Antoine v. CEU, IBT, L. 237 & Dept. of Correction, 73 OCB 8 (BCB 2004) [Decision No. B-8-2004 (IP)]

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

-between-

RUDOLPH ANTOINE, et al.,

Petitioners,

Decision No. B-8-2004
Docket No. BCB-2356-03

-and-

CITY EMPLOYEES UNION, IBT LOCAL 237, and THE CITY OF NEW YORK DEPARTMENT OF CORRECTION,

Respondents.
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DECISION AND ORDER

On September 18, 2003, Rudolph Antoine and 19 other individuals filed a verified improper practice petition against the City Employees Union, IBT Local 237 ("Union" or "Local 237"). The City of New York Department of Correction ("DOC" or "City") was joined pursuant to § 12-306(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The petition alleges that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to negotiate to avoid the layoff of Petitioners. The Union argues that it negotiated in good faith regarding the layoffs

[1] NYCCBL § 12-306(d) provides:
The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

and that Petitioners have failed to state a *prima facie* case for a breach of the duty of fair representation. The City argues that Petitioners have failed to demonstrate that the Union's conduct was arbitrary or discriminatory which is a precondition to employer liability. This Board finds the record does not demonstrate that the Union's conduct was arbitrary, discriminatory, or in bad faith. Accordingly, the petition is dismissed.

BACKGROUND

Petitioners are 20 former food service employees in the following titles: cook, senior cook, food service manager, and food service administrator. Nineteen worked for DOC and one worked for the Administration for Children's Services. Petitioners were covered by the Citywide Agreement ("Agreement") which was negotiated by the City and District Council 37 on behalf of a variety of titles working throughout the City of New York. Article XVII of the Agreement sets forth the general provisions, obligations, and procedures in the event there are layoffs.

In 2003, the Mayor, in order to close the City's projected budget gap, sought approximately $600 million in give-backs from the City's public employee organizations in order to avoid widespread layoffs. The Municipal Labor Committee ("MLC") opposed the give-backs and sought alternative means to closing the budget gap.[2] The Union's President, Carroll Haynes, an Executive Vice President of the MLC, participated in meetings and discussions with the MLC and the City in an effort to avoid the widespread layoff of public employees, including Petitioners.

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[2] The MLC is the association of representatives from the City's public employee organizations. *See* NYCCB § 12-303(k).

On April 9, 2003, the City sent a general letter to many City employees, including Petitioners, advising them that as a result of the growing severity of its financial situation, layoffs in their title were necessary. The letter stated that contractual rights with regard to layoffs would be honored. If the employee's noncompetitive/labor class title was covered by the Agreement, layoffs would occur in inverse seniority order; if not, the employee could be laid off in any order. Also, if the employee's labor class title was not covered by the Agreement, layoffs would occur in inverse seniority order determined by the date of their first permanent appointment followed by continuous service.

Sometime in early 2003, DOC, due to a stated reduction in its inmate population from 22,000 to 14,000, consolidated its operations and closed three detention houses in Queens, the Bronx, and Brooklyn and three facilities on Rikers Island. The restructuring of DOC's operation resulted in the elimination of 315 correction officer positions and 100 civilian staff positions, including food service personnel. No union jobs were privatized as a result of this restructuring.

In a May 2003 Newsletter message entitled "The Mayor is Playing Out His Doomsday Budget Scenario -- For Now," the Union President wrote to his members that the City was uninterested in discussing alternatives to coming up with $600 million in savings. The President explained that he did not want to give back $600 million in hard-won benefits, such as vacation days, accepting co-payments for health insurance, increasing employee pension contributions, etc., without assurances from the City that there would be job security for its members, wage increases, and no further productivity demands when a new contract is negotiated.

On May 1, 2003, the City notified the Union that, as a result of budget cuts, it would lay off DOC food service employees on May 17, 2003.

On May 2, 2003, the City sent letters to more than 3,400 employees, including Petitioners, from 20 City agencies and some borough presidents' offices advising that due to the City's financial problems and despite efforts to achieve savings through attrition and other means, they would be laid off effective May 17, 2003. The City stated that the decision to lay off certain employees was based upon an agency's needs as well as the applicable law, rules, and contracts. In addition to the information previously stated in the April 9, 2003, letter regarding the order of layoffs based on employee status, the City noted that provisional and exempt class employees were not protected by the New York Civil Service Law ("CSL") or the Agreement. The City advised that after the layoffs, labor class employees who were not covered by the Agreement would be placed on a preferred list and that noncompetitive employees and labor class employees who were covered by the Agreement would be placed on appropriate recall lists.

On May 5, 2003, the City and Local 237 met to discuss the process by which layoffs in the food service area at DOC would be carried out. According to Local 237, the Union President opposed the layoffs and stated that if they took place, he expected the City to adhere to the Agreement and the CSL. He made a verbal demand for information so that the Union could ensure that the seniority rights of its members were protected.

On May 6, 2003, the Union President met with Petitioners and other employees at Local 237's Union Hall to discuss the impending layoffs. It is undisputed that the President stated he was doing everything to protect their rights and that he intended to ensure that the layoffs would be implemented as set forth in the CSL and the Agreement. According to the Union, the President advised the employees that he had requested information from the City and that he was hopeful that the layoffs could be avoided as a result of discussions in which he was participating

with the MLC and the City. According to Petitioners, the Union President advised them that in the worst case scenario, all displaced food workers would be redeployed to other City agencies. Petitioners state that they pleaded with the President to safeguard their jobs and proposed that he offer give-backs such as unpaid furloughs and vacation time. Furthermore, when an employee asked why the Union never demanded that the City create a civil service examination to guarantee permanence for food service titles, counsel for Local 237 allegedly stated: "If there was such an examination, most of you would not pass anyway." Petitioners contend that the Union President failed to retract or contest this "unseemly" remark. Moreover, Petitioners state that when they informed the Union President that the City was terminating employees contrary to the previously prepared layoff list and in violation of the Agreement, he stated that he would have the matter straightened out but then failed to do so.

Sometime between May 6 and 17, 2003, some Petitioners, along with other employees, signed and submitted to the Union President a petition questioning his actions regarding his handling of the layoffs.

On May 17, 2003, the City laid off approximately 4000 employees citywide, including Petitioners and other food service personnel at DOC.

On May 21, 2003, the Union wrote to the City's Office of Labor Relations reiterating the May 5th request for information regarding the layoffs. The Union stated that the information should have been provided prior to the layoffs and that it must be produced so that the Union could have good faith negotiations with the City regarding their impact. Specifically the Union requested: (1) a final list of employees laid off, including their dates of hire, positions held, and dates of appointment to last position held; (2) the name and seniority date of the least senior

employee being retained in each affected title; (3) a copy of any recall list promulgated; and (4) the City's position with regard to an employee's ability to claim a veteran's credit.

On May 23, 2003, the Union President sent a memorandum to members, including Petitioners, who had been laid off, to advise that the Union was working to rescind the layoffs and that it was looking for new employment opportunities in other City agencies. Petitioners admit that on numerous occasions, the Union President spoke to individual members, including some Petitioners, and tried to reassure them that the Union was doing everything possible to avoid or limit the layoffs.

On June 4, 2003, the City responded to Local 237's information request. According to the Union, it reviewed the information and determined that while it did not agree that the layoffs were necessary or just, the City's decision and implementation of the layoff of its members did not violate the Agreement or the CSL. At no time did Petitioners request that Local 237 file a grievance in connection with the May 17 layoffs, and no grievance was filed.

Petitioners seek redeployment, back pay, punitive damages, and request that notice be posted declaring the Union breached its duty of fair representation.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners claim that the Union breached its duty of fair representation under NYCCBL § 12-306(b)(3)[3] when it failed to negotiate a feasible alternative to the layoffs as set forth in

[3] NYCCBL § 12-306(b) provides:
It shall be an improper practice for a public employee organization or its agents:
* * *

Article XVII, § 1(b) of the Agreement.[4] Petitioners argue that, despite their protests, the Union President spent no longer than one hour with them on May 6, 2003, and failed to contest the Union counsel's remarks regarding the civil service examination inquiry. Moreover, upon information and belief, the Union participated in only one 45 minute meeting with the City under the guise and pretext of negotiating to prevent the layoffs of food service employees. Petitioners believe that at this May 5, 2003 meeting, the Union President failed, as allegedly required by Article XVII, § 1(b), of the Agreement, to negotiate: (1) the transfer of food service employees to other agencies; (2) the use of federal or state funding to avoid the layoffs; (3) the elimination of work given to independent contractors; (4) the encouragement of early retirement to avoid the layoffs; and (5) give-backs to avoid layoffs.

Petitioners argue that the Union acted in bad faith because the Union President failed to keep his promise of avoiding the layoffs or limiting them by having Petitioners redeployed to

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

[4]Article XVII, § 1(b) of the Agreement provides:

Section 1. General Layoff Provisions

Where layoffs are scheduled affecting full-time employees in competitive class, non-competitive class, and labor classes the following procedures shall be used:

b. Within such 30-day period designated representatives of the Employer will meet and confer with the designated representatives of the appropriate union with the objective of considering feasible alternatives to all or part of such scheduled layoffs, including but not limited to:

i. the transfer of employees to other agencies with retraining, if necessary consistent with Civil Service law but without regard to the Civil Service title,

ii. the use of Federal and State funds whenever possible to retain or re-employ employees scheduled for layoff,

iii. the elimination or reduction of the amount of work contracted out to independent contractors, and

iv. encouragement of early retirement and the expediting of the processing of retirement applications.

other agencies. Moreover, the Union openly discussed and justified the layoffs of Petitioners based on DOC's restructuring of its correctional facilities.

Union's Position

First, the Union argues that the petition is untimely in that it should have been filed on September 17, 2003, four months after the layoffs. Second, the Board lacks jurisdiction to determine violations of the Agreement. Third, Petitioners have failed to exhaust their administrative remedies under the Agreement. If Petitioners claim that their layoff violated Article XVII, § 1(b), their remedy is to file a grievance under the contract's grievance procedure.

The Union further argues that Petitioners have failed to allege facts sufficient to find a violation of the NYCCBL. A union need not process every complaint, and the duty of fair representation requires that the refusal to advance a claim be made in good faith. The record demonstrates that the Union acted in good faith with regard to layoffs. The Union met with Petitioners on May 6 to discuss the layoffs. Morever, the Union, as part of the MLC, participated in many meetings with the City in an attempt to avoid the layoffs. On May 5, 2003, the Union met with the City to discuss the process by which layoffs in the food service area at DOC would be carried out, and the Union President asked for information in order to ensure that the layoff of Petitioners was in compliance with the Agreement and the CSL. When the City failed to provide the appropriate documents, it made a second, written request. After the documents were received and reviewed, the Union made a good faith determination that the City had complied with the CSL and the Agreement.

City's Position

The City argues that: (1) the petition is untimely; (2) the Board lacks jurisdiction to

determine whether the layoff procedures violated the Agreement; (3) Petitioners have failed to demonstrate bad faith or arbitrary conduct on the part of the Union which is a precondition to employer liability; and (4) even if the Union had breached its duty of fair representation, the petition fails to set forth facts that the City violated the NYCCBL.

DISCUSSION

As a preliminary matter, we find the petition timely. NYCCBL § 12-306(e) provides:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

See also Section 1-07(b)(4), formerly § 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"). A charge of improper practice must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have know of said occurrence. *Raby*, Decision No. B-14-2003 at 9, *aff'd, Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003); *Tucker*, Decision No. B-24-93 at 5.

Here, Petitioners challenge the Union's actions with regard to their layoffs which became effective May 17, 2003. Petitioners could not know that the Union had not prevented their layoff until they were actually laid off. This is especially true in light of the Union's numerous reassurances to its members that it was doing everything possible to avoid the layoffs.

Contrary to Respondents' arguments, May 17, 2003, is not the last possible date from

which the four month limitation could be calculated. OCB Rule § 1-12(f), formerly § 1-13(d), provides: "In computing any period of time prescribed or allowed by these rules . . . the day of the act, event or default after which the designated period of time begins to run shall not be included." Accordingly, the statute of limitations began to run on May 18, the day after Petitioners were laid off, and the filing on September 18, 2003, exactly four months later, is timely. *See Barry*, Decision No. B-38-2001 at 7 (claims regarding termination on December 2, 1999, timely filed on April 3, 2000).

Turning to the merits, the gravamen of the petition is that the Union breached its duty of fair representation because it failed to negotiate with the City to avoid and/or limit the layoffs of Petitioners. 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." This duty requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Minervini*, Decision No. B-29-2003 at 15; *Hug*, Decision No. B-5-91 at 14. It is not enough for a petitioner to allege negligence, mistake, incompetence, or even error in judgment on the part of the union. *Page*, Decision No. 31-94 at 12. Petitioner has the burden of pleading and proving that a union has engaged in prohibited conduct. *Barry*, Decision No. B-38-2001 at 8.

Pursuant to NYCCBL § 12-307(b), the City has the right to determine the standards of services to be offered by its agencies and to "relieve its employees from duty because of lack of work or for other legitimate reasons." The Board has long held that "[p]ersonnel decisions concerning termination of employees because of economic or other legitimate reasons are within management's statutory right to direct its employees and maintain the efficiency of its

operations." *Communications Workers of America, Local 1180*, Decision No. B-19-99 at 11; *see District Council 37, AFSCME*, Decision No. B-21-75, *aff'd*, *City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976). Accordingly, the Union had no duty to bargain the decision to lay off Petitioners. *Communications Workers of America, Local 1180*, Decision No. B-19-99 at 15.

However, under NYCCBL § 12-307(b), questions concerning the practical impact of management's decision to layoff employees is bargainable. *Communications Workers of America, Local 1180*, Decision No. B-19-99 at 13-14; *District Council 37, AFSCME*, *Local 983 and 1062*, Decision No. B-6-90 at 28; *Probation and Parole Officers Ass'n, Local 599, SEIU*, Decision No. B-2-76 at 10-11. When the City makes a decision to layoff employees, a union has the right to demand information for purposes of impact bargaining. *Civil Service Technical Guild*, Decision No. B-41-80 at 8. In matters concerning negotiations, a union is allowed considerable latitude. *Rolle*, Decision No. 31-91 at 9. Absent an indication of discriminatory motive, the Board will not evaluate or pass judgment upon a bargaining strategy of a union. *Miller*, Decision No. 21-94 at 21-22; *Shaprio,* Decision No. B-9-86 at 18.

Petitioners argue that the Union failed to negotiate give-backs and/or alternatives to the layoffs such as transfers to other agencies, the use of federal or state aid, the elimination of independent contractors, or early retirement as set forth in Article XVII, § 1(b), of the Agreement. This argument is without merit. First, the terms and conditions intended to alleviate, to the extent possible, the impact of layoffs, have already been negotiated and are incorporated into Article XVII, of the Agreement. Therefore, the duty to bargain over these terms has been satisfied. "A union and an employer may satisfy by agreement their mutual duty

to bargain a given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right." *Doctors Council, S.E.I.U.*, Decision No. B-24-2002 at 7. Accordingly, the Union had no right, and, thus, no duty to bargain alternatives to laying off Petitioners.

Second, Article XVII, § 1, of the Agreement requires that "the Employer will meet and confer with the designated representatives of the appropriate union with the objective of considering feasible alternatives to all or part of such scheduled layoffs." The plain language of this section demonstrates that the obligation to meet and confer runs to the City; it does not create an independent right on the part of the Union to bargain anew. Here, the City met with the Union and the MLC on more than one occasion in an effort to avoid the layoffs and discuss alternatives to closing the budget gap. Petitioners fail to explain why the Union President's reasons not to give back $600 million in hard-won benefits without assurances from the City over job security, wage increases, and productivity demands, were arbitrary or discriminatory. Instead, Petitioners base their claim on such things as the Union President's failure to spend more than one hour with them on May 6, 2003, his failure to retract counsel's remarks regarding the civil service examination inquiry, his recognition that Petitioners' layoffs were due in part to DOC's restructuring of its correctional facilities, and his failure to fulfill the promise to avoid or limit the layoffs. These acts, however, do not rise to the level of arbitrary, discriminatory, or bad faith conduct.

It is undisputed that the Union requested information twice from the City to ensure that the seniority rights of its members were protected. After the information was received, the Union reviewed it and determined that the City's decision and implementation of the layoff did not violate the Agreement or the CSL. A union has wide latitude in determining which contractual

claims it will pursue; however, the reason not to process a grievance must not be arbitrary, discriminatory, or in bad faith. *Minervini*, Decision No. 29-2003 at 15; *Yovino*, Decision No. 40-2002 at 9. Here, there is no allegation that Petitioners ever requested that the Union file a grievance let alone that it refused in bad faith to do so. Although Petitioners make a conclusory claim that they informed the Union President that their termination was contrary to the Agreement and that he failed to do anything about it, Petitioners do not allege that the Union's subsequent review of the information was arbitrary or discriminatory. Moreover, it appears from Petitioners' Reply that at least one Petitioner, Eula Malabre-Brown claims that her layoff was improper because she disagrees with the way her start date was calculated for purposes of seniority. If Petitioner believed that the Agreement was violated, she was free to file a grievance under the procedures set forth in Article XV of the Agreement.[5]

Because there has not been a breach of the duty of fair representation by the Union, there can be no derivative claim against the City. *Barbee*, Decision No. B-16- 2003; *Silva*, Decision No. B-31-2000.

[5] Article XV, § 2, of the Agreement provides that "the employee and/or the Union" can present a grievance to the agency head at Step I of the grievance procedure.

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 Rudolph Antoine, et al. in the matter docketed as BCB-2356-03 be, and the same hereby is, dismissed.

Dated: New York, New York
March 19, 2004

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER