Rocke v. UPOA & DOP, 73 OCB 5 (BCB 2004) [Decision No. B-5-2004 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

BETTY ROCKE, *pro se*,

Petitioner, Decision No. B-5-2004

-and- Docket No. BCB-2353-03

UNITED PROBATION OFFICERS ASSOCIATION

-and-

NEW YORK CITY DEPARTMENT OF PROBATION,

Respondents.

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DECISION AND ORDER

On August 27, 2003, Betty Rocke filed a *pro se* verified improper practice petition against the United Probation Officers Association ("Union") and the New York City Department of Probation ("DOP" or "City"). Petitioner charges that the Union violated § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter3) ("NYCCBL"), by failing to represent her in the processing of grievances with respect to an involuntary transfer without regard to her seniority and requests for religious and health-related accommodations. Petitioner also charges that DOP violated NYCCBL § 12-306(a)(1) and (3) by retaliating against her with regard to those claims. This Board finds that Petitioner has failed to allege facts demonstrating that the Union breached its duty of fair representation or that she was engaged in protected activity when she spoke about seniority,

religious, and health-related complaints with DOP supervisors. Thus, we find no violation of the NYCCBL by either the Union or DOP, and the instant petition is dismissed.

BACKGROUND

Petitioner was hired by DOP on December 2, 1999, as a Probation Officer and assigned to work on Staten Island. On a date unspecified in the pleadings, Petitioner was granted a religious accommodation to leave work early on Fridays in order to observe the Sabbath. Following her probationary period of service, Petitioner sought a transfer from Staten Island to Manhattan. In 2001, she asked the Union to help her secure that transfer. In February 2003, Petitioner wrote to DOP's Deputy Commissioner for Adult Services reiterating her request. By letter dated February 7, 2003, Petitioner was granted a transfer to work at 100 Centre Street in Manhattan effective February 24, 2003.

In March 2003, Petitioner and other employees in her work unit learned that, effective April 14, 2003, they would be transferred from 100 Centre Street to 50 Lafayette Street in Manhattan. After taking a "walk-through" to select their respective work spaces, the employees wrote a letter on March 18, 2003, to the Union's president, asking the Union to cause the City to correct certain working conditions at 50 Lafayette Street, such as a leaky ceiling, missing floor tiles, poor air quality, and no cubicles or offices with any privacy for Probation clients. On April 10, the employees asked their unit supervisor to investigate these issues further. During a subsequent "walk through" on an unspecified date, Petitioner and other employees allegedly experienced adverse respiratory symptoms. According to Petitioner, Branch Chief Martin Jeske stated that anyone experiencing health symptoms was free to request another transfer, supported

by a doctor's note, but that the transfer might be to a location that some "may not like." Petitioner and some of her colleagues then complained in a memo to their supervisor about the working conditions at 50 Lafayette Street.

When Petitioner reported to work on Monday, April 14, she learned that DOP had reassigned her to the Bronx. There are no facts alleged to indicate whether other employees were reassigned. Petitioner sent Jeske a memo that same day about her "medical situation" and the "hardship" which she claimed prohibited her from traveling to the Bronx. While retrieving her personal effects from the office at 50 Lafayette Street, which she had deposited there the previous week at the same time that employees were allowed to select their respective desks, Petitioner saw an employee who, she claimed, had less seniority sitting at Petitioner's desk. The employee allegedly told Petitioner that she had been involuntarily assigned to that office. Petitioner contends that she immediately told Union President Dominic Coluccio about the circumstances and that he erroneously told her that the other woman had seniority over Petitioner.

On April 14, Petitioner put herself on what she calls voluntary medical leave. On April 17, Petitioner obtained a psychologist's note attesting to treatment for anxiety and depression and recommending that Petitioner be excused for a three-week leave-of-absence. Petitioner contends that, on April 25, her employee health insurance coverage was terminated although she did not become aware of it for six more weeks. The City asserts that, as of that date, Petitioner was on sick leave without pay and that she was given special leave of absence health insurance coverage for the period from April 25 to August 24, 2003. The City also asserts that Petitioner was notified that if she did not return to work, health coverage would be available, at her expense, under the Consolidated Omnibus Budget Reconciliation Act, for an additional 18

months after her separation from DOP.

By letter dated April 29, Petitioner asked Coluccio to explain how transfer decisions are made by DOP and whether the Union had any "input" into the process. She also sought the Union's help in being transferred back to an unspecified location in Manhattan and in monitoring the health conditions at 50 Lafayette Street.

By letter dated May 14, DOP ordered Petitioner to report on May 29 for a mental health evaluation by a psychiatrist chosen by the City, to determine her fitness to return to work, pursuant to § 72 of the Civil Service Law ("CSL"). A copy of that letter was sent to Union President Coluccio. By letter dated June 9, DOP advised Petitioner that the psychiatrist had determined her to be mentally unfit to perform her duties and that she would be granted a leave of absence starting June 23, 2003. The letter also advised that, if Petitioner wanted to dispute the determination, she could write to the DOP Advocate and request a hearing before the New York City Office of Administrative Trials and Hearings ("OATH"), where she could have her own legal representative.

There is no indication whether Petitioner asked the Union to represent her at an OATH hearing; nor is there any indication whether Petitioner or anyone on her behalf requested such a hearing. In any event, by letter dated July 9, 2003, DOP advised Petitioner that a hearing on whether she was medically unfit for duty would take place on July 25 preceded by a conference on July 17. The letter also advised that her failure to appear at the trial could result in termination under CSL § 72.

Petitioner claims that she hired an attorney because the Union failed to get in touch with her about the hearing. She does not indicate, however, whether she requested that the Union

represent her, or whether the Union otherwise had notice of either the July 9 letter or of the hearing. The Union denies that it failed to meet or speak with Petitioner regarding her complaints. At the pre-hearing conference on July 17, DOP and Petitioner's attorney agreed to schedule another examination on August 15 and to permit Petitioner to return to work if she were found fit. By letter dated September 26, DOP determined that she was, in fact, fit to return to work and Petitioner was notified to report to the Bronx as soon as possible. Petitioner did report to work and has been working in the Bronx since that date.

Between July and September, while she was still on leave, Petitioner allegedly sent counsel for the Union a list of grievances which she wanted processed. Those complaints consist of DOP's alleged failure both to give her advance notice that she would be transferred from Manhattan to the Bronx and to abide by her "seniority rights" in reassigning her. She also complained of poor working conditions at 50 Lafayette Street where she had been assigned for a short time, refusal by DOP to accept her contract grievances for processing while she was on medical leave, termination of her medical benefits while on medical leave, and conflicting statements by DOP to State Human Rights investigators and the Unemployment Compensation Board that she was absent without leave and also on approved leave of absence.

Petitioner asserts that she spoke with the Union's counsel on July 21, 2003, at which time he told her that the Union had not been able to "pin the Department down" regarding accepting grievances when an employee is out on medical leave but that when she returned to work, DOP "will honor [her] grievances." Petitioner also asserts that counsel told her that the statute of limitations for bringing her grievances "would not apply."

On August 27, 2003, Petitioner filed the instant petition against the Union and amended it

on September 29 to join DOP as a party and to correct pleading and service-of-process deficiencies. Petitioner returned to work on October 6, 2003. By letters dated October 20 and November 18, 2003, the Union invited Petitioner to discuss her grievances for the purpose of filing them at the lower steps of the contractual grievance procedure. Petitioner declined to do so.

Article VI of the applicable collective bargaining agreement between the City and the Union ("Agreement") describes the grievance procedure. Section 2 of that Article provides that in the event the results of an informal discussion with the employee's supervisor are unsatisfactory, "the employee and/or the Union" may present the grievance to the employer at Steps I and II of the grievance process and to Commissioner of Labor Relations at Step III. That section also provides that grievances "must be presented in writing at all steps of the grievance procedure." The Agreement is silent with regard to the subject of transfers but a separate letter agreement of October 2002 between the Union and the City provides as follows:

> Any employee in the bargaining unit serving in a permanent position may request a transfer within title to another location by making a written application to the Agency's Director of Personnel.
>
> It is agreed and understood that the Department of Probation reserves the right to make transfer decisions based on the needs and efficient operation of the Department.
>
> The terms of this letter of understanding are not subject to the grievance procedure.

Petitioner seeks an order directing the Union to assist her in the processing of the grievances described above, including, but not limited to, transfer to a work location in Manhattan, and reimbursement for medical expenses while on leave of absence. The petition

also seeks an order directing DOP to accept the grievances for processing. Ultimately, as a religious and/or medical accommodation, Petitioner wants to be returned to work in a location in Manhattan. She also seeks $500,000 in compensatory damages for mental and emotional hardship.[1]

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3)[2] when it failed to help her with grievances which were related to her requests for a work-location transfer on religious, medical, and seniority grounds. Petitioner complains that the applicable Agreement is "vague," that it fails to make "accommodations for employees [like Petitioner] with seniority rights, bumping rights, and

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[1] In addition, on February 5, 2004, Petitioner filed a letter with the Office of Collective Bargaining advising that she would not be pursuing her grievances because she believed that the time for filing had expired. In addition to reiterating prior complaints, the letter asserts out-of-title claims which assertedly accrued after her return to work on October 6, 2003. Since the letter does not assert retaliation or discrimination under the NYCCBL, the out-of-title claim is not appropriately heard in an improper practice proceeding.

[2] NYCCBL § 12-306(b) provides, in relevant part:
It shall be an improper 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 section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

* * *

(3) to breach its duty of fair representation to public employees under this chapter.

NYCCBL §12-305 provides, in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

special needs such as Sabbath observan[ce] . . . ," and that it does not specifically state that an employee has to be in active employment before grievances can be filed.

Despite phone calls, certified letters, and memoranda from April to June 2003 in which Petitioner asked the Union to have DOP rescind both her transfer to the Bronx and the termination of her insurance benefits while she was on medical leave, the Union took no action but, instead, Coluccio erroneously insisted that Petitioner had no seniority rights over the employee who took her place in Manhattan. As a result of the Union's failure to file grievances on these matters, Petitioner had to hire a private attorney to represent her in a departmental proceeding at OATH to determine her fitness to return to work after her medical leave of absence.

Petitioner cites NYCCBL § 12-306(a)(1) and (3),[3] as the sections which DOP allegedly violated by failing initially to accommodate her transfer requests for religious and health-related reasons, by later transferring her first to a location with alleged environmental problems and later to the Bronx without regard to her seniority and without advance notice, and by failing to accept her grievances for processing while she was on medical leave. Petitioner also claims DOP violated the NYCCBL when it attempted to dispute her eligibility for unemployment insurance benefits while on medical leave and failed to accept the medical documentation she presented as to her fitness to return to work.

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[3] NYCCBL §12-306(a) provides, in relevant part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

Union's Position

The Union maintains that while Petitioner was on medical leave, her employment technically was terminated pending determination of her fitness to return to work. As such, she was not entitled to process contract grievances or obtain employment-related medical benefits. The Union insists, without specifying a date, that it explained this situation to Petitioner. Now that her employment is reinstated, the Union has expressly offered to pursue her grievances; thus, her complaints that the Union failed to help process her grievances are moot. Since Petitioner has failed to contact the Union about pursuing those grievances at this time despite its express, written representation that it would do so, Petitioner's claim that the Union breached its duty of fair representation is without merit. Further, any claims based on religious and medical grounds are not properly before this Board and also must be dismissed.

City's Position

The City asserts that it cannot be found derivatively to have violated the NYCCBL because Petitioner has failed to sustain her burden against the Union. As for any independent claim of improper practice against DOP concerning its decisions to transfer her and put her on medical leave, the City asserts that Petitioner has failed also to state a claim under NYCCBL § 12-306(a)(1) and (3). Petitioner's allegations – that DOP improperly transferred her in disregard of what she described as seniority rights, that it failed to grant her religious accommodation, and that it improperly terminated her medical benefits while she was on unpaid leave – do not support a claim that any of DOP's actions were motivated by anti-union animus; nor has Petitioner shown a causal link between any alleged union activity and DOP's actions.

Moreover, even if Petitioner's allegations were sufficient to establish such a claim, DOP

had legitimate business reasons to transfer her based upon its determination of staffing needs; to terminate her employment (pending possible reinstatement) because she was mentally unfit to perform her duties; to handle her religious accommodation requests pursuant to statutory scheme outside of the jurisdiction of this Board; and to end her employee benefits during the term of her unpaid leave pursuant to the CSL. Moreover, Petitioner received special leave-of-absence health-care coverage during her leave. Therefore, Petitioner's claims against the City must be dismissed.

DISCUSSION

A. Claims against the Union

Pursuant to NYCCBL § 12-306(b)(1), it is an improper practice for a public employee organization "to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter . . . ." These include the right to participate in union activities. Filing grievances is one such protected activity. *Fabbricante*, Decision No. B-30-2003 at 27; *Doctors Council*, Decision No. B-12-97.

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." The duty of fair representation requires a union to refrain from arbitrary, discriminatory or bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Yovino*, Decision No. B-40-2002 at 9; *Hug*, Decision No. B-5-91 at 14. 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. *Yovino*, Decision No. B-40-2002 at 9; *Wooten*, Decision No. B-23-94 at 19. Petitioner has the burden of pleading and proving that the Union has breached its duty of fair representation. *Yovino*, B-40-2002 at 9; *Barry*, Decision No. B-38-2001 at 8. While a union is not obligated to advance every grievance, *see Keyes*, Decision No. B-32-86 at 7, it has "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Minervini*, Decision No. B-29-2003 at 15; *see Social Service Employees Union, Local 371,* 11 PERB ¶ 3004 (1978).

We find Petitioner's arguments against the Union unavailing. Although the facts indicate that, in the months before her leave of absence, Petitioner spoke with Union personnel about her desire for a transfer, her working conditions, and her medical benefits, it was not until after her leave of absence began that she sought to pursue these matters as grievances. The Union asserts, and Petitioner does not deny, that it told Petitioner that upon her return to work it would pursue the grievances on her behalf. In fact, when Petitioner returned to work in October, the Union contacted her by letter dated October 20, 2003, for the express purpose of pursuing the grievances. Petitioner did not respond to the letter, nor did she otherwise contact the Union after her return to work. As Petitioner has failed to state any facts alleging bad faith on the part of the Union, we find that the Union's determination not to process Petitioner's complaints while she was on medical leave was not a breach of its duty.

Moreover, it is undisputed that the applicable Agreement permits an employee to pursue a grievance through the lower steps of the grievance procedure. Here, Petitioner did not commence a grievance on her own when informed that the Union would not do so until she returned to work, and she neither renewed her request to the Union nor filed on her own after her

return to work. Under these circumstances, Petitioner's failure to pursue the grievances on her own presents another reason that the Union cannot be held to have violated the NYCCBL as alleged in the instant petition.

Petitioner's complaint that the Agreement fails to spell out seniority rights of unit members with respect to transfers is also unavailing. First, the right to assign employees generally is a management prerogative. *Communications Workers of America*, Decision No. B-37-82 (transfer requiring longer commute held not to be improper practice in absence of improper motive); therefore, the Union had no duty to bargain over that subject during collective negotiations with the City. Even if there were such a duty, the parties' rights were limited by the October 2002 letter agreement which provides that "any employee in the bargaining unit serving in a permanent position may *request* a transfer within title to another location by making a written application to the Agency's Director of Personnel" but that DOP reserves the right to make transfer decisions based on the needs and efficient operation of DOP. (Emphasis added.) Because the letter agreement states specifically that transfers are not subject to the contractual grievance procedure, Petitioner has no right to grieve claims arising thereunder.

If Petitioner means to claim that the Union failed with respect to any duty to represent her at the OATH hearing on her medical fitness to work, we find that Petitioner has failed to allege or provide any documentary evidence that the Union knew about DOP's June 9 letter placing her on medical leave-of-absence. In fact, there is no allegation that she even asked the Union to represent her at the OATH hearing.

Further, any rights which Petitioner may have with respect to religious accommodation and medical benefits during her leave of absence arise under statutes other than the NYCCBL

and, thus, are not enforceable by this Board in the absence of any allegation that the Union discriminated against Petitioner by failing to pursue such grievances for her while pursuing such for another unit member. *Yovino*, Decision No. B-40-2002 at 9; *Wooten*, Decision No. B-23-94 at 19. We find that Petitioner has alleged neither acts nor omissions on the Union's part articulating any breach of its duty of fair representation.

With respect to Petitioner's out-of-title claims, collective bargaining demands, and demand for restoration of dues, those are matters which are not properly before this Board in an improper practice proceeding.

B. Claims against DOP

We also find Petitioner's claims against DOP unavailing. Petitioner contends that DOP's decision to transfer her, curtail certain medical benefits during her leave of absence, and refusal to process her grievances while on leave constituted retaliation in violation of NYCCBL § 12-306(a)(1) and (3). She also complains that DOP retaliated against her when it failed to give her adequate notice of her transfer from Manhattan to the Bronx, improperly disputed her eligibility for unemployment insurance benefits while on medical leave, and failed to accept her own health practitioners' documentation of her fitness to return to work.

To determine whether alleged discrimination or retaliation has occurred in violation of § 12-306(a)(1) and (3) of the NYCCBL, this Board uses the standard adopted by this Board in *Bowman*, Decision No. B-51-87 at 18, which requires that a petitioner show that:

> 1. the employer's agent responsible for the alleged discriminatory act had knowledge of the employee's protected activity; and
>
> 2. the employee's protected activity was the motivating factor in the employer's decision.

If a petitioner alleges facts concerning these two elements sufficient to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Civil Service Bar Association*, *Local 237*, Decision No. B-32-2003; *Rivers*, Decision No. B-32-2000. A prerequisite to analysis under this standard is a finding that the activity which was the basis for the alleged retaliation or discrimination is a type protected by the NYCCBL. *Civil Service Bar Ass'n, Local 237*, Decision No. B-32-2003 at 8.

Even if Petitioner's actions were deemed protected activity, her claim of retaliation would fail, for she has not shown that the complaints were the motivating factor in the City's challenged actions. Her own papers show that other employees participated in complaints regarding working conditions at 50 Lafayette Street, and that they signed letters and memoranda addressed to management, yet Petitioner has not alleged that anyone other than she was transferred. Thus, we find no causal link between her activity and the alleged retaliatory acts. Moreover, we find that, because her complaints were not presented to DOP as grievances, which, at the lower steps of the contractual grievance procedure, she was entitled to do so by herself, we cannot find DOP to have refused to process them.

For these reasons, the improper practice claims against the City must be dismissed.

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, BCB-2353-03, filed by Betty Rocke, *pro se*, be, and the same hereby is, dismissed in its entirety.

Dated: March 19, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER