Gibson v. L. 1549, DC 37, DOH & OLR, 63 OCB 5 (BCB 1999) [Decision No. B-5-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
MURIEL E. GIBSON,	:	
	:	Decision No. B-5-1999
Petitioner,	:	Docket No. BCB-1957-98
	:	
-and-	:	
	:	
DISTRICT COUNCIL 37, LOCAL 1549, NEW YORK CITY DEPARTMENT OF HEALTH AND MAYOR'S OFFICE OF LABOR RELATIONS,	:	
	:	
Respondents.	:	

DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"), [1] Muriel E. Gibson ("Petitioner") filed a Verified Improper Practice Petition on February 20, 1998, against Local 1549, District Council 37, AFSCME, AFL-CIO ("Union"). Petitioner also named the New York City Department of Health and the Mayor's Office of Labor Relations as Co-

[1] Section 12-306(b) of the NYCCBL provides:

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...

Respondents ("City").[2] The Union filed an answer on March 25, 1998 and the City filed an answer on March 11, 1998. The petitioner did not submit a reply.[3]

Background

The Petitioner has been employed by the City of New York since 1954 and has held the civil service title of Clerical Associate since 1988. Petitioner works for the Department of Health in the Sexually Transmitted Diseases ("STD") Unit . On November 14, 1997, Frantz Desire, Clinic Manager of the STD Unit approved the Petitioner's request for annual leave from December 26, 1997 to January 2, 1998. On December 22, 1997, Petitioner told Mr. Desire that she would start her vacation the following day, December 23, which was two days prior to her scheduled vacation. Mr. Desire informed Petitioner that she had to report to work on December 23 and December 24, because the vacation schedule for December was already in place and there was no available coverage for Petitioner. The Petitioner, however, did not report to work on December 23 and 24, 1997, and was not paid for those days.

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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] Petitioner was informed by the Office of Collective Bargaining by letter dated July 1, 1998, that she is entitled to submit a reply which may address any additional facts or new matter alleged in the respondents' answers. She was informed that if she did not submit a reply, disposition of the matter will proceed based on the existing record. Pursuant to the Rules of the City of New York for the Office of Collective Bargaining, Title 61, Chapter 1, § 1-07 (i), "Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

On January 15, 1998, the Petitioner submitted a written response to Mr. Desire noting that she "did not deliberately circumvent the rule." In January 1998, the Petitioner contacted Council Representative Georgeann Collazzo ("Collazzo") by telephone and informed her that the Department of Health had deducted one hundred fifty dollars ($150) from Petitioner's paycheck. Collazzo requested that Petitioner send her a copy of her check and all other relevant paperwork. After reviewing the paperwork, Collazzo spoke with the Petitioner and the Petitioner admitted that she took two days of unauthorized leave. The Petitioner explained to Collazzo that on November 14, 1997, her request for vacation from December 26, 1997 to January 2, 1998 was approved. She also explained that on December 22, 1997, she attempted to change her request in order to begin her vacation the following day, and that although the change was not approved, she nevertheless took the time off.

Petitioner did not provide any information to Collazzo indicating that the additional days were necessary for emergency reasons or in order to avoid a financial hardship. Collazzo informed Petitioner that her director had acted in accordance with agency procedures.

On February 20, 1998, the Petitioner filed the instant improper practice petition.

Positions of the Parties

Petitioner's Position

The Petitioner alleges that she has been paying fifty dollars ($50) a month in union dues and that the Union has "consistently refused to help [her] in matters relevant to [her] job." She

claims that it has been an ongoing situation. Petitioner alleges that in December of 1997, one hundred fifty dollars ($150) was deducted from her paycheck for no valid reason. She states that in January of 1998 she phoned Collazzo, her Union representative, and that Collazzo told her that the money should not have been deducted. Petitioner also states that Collazzo told her to send her a copy of the check and petitioner complied with that request. She states that a month passed and she heard nothing from the Union.

Petitioner also states that on an earlier occasion in 1997, she was a "little late" returning to work because she went to pick up her car. She claims that she explained the circumstances to her manager who then wrote her up. Petitioner alleges that another employee used to leave the clinic and stay out for more than one hour and nothing was said to her. Petitioner filed her improper practice claim on February 20, 1998.

Union's Position

The Union states that monthly union dues are forty-nine dollars ($49) a month as opposed to the fifty dollars ($50) a month alleged by the Petitioner. The Union also denies the allegation that Collazzo told Petitioner that the money should not have been deducted from her paycheck and asserts that Collazzo thoroughly investigated the matter.

The Union alleges that Collazzo attempted to ascertain whether there was an emergency or whether the additional vacation days were necessary in order to avoid financial hardship due to previously purchased plane or train tickets, or hotel accommodations that could not be changed. The Union asserts that Petitioner did not provide information indicating that there had been any such emergency or hardship. Furthermore, the Union alleges that Collazzo, who was familiar

with the Agency's policy regarding annual leave requests, informed petitioner that the manager acted in accordance with agency procedures. The Union also argues that Petitioner never contacted Collazzo about her allegations concerning returning late to the clinic earlier in 1997.

The Union argues that petitioner failed to state a cause of action for the breach of the duty of fair representation under NYCCBL § 12-306 (b)(1), which imposes upon a public employee organization the duty to treat its members fairly and impartially. The Union claims that the petitioner bears the burden of pleading and proving that the Union has engaged in prohibited conduct. The Union argues that the Petitioner has pled no facts demonstrating arbitrary, discriminatory or bad faith conduct on the part of the Union. Absent a showing of hostile discrimination, the Union does not breach its duty because an employee is merely unhappy with the results of the Union's representation. In addition, the Union argues that the claim concerning Petitioner's late return to the clinic is so vague that it fails to state a cause of action. In fact, the Union argues that it was never notified of the matter.

The Union argues that it does not have an obligation to represent members who have no legal or contractual rights to the relief that they seek. The Union thus claims that since the Department of Health acted in conformance with its annual leave regulations when it deducted money from Petitioner's pay, the Union has no obligation to represent the Petitioner in this matter. The Union asserts that since the petition is devoid of facts which would support a finding that the Union or its agents committed an improper practice, it should be dismissed for failing to state a claim for a breach of the duty of fair representation.

The Union further argues, that assuming arguendo that the Union was notified of the

claim concerning Petitioner's late return to the clinic, the claim which arose in 1997, is time-barred by the four (4) month statute of limitations.

City's Position

The City claims that the Improper Practice Petition must be dismissed for failure to state a prima facie improper practice claim under the NYCCBL 12-306(a). The City argues that there has been no violation of § 12-306(a)(1) because the petitioner does not allege any interference, restrain or coercion in the exercise of rights granted in §12-305. The City also claims that Petitioner fails to allege a violation of NYCCBL § 12-306(a)(2) because the Petitioner does not allege interference with the formation or administration of any public employee organization. Furthermore, the City argues that the Petitioner fails to allege facts sufficient to support a violation of NYCCBL § 12-306(a)(3) because the petition does not allege any discriminatory action by the employer. The City further argues that plaintiff does not allege facts sufficient to support an improper employer practice under § 12-306(a)(4) of the NYCCBL because the petition does not allege that the employer refused to bargain collectively in good faith on matters within the scope of collective bargaining. Therefore, the City argues that the improper practice petition must be dismissed because the Petitioner has not established a prima facie case of improper practice.

The City also argues that the Board of Collective Bargaining lacks jurisdiction over the alleged contractual violation and that the appropriate forum for resolution of the allegation is through the grievance procedure described in Article IV of the collective bargaining agreement. The City thus concludes that the petition must be dismissed.

Discussion

The allegations in the petition raise the issue of whether the Union breached its duty of fair representation in the processing of a grievance on Petitioner's behalf. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[4] 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.[5] 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.[6] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[7]

The Petitioner contends that the Union violated its duty of fair representation when it "refused to help [her] in matters relevant to [her] job." We reject this contention on the ground that the Petitioner has failed to establish that the Union's determination was effected arbitrarily, discriminatorily or in bad faith. The Petitioner does not establish that the Union's determination

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[4] *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.

[5] *Id.*

[6] *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.

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

to refrain from pursuing the Petitioner's grievance was in any way improperly motivated. Rather, the evidence presented in this case indicates that the Union's determination was reached in good faith, after it assessed the circumstances of the Petitioner's situation and made efforts to resolve the problem informally. Even where a union may have been guilty of an error in judgment, there is no violation of the duty of fair representation, provided the evidence does not suggest that the union's conduct was improperly motivated.[8]

In light of this standard, we find that Local 1549 neither abused its discretion nor acted in bad faith when it did not proceed on Petitioner's grievance. Council Representative Georgann Collazzo investigated the charges and determined that the Department of Health acted in accordance with agency procedure when it deducted one hundred fifty dollars ($150) from the Petitioner's pay. The Petitioner even admitted to Collazzo that she took the two unauthorized vacation days. When Collazzo attempted to investigate the Petitioner's reason for taking the two unauthorized days, the Petitioner did not supply her with any information of emergency or financial hardship. Since Collazzo was familiar with the City's annual leave policy, she determined that nothing could be done on behalf of Petitioner.

While the Union contends that the Petitioner's claim concerning her late return "earlier in 1997" is time-barred, we need not reach the issue. Since the Petitioner does not allege that she ever asked the Union to assist her in this matter, the petition fails to allege a prima facie improper public employer organization practice as to this claim.

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

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

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-1957-98 be and the same hereby is, dismissed in its entirety.

Dated: February 4, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
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