Robinson v. Legal Dep't, Ramsey, Velez, DC 37 & DOH, 67 OCB 29 (BCB 2001) [Decision No. B-29-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

CHRISTLYN ROBINSON,

Petitioner,

Decision No. B-29-2001
Docket No. BCB-2175-00

-and-

LEGAL DEPARTMENT, DARRYL RAMSEY, STEPHANIE VELEZ, DISTRICT COUNCIL 37, AFSCME, AFL-CIO and NEW YORK CITY DEPARTMENT OF HEALTH,

Respondents.
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DECISION AND ORDER

Christlyn Robinson filed a Verified Improper Practice Petition alleging that District Council 37, AFSCME, AFL-CIO ("Union") breached its duty of fair representation by failing to help her after she sustained an on-the-job injury.[1] The Union alleges that the Petitioner's failure to set forth any facts alleging arbitrary, discriminatory or bad faith conduct on the part of the Union mandates dismissal of the petition. Since Petitioner made no showing of discrimination or improper motivation, the Board finds that the petition must be dismissed.

BACKGROUND

[1] The Petitioner cites violations of §§ 12-306a(4), 12-306b(2) and (3), and 12-306c(1), (2), (3), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title12, Chapter 3)("NYCCBL").

The Petitioner was an employee of the Department of Health ("DOH") and held the civil service title of City Pest Control Aide.[2] On August 24, 1999, the Petitioner alleged that she injured her back while lifting heavy garbage bags at work. She was granted a three-month leave to recover from her injury.

Near the end of her leave, Petitioner, on the advice of her physician, concluded that she was not physically able to return to work. Petitioner alleges that she called Darryl Ramsey, a Union Grievance Representative. She also alleges that she asked for advice on how to proceed, but did not receive any help. The Union asserts that the Petitioner did not ask for help at that time. In April or May, Petitioner spoke with Ramsey and, according to the Union, insisted upon a clerical position at the DOH. The Union alleges that Ramsey told her that he could not force the City to give her clerical work while she was in her present title, which did not involve clerical work. The Union states that nevertheless, Ramsey called a manager at the DOH, who stated that he could not help because the Petitioner was not a clerical worker and there was no clerical work available. About the same time, Petitioner also met with Local 768's President, Helen Green, and Green arranged with the City to have the Petitioner work in a modified light-duty in-title position. Petitioner declined the position because she did not feel capable of performing even the modified light-duty position.

At the end of April or early May 2000, Petitioner inquired about filing a grievance, and Ramsey referred the matter to the DC 37 Legal Department. The Legal Department concluded that her problem was not grievable. On several other occasions through August 29, 2000, Petitioner voiced her objection to a modified light-duty position and asked to be placed in a clerical position. On August

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[2] Part of the job description for City Pest Control Aide is that the Aide "[r]emoves refuse accumulations from the interiors and exteriors of premises and from adjacent lots in Pest Control Program target areas, and loads such accumulation on trucks." (Union Exhibit "B").

29, 2000, Gregory Antollino, Esq., Petitioner's attorney, sent a letter to Stephanie Velez, Director of Personnel at DC 37, stating that the Petitioner had repeatedly asked for help from the Union to no avail, and urged the Union to file a grievance against her employer. Neither the Petitioner nor her attorney had any other communication with the Union after the August 29, 2000 letter.

The initial petition was filed on December 29, 2000, and it included the DOH as co-respondent.[3] The petition was dismissed by Office of Collective Bargaining's ("OCB's") Executive Secretary because it failed to set forth a statement of the nature of the controversy as required by § 1-07e(3) of the OCB Rules. Dismissal of the petition was without prejudice to resubmission of a petition which satisfied minimum pleading requirements within ten days. The petition was resubmitted with additional details, and deemed sufficient, but it was considered timely only as to conduct which occurred within four months of December 29, 2000, the date of the initial filing.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that she has done all of the work in trying to resolve her problem, and the Union has shirked its responsibility by failing to help her. She also alleges that when she told Greene that she could not perform the modified light-duty assignment that was offered, Greene told her to go to the field and prove to them that she could not do the assignment. Petitioner felt that she should not have to go to prove she was unable to perform the light-duty assignment.

Union's Position

The Union asserts that the failure to file the Improper Practice charge in a timely manner

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

compels the Board to dismiss this action, as there was no conduct or activity that could have provided the basis for any allegation against the Union for any relevant activity in the four months prior to the Petitioner's filing. Petitioner has also failed to state a cause of action against the Union because the gravamen of the complaint is that she was not satisfied with the Union's successful efforts when it obtained a modified light-duty Pest Control Aide assignment.

According to the Union, the Petitioner also fails to state a claim upon which relief can be granted since the pleadings are entirely devoid of any factual allegations relating to bad faith, hostile, arbitrary or discriminatory conduct on the part of the Union. Furthermore, the Board has stated that a petitioner must offer more than speculative assertions and legal conclusions, as Petitioner has done here.

City's Position

The City also argues that the petition must be dismissed as untimely. Petitioner has failed to show how the City violated §§ 12-306a(4), 12-306b(2), or 12-306c(1)(2)(3) and (5). The petition also must be dismissed because the claims made in the petition relate to the City's decision to offer Petitioner a modified duty assignment rather than a clerical position, and the appropriate forum for the resolution of these allegations, if any, is through the mechanisms provided by the contract between the Union and the DOH.

DISCUSSION

Here, Petitioner asserts that the Union breached its duty of fair representation when it did not help her after sustaining an on-the-job injury. The claims must be dismissed because the majority of the allegations are untimely and the remainder of the assertions fail to state a cause of action.

We find that Petitioner's claims prior to August 29, 2000, are untimely because those claims

arose more than four months before she filed her initial petition. The Board has consistently held that the four-month limitations period contained in § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1)("OCB Rules") will bar consideration of an untimely filed improper practice petition.[4] Therefore, we may consider only the August 29, 2000, letter from the Petitioner's attorney to DC 37, which asks the Union to take action on Petitioner's behalf, as timely. Allegations relating to events which occurred more than four months before the filing of such a petition may be considered only in the context of background information and not as specific violations of the NYCCBL.[5]

The August 29, 2000, letter raises the issue whether the Union breached its duty of fair representation. Section 12-306b(3) of the NYCCBL provides that it is an improper practice for a public employee organization or its agents to breach its duty of fair representation to public employees. To prove that a union breached this duty, it is not enough for a petitioner to allege negligence, mistake or incompetence on the part of the union.[6] Unless a 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 such as faulty advice do not breach the duty.[7] Here, Petitioner has not shown any evidence that Union's actions were discriminatory, arbitrary or taken in bad faith, or that she was treated differently from anyone else. Indeed, it appears that the Union had

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[4] *See, e.g., Centeno and City Employees Union, Local 237, IBT; Robinson, Cross & The New York City Housing Authority*, Decision No. B-7-97 at 10.

[5] *Id.*

[6] *Schweit v. NYC Dep't of Correction, Health Management Division and the Correction Officers Benevolent Ass'n*, Decision No. B-36-98.

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

some measure of success in helping her by attaining a modified light-duty position for the Petitioner, which she declined. Thus, the Petitioner's claims must be dismissed. Any remaining derivative claim against the DOH brought pursuant to § 12-306(d) of the NYCCBL also must fail and, therefore, we need not reach the DOH's arguments. 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-2175-00 be, and the same hereby is, dismissed in its entirety.

DATED: June 14, 2001
New York, N. Y.

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER