursuant to § 12-306(d) of the NYCCBL cannot 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 be, and the same hereby is, dismissed in its entirety.

Dated: August 4, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL B. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOBUCKI
MEMBER

SAUL G. KRAMER
MEMBER