White v. HRA, OLR & L. 1180, CWA, 69 OCB 25 (BCB 2002) [Decision No. B-25-2002 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

PATRICIA WHITE,

Petitioner,

Decision No. B-25-2002 (ES)
Docket No. BCB-2157-00

-and-

HUMAN RESOURCES ADMINISTRATION
AND OFFICE OF LABOR RELATIONS

-and-

COMMUNICATIONS WORKERS OF
AMERICA, L. 1180

Respondents.

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DETERMINATION OF EXECUTIVE SECRETARY

On October 18, 2000, Patricia White ("Petitioner") filed a verified improper practice petition against Human Resources Administration ("HRA") and Communications Workers of America ("CWA" or "Union"). Petitioner submitted additional supporting papers dated February 19, 2001, and March 12, 2001, as well as several letters of inquiry. Petitioner alleges that when she was transferred from her position as a Computer Associate Technical Support Level II ("CATS II") at City University of New York ("CUNY") to HRA, she was wrongfully demoted to the lower position of Technical Support Aide ("TSA") at the latter agency. Petitioner alleges that HRA's actions interfered with the exercise of her rights under the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL").

She further alleges that the Union committed an improper practice when it failed to process her grievance regarding her reassignment and demotion in a timely manner. Petitioner characterizes her claim as a "continuing grievance" and argues that her "right to relief will not be barred by the four-month statute of limitations."

BACKGROUND

Petitioner began working for CUNY on May 29, 1973, when she was appointed to the position of Alpha Keypunch Operator. While at CUNY, Petitioner was promoted to CATS I and was earning an above-the-minimum salary for that title and level. On February 8, 1988, Petitioner claims she was functionally transferred to HRA and assigned to serve in the lower title of TSA. Petitioner contends that the HRA's failure to maintain her in the CATS I title she had held at CUNY constituted a demotion which was a violation of due process and a wrongful disciplinary action under the Civil Service Law, and that HRA's actions interfered with the exercise of her rights under the NYCCBL. Petitioner asserts that the Union's failure to investigate this claim and its wrongful refusal to pursue it was a breach of the Union's duty of fair representation. Nevertheless, as a result of a grievance determination, Petitioner's salary at HRA was adjusted, effective June 2, 1988, to conform with the above-minimum rate she had received at CUNY while she worked in the CATS I title. Further, on or about August 14, 1988, Petitioner was promoted to the CATS I title at HRA.

An investigation regarding Petitioner's title and grade level commenced and Petitioner claims that sometime in 1990 or 1991, she presented "substantial evidence" that her correct title and level was CATS II. The record demonstrates that Petitioner was paid the salary of a CATS II

as a result of a grievance determination for working out-of-title from June 26, 1994 until June 29, 1996. Furthermore, since filing the improper practice petition, Petitioner was informed by letter dated February 27, 2001, from HRA Deputy Administrator of Personnel Services, Jane Roeder, that Petitioner's salary from June 2, 1988 through June 11, 1994 will be adjusted to that of a CATS II. The letter states that Petitioner's "payment as a CATS Level II reflects grievance determinations. These grievance determinations did not promote [her] or change [her] title to CATS II."

DISCUSSION

Pursuant to Title 61, §1-07(d), of the Rules of the City of New York ("RCNY"), a copy of which is annexed hereto, a claim alleging conduct in violation of §12-306 of the NYCCBL must be filed within four (4) months of the date the alleged improper practice occurred. It is undisputed that Petitioner was transferred to HRA on February 8, 1988, that she was demoted to the TSA title as of the same date, and that her complaint that the Union failed to investigate or pursue her reassignment and demotion arose within several months after that date. At the least, it can be said that the Petitioner's claims against both HRA and CWA arose during the year 1988.

The present petition was filed on October 18, 2000, far more than four months from the date of origin of Petitioner's claims; in fact, **twelve years later**. The petition alleges that notice was given to the Union "on several different occasions" that the Petitioner believed her transfer and reassignment to be improper, and that she believed the Union had filed a grievance on her behalf "improperly" under a section of the contract other than the section she thought most appropriate. The petition does not allege the dates on which such notice was given. However,

Petitioner's brief submitted with her petition alleges that she informed the Union of her position concerning the reassignment and demotion in July and August of 1988 and that a grievance was filed by the Union on her behalf in October of 1988 based on a claim of out-of-title work, not the wrongful reassignment claim urged by the Petitioner. Petitioner's requests for assistance and her complaints about the basis used for the grievance, made after that time, and her supplying additional information about her claim to HRA and the Union in 1990-1991 and in 2000 did not serve to toll the four-month statute of limitations. Petitioner's reassignment from CUNY to HRA, her placement in the TSA title, and the Union's refusal to challenge that action as a "wrongful reassignment" all took place at definite points in time. They cannot be considered as continuing violations. Therefore, the petition, filed twelve years too late, is untimely.

Even if the petition were timely filed, a thorough review of the petition and Petitioner's numerous attachments and supplemental submissions fails to reveal any facts which show that either HRA or the Union violated any rights delineated in the NYCCBL. Petitioner's claims of interference with her rights under the NYCCBL are entirely conclusory. Absent allegations of fact showing that the actions of HRA or CWA were intended to, or did, affect rights protected under §12-306 of the NYCCBL, the Petitioner's assertions fail to state a claim of improper practice.

As to HRA, the petition fails to allege any facts that would demonstrate that the employer's actions were improperly motivated within the meaning of § 12-306(a) of the NYCCBL. At most, the petition alleges that, by assigning Petitioner initially to the TSA position, HRA violated rights under the Civil Service Law, the federal and State constitutions,

and the applicable collective bargaining agreement. As will be explained more fully below, none of those asserted violations fall within the jurisdiction of the Board of Collective Bargaining.

As to the Union, Section 12-306(b)(3) of the NYCCBL, the duty of fair representation, requires a union to treat all members of the bargaining unit in an evenhanded manner and to refrain from arbitrary, discriminatory and bad faith conduct. *Hug*, Decision No. B-5-91 at 19. A union breaches its duty of fair representation if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. *Perlmutter*, Decision No. B-16-97 at 5; *see also Bowers*, Decision No. B-56-90 at 5. Petitioner has neither alleged nor offered any evidence to show that the Union herein treated her in an arbitrary, discriminatory or bad faith manner. The record shows that the Union did assist Petitioner, and filed one or more out-of-title grievances on her behalf. Petitioner's own papers show that her salary was adjusted upwardly several times as a result of grievance determinations.

It is noted that Petitioner's original employer, CUNY, is a non-municipal agency, while her subsequent employer, HRA, is a municipal agency under § 12-303 of the NYCCBL. HRA is under the jurisdiction of the Board of Collective Bargaining; CUNY is not. The petition does not explain the circumstances that resulted in what the petition characterizes alternatively as a "functional transfer" or a "reassignment" of Petitioner from one agency to the other. The petition does assert that when Petitioner was reassigned to HRA, she was "demoted" to a lower title, in violation of her rights under § 75 of the Civil Service Law. Section 75 deals with disciplinary rights and procedures. The petition does not suggest why HRA would, at the time of initial assignment, discipline an employee newly-acquired from another public employer. While the petition alleges that the Union failed to investigate Petitioner's claim and wrongfully refused to

pursue it, the record reflects that the Union did file and pursue (successfully) an out-of-title work claim on her behalf. A union is entitled to considerable latitude in determining the most appropriate means of administering and enforcing rights under a collective bargaining agreement. *See Gillard*, Decision No. B-35-2001 at 5; *Terry*, Decision No. B-42-99 at 5-6; *Richardson*, Decision No. B-24-94 at 13-14. Given the background summarized above, the Union's decision to grieve Petitioner's problem as an out-of-title work assignment rather than as a wrongful disciplinary action was not arbitrary, discriminatory or bad faith.

In addition, Petitioner's assertion of claimed violations of due process rights under the Fourteenth Amendment to the United States Constitution and the New York State Constitution, as well as claimed violations of § 75 and other sections of the Civil Service Law (other than sections of the Taylor Law) and the Labor Law are outside the jurisdiction of the Board of Collective Bargaining. *Green*, Decision No. B-34-2000 at 9; *Parker*, Decision No. B-15-97 at 5. Furthermore, Petitioner's claim that HRA violated provisions of the applicable collective bargaining agreement is unavailing, since the Board does not have jurisdiction to consider a breach-of-contract claim that does not otherwise state an independent claim of improper practice. *Smith*, Decision No. B-22-2000 at 7; *Vega*, Decision No. B-35-97 at 13-14.[1]

[1] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides that "the board shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice. . . ."

For the above reasons, the petition must be dismissed. Such dismissal is, of course, without prejudice to any rights that the Petitioner may have in any other forum.

Dated: August 8, 2002
New York, New York

Alessandra F. Zorgniotti
Executive Secretary