Jones v. NYCHA & L. 237, IBT, 71 OCB 7 (BCB 2003) [Decision No. B-7-2003 (IP)]

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

-between-

ANDREA O. JONES,

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY
and LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Respondents.
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Decision No. B-7-2003
Docket No. BCB-2302-02

**DECISION AND ORDER**

Andrea O. Jones, *pro se*, filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") and Local 237, International Brotherhood of Teamsters ("Union") on September 30, 2002. Petitioner alleges that her employment was terminated without due process and that, in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Union breached its duty of fair representation in the handling of her grievance concerning her termination. The Union asserts that Petitioner has failed to allege facts sufficient to find that it discriminated against her or breached its duty. In addition, both the Union and NYCHA claim that Petitioner has no right to challenge her termination under the provisions of the collective bargaining agreement ("CBA") because she did not serve in a civil service title under which she was entitled to grievance rights under the CBA. The Board determines that the allegations are insufficient to

find either that the Union violated its duty of fair representation or that, derivatively, NYCHA engaged in any conduct violative of the NYCCBL. Accordingly, the petition is denied.

## BACKGROUND

______Petitioner was employed in the non-competitive title of Emergency Service Aide ("ESA") by NYCHA from May 1, 2000, through May 29, 2002, at which time her employment was terminated following an incident that occurred on April 30, 2002. Petitioner claims that on April 30 she received upsetting news about her family. A few hours later, she received a phone call in her capacity as an ESA from a resident in the Morris Houses in the Bronx. The resident had called earlier to request that a plumbing blockage be corrected. When no one from NYCHA responded to the problem, the resident called again, this time reaching Petitioner. Petitioner told the caller that it might be several hours before the problem could be fixed. The caller was dissatisfied with that response.

The further content of the discussion is in dispute. Petitioner contends that the caller repeated her complaint, which caused Petitioner to tell her that it was not necessary to describe the problem repeatedly. Petitioner told the caller to "hold on, hold on." Petitioner alleges that the caller was indignant and cursed at her. NYCHA denies this, asserting that a tape of the telephone conversation shows that the caller was calm and rational and that Petitioner was rude and belligerent. Petitioner admits that she felt herself losing composure and that she put the caller on hold to regain composure.

It is undisputed that after Petitioner put the call on hold, she threw the phone receiver on the desk and started talking to herself. The director of her unit approached, asking what had

happened. According to Petitioner, she said that the caller was "indignant" and asked the director if he "would like to talk to" the caller. According to NYCHA, however, Petitioner disrespectfully stated to the director, "You want it?" The shift superintendent reprimanded Petitioner for addressing the director as she had done. Petitioner admits that the manner in which she spoke to her director was the subject of her later apology to him. She also apologized to the superintendent and promised not to let it happen again.

A week after the incident, Petitioner's superintendent called her into his office and handed her a memorandum in which he stated that, after reviewing the recorded telephone conversation, he found her conduct unprofessional and disrespectful to both the caller and the director. The superintendent's memorandum also requested that "further administrative action be taken" which "may result" in termination of Petitioner's employment. Petitioner asked the superintendent why the punishment for this, her first offense, was so harsh, particularly when the director had reviewed her handling of other phone calls and had found no objection. The superintendent told Petitioner that her handling of the call was unacceptable. Asked to explain her state of mind when dealing with the caller, Petitioner explained the family situation that troubled her. The superintendent suggested that Petitioner consult her Union representative. On May 29, 2002, the coordinator of the Emergency Service Unit discharged Petitioner.

On June 3, 2002, Petitioner spoke with the Union's Business Agent. On June 6, 2002, the Deputy Director of the Housing Division of the Union sought a review of Petitioner's termination by the NYCHA Director of Human Resources, who refused to rescind it. The Union tried a second time to have NYCHA reverse its decision, but in a meeting with NYCHA representatives including Petitioner's supervisor, management again refused to rescind the

termination. By letter dated September 30, 2002, the Business Agent told Petitioner of the Union's efforts on her behalf. He advised Petitioner that since she was not entitled to due process appeal rights under the contract, the Union was "precluded" from taking the matter further.

The remedy Petitioner seeks in this proceeding is to "have her [termination] case reopened for appeal."

## POSITIONS OF THE PARTIES

### Petitioner's Position

Petitioner claims that the Union has violated NYCCBL § 12-306(b)(3)[1] in its handling of her employment termination. She disputes that "contractual obligations owed to [Petitioner] from the union were . . . given to her" or that the Union's "right . . . to extract union member payments . . . [was] justifiable and valid." Petitioner contends that the fact that the shift superintendent suggested that she contact her Union representative indicated that Petitioner had "significant rights, according to her union membership and dues deducted from her payroll" and that she "had the right to receive full union representation based on her length of employment." She demands "proof that [the Union] made every effort to aid [Petitioner] in the continuation of her employment. . . ." Petitioner describes the basis for her desire to appeal the termination, for example, the disturbing family news that she received prior to the phone call, her work record

[1] NYCCBL § 12-306(b) provides, in relevant part: "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."

which contained complimentary statements from a supervisor on her behalf, and her assertion that this was the first time that she had been cited for a disciplinary offense.

**Union's Position**

The Union argues that Petitioner has not provided sufficient allegations of facts to show that the Union violated its duty of fair representation on her behalf. Under § 44 of the CBA between NYCHA and the Union, due process hearing rights for disciplinary charges are granted only to (i) permanent, competitive employees in the civil service, (ii) employees in the labor class title of Caretaker (HA), and (iii) provisional employees who have actively served for two continuous years in the same title or within the same occupational group at NYCHA. Petitioner does not fall within any of these categories and was not entitled to contractual due process hearing rights for her termination. She also was not entitled to due process rights under the Civil Service Law since it is undisputed that she was not in a non-competitive position with more than five years of service.[2] According to the Union, it acted properly and attempted twice to seek a review of the decision to terminate Petitioner's employment, even though Petitioner was not entitled to a hearing prior to termination pursuant to either the CBA or the Civil Service Law. Therefore, Petitioner's claim that the Union violated § 12-306(b)(3) because the Union did not obtain such a hearing must be dismissed.

**NYCHA's Position**

NYCHA asserts that NYCHA's decision to terminate Petitioner's employment was a

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[2] Section 75 of the New York State Civil Service Law provides, in pertinent part: "A person described [as an employee who has served at least five years of continuous service in the non-competitive class] . . . shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section. . . ."

proper exercise of management's right under NYCCBL § 12-307(b) to determine standards of selection for employment, direct its employees, take disciplinary action, relieve its employees from duty for a legitimate reason, maintain the efficiency of governmental operations, determine the methods, means, and personnel by which government operations are conducted, and exercise complete control and discretion over its organization. Furthermore, NYCHA argues that Petitioner has no contractual or statutory right to appeal her termination because she was in a non-competitive title and did not have five years of service to her credit. Petitioner has asserted no allegations independent of the fair representation claim against the Union that NYCHA violated the NYCCBL in any other manner.

## DISCUSSION

The duty of fair representation requires that a union act fairly, impartially, and non-arbitrarily in negotiating, administering, and enforcing collective bargaining agreements. *Robinson*, Decision No. B-43-2002 at 7; *Gillard*, Decision No. B-35-2001 at 5. A union does not breach its duty merely by refusing to advance a member's complaint if the refusal to act is made in good faith and in a manner which is neither arbitrary nor discriminatory. *Robinson*, Decision No. B-43-2002 at 7.

In this case, Petitioner has not alleged facts sufficient to constitute a violation of the Union's duty of fair representation. To the contrary, Petitioner provides evidence that in June 2002, the Union did in fact address her complaints regarding NYCHA's decision to terminate her employment. The Business Agent met with Petitioner to discuss her problem, and the Deputy Director of the Housing Division of the Union sought a review of Petitioner's termination by the

NYCHA Director of Human Resources. Thus, the Union tried twice – albeit unsuccessfully --to have NYCHA reverse its decision. Moreover, Respondents are correct that the hearing and appeal provisions of § 44 of the CBA do not apply to non-competitive employees, such as Petitioner, and that disciplinary rights under the Civil Service Law do not extend to non-competitive employees who have less than five years of service. As a non-competitive, without a contractual or statutory right to a hearing, the Union could do no more to assist Petitioner in challenging her termination. Thus, we find no breach of the Union's duty of fair representation toward Petitioner on the facts before us.

Since we dismiss the claim against the Union, we also find no derivative liability on the part of NYCHA. *Edwards*, Decision No. B-35-2000 at 11. Further, Petitioner has not articulated any independent NYCCBL claim against NYCHA. Accordingly, the instant 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 filed by Andrea O. Jones docketed as BCB–2302-02 be, and the same hereby is, denied in its entirety.

Dated: February 26, 2003
New York, New York

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