Hodge, 77 OCB 36 (BCB 2006)

[Decision No. B-36-2006] (IP) (Docket No. BCB-2545-06), **aff'd app. pending**, *Matter of Hodge v. Office of Collective Bargaining*, Index No. 104531/07 (Sup. Ct. N.Y. Co. Dec. 3, 2007)(York, J.); notice of app filed 1/28/2008.

***Summary of Decision*:** Petitioner alleges that in violation of the NYCCBL, the Union breached its duty of fair representation with regard to an arbitration and a settlement agreement. Petitioner also alleges that ACS wrongfully terminated her employment because she was involved in a Worker's Compensation proceeding. Both the Union and the City assert that the petition should be dismissed because Petitioner has failed to allege sufficient facts to state a claim under the NYCCBL. This Board found that there was insufficient evidence to establish a *prima facie* case that the Union breached its duty of fair representation. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

GWENNETT E. HODGE,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, and THE CITY OF NEW YORK and THE ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On March 31, 2006, Gwenett E. Hodge ("Petitioner") filed a verified improper practice petition against the Social Service Employees Union, Local 371 ("Union"), and the City of New York Administration for Children's Services ("ACS" or "City"). Petitioner alleges that the Union breached its duty of fair representation in violation of the New York City Collective Bargaining Law

(New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), with regard to an arbitration hearing and a settlement agreement. Petitioner also alleges that ACS wrongfully terminated her employment because she was involved in a Worker's Compensation proceeding. Both the Union and the City assert that the petition should be dismissed because Petitioner has failed to allege sufficient facts to state a claim under the NYCCBL. This Board dismisses the petition for failure to establish a *prima facie* case that the Union breached its duty of fair representation.

BACKGROUND

The Union is duly certified as the collective bargaining representative for the title of Caseworker. Gwennett E. Hodge was a member of the Union and held the civil service title of Caseworker until her termination by ACS on October 3, 2003.

On September 11, 2001, Hodge was injured while at work.[1] According to Hodge, after she was injured, she spoke to the ACS Personnel Department's ("ACS Personnel") Employee Relations Manager, Joette Pompeo, who told her to submit a written request for medical leave. On October 1, 2001, Hodge requested a medical leave of absence and submitted medical documentation in support of her request. On October 23, 2001, ACS approved Hodge's request by a letter signed by Pompeo, which stated:

> Your request for medical leave is authorized. Dates of leave are from 10/01/01 through 02/01/02 all without pay.
> **You must contact our office . . . to make an appointment two weeks prior to your scheduled return date of 02/04/02.** Please report to ACS Personnel . . . and please bring the following document/s: A doctor's note attesting to your fitness to return to work.

[1] Hodge states that she suffered injuries as a result of having been pushed and trampled while leaving the building at 150 William Street following the terrorist attack on the World Trade Center.

> If you are unable to return on the scheduled return date, please contact this office prior to the expiration of your leave. If you do not return to work or contact this office prior to the expiration of your leave you will be considered on an unauthorized leave and you will be in jeopardy of disciplinary action and/or termination.
> (Emphasis in original.)

On January 2, 2002, Hodge requested an extension of her medical leave through July 8, 2002. ACS granted Hodge's request and extended her medical leave of absence.

On May 14, 2002, Hodge applied for worker's compensation, indicating Pompeo as the person at ACS to whom she orally gave notice of her injuries sustained on September 11, 2001. According to Hodge, a few months after she applied she called the Workers' Compensation Board and was told that there was a problem because ACS was not cooperating.

In June 2002, Hodge requested a second extension of medical leave. According to Hodge, at that time she provided medical documentation from Prasad Chalasani, M.D., a board certified General Surgeon. By letter dated June 14, 2002, signed by Pompeo, ACS granted Hodge's request and extended her medical leave until October 1, 2002, stating:

> Your request for medical leave extension is authorized. Dates of leave are from 10/01/01 through 07/08/02 with an extension through 10/01/02 all without pay. Please be advised that this is the max time allowed.
> **You must contact our office . . . to make an appointment two weeks prior to your scheduled return date of 10/02/02.** Please report to ACS Personnel . . . and please bring the following document/s: A doctor's note attesting to your fitness to return to work.
> If you are unable to return to work on the scheduled return date, please contact this office prior to the expiration of your leave. If you do not return to work or contact this office prior to the expiration of your leave you will be considered on an unauthorized leave and you will be in jeopardy of disciplinary action and/or termination.
> (Emphasis in original.)

According to Hodge, she contacted Pompeo two weeks before her scheduled return date of October 2, 2002, as required and asked to be transferred to a work location outside of the World

Trade Center area because she was "nervous" to return there. Hodge stated that Pompeo told her to get a letter from her doctor and to speak to a Mr. Greenfield when she reported to work on October 2, 2002. On September 4, 2002, a Preliminary Expedited Hearing Conference was held at the Worker's Compensation Board regarding Hodge's application for workers' compensation. According to Hodge, at that conference, ACS's counsel avoided addressing why ACS did not submit certain forms on behalf of Hodge, but instead questioned her medical documentation.

On September 25, 2002, ACS received a letter from Dr. Chalasani regarding Hodge, which stated:

> This is to certify that Ms. Gwennette Hodge [sic] is being treated at our facility. As per the doctor's advise [sic] the patient is currently undergoing physical therapy because of the severity of the injuries sustained in the accident referred above.
> On October 2, 2002, Ms. Hodge will be returning from medical leave, which was due to the traumatic events of September 11th. She was physically injured and suffered significant psychological distress and Post Traumatic Stress Disorder. It is imperative that she be transferred to a position outside of the World Trade Center area.

After ACS received Dr. Chalasani's letter, Pompeo replied on September 26, 2002, informing Hodge that ACS could not extend her medical leave beyond the one year period already granted, and that if Hodge were physically and mentally fit to perform her duties, she should report to ACS Personnel on October 2, 2002, with a doctor's note attesting to her ability to resume her full duties. The letter further indicated that if Hodge was unable to resume her full duties, her doctor's note must specify any restrictions and the length of time such restrictions are anticipated. The letter stated in part:

> You will not be returned if, despite reasonable accommodation required by law, your restrictions prevent you from performing the essential duties of your position.
> Should you not be able to return by 10/02/02, since you are ineligible for Service Retirement, we suggest that you might consider filing for Ordinary Disability

> Retirement . . . You might also be eligible for Social Security Benefits. . . .
> In the alternative, if you wish to resolve your status by resignation, we are enclosing a resignation form for your convenience. If you do not wish to resolve your employment status, we shall have no choice but to terminate your services under Section 73 of the Civil Service Law. Section 73 provides that an employee who has been continuously absent for one year or more because of a non-work connected disability, may be separated from staff. . . .
> If we terminate your services pursuant to Section 73, this may adversely affect your pension rights. It is, therefore, advisable for you to seek counsel regarding this matter. If you require any information regarding the above, please feel free to contact Ms. Socci at (212) 341-2551.[2]

According to Hodge, she did not understand this letter because she had not asked for an extension of her medical leave but had requested a transfer to a different work location.

According to the City, on October 2, 2002, Hodge reported to ACS Personnel without the required medical documentation but provided ACS with the letter submitted by Dr. Chalasani on September 25, 2002. ACS told Hodge that the letter was insufficient because it did not provide a medical diagnosis or state that Hodge was fit to return to work, and that Hodge would have to provide additional medical documentation. According to the City, ACS also advised Hodge that the only available Caseworker positions were located at 150 William Street or at 2 Washington Street

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[2] N.Y. Civil Service Law ("CSL") § 73 provides, in part:
> When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, his employment status may be terminated and his position may be filled by a permanent appointment. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be concluded by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field in his former department or agency.

and Hodge stated she would not accept a position at either location.

According to Hodge, when she reported to ACS Personnel on October 2, 2002, she was not told that Dr. Chalasani's letter was deemed insufficient, she was not requested to provide additional medical documentation, and she was not advised of the available work locations. She claims that on that day Socci told her that there was a freeze on transfers. According to Hodge, she contacted the Union and the Union said they would call the Office of Labor Relations.

On October 3, 2002, Assistant Commissioner Roger A. Hannon notified Hodge by letter that her services as a

> Permanent Caseworker are terminated in accordance with Section 73 of the state Civil Service Law.
> Your services are being terminated due to your refusal to respond to the various attempts to have your employment status resolved. You have left this agency no recourse but to separate your employment.

On November 25, 2002, a hearing was held before an administrative law judge at the Worker's Compensation Board regarding Hodge's claim for workers' compensation. Hodge was awarded worker's compensation to be paid by the employer or insurance carrier for the period September 12, 2001 to October 2, 2002, but the administrative law judge found no compensable lost time for the period October 2, 2002 to November 26, 2002. The decision stated that "the claimant Gwennett Hodge had a work related injury to the neck, back and post traumatic stress disorder."

On January 27, 2003, the Union filed a Step II grievance claiming that ACS wrongfully terminated Hodge. By letter dated March 5, 2003, ACS denied the grievance, stating that because Hodge was not terminated for disciplinary reasons, but in accordance with CSL §73, there is no grievable contractual, policy or procedural violation.

On April 21, 2003, the Union filed a Request for Arbitration with the Office of Collective

Bargaining ("OCB"), claiming that ACS wrongfully terminated Hodge in violation of Article VI, Section 1 of the parties' collective bargaining agreement ("Agreement").[3] As a remedy, the Union sought "exoneration, reinstatement, expungement of the instant charges, restoration of lost pay and benefits." (City Ex. K)

On September 9, 2003, Hodge filed a complaint with the New York State Division of Human Rights ("SDHR") alleging discrimination based on disability. On April 19, 2004, SDHR dismissed the complaint, stating that there was no proof to support the claim of disability discrimination. (City Ex. M.)

On December 1, 2005, an arbitration hearing was held on the issue of Hodge's termination, at the commencement of which the City made a motion to dismiss the grievance because ACS terminated Hodge for non-disciplinary reasons pursuant to CSL § 73, and an Article 78 proceeding was the appropriate forum for Hodge's claim. The Union argued against the dismissal of the grievance and contended that it was arbitrable. Without ruling on the City's motion, the arbitrator

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[3] Article VI, Section 1, provides in relevant part:
The term "Grievance" shall mean:

a. A dispute concerning the application or interpretation of the terms of this Agreement;
b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant . . . ;

* * *

e. A claimed wrongful disciplinary actions taken against a permanent Employee covered by Section 75(1) of the Civil Service Law . . . ;
f. A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title . . . ;

* * *

h. A claimed wrongful disciplinary action taken against a provisional Employee who has served for two years in the same or similar title or related occupational group in the same agency.

directed the parties to discuss settlement.

After discussion, the City and Union negotiated a draft Consent Award, resolving the issue before the arbitrator, which allowed Hodge to apply for reinstatement subject to certain requirements. The Consent Award states, in relevant part:

> 1. The City agrees to allow Grievant to apply to the Department of Citywide Administrative Services ("DCAS") for reinstatement pursuant to Rule 6.2.5 of the Personnel Rules and Regulations of the City of New York.
> 2. The Grievant will provide DCAS with medical documentation regarding her physical and mental fitness to return to work, and DCAS may schedule a medical examination within sixty (60) days of the date the Grievant provides said medical documentation. . . .
> 3. If, upon such examinations, such DCAS examiner(s) shall certify that the Grievant is physically and mentally fit to perform the duties of her former position, the Greivant shall be reinstated to it, if vacant, or to a vacancy in a similar or lower position in the same occupational field or to a vacant position for which the Grievant was eligible for transfer. If the Grievant is certified physically and mentally fit to perform the duties of her former position, the Administration agrees to make all reasonable efforts to return the Grievant to an available position within thirty (30) days of when notified by DCAS. The Grievant will be restored to the rate of pay applicable to her Civil Service title on the date she returns to work, regardless of the position to which she is restored.
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> * * *
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> 5. The period from October 1, 2001 through October 1, 2002 will be treated as an approved medical leave. The period from October 2, 2002 through the date the Grievant returns to work shall be treated an approved personal leave without pay. DCAS and the Administration will adjust the Grievant's personnel file accordingly.
> 6. Grievant will not receive any back pay or benefits pursuant to this Consent Award.

The City informed the arbitrator and the Union that DCAS would need to review the terms of the Consent Award before fully agreeing to it. According to the City, Hodge was present during all settlement discussions between the City, the Union, and the arbitrator, and did not voice any objection to the Consent Award, the terms of which the arbitrator explained to her, including the lack

of any provision for back pay. Both the City and the Union state that the terms of the Consent Award were fully disclosed and discussed with Hodge and that she indicated that she understood and agreed to the settlement.

According to Hodge, on the day of the arbitration hearing, Union's counsel arrived late, was unprepared, and was unfamiliar with the facts of the case. Hodge claims that because counsel was unprepared, "he chose to resolve the wrongful termination case with an 'Expedited Arbitration' procedure, which produced an award that totally contradicted with the original remedy sought . . . ." (Petition at 1.) Hodge claims that the facts of her case were never heard at the arbitration and that although she understood the arbitrator's explanation of its terms, she did not agree to the award when it was presented to her and never signed it.

The City submitted the Consent Award to DCAS for review. According to the City, based upon DCAS's review, the City informed the Union and the arbitrator that although ACS has stated that it terminated Hodge pursuant to CSL § 73, Paragraph 5 needed to be modified to more accurately state that Hodge was terminated pursuant to CSL § 71, which covers absence due to occupational injury or disease as defined in the workmen's compensation law, while CSL § 73 does not. Because Hodge received worker's compensation, the City stated that CSL § 71 was the appropriate mechanism for terminating Hodge's employment after one year of medical leave.[4] With

[4] CSL § 71 provides, in relevant part:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected

the consent of the Union, Paragraph 5 of the Consent Award was modified as follows:

> The period from October 1, 2001 through October 1, 2002 will be treated as an approved medical leave. The period from October 2, 2002 through the date the Grievant returns to work shall be treated as a termination pursuant to § 71 of the Civil Service Law, rather than a termination pursuant to § 73 of the Civil Service Law.

Union's counsel sent Hodge the revised Consent Award with a letter dated December 21, 2005. In its letter, counsel stated:

> Please secure medical and mental health evaluations as quickly as possible and contact me with any questions that you or your doctor may have. Congratulations upon a successful outcome of your case.

According to Hodge, she did not consent to the alteration of the Consent Award and did not sign the finalized version when it was sent to her. Hodge claims that she called Union's counsel's office and could not reach him. On December 27, 2005, when Union's counsel did call her back, Hodge stated that he shouted at her and said, among other things, "If you get back pay it would be a felony," and "You can't sue me." Hodge told him that she wanted the Consent Award vacated but Union's counsel continued shouting, and she got off the phone.

On December 28, 2005, Hodge faxed letters to Union's counsel's office, to the Union, and to the arbitrator requesting to have the award vacated. Hodge's letter to Union's counsel stated in part:

> I request to have the Consent Award A-9933-03 **retracted** for the executed Consent Award dated December 21, 2005 has been modified without my consent. This

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> for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer.

> document has been modified to the point that it is incriminating. In light of this act of bad faith I request to not waive my right of arbitration hearing, but to proceed with arbitration. I will also request with Local 371 Union to have a different attorney, for throughout this whole ordeal you have not acted in my best interest. I was never able to contact you, and it was obvious that you were not familiar with my case. As an attorney you suppose to be representing my best interest, but you suggested that I waive my right to arbitration, and accept a consent award that favored the opposing side.
> (Emphasis in original.)

Hodge's letters to the arbitrator and the Union contained a similar paragraph.

According to the City, sometime during the end of December 2005 to the beginning of January 2006, Hodge contacted ACS Personnel and requested a reinstatement date. ACS asked Hodge whether she had provided the requisite medical documentation to DCAS. When Hodge replied that she had not, ACS told her that she could not be reinstated until DCAS reviewed her medical documentation. According to the City, Hodge has still not provided medical documentation to DCAS.

On January 16, 2006, Union's counsel sent Hodge a letter, enclosing the arbitrator's reply to the Union and City regarding Hodge's application to vacate the Consent Award. The arbitrator's reply stated:

> This is to inform you that I have reviewed Ms. Hodge's letter and the terms of the consent award, and find no reason to vacate this award.

In his letter, Union's counsel stated:

> Please be advised that, because I have no doubt that the Consent Award was in your best interest, fully reviewed with and authorized by you in all substantive respects, and properly issued, I cannot recommend to the Union that there is any substantive or procedural basis upon which to vacate it.

Union's counsel also told Hodge that she should contact the Union directly if she wished to pursue the issue.

Hodge contacted the Union on January 4, 2006, stating that Union's counsel had acted in bad faith and requesting a different attorney and a different arbitrator. On January 30, 2006, she contacted the Union again indicating that she had spoken to the Union's Associate Director of Grievances, and again requested another attorney to go to arbitration. On February 6, 2006, Hodge contacted the Union a third time asking what was being done in her case.

On February 13, 2006, Hodge again wrote to the arbitrator – which was copied to OCB and the New York City Office of Labor Relations ("OLR") – requesting that the Consent Award be vacated and alleging that Union's counsel was unprepared for the arbitration hearing, and that Union's counsel told her when she first met him that she would get back pay, name clearing and seniority, all of which she did not get in the Consent Award.

On February 28, 2006, OCB's Deputy Director of Dispute Resolution responded to Hodge's letter stating that the arbitrator's award was final and binding. Because the arbitrator's responsibilities were concluded in the matter, OCB told Hodge that any questions she may have should be addressed to the Union.

On March 31, 2006, Hodge filed the instant verified improper practice petition. Hodge seeks as appropriate remedies: (1) an investigation into the processing and oversight of the arbitration by the arbitrator and OCB; (2) an investigation into the procedures followed by the arbitrator regarding the draft and modified Consent Awards; (3) an investigation of Union's counsel, and; (4) "exoneration, expungement of the instant charges, restoration of lost pay and benefits, and immediate reinstatement."

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that Union's counsel violated NYCCBL § 12-306 (c)(1), (2), and (3).[5] Petitioner asserts that before the arbitration, Union's counsel was difficult to reach, did not return her calls, and kept canceling and rescheduling the arbitration date, so that it took years before the arbitration took place. Petitioner claims that on the day of the arbitration, Union's counsel was unprepared and unfamiliar with her case, and that because of his lack of preparation, the facts of her case were not heard. Petitioner asserts that as a result Union's counsel "folded" and settled for a Consent Award that contained none of the remedies that she sought. Moreover, Petitioner claims that she was expecting an arbitration hearing but sat in the waiting area by the receptionist until Union's counsel came back and presented her with the Consent Award without being informed that a hearing would not take place. Petitioner states that while she understood the arbitrator's

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[5] Petitioner incorrectly cites to NYCCBL § 12-306(c) in the petition regarding her claim that the Union breached its duty of fair representation. That statutory provision addresses the duty of a public employer or designated employee organization to bargain collectively in good faith. The duty of fair representation is addressed by NYCCBL § 12-306(b), which states 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 their 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.

§ 12-305 provides in pertinent part:

> Public employees shall have the right to self-organize, to form, join or assist public employee organizations, to bargain collective through certified employee organizations of their own choosing . . .

explanation of the Consent Award, she was in total disagreement with it and never signed it.

In addition, Petitioner argues that Union's counsel acted in bad faith by agreeing to modify the Consent Award without her consent. Petitioner claims that Union's counsel admitted that he put "personal leave" in Paragraph 5 of the draft award which was later changed to "termination" because he knew that Petitioner would not have agreed to "termination." Petitioner asserts that Union's counsel shouted at her when she stated that she wanted the award vacated.

Petitioner states that Union's counsel, the arbitrator, and the OCB ignored her pleas to vacate the modified Consent Award, and advised her to address her concerns to the Union. However, Petitioner claims that all her correspondence with the Union regarding the status of her request to have a different attorney and arbitrator have remained unanswered. Petitioner argues that the Union's failure to respond to her request for an update on her grievance is actionable under the NYCCBL.

Petitioner asserts that pursuant to NYCCBL § 12-306(d) and § 1-07(c)(1)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") she included ACS as a respondent.[6] Petitioner further argues that ACS wrongfully terminated her employment in retaliation for her worker's compensation proceeding in which ACS

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[6] 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.

OCB Rule § 1-07(c)(1)(iii) provides in pertinent part:
The public employer shall be made a party to any improper practice charge pursuant to § 12-306(d) of the statute and shall file responsive pleadings in accordance with § 1-07(c)(3) of these rules.

was involved. Petitioner also argues that Pompeo is the person behind her termination, and that ACS's action was unlawful pursuant to the Worker's Compensation law.[7]

Petitioner claims that ACS's first act of retaliation was when ACS did not submit the requisite forms on her behalf to the Worker's Compensation Board. At the hearing, as the second act of retaliation, Pompeo did not show up and instead, ACS's counsel disagreed with her application for worker's compensation and questioned medical documentation that Pompeo had already approved in the past. As ACS's third act of retaliation, Petitioner claims Pompeo had her employment terminated. Petitioner asserts that her medical documentation was never questioned when she reported for work on October 2, 2002, and that even if ACS found that it was insufficient, she was terminated the next day without an opportunity to provide additional documentation.

Union's Position

The Union argues that the Petitioner fails to state any claimed violation of the NYCCBL. Furthermore, the Union asserts that Petitioner has alleged no facts that the Union acted unlawfully towards her. The Union contends that it acted in the utmost good faith toward the Petitioner, pursued her grievance to arbitration, and achieved the best result obtainable under the facts and circumstances of her case.

The Union claims that Petitioner was fully aware of the terms and conditions of the Consent Award and agreed to them. The revision to Paragraph 5 of the draft Consent Award from CSL § 73

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[7] Worker's Compensation Law § 120 states, in relevant part:
Discrimination against employees who bring proceedings. It shall be unlawful for any employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer.

to CSL § 71, was not a substantive change which adversely affected Petitioner's benefits and rights under the final Consent Award.

City's Position

The City argues that Petitioner fails to allege facts sufficient to support a claim that the City or the Union violated NYCCBL § 12-306 (c)(1), (2) or (3). These statutory sections cited by Petitioner are not applicable to her arbitration proceeding.

To the extent that Petitioner is arguing a breach of the duty of fair representation pursuant to NYCCBL § 12-306 (b)(3), the City argues that the Petition must be dismissed because Petitioner fails to allege facts sufficient to establish a breach of the duty of fair representation. Petitioner fails to show that the Union's conduct in negotiating the draft and final Consent Award was arbitrary, discriminatory, or founded in bad faith. Indeed, despite the absence of a valid contractual grievance, the Union negotiated successfully for Hodge's reinstatement pursuant to Rule 6.2.5 of the Personnel Rules and Regulations of the City of New York.[8] Moreover, the arbitrator explained the terms of the Consent Award and Petitioner indicated that she understood and agreed to them.

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[8] Rule 6.2.5 states, in relevant part:
(a) Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workers' compensation law, such employee shall be entitled to a leave of absence for at least one year unless the disability is of such a nature as to permanently incapacitate the employee from the performance of the duties of the position.
(b) Such employee may, within one year after the termination of such disability, make application to the commissioner of citywide administrative services for a medical examination to be conducted by a medical examiner selected by the commissioner of citywide administrative services. If, upon such examination, such examiner shall certify that such person is physically and mentally fit to perform the duties of the former positions, such person shall be reinstated to it, if vacant, or to a vacancy in a similar or lower position in the same occupational field or to a vacant position for which such person was eligible for transfer.

The City asserts that the arbitrator acknowledged that the draft Consent Award was subject to review by DCAS. In addition, Paragraph 5 of the Consent Award was modified to accurately reflect the facts surrounding Petitioner's termination on October 2, 2002.

The City claims that Petitioner has only been prejudiced by her refusal to accept available positions offered by ACS on October 2, 2002, and her refusal to seek reinstatement pursuant to the terms of the Consent Award. The City notes that Petitioner may still seek reinstatement to ACS pursuant to the terms of either the draft or final Consent Awards.

Because the Union did not breach its duty of fair representation, the Petition must be dismissed and any derivative claim against the City pursuant to NYCCBL § 12-306 (d) must also be dismissed.

DISCUSSION

The primary issue before this Board is whether the Union breached its duty of fair representation in handling an arbitration, and in negotiating a settlement agreement regarding Petitioner's termination. We find that the Petition failed to establish 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, 177 (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.

Similarly, this Board, in interpreting NYCCBL § 12-306(b)(3), requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing

collective bargaining agreements. *See Samuels,* Decision No. B-17-2006 at 12*; Del Rio,* Decision No. B-6-2005 at 12; *Whaley,* Decision No. B-41-97 at 12; *see also Transport Workers Union, Local 100 (Brockington),* 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board). A union enjoys wide latitude in the handling of grievances as long as it exercises its discretion with good faith and honesty. *See Wooten*, Decision No. B-23-94 at 15; *Page*, Decision No. B-31-94 at 11. A grievant's disagreement with the union's tactics or discontent with the quality or extent of representation does not constitute a breach of the duty of fair representation. *Burtner*, Decision No. B-1-2005 at 14; *Whaley*, Decision No. B-41-97 at 12. This Board will not find that a union has breached its duty of fair representation merely because a member is dissatisfied with the outcome of a case. *Green*, Decision No. B-34-2000 at 9; *White*, Decision No. B-37-96 at 7; *Hug,* Decision No. B-51-90 at 17.

In *White*, Decision No. B-37-96, a union represented petitioner at an arbitration regarding the public employer's imposition of disciplinary charges and a penalty, which petitioner disputed. During the arbitration, the union argued that petitioner was an excellent worker and had done nothing wrong. After the arbitrator found that petitioner had not been wrongfully disciplined, petitioner filed an improper practice petition complaining that the union had failed to represent her adequately during the arbitration. The Board found no evidence that the union discriminated against the petitioner because the union not only represented petitioner through the lower steps of the grievance process but also at arbitration where the union presented a credible case. The Board stated: "Merely because the outcome of the arbitrated matter was not satisfactory to Petitioner does not establish a breach of the duty of fair representation, nor does it justify the grant of a remedial order by this Board." *Id*. at 7.

In *Hug*, Interim Decision No. B-51-90, the union represented petitioners through the grievance process, and pursued petitioners's claims in arbitration, during which the parties entered into a settlement agreement. Petitioners complained that the union settled the group grievance to their detriment. The Board stated that even if petitioners could prove that the settlement agreement did not operate in their best interest, such claims "would constitute a basis for a finding of an improper practice only if the [union] acted in an arbitrary, discriminatory, or bad faith manner in administering or enforcing the collective bargaining agreement." *Id*. at 21. Because petitioners presented no evidence of improper motivation, such as malice or discrimination, in the union's acceptance of the settlement agreement, the Board dismissed petitioners' claim. *Id.* at 22.

Here, just as in *White* and *Hug,* the Union assisted Petitioner through all the lower steps of the grievance process and pursued her claims in arbitration. Petitioner claims that Union's counsel mishandled the arbitration because he was unprepared and negotiated a settlement agreement to her detriment. As in *White*, we cannot in this case deem the Union's conduct in breach of the duty of fair representation based on Petitioner's dissatisfaction with the manner in which the Union handled the arbitration. At the arbitration, when the City moved to dismiss the grievance because terminations for medical disability under the Civil Service Law do not constitute discipline and, thus, are not arbitrable under the parties' Agreement, the Union persisted in seeking arbitral review of the termination. Under the arbitrator's direction, the parties entered into settlement discussions. As the product of those discussions, the parties negotiated a Consent Award. Nothing in the record indicates that the Union's agreement with the Consent Award was an arbitrary, discriminatory, or bad faith act. Indeed, despite the City's position that Petitioner's termination was not arbitrable, the Union was successful in gaining Petitioner's reinstatement at ACS subject to submission of medical

documentation and a medical examination. As in *Hug*, this Board finds that the record provides no evidence of improper motivation in the Union's negotiation and acceptance of the settlement agreement.

Further, Petitioner asserts that the Union acted in bad faith by agreeing to modify the settlement agreement without her consent. Even if the Union did agree to the modification without her consent, Petitioner failed to demonstrate that the Union's actions were perfunctory, prejudicial, or in bad faith under the circumstances of this case. We do not find that the change from "CSL § 73" to "CSL § 71" to more accurately state the provision under which Petitioner was terminated was prejudicial in nature. Furthermore, we do not find the modification of "personal leave" to "termination" prejudicial or undertaken in bad faith. The provisions of CSL § 71 – that an employee may be terminated when unable to perform the duties of his or her position for one year or more by reason of a disability – does not imply that misconduct was the reason for termination. As to Petitioner's claim that the Union ignored her calls and letters seeking to vacate the Consent Award, the record shows that the Union did respond by letter explaining that the Consent Award was the best outcome she could obtain and also sent her the arbitrator's reply which stated that the arbitrator saw no reason to vacate the Consent Award.[9] Moreover, regarding Petitioner's complaint that the Union failed to respond to her request for another attorney and arbitrator, the Union has no duty to relitigate an issue based on Petitioner's dissatisfaction with the Consent Award. *Page*, Decision B-31-94 at 15.

With regard to Petitioner's request that OCB investigate the procedures followed by the

[9] We note that the City stated in its pleadings that Petitioner may still seek reinstatement to ACS pursuant to the terms of either the draft or final Consent Awards

arbitrator regarding the Consent Award, this Board has no jurisdiction or appellate review powers over an issue decided in arbitration. *Zeigler*, Decision No. B-13-97 at 4.

Finally, this Board has no jurisdiction over the administration of statutes other than the NYCCBL. *Del Rio*, Decision No. B-6-2005 at 15; *Green*, Decision No. B-34-2000 at 9. Therefore, we may not consider Petitioner's claims regarding alleged violations of the CSL or the Worker's Compensation Law, matters which are beyond the jurisdiction of this Board. *Id.*

Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Samuels*, Decision No. B-17-2006 at 16. Accordingly, the 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, docketed as BCB-2545-06, filed by Gwenett E. Hodge, be, and the same hereby is, dismissed.

Dated: December 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER