Watkins, 75 OCB 23 (BCB 2005)

[Decision No. B-23-2005] (Docket No. BCB-2447-04).

Summary of Decision: Petitioner alleged the Union breached its duty of fair representation in the handling of a contract grievance alleging out-of-title work and that HHC derivatively violated the NYCCBL. The Board found the petition presented insufficient evidence to overcome the Union's defense of its action on Petitioner's behalf. The Board also found no independent or derivative claims against HHC. The Board further found no violation of any *Weingarten* rights. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

MICHELE WATKINS,

Petitioner,

- and -

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, & NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On December 27, 2004, Michele Watkins filed a verified improper practice petition, *pro se*, against the Communications Workers of America, Local 1180, ("Union" or "Local 1180") and the New York City Health and Hospitals Corporation ("HHC"). The petition alleges that Respondents violated § 12-306 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") as a result of their handling of a grievance she filed under the applicable collective bargaining agreement ("Agreement").

Petitioner alleges that the Union breached its duty of fair representation by failing to enforce an informal agreement which settled the grievance, and that, by failing to do so, her supervisors retaliated against her. The Union denies that it mishandled the grievance. HHC contends that Petitioner has failed to assert facts supporting any improper practice by its agents. This Board dismisses the petition because it fails to allege sufficient factual support to establish a *prima facie* case arising under the NYCCBL.

BACKGROUND

Petitioner is a Principle Administrative Associate, Level I ("PAA"), a title represented by the Union. During the time relevant herein, Petitioner worked at Bellevue Hospital. At an unspecified time, Petitioner worked full-time in the pharmacy department. Subsequently, she worked two days in the pharmacy and three in the Elderly Patient Insurance Coverage ("EPIC") program clinic in the geriatric department. Joseph Calderon was assigned to Bellevue as Union Staff Representative.

On October 28, 2003, Michael Becton, a Union shop steward, filed an out-of-title grievance on behalf of Petitioner alleging that she was "performing duties of a coordinating manager in the EPIC program and other duties assigned," in violation of the Agreement.[1] In an affidavit, Calderon asserts that, on November 3, 2003, he instructed Becton to move the grievance to Step I(a), and that Becton did so. By memo dated November 5, 2003, to Petitioner, the Director of Pharmacy restated the duties of the PAA title as stated in the job specifications.

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[1]Article VI, § 1(c), of the Agreement provides that the term "grievance" shall mean:
A claimed assignment of Employees to duties substantially different from those stated in their job specifications. . . .

The Union asserts that it did not receive an answer from HHC and that by a memo dated December 30, 2003, Becton requested an "official response" and a meeting. The Union asserts that it "periodically" repeated its request and that, on May 12, 2004, the Union moved the grievance to Step II. Petitioner asserts that she attempted to speak to Calderon on August 3, 4, and 5, and September 1, 2004, but that he "refused" to respond to her calls. She also asserts that HHC failed to respond to the grievance in a timely fashion and that the Union failed to require HHC to adhere to the rules that govern the grievance procedure.[2]

A Step II hearing was held on August 23, 2004, and Petitioner, Becton, Calderon, the Director of Pharmacy, the current and former Assistant Directors of Pharmacy, and a Labor Relations Associate attended. Petitioner explained her complaint as an inability to complete all of her work since she was assigned to work two days in one location, three in another. HHC argued that Petitioner's work assignments were not out-of-title and that it was HHC's prerogative to determine the nature of the work it assigned. There is no dispute that the Union raised the issue of Petitioner's work assignments and that HHC agreed to assign Petitioner to work in only

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[2]Article VI, § 2, of the Agreement provides that the grievance procedure shall be:

> An appeal from an unsatisfactory determination at Step I shall be presented in writing to the person designated by the agency head for such purpose. The appeal must be made within five (5) working days of the receipt of the Step I determination . . . .
>
> An appeal from an unsatisfactory determination at Step I or Step I(a) . . . shall be presented in writing to the agency head or the agency head's designated representative . . . .
>
> The appeal must be made within five (5) working days of the receipt of the Step I or Step I(a) determination . . . .
>
> An appeal from an unsatisfactory determination at Step II shall be presented by the Employee and/or the Union to the Commissioner of Labor Relations in writing within ten (1) working days of the receipt of the Step II determination. . . .

one location.

On September 3, 2004, Petitioner submitted a Request for Departmental Transfer/ Promotion to Assistant Coordinating Manager and Manager. By memo dated September 20, 2004, the Assistant Director of Pharmacy informed Petitioner that she would be reassigned to work within the PAA title in the out-patient pharmacy department full-time, effective October 12, 2004.

On October 4, 2004, the Step II hearing officer rendered his determination and noted that "as between the Grievant and the Facility it appears that there is no actual dispute over the specific tasks the Grievant claims to perform." The hearing officer concluded that Petitioner was not working out-of-title and denied the grievance.

By letter dated November 10, 2004, Petitioner wrote the Step II hearing officer, alleging that: (1) although she received a memo from the director of pharmacy stating that she would be reassigned to work five days in the pharmacy department, "no assignment, time to report or supervisor was included within the letter"; (2) Calderon had not contacted her about it; (3) she had not received the hearing officer's actual decision; and (4) she was being reassigned a second time, this time to "security." Petitioner complained that "[t]hese actions are not within the guidelines of HHC Policies, and are in violation of Civil Service Laws." Petitioner asserts that she faxed a copy of this letter to Calderon and that his voice-mail "no longer was turned on," so she could not get through to him.

On November 16, 2004, Petitioner filed a complaint with the New York State Division of Human Rights, alleging race and age-related discrimination and retaliation by supervisors who she said had authorized her to procure items for the pharmacy with which she took issue. She

had filed similar complaints in January and April 2004. Petitioner contended that she was "set up" by her supervisors because of her prior complaints of discrimination. By memorandum dated November 17, 2004, the Assistant Director of the Pharmacy informed Petitioner that, within a matter of weeks, she would be reporting to the Associate Executive Director for Operations. Petitioner asserts that she "immediately" called Calderon to protest the second reassignment, that he never responded, and that the Union was "negligent" and "indifferent" towards the HHC's "disregard" of the Step II officer's "instructions."

According to the Union, in mid-November, Petitioner informed Calderon "for the first time" that HHC was reassigning her at which time he told her that it had the right to do so as long as her duties were within the job specifications. On November 19, 2004, Petitioner wrote to Arthur Cheliotes, President of Local 1180, regarding the reassignment:

> ***I do not wish to be moved,*** and have requested the aid of Mr. Calderon. I now am asking that you intervene. There are at least three other people hired after me who are not certified in their title, one of whom replace me in my position that was hired for. [*sic*]
>
> In August a hearing was held regarding my work location, and later a letter was given to me stating that I would be assigned to the pharmacy dept for five days per week. Now I am being told to go to another un-posted and non civil service position. Although my title of PAA I would remain the same, the position did not exist before.
>
> I am sure that no budget transfer will be made to accommodate my salary from pharmacy, and that I will remain under pharmacy's budget. **The entire process is against civil service law and the procedures governing transfers.**
>
> Management is backing out of their agreement as stated in the hearing, and therefore I would like a step three hearing. I am asking for a response to this request within five business days. . . . (Emphases in original.)

On November 20, 2004, Petitioner e-mailed Bill Henning, Second Vice President of Local 1180, complaining that she was being reassigned to a "non-certified" position. She complained:

> [M]y certification is still being ignored by both management and the Union. It is my understanding that a certified position differs from the regular civil service within the state. I am in need of assistance to stop management from railroading me into a position that was not even posted and is not certified. . . .

On November 21, 2004, Henning responded:

> You still don't tell me what position you are in, and I have no idea what you mean by a "certified position" within the state. What do you mean by your "certification . . . being ignored"? Is the job within your civil service title? Are the duties consistent with your title? Is the 5-day assignment to pharmacy temporary? And I guess the bottom line is what is your objection and what is your proposed remedy?

On November 23, 2004, Petitioner faxed a memorandum to Calderon and sent a copy to Cheliotes:

> I would appreciate a response ASAP. I have been told of a meeting with you. Is this meeting still on? Time, location, date? Apparently your voice mail is not on, please respond. I hope the union is going to help me in this matter. Tks

Also on November 23, 2004, Henning e-mailed Petitioner, and stated:

> What you are telling me is that you are permanent (not "certified" -- you were certified as being on the eligible list and subsequently appointed) in your civil service job title of PAA. That does not change your duties one iota. Permanent or provisional PAAs do the same job . . . The only question to be answered is whether the pharmacy job is PAA work. Period. Is it? If not, you need to reopen your grievance. . . .

Henning added that the "other stuff" which Petitioner raised in her e-mail – being assigned to work in the pharmacy department five days a week, and whether or not pharmacy "is . . . going to transfer thousands of dollars to the security dept for my salary" – "has no merit."

Petitioner told Becton she wanted to meet with Calderon before Thanksgiving to discuss the subsequent reassignment. Petitioner asserts that she could not reach Calderon by phone and that she sent a letter, dated November 19, 2004, to Cheliotes demanding a response within five days on her request for a Step III hearing which had been resolved following the August 23 Step II conference. The Union asserts that Calderon was out of the office on Monday and Tuesday of the week before Thanksgiving.

On November 30, 2004, Petitioner went to the Union and spoke with Bernadette Sullivan in Calderon's absence. Sullivan states in an affidavit that she explained that Petitioner had not been "transferred" but merely reassigned to duties within her job description, which was not a contractual violation. Later that day, Petitioner faxed Sullivan stating, "I looked up Civil Service Law, [and] it clearly states that certified employees must consent to reassignment to another dept. . . ." Sullivan states Petitioner never furnished her with any information that changed the Union's assessment that the complaint was not grievable. Petitioner does not dispute that Sullivan, Calderon, and Henning explained the Union's assessment of the case to her on several occasions.

On December 6, 2004, Petitioner reported to her new assignment. Notwithstanding the Union's assessment, Becton faxed a memorandum to Calderon, on December 10, 2004, with a copy to Petitioner, indicating the Union's continuing efforts to address Petitioner's concern about the logistics of her work conditions:

> Joe, I need to communicate with you regarding Michele Watkins. She was given a ten-day letter to report to a Mr. Marrero at Bellevue Hospital Center. This man is in charge of security, research and operations. So, now we have Michele once again working in two areas, security and research. Were any of these changes discussed with labor relations and you, after the meeting at 125 Worth St. I've attached a sheet of Michele Watkins first week in her new assignment. What do you think? Your attention to this memo would be greatly appreciated.

Petitioner contends that, from December 6, 2004, to February 2, 2005, she was "locked out" of and denied access to "two offices," which she does not identify, for up to two hours a day, five days a week

The petition seeks restoration of dues checkoff from "7/02-to date," with interest, permanent assignment in the Pharmacy Department with seniority, and an immediate upgrade to

"mgr, Level B" retroactively paid to December 6, 2004, to comport with her "out of title" duties. In addition, Petitioner seeks the removal of Calderon and his supervisor; the restructuring of Local 1180; and a reprimand for Bellevue's Director of Pharmacy, Assistant Director of Pharmacy, and a Labor Relations Associate "for breaking contract."

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that Cheliotes, Henning, Sullivan, and Calderon were indifferent to her grievance and viewed her as a "complainer." This non-action by the Union's representatives resulted in retaliation by management in violation of unspecified sections of the NYCCBL.[3]

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[3] Section 12-306(a) of the NYCCBL 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;

Section 12-306(b) of the NYCCBL provides:
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.

Section 12-305 of the NYCCBL provides:
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 . . . .

Petitioner argues that the Union should have demanded a hearing at Step I for her out-of-title grievance and that, if it was not an out-of-title grievance, then the Union should have articulated it in a different way. By not doing so, HHC representatives were allowed to retaliate against her in response to earlier racial complaints she had filed against them.

Petitioner does not dispute that a Step II hearing was held and that an informal agreement was reached which would restore her to an assignment that she was seeking. However, she contends that her subsequent reassignments annulled that informal agreement and that this was due to a retaliatory motive by the Director and Assistant Director of Pharmacy following the complaints she filed at the New York State Division of Human Rights. She contends that the reassignments violated the Agreement and the New York Civil Service Law ("CSL") including but not limited to Article 14 (Public Employees Fair Employment Act) ("Taylor Law"). Attached to the instant petition is a photocopy of three pages of an unspecified document entitled "Summary of New York State Civil Service Law," assertedly produced by the New York State Department of Civil Service, referencing citations to the CSL and "CSR." The topics relate to "reassignment" and "transfers," the latter stating: "Transfers require the written consent of the transferee. . . ."

Petitioner further contends that the Pharmacy Director and Labor Relations Associate violated her *Weingarten* rights by removing her time sheet on one occasion without her knowledge and permission. She also claims *Weingarten* rights were violated when the Assistant Director evaluated her work performance in the Pharmacy. She claimed that he had not served

long enough under unspecified HHC rules, to do so."[4]

Union's Position

The Union contends that, as evinced by the record, its representatives responded to Petitioner's numerous requests for assistance, and repeatedly explained that her complaint did not constitute an out-of-title grievance, but rather one concerning reassignment to duties within her job description, which is not grievable. Despite this, its representatives managed to have HHC agree to reassign her to a location that would address her concerns. The Union presents documentary evidence that its shop steward followed up when problems occurred even after the initial reassignment. In short, the Union responded in good faith to Petitioner's numerous requests for assistance notwithstanding its assessment that they concerned a matter that was not within its duty of fair representation. The Union further contends that the Board does not have jurisdiction to enforce the CSL or alleged violations of the Agreement.

HHC's Position

HHC argues that Petitioner has failed to allege any facts that demonstrate that the Union failed to act fairly, impartially and non-arbitrarily in administering and enforcing the Agreement, and, thus, the employer cannot be held derivatively liable for any alleged violation of the NYCCBL. Moreover, Petitioner has failed to allege facts demonstrating independent violation of the NYCCBL. HHC notes that no section of the NYCCBL has been cited as having been violated. HHC further argues that any claims which Petitioner means to assert arising under the CSL, the Taylor Law, and the Agreement, and any *Weingarten* rights as embodied in the

[4] Petitioner cites "Exhibit VIII," but the only performance evaluation for Petitioner attached to the instant verified improper practice petition is one prepared by the Assistant Director of Pharmacy and reviewed by the Director of Pharmacy. It is denominated "Exhibit II."

applicable Citywide Agreement are outside the jurisdiction of this Board.

DISCUSSION

The principal issue before the Board is whether the Union breached its duty of fair representation in handling Petitioner's grievance of October 28, 2003. We find that Petitioner has not provided sufficient facts to state a *prima facie* case that the Union's conduct was arbitrary, discriminatory or founded in bad faith.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), defined the duty of fair representation:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177. A breach of this duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. Although the Court in *Vaca* was interpreting the National Labor Relations Act, the New York State Public Employment Relations Board uses a similar standard:

> In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith.

CSEA v. PERB and Diaz, 132 A.D.2d 430, 432 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988). Consistent with *Vaca*, *Diaz*, and their respective progeny, this Board, in interpreting NYCCBL § 12-306(b)(3), requires the union to refrain from arbitrary, discriminatory or bad faith conduct in negotiating, administering and enforcing collective bargaining

agreements. *Burtner*, Decision No. B-1-2005 at 13. Under the NYCCBL, a union enjoys a wide latitude in the handling of contract grievances as long as it exercises its discretion with good faith and honesty. *Id*. at 14. This means that a union may determine which contractual claims it will pursue through the grievance procedure so long as it acts in good faith and does not discriminate in its conduct from one member to another. *Hassay*, Decision No. B-2-2003 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. *Minervini*, Decision No. B-29-2003 at 15-16; *Yovino*, Decision No. B-40-2002 at 9. 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. *American Federation of State, County and Municipal Employees, District Council 37*, Decision No. B-18-86 at 18.

Moreover, this Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *Burtner*, Decision No. B-1-2005 at 14; *Grace*, Decision No. B-18-95 at 8; *Miller*, Decision No. B-21-94 at 14. The duty of fair representation is not breached simply because a member disagrees with the union's tactics, *Burtner*, Decision No. B-1-2005 at 16, or quality and extent of representation. *White*, Decision No. B-37-96 at 6. Furthermore, allegations of mere negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of its duty of fair representation. *Schweit*, Decision No. B-36-98 at 15. Even errors in judgment do not breach this duty, unless a petitioner shows that the union's actions were arbitrary or perfunctory. *Page*, Decision No. B-31-94 at 11.

We find that Petitioner's allegations fail to demonstrate that the Union's handling of her

complaints was arbitrary or in bad faith. The record demonstrates that the Union investigated Petitioner's out-of-title work grievance, represented her at Steps I and II of the grievance procedure, negotiated a resolution of a logistical problem that gave rise to the grievance, and ultimately determinated that HHC's actions relating to Petitioner were within the agency's discretion and were not violative of the Agreement. In this regard, when it became apparent to the Union and HHC that Petitioner's grievance concerned something other than out-of-title work, the parties negotiated Petitioner's reassignment to a single location five days a week as a way to resolve the matter. When Petitioner was reassigned a second time, the Union met with her on several occasions and explained that HHC had the right to reassign her "so long as her duties were within her job specifications." Even then, the Union attempted to persuade HHC to discuss Petitioner's reassignment. Notwithstanding Petitioner's conclusory assertions concerning her "certification" and its supposed effects, she has not offered any explanation that demonstrates the Union's assessment of her claims were arbitrary or capricious. Moreover, nothing alleged by Petitioner shows that the actions taken by the Union, from the filing of her grievance in October 2003 through Becton's submission of a memo to Calderon regarding Petitioner's possible reassignment in December 2004, were in bad faith. Accordingly, we do not find any breach of the Union's duty of fair representation.

As Petitioner has failed to state a claim against the Union, any derivative claim against the employer must also fail. *See Raby*, Decision No. B-14-2003 at 15, *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003). We also find that Petitioner has not stated an independent claim of retaliation against HHC under the NYCCBL. A prerequisite to such a claim is a finding that the purported activity which caused the retaliation is

related to union activity. *Civil Service Bar Ass'n*, Decision No. B-24-03 at 12; *Fabbricante*, Decision No. B-30-2003 at 30. Here, Petitioner contends that the retaliation against her relates to the filing of complaints with the New York State Division of Human Rights concerning race and age-related discrimination. Petitioner does not allege that her reassignments were in retaliation for union activity but rather for taking issue with her supervisors over items procured for the pharmacy.

Petitioner also contends that her supervisors violated her *Weingarten* rights with respect to her time sheets and performance evaluation. The principal underlying *Weingarten* rights was first enunciated in *NLRB v. Weingarten*, 420 U.S. 251 (1975). Subsequently, this Board recognized a unit member's right to union representation at an interview by supervisory personnel which the employee reasonably believes will result in disciplinary action. *See Assistant Deputy Wardens*, Decision No. B-9-2003. Here, Petitioner presents no facts that she was given a supervisory interview which she reasonably believed would result in disciplinary action and that her request for union representation at any such interview was denied.

As to the claim that the Taylor Law was violated, we note that, although some provisions of the Taylor Law may be enforced by this Board, Petitioner has failed to identify any section which applies to this case. Therefore, she has not stated a claim under the Taylor Law. With regard to claims that other sections of the CSL were violated, they do not fall within the authority of this Board to address or rectify. *Del Rio*, Decision No. B-6-2005 at 15; *Doctors Council*, Decision No. B-31-2002.

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 docketed as BCB-2447-04 be, and the same hereby is, dismissed in its entirety.

Dated: July 28, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER