Griffiths v. NYSNA & HHC, 63 OCB 3 (BCB 1999) [Decision No. B-3-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
Carolyn Rae Griffiths,	:	
	:	Decision No. B-3-1999
Petitioner,	:	Docket No. BCB-1971-98
	:	
-and-	:	
	:	
NEW YORK STATE NURSES ASSOCIATION and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

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

[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;

***

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 so...

Carolyn Rae Griffiths ("Petitioner" or "Griffiths") filed a Verified Improper Practice Petition, on April 7, 1998, against the New York State Nurses Association ("Union," "NYSNA" or "Respondent"). Petitioner also named the New York City Health and Hospitals Corporation ("HHC," or "Respondent") as Co-Respondent.[2] The petition alleges that, among other things, her requests to have her shift changed for medical reasons were ignored and that the union breached its duty of fair representation because it did not represent her "properly and professionally." The Union filed its answer and motion to dismiss on April 20, 1998. The HHC filed its answer on April 23, 1998. The petitioner did not file a reply.

BACKGROUND

On June 28, 1996, a memorandum was sent to Carolyn Griffiths, then Supervisor of Nurses for Surgery, 5S by Yolando Russell, confirming Ms. Griffiths' selection of reassignment "as a result of the budget reduction process." Effective July 1, 1996, her new assignment was to be Supervisor of Nurses in Nursing Administration at the Jacobi Nursing Office. The shift she selected was from 4 p.m. to midnight on rotating days. On June 23, 1997, Griffiths sent a memorandum to Ms. Eva Otero, Chief Nurse Executive, stating that her doctor had given her a note requesting that her work schedule be changed from evening hours to day hours, as evening hours had "exacerbated" a medical condition. Griffiths stated that she would submit the note upon request. The record does not show

---

[2] Civil Service Law, § 209-a, provides, in pertinent part, as follows:

[I]mproper employee organization practices.

***

(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.

a response to the memo. Subsequently, Griffiths wrote an undated memo to Ms. Russell, again outlining her predicament. The memorandum stated that Griffiths spoke to Otero, who then suggested that Griffiths speak with Russell.

On July 14, 1998, Griffiths again wrote to Otero, outlining her predicament, and stated, "as per our conversation on the telephone, I hope when a supervisor position becomes available, I will have first consideration." The memorandum was copied to Russell and the NYSNA. On August 12, 1997, Griffiths again sent a memorandum to Otero, reminding her of Griffiths' July 14, 1997 letter requesting a work schedule change and stating that she had not yet received a response from Otero. Griffith also requested an appointment with Otero as soon as possible. The memorandum was again copied to the NYSNA and Russell.

On August 14, 1997, Otero wrote Griffiths a memo, stating, "In response to your request for change of a work schedule, I will repeat what I told you before, you will need to talk to the Service Line Nursing Associate and request a line (vacancy). With Service Lines you need a vacant position." The memorandum was copied to the NYSNA and Russell. On August 15, 1997, Griffiths again wrote a memorandum to Otero requesting an appointment to discuss her request for a change in work schedule.

On January 13, 1998, Leanora Gilmore, NYSNA Nursing Representative, Economic and General Welfare Program wrote to Russell on behalf of Griffiths. It stated that Griffiths would like to be considered for a supervisory position on Tour II, and that, to the Union's understanding, there were going to be a number of supervisory positions available after the early retirement incentive. On February 18, 1998, Griffiths wrote to Martha Orr, Executive Director of the NYSNA. The letter

stated that Griffiths had approached the NYSNA for guidance in her request to transfer from Tour III to Tour II. She stated that she was in receipt of Gilmore's letter "stating that I will be considered for a supervisor's position on Tour II once positions become available after the early retirement incentive." She stated that she feels that she has not received the appropriate help from her local NYSNA representatives Joan Brown, Carol Stockett and Leanora Gilmore. Griffiths stated,

> My requests for transfer dating back to June 11, 1997 have not been dealt with in a timely fashion. Phone calls and letters from my physician to Ms. Otero have been ignored. My phone calls and letters to Yolanda Russell and Ms. Otero have not been answered to my satisfaction. Ms. Otero has ignored the fact that my physician called her personally and spoke with her. None of the above mentioned have addressed that fact that I have a medical directive from my physician stating I can no longer work Tour III. It is extremely detrimental to my health and well-being.
>
> I do not feel that I have been properly and professionally represented by my local NYSNA representatives. My local NYSNA representatives have not afforded me the right to use the proper grievance procedure. I have a legal right to use this grievance process. These representatives were well aware that a position in Surgery was available on Tour II prior to my doctor's notes. I was never approached nor notified that this position was available. The position was never posted to my knowledge.
>
> As a Nursing Supervisor for approximately 16 ½ years, I believe I have seniority. The position on Tour II should have been offered to me. The position was filled by a Supervisor of lesser seniority.
>
> I have already filed a complaint with the Division of Human Rights. A hearing has been scheduled. I will find it necessary to file complaints with the National Labor Relations Board and the Department of Labor, if positive representation by NYSNA is not forthcoming.
>
> The transfer to Tour II is the only ultimate positive outcome that I will accept.

On February 23, 1998, Gilmore responded to Griffiths' letter with a letter of her own. It stated:

> . . . We have, on several occasions, spoken via telephone and in person. I am putting into writing my suggestions to you. I encouraged you to apply for positions you qualify for and also encouraged you to submit a written request to Ms. Otero. I also requested information from you, specifically copies of your request for a change of tour and medical documentation. I also suggested that you wait to see what vacancies occurred after the Early Retirement Incentive, December of 1997 to January 1998. This discussion had taken place on October 10, 1997, via telephone and your response to me

> was 'I don't feel like waiting that long, and you better get me my job back.'
>
> I forwarded a letter to the Human Resources Department dated January 13, 1998, asking Ms. Yolanda Russell, Assistant Director of Human Resources for consideration regarding your request. I have also asked you why you failed to apply for any positions, specifically the supervisory position in Nursing Education that became available in June 30, 1996, and you told me that someone told you not to apply and you stated to me 'I did not apply because I was not going to get it anyway.'
>
> Let me remind you again that it is your responsibility to apply for positions which become available at Jacob Medical Center. You must, however, become an applicant first to be considered for any positions. I will encourage you again to follow-up and apply for any positions to your liking. . . .

The Petitioner filed her improper practice petition on April 7, 1998. The NYSNA filed its answer and motion to dismiss on April 20, 1998. The HHC filed its answer on April 23, 1998. The petitioner did not submit a reply.

POSITIONS OF THE PARTIES

Petitioner's position

Griffiths alleges that at the end of 1995, her superior ordered her to write an unsatisfactory performance evaluation of another nurse. She feels that she was assigned this task because her superiors did not want to write an unfavorable evaluation even though they are normally charged with the task of writing evaluations. Griffiths states that when she spoke to her union representative, Joan Brown about the situation, Brown told her, "to do what [she] had to do."

Griffiths also states that in February of 1996, her position as Nurse Clinician covering 2 South was taken away from her during her vacation and that people were told not to mention it to her. She also states that she had been the wound and ostomy nurse clinician for several years when that task was also taken away from her. She alleges that Ms. Clara Rivera purposely threw out her equipment in front of several other doctors and nurses, which she claims she purchased and was

allegedly worth thousands of dollars. She states that "I feel when I refused to allow myself to be manipulated, actions were put into place to remove me from a position in which I was knowledgeable, and respected by my peers and doctors." She states that, "to show how desperate and devious Clara Rivera and Janet Cacuzzo were when I continued to stand firm and not change my evaluation from satisfactory to unsatisfactory for Ms. Quintye, I never heard from [a doctor]or anyone else requesting my services."

In June of 1996, Five South, then Griffiths' assignment, was closed due to a city-wide downsizing. Griffiths states that she was displaced out of surgery. She alleges that Russell called her at home on her day off and offered her a choice of three positions. Griffiths alleges that she was only given two hours to completely investigate the positions and make up her mind. She decided on Tour III, a shift from 4 p.m. through 12:30 a.m. Griffiths alleges that a short time after she started at Tour III, she became ill and orally requested a transfer to Tour II, days, from Otero. Otero allegedly told Griffiths that Griffiths would have to wait until a position became available on Tour II.

Griffiths' sickness allegedly got worse, to the point where, on June 11, 1997, her doctor gave her a note requesting that she be returned to days as soon as possible, "as the evening hours were causing an exacerbation of her medical condition." Griffiths even had her physician call Otero. However, she alleges, her note and phone call were totally ignored. Griffiths states that when another nurse became ill working nights, the nurse was returned to days upon request. Griffiths alleges that she had seniority over the other nurse. Griffiths alleges that when she approached Otero regarding the "unfairness," Otero allegedly stated that "I would have to find someone to take me on

days on my own."

Griffiths alleges that when a position opened up in surgery, where she was originally stationed, she was never approached and to her knowledge, the position was never posted. She states that the position was given to another nurse, despite the fact that Griffiths had many years of seniority. She alleges that her seniority was totally overlooked when it came to the position opening.

Union's Position

The Union states that the basis of the petition is the July 1, 1996 reassignment of petitioner, her dissatisfaction with that change, her June 1997 through August 1997 requests to change that assignment, Jacobi Medical Center's August 14, 1997 notice to petitioner about the procedure for requesting a change in work schedule, the NYSNA's attempt to assist her even though its collective bargaining agreement with the HHC does not limit the HHC's right to assign and reassign nurses, her refusal to understand that it is her responsibility to apply for vacant positions and her failure to file a grievance under the NYSNA's collective bargaining agreement with the HHC if she believed that her rights have been violated.

The Union challenges the timeliness of the filing of the instant petition. It argues that petitioner appears to have made her initial request for a reassignment sometime in June 1997 and continued those requests through August of 1997. Thus, the Union argues, if she believed that the NYSNA did not properly represent her concerning that issue, she had four months from June 1997, at the earliest, or August 1997 at the latest, to file a petition under ¶ 1-07(d).[3] Since the petition was

---

[3] Paragraph 1-07(d) of the Office of Collective Bargaining's Rules of Practice and Procedure specifies that:

A petition alleging that a public employer or its agents or a public employee organization

(continued...)

filed with the NYSNA on March 23, 1998, it is clearly untimely.

The Union contends that, after the HHC's June 1996 layoffs, Jacobi Medical Center had certain vacancies available. Petitioner was offered three positions and selected one on the 4 p.m. to 12:00 a.m. shift. At that time, she was allegedly advised by the NYSNA representative that vacancies are not filled based upon seniority and the issue is not covered by the NYSNA's collective bargaining agreement with the HHC. Since then, the grievant has allegedly been repeatedly told by NYSNA representatives that the Association cannot file a grievance on this issue because there is no contractual violation. The Union argues that the collective bargaining agreement does not prohibit petitioner from filing her own grievance, but she has not done so.[4]

Finally, the Union argues that the issue of the HHC's right to assign nurses was addressed in a July 15, 1981 arbitration award, where the arbitrator held that the HHC has the right to reassign employees "in the interest of managerial effectiveness." It argues that petitioner, despite being told this repeatedly by NYSNA and HHC representatives, is either unwilling or unable to understand it.

HHC's Position

---

[3](...continued)
or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the board for a final determination of the matter and for an appropriate remedial order.

[4] Article VI, § 2 of the parties' collective bargaining agreement states:
". . . The Grievance Procedure, except for paragraph (D) of Section 1, shall be as follows:
Step 1. The Employee and/or the Association shall present the grievance verbally or in the form of a memorandum to the person designated for such purpose by the agency head no later than 120 days after the date on which the grievance arose. . .

The HHC states that petitioner verbally requested a change to Tour II in late 1996 and was informed that she would have to apply for vacancies as they occurred. It states that petitioner was also notified of the proper procedure for requesting a change in work schedule in Otero's August 14, 1997 memorandum to Griffiths. The HHC also produced a posting for a Tour II Supervisor of Nurses in Surgical Services - ICU that was allegedly posted from November 26, 1996 through December 3, 1996. The HHC alleges that petitioner did not apply for the position, and that another nurse applied for it and was awarded the position.

The HHC argues that even assuming *arguendo*, that the petition contained facts sufficient to state a cause of action under § 12-306 of the NYCCBL, petitioner has failed to file her petition within the time set forth in § 1-07 of Chapter 61 of the Rules of the City of New York. The HHC argues that the Board has held that the four-month limitation contained in [then] § 7.4 of the OCB Rules bars consideration of untimely filed improper practice petitions, even where the delay in filing has not prejudiced the party charged.[5] It states that the Board has also held that it would consider allegations of events which are time-barred in the context of background information, but only where there are timely assertions as well.[6] The HHC contends that petitioner sets forth allegations concerning matters which took place in 1994, 1995, 1996 through August 1997. It also contends that the petition was filed with this Board on or about April 8, 1998 and received by the HHC on April 13, 1998. Accordingly, it argues, the improper practice petition was filed more than four months after the occurrence of any of the acts complained of and is, therefore, untimely. The HHC then

---

[5] The HHC cites Decision Nos. B-26-80 and B-18-86.

[6] The HHC cites Decision No. B-27-83.

addresses each of the four subsections of § 12-306(a) of the NYCCBL and argues why the HHC did not violate them.

Finally, the HHC argues that the Board has held, in accordance with § 12-307(b) of the NYCCBL,[7] that personnel actions, including transfers and reassignments, generally are within management's statutory prerogative to direct its employees and to maintain the efficiency of its operations, and as such, they are not normally reviewable in the improper practice forum.[8] The HHC argues that the Board stated that transfers and reassignments may give rise to an improper practice finding only if they can be shown to have been used as a pretext for interference with an employee's statutory organizational rights.[9]

The HHC argues that in the instant matter, management had a sound business reason for its decision to reassign petitioner. Moreover, it adds, petitioner failed to present any claim of a causal link between the decision to reassign her and any union activities. The HHC contends that § 12-307(b) gives it the right to reassign staff following layoffs of personnel and to reassign staff to maintain the efficiency of governmental operations and to determine the personnel by which the operations of the hospital are to be conducted. It argues that § 7:2 of the New York City Health and

---

[7] Section 12-307(b) of the NYCCBL states:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining. . .

