Hassay v. DC 37, Human Resources Admin., NYC office of Labor Relations, 71 OCB 2 (BCB 2003) [Decision No. B-2-2003]

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

-between-

THOMAS HASSAY,

Petitioner,

Decision No. B-2-2003
Docket No. BCB-2281-02

-and-

FARYCE MOORE, DIRECTOR OF GRIEVANCES, DISTRICT COUNCIL 37; GARY MAITLAND, ESQ.; ERIC WASHINGTON, DIRECTOR, HUMAN RESOURCES ADMINISTRATION; AND NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.
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DECISION AND ORDER

On April 17, 2002, Thomas Hassay, *pro se*, filed a verified improper practice petition pursuant to § 12-306 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") against Faryce Moore, Director of Grievances, District Council 37, ("Union"), and Gary Maitland, counsel to the Union. The petition alleges that the Union breached its duty of fair representation by failing to resolve a contract arbitration claim relating to HRA's decision to demote Petitioner from his position as Supervisor I (Welfare) to Caseworker. Pursuant to § 12-306(d) of the NYCCBL, which provides for the joinder of the public employer in duty of fair representation cases, Petitioner also named Eric Washington, Director, New York City Human Resources Administration ("HRA" and

"City") and the Office of Labor Relations ("OLR") as co-respondents.[1] For the reasons stated below, the petition is dismissed.

BACKGROUND

Petitioner was employed by HRA in the permanent title of Caseworker on June 29, 1992. On March 17, 1997, he was promoted to a Supervisor I (Welfare) and was assigned to HRA's Bronx Housing Court Liaison Office, subject to a one-year probationary period as required by the Personnel Rules and Regulations of the City of New York, § 5.2.1. Upon receiving a negative evaluation of his performance for the first three months of his work as Supervisor, Petitioner filed a grievance under the dispute resolution procedure provided in the parties' collective bargaining agreement ("CBA"). The grievance was upheld and the negative evaluation was expunged from his personnel file. Upon receiving a second negative evaluation, Petitioner filed another grievance in protest. On October 4, 1997, while awaiting the outcome of this second grievance, he was demoted from Supervisor back to Caseworker. Grievant contended that the demotion occurred because he complained that his supervisor repeatedly smoked in a non-smoking work area and that she repeatedly made derogatory comments about men. The grievance was denied at Step III on March 14, 1998, and on April 27, 1998, the Union filed a

[1] Pursuant to § 12-306 of the NYCCBL, it is an improper practice for a public employer or a public employee organization to engage in certain proscribed conduct. A public employer or a public employee organization may be held responsible for the acts of its agents. However, an individual cannot commit an improper practice in his or her personal capacity. Because the conduct about which Petitioner complains herein occurred when Moore, Maitland, and Washington were acting as agents of the Union and the HRA, respectively, we find that the Union and HRA are proper parties to this proceeding but that the named individuals are not. In addition, as OLR is involved solely as the legal representative of HRA, it is also not a proper party here.

request for arbitration on Petitioner's behalf.

At an expedited arbitration hearing on December 16, 1998, the arbitrator determined that the matter should be heard in a full hearing. Union representatives told Petitioner that the Union would provide an attorney to represent him in the arbitration proceedings. The attorney retained by the Union, Gary Maitland, met with Petitioner on September 30, 1999, discussed the case, and informed Petitioner that the date for the full arbitration hearing was October 22, 1999. Petitioner asserts that at that meeting Maitland asked him to forward documents pertaining to a Petitioner's gender discrimination claim before the New York City Human Rights Commission. In a letter dated October 3, 1999, Petitioner reiterates what he asserts was Maitland's advice to him, namely, that Maitland would seek to establish at arbitration that Petitioner's demotion occurred because of a hostile environment. The Union generally denies this assertion. On October 6, 1999, Maitland called Petitioner to notify him that the October 22, 1999, hearing would be cancelled because the arbitrator would be unavailable but that the hearing would be rescheduled. On October 24, 1999, Petitioner wrote to Maitland complaining of delays in the case and requesting a meeting to discuss the information which Petitioner had sent to Maitland about the Human Rights complaint. Petitioner asked Maitland to assess those materials.

In November 1999, HRA proposed to Maitland that Petitioner's grievance be settled by a stipulation whereby, as with the first grievance, the negative evaluation would be expunged from Petitioner's personnel file. There is disagreement as to whether Petitioner was told of the proposed settlement and the extent to which it was discussed. The Union contends – but Petitioner disputes – that Maitland told Petitioner about it "at the time." Petitioner contends that it was Maitland's secretary who informed him, on December 28, 1999, when Petitioner called

Maitland's office, that "there would not be an arbitration but a settlement instead," and also that Maitland was not available to talk because he was on vacation.

Petitioner contends that subsequent phone calls to Maitland's office were not returned until six months later, in June 2000, at which time Maitland assertedly told Petitioner that the delay in calling Petitioner was occasioned by difficulties in identifying an approach that would be successful. Maitland nonetheless vowed to continue processing the case. During the summer of 2000, Petitioner received verbal support from Union officials including the president of his local. Petitioner asserts that one official, Jon Peek, promised an arbitration hearing in January 2001 and, prior to that, a preparatory meeting with Maitland in December 2000. The meeting with Maitland did not take place until a few days before the hearing.

On January 6, 2001, Petitioner wrote Maitland to complain about Maitland's purported assertion three days earlier, namely, that the only matter to be addressed at arbitration would be the performance evaluation, not the Human Rights complaint. Petitioner argued that he expected a "full blown" arbitration, as promised by the Union, and that his prospects at winning would not be "bleak," as Maitland assertedly told him, if the Human Rights matter were addressed. Petitioner wrote to Maitland two more times requesting a meeting to discuss the handling of the arbitration case.

At the arbitration on January 19, 2001, the arbitrator certified the issues as (1) whether the parties' CBA was violated by HRA's negative evaluation of Petitioner's work from June 17 to September 16, 1997, and, if so (2) whether the arbitrator was authorized under that agreement to order the remedy sought, that is, to reinstate Petitioner to the supervisory position from which he was demoted. Counsel for the City told the arbitrator that HRA was prepared to expunge the

negative evaluation from Petitioner's personnel file and that no hearing should be held because, in its view, Petitioner was not entitled to reinstatement as a matter of law. Declining to receive evidence at that point, the arbitrator asked the parties to file briefs in March 2001 on whether the law prevented him from granting reinstatement should evidence support a finding of breach of the CBA.

By letter dated March 12, 2001, Petitioner asked Maitland to explain the legal significance of what had transpired at their appearance before the arbitrator. By letter dated March 16, 2001, Maitland explained that the City had filed what was the "arbitration equivalent of a motion for partial summary judgment" which had to be adjudicated before evidence could be proffered on the CBA violation claim. In that same letter, Maitland stated, "You are correct that I have failed to respond to all of your telephone calls and letters. The reason, quite frankly, is that you constantly ask the same questions and my time is limited." In the letter, Maitland explained the limited nature of the remedies available even if Petitioner were to prevail on the claimed CBA violation. He further stated that he was continuing to work on the Union's brief in opposition to the City's argument, that he would send Petitioner copies of the briefs of both parties, and that he would meet with Petitioner to answer any questions which Petitioner might have.

On June 4, 2001, the arbitrator issued his decision and award, finding that the CBA did not authorize him to grant the remedy of reinstatement to the supervisory position. However, he retained jurisdiction over the case in the event that the Union desired a hearing on the issue of whether the negative performance evaluation violated the CBA.

On July 23, 2001, Petitioner met with Maitland to discuss his options: whether to

arbitrate the performance evaluation contract claim or to accept HRA's November 1999 offer to settle the case by expunging the negative evaluation.

The Union asserts that Petitioner and Maitland had many conversations and communications between July 23, 2001, and October 19, 2001, at which time Maitland wrote to Petitioner again explaining his legal options and recommending settlement in light of the arbitrator's ruling that reinstatement was not possible. On October 25, 2001, Petitioner faxed Maitland that he was rejecting the City's settlement offer and that he wished to arbitrate the CBA violation claim. On October 31, 2001, Petitioner phoned Maitland's office and sent a letter asking for another meeting to discuss the settlement option again. On November 12, 2001, Maitland wrote Petitioner agreeing to "hold off" on rescheduling the arbitration hearing so that they could meet to discuss the options "one more time." In that letter also, Maitland disputed Petitioner's assertion in the October 25 fax that Maitland had not presented the settlement option to him back in November 1999. Maitland reiterated his recommendation that settlement offered the best option.

On January 7, 2002, Petitioner met with Maitland about the options. Two days later, Petitioner left a phone message for Maitland instructing him to proceed to arbitration. By fax the following day, Petitioner confirmed the message. By letter dated January 30, 2002, Petitioner asked Maitland for the arbitration date. By letter dated February 28, 2002, Petitioner asked Moore for help in establishing contact with Maitland and "resolving this matter without further delay." Petitioner seeks "just resolution and compensation."

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by failing to honor a commitment to him to guarantee an arbitration hearing and to provide legal representation at the hearing. With regard to delays in the case, Petitioner argues that counsel failed to explain the steps in the "full blown" arbitration procedure, its duration and possible outcomes, and failed to review documents which "could be presented" in support of Petitioner's contention that his demotion involved Human Rights violations. By "inaction, delay, and neglect," Maitland interfered with Petitioner's right to be heard on the Human Rights claim which he contends is "the one issue that could have protected [his] job and for which duty he was retained." Despite the meeting with Maitland on September 30, 1999, Petitioner failed to receive "official" notification that the arbitration hearing was scheduled for October 22, 1999. There is no dispute that Maitland later told him that, due to the arbitrator's unexpected unavailability, the hearing would be rescheduled. But Petitioner asserts that the cancellation alone constituted a breach of the Union's duty. The Union breached its duty every time Maitland and Union representatives failed to return calls or respond to letters inquiring about the status of the case. Petitioner lists dates of his meetings with Maitland from 1999 to 2002, including the length of each meeting, noting that no meetings took place at all in 2000.

Petitioner alleges that the Union breached its duty of fair representation because of the inadequate quality of Maitland's representation. During a six-month hiatus between July 2001 and January 2002, no discussion took place about Petitioner's options following the arbitrator's

determination that reinstatement was not possible even if the Union won on the underlying breach-of-contract question. As of January 7, 2002, neither Petitioner nor Maitland had presented to any arbitrator evidence of any Human Rights violations which Petitioner contends caused his demotion. Though he left phone and faxed messages for Maitland and other Union representatives with instructions to proceed to arbitration concerning the performance evaluation, these calls and letters remained unanswered.

Union's Position

First, Moore and Maitland are improper parties to this proceeding inasmuch as they acted in a representative capacity on behalf of the Union and cannot be held personally liable for violation of the NYCCBL. Second, Petitioner has failed to assert facts which would state a claim that the Union violated the NYCCBL because the Union has handled and continues to handle Petitioner's request as an active case. Petitioner "in due course" will have an opportunity to testify at the arbitration hearing on the issue of whether the second evaluation of his performance as a Supervisor I (Welfare), received in September 1997, violated the CBA.

City's Position

First, the instant petition is untimely. The City characterizes Petitioner's case as alleging one of inadequate Union representation in appealing the managerial action taken because of negative job performance. Thus, it argues that Petitioner's time for filing the instant claim started on June 4, 2001, the date of the arbitrator's opinion on the issue of available remedies. Filed on April 17, 2002, the instant petition is untimely by six months.

In addition, OLR is not a proper party to this proceeding. Neither its conduct in a representative capacity on behalf of HRA nor the actions of counsel for the employer can form

the basis of a fair representation claim. Moreover, since the facts presented fail to state a viable claim, the City cannot be held to have violated the NYCCBL derivatively. Petitioner's mere allegation that he has not offered testimony at arbitration on his September 1997 performance evaluation grievance does not, in itself, articulate a claimed breach of the duty of fair representation by the Union.

Finally, Petitioner has alleged no facts articulating a claim that HRA independently violated the NYCCBL by interfering with, restraining, discriminating against, or coercing Petitioner in the exercise of his rights granted under the NYCCBL or by interfering with or dominating the administration of the Union. To the contrary, HRA has fulfilled its obligation under the CBA to process Petitioner's grievance. Petitioner has not claimed otherwise. For all these reasons, Petitioner has failed to state a claim of improper practice against the City.

DISCUSSION

The first question the Board must decide is whether the petition is timely. Section 12-306(e) of the NYCCBL and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action took place. The City alone argues that the instant petition, filed on April 17, 2002, is untimely because it was filed more than four months after the arbitrator's determination, on June 4, 2001, that reinstatement was not an available remedy if the Union won the breach-of-contract question. Insofar as the petition challenges the sufficiency of the Union's efforts to remedy Petitioner's contract claim concerning his demotion, the charge is time-barred. There is no dispute that, on

July 23, 2001, Petitioner and counsel met a month after the arbitrator's determination – that reinstatement was not an available remedy – to discuss whether to arbitrate the performance evaluation contract claim or to accept HRA's offer to settle the case by expunging the negative evaluation. Petitioner was on notice from that date in July 2001 that he was not entitled to reinstatement. Any improper practice claim based on the Union's handling of this aspect of the arbitration case would have to be filed by November 2001. The instant petition was filed in April 2002 and is time-barred.

Insofar as the instant improper practice petition argues a continuing complaint about the Union's handling of his arbitration case, we find that this claim is timely. There is no dispute that Petitioner met with counsel on January 7, 2002, to discuss further his options and that the arbitration of the performance evaluation claim was then and still is pending. The petition was filed within four months of that meeting and is timely. However, this claim is unavailing. The allegations of the petition fail to assert facts to state a claim that the Union violated the NYCCBL by inadequate representation of his grievance. The duty of fair representation requires a union to act fairly, impartially, and non-arbitrarily in the administration and enforcement of a collective bargaining agreement. *Yovino*, Decision No. B-40-2002. This duty includes the investigation of breach-of-contract claims. A union has wide latitude in determining which contractual claims it will pursue at arbitration, but it must act in good faith and must not discriminate in its conduct from one member to another even in matters that lie outside the contractual context. *Id*. at 9; *Wooten*, Decision No. B-23-94 at 19. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation, but the burden is on a petitioner to plead and prove that a union has engaged in such conduct.

Yovino, Decision No. B-40-2002 at 9. It is not enough merely to allege that a union has engaged in conduct violative of the law. *Id.* A petitioner must plead facts to support the allegations of an improper practice. *American Federation of State, County and Municipal Employees, District Council 37*, Decision No. B-18-86 at 14. Without specific facts to support a charge that a union has breached the duty of fair representation, there is no basis upon which this Board may find such a violation. *Id.* at 18.

Here, there is no dispute that Maitland and other Union grievance representatives researched Petitioner's case, discussed it with Petitioner on several occasions, scheduled an arbitration date, and represented Petitioner at the hearings on December 16, 1998, and January 19, 2001. Maitland also submitted a brief to the arbitrator on the issue raised by the City at the January 19 hearing. Moreover, the Union, through Maitland, has vowed to continue to represent Petitioner when the arbitration continues.

The Union has not abandoned the case. In *Whaley*, Decision No. B-41-97 at 12, we stated that a union does not breach its fair representation duty merely because the outcome of a union's good faith efforts to resolve a unit member's contractual grievance does not satisfy the grievant. Also, in *Urban*, Decision No. B-20-97 at 11, we found that a union's six-month delay in apprising a grievant of its good faith decision not to pursue a grievance did not rise to the level of a breach of the union's duty. We reasoned that even if the union was remiss in waiting to inform the grievant, poor judgment on its part is not an act which rises to the level of a breach of the duty of fair representation. *Id.* Here, Maitland, in his letter of March 16, 2001, acknowledged that he did not respond to every phone call or letter from Petitioner but stated that it was because Petitioner "constantly ask[ed] the same questions." The six-month hiatus between July 2001 and

January 2002, during which no face-to-face discussion took place about Petitioner's options in the aftermath of the arbitrator's ruling about a remedy, does not constitute a breach of the duty of fair representation.

With respect to Petitioner's claim that the Union breached the duty of fair representation by not pursuing the alleged Human Rights violation at arbitration, this Board has held that an alleged violation of statute other than the NYCCBL does not present an arbitrable issue when the parties have not included such a dispute within the range of matters that they have agreed to arbitrate. *Uniformed Firefighters Association of Greater New York,* Decision Nos. B-14-87 at 17; *International Union of Operating Engineers*, Decision No. B-12-77 at 8. Here, Petitioner has pointed to no contractual definition of a grievance that includes Human Rights claims, nor has he articulated how a claimed violation of Human Rights law may be brought under the contractual definition of a grievance or remedied by arbitrating a contractual grievance. Under these circumstances, the Union's failure to offer Petitioner an opportunity to present evidence concerning such a non-arbitrable claim does not constitute a breach of the duty of fair representation.

Because neither the facts alleged nor the documents offered in support state a claim of breach of the duty of fair representation against the Union, the derivative claim against HRA also must fail. In addition, Petitioner has raised no independent claim of improper practice against the employer. Accordingly, the instant improper practice 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 instant improper practice petition filed by Thomas Hassay, docketed as BCB-2281-02, be, and the same hereby is, dismissed in its entirety.

Dated: January 27, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER