Rosa v. OSA & HHC, 63 OCB 36 (BCB 1999) [Decision No. B-36-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

ELBA ROSA,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

Decision No. B-36-1999
Docket No. BCB-2047-99

DECISION AND ORDER

On March 12, 1999, Elba Rosa ("Petitioner") filed a verified improper practice petition pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] against the Organization of Staff Analysts ("OSA" or "Union") alleging a breach of the duty of fair representation. Pursuant to § 12-306(d), Petitioner also named the New York City Health and Hospitals Corporation ("HHC") as a respondent.[2] Both OSA and HHC filed verified answers on

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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
(continued...)

April 12, 1999. The Petitioner filed a verified reply on April 23, 1999.

Background

In September 1991, the Petitioner was hired as a Senior Hospital Care Program Analyst employed by Harlem Hospital Center and assigned to the City University of New York Physician Assistant program located at Harlem Hospital. On or about September 1992, the Petitioner became a part-time employee. On July 31, 1998, the Petitioner's salary line with HHC was terminated, but she remained on the payroll, on terminal leave, until September 9, 1998.

The Petitioner was then hired as a part-time clinical coordinator. Her new position was a non-union position at a reduced salary. The parties dispute whether Petitioner's new employer was the City University of New York ("CUNY") or HHC's Harlem Hospital. It is clear, however, that Petitioner was no longer in OSA's bargaining unit.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner alleges that in July 1998, her supervisor informed her that her HHC salary line was terminated. Petitioner alleges that in August 1998, when she contacted OSA about her termination, Shirley Grey and Hank Mandel told her that an investigation would immediately ensue. She alleges that over the next two months, she called OSA to find out the progress of the investigation and Grey told Petitioner that there were obstacles at HHC that prevented her from

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[2](...continued)

subdivision b of this section which alleges that the duly 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.

making the appropriate inquiries. Petitioner alleges that she continued to write to OSA through March 3, 1999. Petitioner claims that she did not receive any response from OSA acknowledging any of her complaints.

Petitioner also claims that in October 1998, she was rehired by the same employer, Harlem Hospital Physician Assistant Program into a non-union position at a reduced salary with fewer benefits and a different title.

Petitioner states that she had bumping rights under the 1995 Municipal Coalition Memorandum Agreement ("MCMEA")[3] and that neither HHC nor OSA attempted to redeploy Petitioner in accordance with the July 15, 1996 agreement.[4] She argues that this right was

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[3] MCMEA provides in relevant part:

Section 13. Job Security

a. Pursuant to and consistent with the terms of the Transitional Funding Agreement and the provisions of this 1995 MCMEA, no full time, per annum employee covered by this 1995 MCMEA shall be displaced or involuntarily separated (except as modified by the side letters attached hereto) from service during the period from the date of execution of this 1995 MCMEA until June 30, 1998, except for cause or the movement of civil service lists.

b. Any part time or per diem employee who, upon execution of this 1995 MCMEA, has two continuous years of service and who works at least 20 hours per week, shall be governed by the job security provisions of this Section 13.

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[4] The July 15, 1996 agreement entitled "Re: 1995 MCMEA - Provisions in Lieu of Section 13 for HHC Employees" provides in relevant part:

The City and the Unions recognize that in addition to sharing the burdens of the City's fiscal difficulties, the changing nature of funding for health care and the restructuring of the Health and Hospitals Corporation ("HHC") presents HHC with major reduction in resources. The parties agree that involuntary separations should be a last resort action and will take steps to mitigate staff reduction if required.

(continued...)

afforded to other union members. Petitioner argues that HHC failed to inform her of any rights that she had under New York Civil Service Law and HHC's Personnel Rules and Regulations. She also alleges that nobody told her that she could have filed a claim of a violation of the Civil Service Law or of HHC's Personnel Rules and Regulations without union representation.

Petitioner alleges that while OSA claims that it did not know of any possible HHC violation until October 20, 1998, beginning in August 1998, Petitioner telephoned and sent letters to OSA apprizing the Union of her situation.

Petitioner further claims that neither her employment contract with HHC nor HHC's corporate job description indicates that her HHC position was a grant-funded salary line. Petitioner alleges that on February 25, 1999, Anthony Williams, Associate Director of HHC/Human Resources told Petitioner that her salary line was not grant funded. Petitioner also contends that an HHC letter which was found in her employee file in November 1998, indicates that termination was to take effect on May 1, 1998. However, Petitioner's name does not appear on the document issued by HHC which lists the names of the people who were to be terminated or bumped on May 1, 1998. Furthermore, according to the Petitioner, OSA was not informed of her termination. She also asserts that she received a salary increase in July.

Union's Position

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[4](...continued)

> In the event that staff reduction are required, HHC and the City agree they will try to redeploy employees within HHC, the City, and other covered agencies that may have vacancies.
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> If involuntary separations occur the parties will abide by state civil service law and related regulations and procedures.

The Union contends that OSA was unaware of Petitioner's layoff until she wrote to OSA on October 20, 1998, advising OSA that she had been rehired on October 5, 1998 on a Research Foundation line. OSA denies that Petitioner was rehired by the same employer. OSA states that Shirley Gray, Bernice Stephens and other OSA staff members actively investigated her status once OSA was informed that petitioner was laid off from her HHC line.

The Union contends that Petitioner was employed by HHC as a part-time Senior Health Care Program Planner Analyst and a member of OSA's bargaining unit since December 19, 1995. Petitioner worked until July 31, 1998, but remained on the payroll on terminal leave until September 9, 1998. On October 5, 1998, Petitioner was hired by CUNY's Research Foundation as a part-time clinical coordinator. OSA maintains that it does not represent employees at CUNY and, therefore, the Petitioner is no longer in OSA's bargaining unit. OSA contends that it was not informed by either HHC or the Petitioner about Petitioner's layoff until long after the layoff occurred and after she had accepted a new job with the Research Foundation.

The Union further asserts that MCMEA provides certain job security provisions for part-time employees. However, the provisions of section 13(b) were superseded by a July 15, 1996 agreement. The July 15, 1996 agreement provides that "in the event staff reductions are required, HHC and the City agree they will try to redeploy employees within HHC, the City and other covered agencies." OSA contends that HHC provided it with a list of people to be terminated or bumped on May 1, 1998, however, the Petitioner's name did not appear on the list. The Union contends that only permanent competitive employees have bumping rights and that Petitioner was not a permanent competitive employee, rather, a part-time employee on a grant funded line.

The Union explains that the Petitioner and two other people on temporary grant lines were notified on or about July 1, 1998, that funding for their positions would expire. OSA, however, was not notified by HHC that Petitioner would be terminated. OSA argues that it first became aware in November 1998 that Petitioner was dropped from dues checkoff and from the City's contributions to the OSA Welfare Fund. The Union argues that its actions were not arbitrary, discriminatory or in bad faith because OSA was unaware until October 20, 1998, that Petitioner had been terminated. By that time she was employed at the Research Foundation. Since the Research Foundation is not in OSA's bargaining unit, OSA claims that it cannot negotiate Petitioner's salary.

Regarding the July 15, 1996 Agreement, OSA argues that it had no way of knowing that HHC may have violated Petitioner's redeployment rights until October 20, 1998. Furthermore, OSA does not know whether HHC even attempted to redeploy Petitioner.

Finally, the Union states that it will reimburse Petitioner if union dues were deducted from her paycheck after September 9, 1998.

HHC's Position

HHC contends that Petitioner was employed by Harlem Hospital Center as a Senior Hospital Care Program Planner Analyst. She was assigned to the City University of New York Physician Assistant program located at Harlem Hospital on a grant funded line. HHC asserts that Petitioner was notified in March 1998 by her supervisor that her employment would be terminated because the grant that funded her line was expiring. Her last day of employment at Harlem Hospital Center was July 31, 1998. After her termination, CUNY offered Petitioner a

position at the CUNY Physican Assistant program. She began her employment with CUNY on August 1, 1998.

HHC argues that its actions have not interfered with, restrained or coerced Petitioner in the exercise of rights under section 12-306 of the NYCCBL. It argues that the petition should be dismissed because it fails to state a cause of action under the NYCCBL.

HHC further states that Article VI of the collective bargaining agreement provides that an employee may file Steps 1, 2 and 3 without the assistance of a union. Petitioner failed to file a grievance within the limitations period. Thus, HHC argues that Petitioner is time-barred from filing a grievance.

HHC further contends that assuming *arguendo* that Petitioner has a claim under HHC's Personnel Rules and Regulations or under the New York State Civil Service Law, such claim for relief is beyond the jurisdiction of the Board of Collective Bargaining. HHC maintains that HHC's Personnel Rules and Regulations and the New York State Civil Service Law are statutory rights and Petitioner did not need the Union to bring a claim under these statutes. HHC further argues that the statute of limitations to file a claim under these statutes has expired.

Discussion

The petition alleges that the Union breached its duty of fair representation when it did not assist Petitioner after she was terminated from her employment with HHC. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[5] In the area of contract

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[5] *Perlmutter v. Uniformed Sanitationmen's Assoc. et al.,* Decision No. B-16-97 at (continued...)

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.[6] 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. When a union arbitrarily ignores a meritorious grievance or processes a grievance in a perfunctory fashion, the union violates the duty of fair representation.[7] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[8]

In the present case, the Petitioner has failed to establish that the Union's alleged failure to act on her behalf was effected arbitrarily, discriminatorily or in bad faith. Rather, the evidence indicates that the Union's determination was reached in good faith, after it assessed the circumstances of Petitioner's situation. According to the Union, Petitioner's name did not appear on HHC's redeployment list in May 1998, because she was a part-time employee on a grant funded line and was not eligible for redeployment. In October 1998, once the Union became aware of Petitioner's termination, it conducted an investigation of the matter. The Union concluded that Petitioner did not have any rights under the July 15, 1996 agreement, because it applies only to permanent competitive employees and Petitioner was a part-time employee on a

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[5](...continued)
5; and *Allcott v. Local 211 et al.*, Decision No. B-35-92 at 7.

[6] *Id.*

[7] *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.

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

grant funded line. The Union determined that HHC was, therefore, under no obligation to redeploy Petitioner or include her on the redeployment list. Where the evidence does not suggest that the union was improperly motivated, there is no violation of the duty of fair representation.[9] We thus 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 HHC 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 31, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

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

CAROLYN GENTILE
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER