Keitt v. DOT, L.1182, CWA, 23 OCB 16 (BCB 1979) [Decision No. B-16-79]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
--------------------------------------x
In the Matter of

Claude Keitt

Decision No. B-16-79

and

Docket No. BCB-331-79

The Department of Transportation
of the City of New York

and

Local 1182, Communications
Workers of America
--------------------------------------x

DECISION AND ORDER

On June 19, 1979, Claude Keitt filed a petition alleging that the Assistant Commissioner of the Department of Transportation, David Love, and the President of Local 1182 of the Communications Workers of America, William Jenkins, have committed improper practices in connection with Mr. Keitt's termination from his job as a Parking Enforcement Agent. The petition accuses the Department of Transportation with failing to specify the charges against Mr. Keith and refusing to allow him an opportunity to improve his job performance. Furthermore, Mr. Keitt claims that when he filed "an appeal" with Local 1182, he was told by Mr. Jenkins that the matter would be investigated but no communication from the union was ever forthcoming. Mr. Keitt attributes the union's failure to pursue the case to the fact that in the previous election for union offices, he unsuccessfully opposed Mr. Jenkins for the presidency of the Local.

The Department of Transportation, by the City's office of Municipal Labor Relations, requests that the charges against it be dismissed on the ground that there is nothing in the petition which

alleges "an improper public employer practice" as that term is defined by the New York City Collective Bargaining Law (NYCCBL). The City suggests that if Mr. Keitt feels aggrieved about the circumstances surrounding his termination, his remedy would lie "either in a grievance or in a court action...."

Local 1182 claims that the charge that it has failed to adequately represent Mr. Keitt is without merit. Local 1182 states that Mr. Keitt was a probationary employee at the time of his dismissal and that the contract precludes the utilization of the grievance procedure by such employees. However, the union points out that it did arrange and accompany Mr. Keitt to a meeting with one of the Department's officials and tried, albeit unsuccessfully, to get the Department to reverse its decision to terminate Mr. Keitt.

A hearing was held in this matter on August 30, 1979. Examination of the stenographic transcript firmly establishes the following events leading up to the filing of the improper practice petition. On February 22, 1979, Mr. Keitt and Mr. Jenkins attended an "interview"[1] with Assistant Commissioner Hogan of the Department of Traffic to discuss Mr. Keitt's impending dismissal. Mr. Hogan explained that Mr. Keitt was being terminated for excessive

---

[1] Section 4.5(i) of the Rules and Regulations of the Department of Civil Service provides that a probationary employee:

> " ... whose services are to be terminated for unsatisfactory service shall receive written notice at least one week prior to such termination and, upon request, shall be granted an interview with the appointing authority or his representative." (emphasis added)

lateness and for making too many errors on summonses. Both Mr. Keitt and Mr. Jenkins asked for additional training or in the alternative, an extension of the probationary period. However, Mr. Hogan decided that he would uphold the District Commander's recommendation that Mr. Keitt be terminated as of March 2, 1979.

Afterwards, outside of Mr. Hogan's office, Mr. Jenkins claims that he explained to Mr. Keitt that the union could not do anything further since probationary employees have no rights under either the contract or Civil Service Law.[2] Mr. Jenkins did volunteer the clerical services that the union could provide if Mr. Keitt was able to pursue his case elsewhere.

n February 27, 1979, Mr. Keitt went to the union office to file "an appeal" of the Department's decision to terminate him. While at union headquarters, he spoke by telephone to Mr. Jenkins who was in the field. Mr. Keitt told Mr. Jenkins that he wished to file a grievance and also informed the union president that on the previous day, he had filed a complaint with the City Human Rights Commission. Mr. Jenkins took down the information about the action instituted with the Human Rights Commission, but again

---

[2] At the hearing, the union introduced into evidence a letter, dated September 14, 1978, addressed to Mr. Jenkins from Nicholas LaPorte, Jr., Secretary of the City Civil Service Commission, written in response to an inquiry by Mr. Jenkins in an earlier case, concerning the rights of allegedly improperly terminated probationary parking enforcement agents. The letter, in pertinent part, stated:

> ". . . Under Civil Service law a probationary employee may be terminated for whatever reason the employing agency deems fit. . . . the City Civil Service Commission lacks jurisdiction to take any action in this matter."

explained to Mr. Keitt that the union could not bring a grievance on his behalf. There is disagreement as to when, if ever, the two men spoke again, but it is undisputed that at some point either during or after the above-mentioned phone conversation, it was made clear to Mr. Keitt that the union could do no more for him in this matter.

DISCUSSION

Mr. Keitt has failed to establish a prima facie case against the Department of Transportation. Grievant's allegations relating to the Department of Transportation include no claims within the purview of the provisions of §1173-4.2 (a) of the NYCCBL.[3] Thus, whatever the merits of Mr. Keitt's complaints as to the Department's action, they do not constitute a basis for a finding of improper practice.

With regard to Local 1182, Mr. Keitt maintains, in his written submissions, that the union failed to meet its "duty of fair representation." In this connection, Mr. Keitt

---

[3] Section 1173-4.2(a) of the NYCCBL states that it shall be in 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 1173-4.1 of this chapter.
> "(2) to dominate or interfere with the formation or administration of any public employee organization;
> "(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;
> "(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its

contended that the union never contacted him after promising to investigate the grievance he wished to file against the Department of Transportation. Mr. Keitt suggested that the union’s failure to communicate with him was related to his recent unsuccessful attempt to unseat Mr. Jenkins as president of the Local.

Judicial recognition of the duty of a unit bargaining representative to provide fair representation to all unit employees can be traced back at least thirty-five years to the decision of the U.S. Supreme Court in Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944). The Court held that when Congress empowered unions to bargain exclusively for all employees in a bargaining unit, thereby subordinating individual interests to the interests of the unit as a whole, it simultaneously imposed on unions a correlative duty “inseparable from the power of representation to exercise that authority fairly.” Although there has been no lack of divergent definitions ascribed to the concept by courts and the National Labor Relations Board (NLRB), the duty of fair representation has been recognized as, at very least, obliging a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. The New York State Public Employment Relations Board (PERB), in a decision affirmed by a state appellate court, has declared that the duty of fair representation applies with the same force in the public sector as it does in private industry. Jackson v. Regional Transit Service, 388 NYS 2d 441, 54 A.D.2d, 305, 10 PERB 7501 (1976).

Limiting our examination of the "obligation" to the issues raised by the instant case, we find that the Supreme Court has held that a union does not breach its duty of fair representation merely because it refuses to bring all employee grievances to arbitration; the decision to refuse to process a grievance, however, must not be made in bad-faith or in an arbitrary or discriminatory manner. Vaca v. Sipes 386, U.S. 171, 190, 64 LRRM 2369 (1967). In a case decided nine years later, the Court explained the basis for its ruling in Vaca as follows:

> "In Vaca 'we accept[ed] the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion'...and our ruling that the union had not breached its duty of fair representation in not pressing the employee's case to the last step of the grievance process stemmed from our evaluation of the manner in which the union had handled the grievance in its earlier stages. Although 'the Union might well have breached its duty had it ignored [the employee's] complaint or had it processed the grievance in perfunctory manner,' 'the Union conclude[d] that arbitration would be fruitless and that the grievance should be dismissed' only after it had "processed the grievance into the fourth step, attempted to gather sufficient evidence to prove [the employee's] case, attempted to secure for [him] less vigorous work at the plant, and joined the employer's efforts to have [him] rehabilitated.'"
> Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570, 91 LRRM 2481 (1976).

The Vaca decision was further analyzed by the U.S. Court of Appeals, 6th Circuit, in Ruzicka v. General Motors Corp., 523 F.2d 306 (1975) where the court found that it was not necessary to read "bad-faith" into the separate and independent standards of "arbitrary" and discriminatory" treatment.

> "Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation."

The court found that the failure of a union to report to an employee whether his grievance would be processed or not, unrelated as it was to the merits of the case, was a clear example of arbitrary and perfunctory conduct.

PERB also has found that a union owes a duty to an employee to inform him about its decision to go forward or not with his grievance. In Social Service Employees Union, Local 371, v. Serge B. Rameau, 10 PERB 4592 (1977) aff'd 11 PERB 3004 (1978), a case involving an improper practice charge against a union for refusing to process several grievances, the PERB hearing officer stated:

> "In the discharge of its duty of fair representation an employee organization has the right and obligation to determine which grievances it will process, but this determination should be made after due consideration and in an unbiased manner.... [E]ven if the local... may have determined the grievance to be non-meritorious, it owed a duty to (the grievant) to either process his grievance or respond and explain the basis for its rejection. It did neither. This perfunctory, indeed arbitrary, conduct... is violative of the Act."

Turning to the facts of the instant dispute, it seems clear that Local 1182 followed standard procedures in acting on behalf of Mr. Keitt. Mr. Jenkins himself accompanied Mr. Keitt to the interview with Assistant Commissioner Hogan and seemingly argued the case as best he could, suggesting that Mr. Keitt be given additional training in order to improve his job performance or in the alternative, that Mr. Keitt's probationary period be extended. When it became evident that the Department of Transportation would not reverse its decision, Mr. Jenkins informed Mr. Keitt that there was little the union could do for probationary employees under such circumstances.

Mr. Jenkins had previously written the City Civil Service Commission and had been informed that there was no recourse to that body for employees in Mr. Keitt's situation. In addition, it was Mr. Jenkin's understanding, as explained to him by his attorneys, that probationary employees have no access to the contractual grievance procedure with respect to disciplinary matters; examination of the grievance and arbitration provisions of the applicable contract between Local 1182 and the City persuades us that this conclusion was well-founded and reasonable. Mr. Jenkins did offer the services of his office for any clerical assistance Mr. Keitt might need in pursuing his case elsewhere. Mr. Jenkins testified that upon learning of the action instituted by Mr. Keitt with the Human Rights Commission against the Department of Transportation he volun-

tarily called that agency to explain that the union would be eager to supply any information that might be helpful to the processing of Mr. Keitt's case. Moreover, it is undisputed that either on or shortly after February 27th, the union again made its position clear to Mr. Keitt that it could do no more for him in the matter by way of arbitration.

Reviewing these facts the Board perceives no basis for a finding of improper practice against Local 1182.[4] The union's treatment of Mr. Keitt's case shows no evidence of hostility or neglect. The union's inquiry into the facts of the case and its reasonable interpretation of the pertinent contract language demonstrate that its conduct in the matter was not arbitrary.[5] Mr. Keitt introduced no proof whatsoever that the union was in a position to do more for him than they did nor did Mr. Keitt attempt to show that the treatment afforded him by Local 1182 differed in any respect to that received by fellow employees in

---

[4] Section 1173-4.2(b) of the NYCCBL provides that 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 1173-4.1 of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> "(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer."

[5] See page 5 of Memorandum 79-55, dated July 9,1979 issued by John S. Irving, General Counsel to the NLRB.

similar situations. Nor was there any failure by the union to communicate with Mr. Keitt as to its handling of the matter; Mr. Jenkins' testimony that Mr. Keitt was advised after the February 22, 1979 conference with Mr. Hogan that the union could do nothing further is unrefuted. it is abundantly clear from the record that neither the City nor Local 1182 are guilty of an improper practice in this matter.

O R D E R

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 Claude Keitt be, and the same hereby is, dismissed.

DATED: New York, New York

October 23, 1979.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD SILVER
M e m b e r

FRANKLIN J. HAVELICK
M e m b e r

EDWARD F. GRAY
M e m b e r

EDWARD J. CLEARY
M e m b e r