[8] The HHC cites Decision No. B-25-89.

[9] *Id.*

Hospitals Corporation Personnel Rules and Regulations defines the term "reassignment" as:

> § 7:2:1 A change of assignment to another position in the same title which has the same salary rate and substantially the same educational and/or training requirements and which is under the Jurisdiction of the same Appointing Office shall be regarded as a reassignment.
>
> § 7:2:2 A reassignment may be made at the discretion of the Appointing Office in the interest of managerial effectiveness.

The HHC argues that the reassignment of staff is a management right protected both by the NYCCBL and the Corporation's Personnel Rules and Regulations. Moreover, it adds, in the Matter of the Arbitration between the NYSNA and the HHC, Docket No. A-832-79, Arbitrator George Moskowitz confirmed the position that the public employer (Harlem Hospital) had the unilateral right to reassign staff in the interest of managerial effectiveness and the grievance was denied.

DISCUSSION

Both Co-Respondents argue that the petition was filed in an untimely manner. The four-month limitation period described in Title 61, § 1-07(d) of the Rules of the City of New York bars our consideration of untimely filed improper practice allegations. Timeliness is an affirmative defense which must be pleaded and proved by the responding party.[10] It is abundantly clear that the events petitioner describes that are not involved with the allegations of breach of the duty of fair representation were filed in an untimely manner.

Regarding the petitioner's claims of the Union's alleged breach of the duty of fair representation, the Co-Respondents argue that time should run from the June date when the

---

[10] *The United Probation Officers Association v. The Department of Probation*, Decision No. B-44-86.

petitioner first requested a transfer, or at the very latest, August, when the petitioner last requested a transfer in writing. However, the time that the Board has marked in the past as the moment when time begins to run is the date on which the basis for the improper practice petition is formed.[11] Here, the petitioner claims that the Union breached its duty of fair representation by not pursuing what she perceived to be a legitimate grievance. Therefore, the date on which time would begin to run is the date on which the Union informed her that aid would not be forthcoming.

We find evidence of when the petitioner was notified, if not for the first time, on October 10, 1997 in the February 23, 1998 letter from a NYSNA representative to the petitioner. In it, the representative states that they had spoken several times, that the petitioner was encouraged to apply for any openings that may arise, and that a discussion took place on October 10, 1997 in which the petitioner told the representative that she didn't "feel like waiting that long, and you better get me my job back." The direct inference from this letter is that the Union told her as early as October 10, 1997 that they would not file a grievance on her behalf. Since the petitioner did not file a reply, the allegations of the respondents' answers, including the attached February 23, 1998 letter from the NYSNA representative, are deemed admitted.[12]

In petitioner's pleadings, we find a lack of particularity as to the times and dates of relevant events that would aid this Board in rendering a decision. The last date mentioned in the text of her pleading is June 11, 1997. We also find attached as an exhibit a letter from the NYSNA to Jacobi on petitioner's behalf written on January 13, 1998, which shows that the Union still attempted to

---

[11] *Leonard L. Whetstone v. Executive Board, District Council 37, AFSCME, AFL-CIO, et. al.*, Decision No. B-2-82 at 15.

[12] *See* § 1-07(i) of the OCB Rules.

help her as late as that date. However, she never explains when she first contacted the Union to complain or when the Union first told her that they would not file a grievance on her behalf. We cannot reconstruct for a petitioner that which he or she does not plead. The fact that petitioner continued to complain to the NYSNA and that the NYSNA apparently kept trying to tell its member that which she was unwilling to accept does not stay the running of the applicable four month limitation period.[13] Thus, we find that the petitioner filed her claim in an untimely manner. Since the petition against the Union fails, the derivative claim brought against the City, pursuant to § 209-a(3) 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 docketed as BCB-1971-98 be, and the

---

[13] In *Marc. A. Miller v. Detectives Endowment Association*, Decision No. B-40-96, we stated:

The fact that the petitioner wrote to the DEA president in April, 1995, and on December 30, 1995, demanding a written explanation as to why the Union decided not to act on his behalf does not serve to toll the statute of limitations. The Petitioner has not alleged that the Union gave him any reason to believe that it was reconsidering its position during this time. His letters do not qualify as commencement of an action before this Board, nor do they stay the running of the applicable four month limitation period.

same hereby is, dismissed in its entirety.

DATED: February 4, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER