

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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 In the Matter of the Improper Practice Petition :
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 -between- :
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 MARIA SILVA, :
 :
 Petitioner, : Decision No. B-31-2000
 : Docket No. BCB-1985-98
 :
 -and- :
 :
 CORRECTION OFFICERS' BENEVOLENT :
 ASSOCIATION and the OFFICE OF LABOR :
 RELATIONS, :
 :
 Respondents. :
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DECISION AND ORDER

On May 8, 1998, Maria Silva (“petitioner” or “Silva”), filed a Verified Improper Practice Petition, alleging that the Correction Officers’ Benevolent Association (“COBA” or “respondent”) breached its duty of fair representation under the New York City Collective Bargaining Law (“NYCCBL”) by refusing to represent her after she was allegedly transferred for disciplinary reasons.¹ Petitioner also named the Office of Labor Relations (“City”) as Co-Respondent.² Petitioner lists § 12-306b.(1) of the NYCCBL as the provision the respondents violated.³ The

¹ **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
(3) to breach its duty of fair representation to public employees under this chapter.

² Section 12-306(d) of the NYCCBL, provides for the joinder of the public employer in duty of fair representation cases.

³ **b. Improper public employee organization practices.** It shall be an improper
(continued...)

Union filed an answer and motion to dismiss on May 27, 1998. The City filed an answer on June 17, 1998. The petitioner submitted a reply on July 28, 1998. The Union submitted a sur-reply on August 21, 1998 and the petitioner submitted a response to the sur-reply on August 31, 1998.

BACKGROUND

On March 25, 1998, a staff meeting, designated as an "Open Forum" was held and petitioner was present. Allegedly, she made a statement that a new case review process was "retarded." On March 27, 1998, she was told that she was going to be transferred out of the Investigation Division to another command. On that date, she wrote a note to Norman Seabrook, President of COBA, seeking assistance in that matter. The Union decided not to represent her. The Union claims that on April 10, 1998, petitioner was transferred back to the Investigation Division by teletype order. However, the petitioner produced an order issued later the same day, rescinding the transfer back to her old post.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that when her employer removed her from her position without "applying a grievance procedure," COBA failed to assist her despite phone calls and facsimiles asking for help. Petitioner argues that by not acting on her behalf, the Union acted in bad faith, breached its duty of fair representation, and failed to properly represent her as it does similarly situated employees. She

³(...continued)

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...

alleges that at some point she was interviewed by several supervisors of the Department of Correction and COBA elected not to send representation. She states that coercion did exist in relation to § 12-306b.(1) when those supervisors interrogated her during a meeting. Petitioner contends that at the meeting she was not counseled but informed that she was being transferred as a means of discipline.

Union's Position

The Union asserts that the petition should be dismissed as vague, and the petition does not allege conduct on the part of COBA that rises to the level of discriminatory, bad faith, or arbitrary and capricious.⁴ Furthermore, COBA argues that petitioner has not alleged facts which make out a violation by COBA of § 12-306b.(1). It argues that the petition is devoid of any facts demonstrating any interference, restraint or coercion of petitioner's rights under that provision.

Although petitioner complains that DOC transferred her without first applying the grievance and arbitration procedure, COBA asserts that stating that a grievance procedure exists does not constitute a grievance. It contends that petitioner's failure to even identify a contract provision that forms the basis for a purported grievance precludes her from stating a claim against COBA for failure to represent.

In response to petitioner's allegations that she was interviewed by supervisors at the DOC, the Union argues that assuming the allegations are true, they still do not constitute an improper practice under § 12-306b.(1). In addition, it argues that DOC's interview of petitioner is not the type of event for which the Union has a duty to provide representation, as the Board has held that the

⁴ The Union cites Decision No. B-12-82.

Union has no duty to represent an employee in non-adversarial transactions.⁵ It contends that by petitioner's own submission, a memorandum by a superior characterizing the meeting as a discussion of counseling, the interview was for the purpose of counseling. As discipline was not discussed, the Union contends that the meeting was non-adversarial and it had no duty to represent the petitioner.

The Union asserts that to the extent petitioner complains of being transferred, this has nothing to do with COBA. It states that it is well settled that transfer decisions are managerial prerogatives under § 12-307 of the NYCCBL.⁶ The Union argues that petitioner speculates that COBA's presence at the interview would have prevented her transfer or that COBA's absence from the interview caused the transfer. Such speculation, it contends, cannot form the basis of a duty of fair representation claim against COBA. It also contends that filing a grievance against the City, given its managerial authority, would be futile. It argues that petitioner has produced nothing to show the existence of a meritorious grievance much less conduct which would satisfy the standard of "arbitrary and capricious."

City's Position

The City contends that petitioner fails to allege facts sufficient to maintain a charge that the City-respondent has taken actions for the purpose of frustrating the statutory rights of petitioner in violation of the NYCCBL. Consequently, it argues, the instant petition must be dismissed unless the Board determines that it must retain jurisdiction over the respondent as a party to an allegation

⁵ *Id.*

⁶ The Union cites Decision No. B-25-89, which, according to the Union, states that transfers and reassignments are not normally reviewable in an improper practice forum unless done as a pretext for interference with an employee's statutory organizational rights.

that the Union has committed an improper practice by breaching its duty to properly represent petitioner and that petitioner had a contractual claim that the Union could have asserted. The City also contends that it bears no responsibility for any damage incurred by the petitioner should the petitioner's claim against COBA be sustained.

DISCUSSION

The petitioner claims that the City violated § 12-306b.(1) of the NYCCBL when her supervisors interrogated her at a meeting. Although this section applies only to improper public employee organization practices, it is clear that petitioner means to cite § 12-306a.(1), the section pertaining to improper public employer practices. In any event, petitioner has presented only conclusory and speculative allegations regarding this claim and it must, therefore, be dismissed.

The petitioner claims that the Union breached its duty to fairly represent her. Unless the petitioner shows that the Union's actions were discriminatory, arbitrary or taken in bad faith, or that it did more for others in the same circumstances than it did for her, even errors in judgment do not breach the duty.⁷ Here, the petitioner has submitted no evidence that the Union's decision that there was no basis to grieve her transfer, under the applicable collective bargaining agreement, was discriminatory, arbitrary, or in bad faith. Accordingly, we find that petitioner has not established that the Union breached its duty of fair representation. The petitioner's claims that COBA failed to properly represent her as it does similarly situated employees, and that the Union acted arbitrarily and capriciously, are conclusory and unsupported by any evidence in the record. Since that is the case, any derivative claim against the City brought pursuant to § 12-306(d) of the NYCCBL also

⁷ *Valentine v. International Union of Operating Engineers, Local 15C, AFL-CIO and Municipal Tractor Operators Association*, Decision No. B-26-81.

fails. Petitioner has also failed to allege facts which make out a violation by COBA of § 12-306b.(1). Accordingly, the petition is 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-1985-98 be, and the same hereby is, dismissed in its entirety.

DATED: October 10, 2000
 New York, N. Y.

MARLENE A. GOLD
CHAIR _____

_____ DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER _____

CHARLES G. MOERDLER
MEMBER

RICHARD WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER _____