

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

DECISION NO. B-11-87

-between-

DOCKET NO. BCB-924-86

WILLIAM S. KELLY,

Petitioner,

-and-

UNIFORMED SANITATIONMEN'S
ASSOCIATION, Local 831,

Respondent.

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DECISION AND ORDER

On December 1, 1986, William S. Kelly ("petitioner") filed an improper practice petition against the Uniformed Sanitationmen's Association, Local 831 ("the Union"). The Union filed an answer on December 31, 1986, to which petitioner replied on January 15, 1987. A hearing was held on February 19, 1987.

Background

Along with five other sanitation workers, petitioner was arrested in August 1985 for allegedly taking trade waste for compensation. The Department of Sanitation ("DOS") thereupon suspended all six workers pending a departmental hearing on the charges. Shortly thereafter, the workers were advised that the Union had retained

Allen A. Cohen, an attorney with the firm of Kirschner, Schechter & Cohen, to represent them at the departmental hearing. The workers were also informed that Mr. Cohen could be retained on a private basis for the criminal charges.

Petitioner, however, notified Mr. Cohen that he intended to retain private counsel for both the criminal and the departmental hearing. of the five remaining workers, three retained Mr. Cohen for the criminal hearing, and two obtained other attorneys. With the exception of petitioner, Mr. Cohen represented all of the workers at the departmental hearing.

In October 1985, the five workers represented by Mr. Cohen were found guilty of the charges at the departmental hearing and were terminated from DOS. Mr. Cohen, at the Union's expense, thereupon instituted Article 78 proceedings to review the termination decisions, which the court ultimately sustained. In the criminal case that followed, the three workers who had privately retained Mr. Cohen received conditional discharges.

Unlike the other workers, petitioner decided to proceed with the criminal case prior to the departmental hearing. After approximately six months, the court dismissed the criminal charges; DOS, however, terminated petitioner on May 23, 1986 following a departmental hearing.

Petitioner thereupon requested the Union to file an Article 78 appeal on his behalf. The Union refused this request, resulting in the instant petition.

Positions of the Parties

Petitioner's Position

Petitioner, appearing pro se, has argued in his pleadings and at the hearing that the Union unfairly discriminated against him, in violation of the New York City Collective Bargaining Law, by denying him the same rights granted to the other workers. Petitioner claims that he contacted Fiore Pappa, secretary-treasurer of the Union, on July 14, 1986. Petitioner allegedly asked Mr. Pappa what he "had to do to secure money from the Union to pay for [his] appeal." According to petitioner, Mr. Pappa replied that although the Union would not pay for his private lawyer, petitioner could obtain Mr. Cohen's services at Union expense. Petitioner allegedly told Mr. Pappa that he would "check on that and call him back." Upon verifying Mr. Pappa's statement with other City employees, petitioner allegedly notified Mr. Pappa on July 28, 1986 that he would accept the Union's repre-

sentative. He inquired, however, whether he could use one of Mr. Cohen's associates. Mr. Pappa allegedly answered that only Mr. Cohen could handle the appeal, whereupon petitioner agreed to Mr. Cohen's representation.

On July 29, 1986, petitioner allegedly telephoned Mr. Cohen for an appointment. Mr. Cohen advised him that he could not represent him and that he had "better call back the Union." Petitioner again telephoned Mr. Pappa, who allegedly said that petitioner "must have misunderstood what he said." Petitioner purportedly replied that he "clearly understood the situation and that was that the Union agreed to pay Mr. Cohen to represent the other five men and that [he] should be afforded the same opportunity, that anything less would be discriminatory." At this point, Mr. Pappa allegedly mentioned that petitioner had "missed the boat" since he had not attended the "appeal meeting." When asked about the date of the meeting and the persons in attendance, Mr. Pappa allegedly replied that he would have to inquire as to such details and would return petitioner's call after speaking with the president of the Union. When he did not call by one week later, petitioner finally reached Mr. Pappa after repeated attempts. Mr. Pappa allegedly notified him at that time that the Union president had decided not to pay for his appeal.

Petitioner also contacted the other five workers to inquire about the claimed appeal meeting. Petitioner testified that they denied attending any such meeting, and he submitted into evidence two affidavits to this effect.

On September 10, 1986, petitioner claims that he attended a meeting with Mr. Scarlatos, the union vice-president, Mr. O'Keefe, the union trustee, and Mr. Pappa. According to petitioner, Mr. Pappa denied that he had ever said that the Union would pay for the appeal. Petitioner claims that he responded that he knew he "was getting a raw deal and only wanted the same treatment that the other Union members got." Although Mr. Scarlatos allegedly said that he would speak again to the union president he later notified petitioner that there had been no change in the union's position.

Petitioner emphasizes that his original decision to decline Mr. Cohen's services was soundly reasoned; he lacked confidence in Mr. Cohen's abilities and questioned his impartiality in view of his prior experience as Deputy Inspector General for DOS. Petitioner further argues that the Union never tried to convince him to use its lawyers and in fact avoided him "from the very start." Thus, the petitioner charges that the

Union abandoned him for using his own lawyer.

Union's Position

The Union claims that shortly after the criminal arraignment, a meeting was held with the workers at Mr. Cohen's office to discuss matters pertaining to their representation. The workers were informed that Mr. Cohen would be available at union expense to represent them at the departmental hearing, and, if necessary, to handle the appeals. Petitioner allegedly informed Mr. Cohen at that time that he had retained private counsel to represent him at the criminal and departmental hearings and that he did not want the Union to provide him with any legal assistance.

The Union also contends that Mr. Cohen spoke with petitioner's private attorney during the pendency of the criminal matter. Petitioner's attorney allegedly informed Mr. Cohen that he had been retained to handle the criminal and the departmental hearing as well as an Article 78 proceeding, should petitioner lose at the departmental hearing.¹

¹Apparently attempting to refute this allegation, petitioner submitted into evidence a letter from his attorney, which says in part as follows:

This is to advise that I have had no
no contact with any representative of the
Sanitation Department Union indicating
(continued...)

The Union also denies that Mr. Pappa ever told petitioner that the Union would pay for his appeal and claims that petitioner never requested the Union's counsel during the pendency of the hearings. Furthermore, the Union argues that petitioner has not been denied any right given to other sanitation workers, since the Union has never paid for the appeal of a member who used his own lawyer for the departmental hearing.

Discussion

It is well established that upon undertaking the duty of representation, a union must exercise its power "fairly, impartially, and in good faith."² The scope of this duty of fair representation generally extends only to the negotiation, administration, and enforcement

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that attorneys of said union would represent Mr. Kelly in any appellate procedure.

I initially discussed Mr. Kelly's situation with a representative of the union at the time criminal charges were pending. However from that date to the present I have never been contacted by, nor have I ever contacted any representative of the union.

²Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 203, 15 LRRM 708, 713 (1944).

of collective bargaining agreements, and not to the institution of lawsuits on behalf of unit members.³

Nevertheless, a union, as here, may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do. Where it assumes such an obligation, the union violates its duty of fair representation if the petitioner shows that (1) the union denies the service to a unit employee, and (2) the union's decision to deny that service is improperly motivated, irresponsible, or grossly negligent.⁴

The petitioner here has not met either criterion. Although it is true that the Union filed Article 78 proceedings on behalf of the other five workers, it had represented those workers at the departmental hearing below. By utilizing private counsel at the departmental hearing and later requesting union counsel, petitioner was in effect seeking a different service from the other workers.

In making this ruling, we note that the Union testified that it essentially filed the same appeal brief on behalf of the five workers. The Union also alleges

³E.g., Decision Nos. B-14-83, B-29-86.

⁴See, e.g., Public Employees Federation (Hartner), 14 PERB 4671 (1981), affirmed 15 PERB 3066 (1982); United Federation of Teachers, Local 2 (Greenberg), 16 PERB 3004 (1983).

that since these workers did not contest their guilt, the issue raised in the briefs was whether the department's penalty was arbitrary and capricious; the issue in petitioner's appeal, in view of his denial of the charges below, would have been whether the determination was supported by substantial evidence. The Union thus claims that in reviewing the transcripts of petitioner's departmental hearing and in preparing a brief with the issues required by his appeal, it would have incurred far greater expense than it did in filing the appeals of the other workers.

Furthermore, petitioner has presented no evidence to show that the Union discriminatorily applied its policy of declining to handle the appeal of a case in which it did not participate below. The Union testified that its counsel had never before handled, and had never been asked to handle, a unit member's appeal where it did not represent him in the earlier proceedings. In the absence of evidence that the Union's policy here was discriminatorily applied, we do not believe that the policy, in itself, constitutes a breach of the duty of fair representation.⁵

⁵See Council of Supervisors and Administrators, Local 1 (Gerwitz), 15 PERB 4554 (union's refusal to grieve employer's denial of employee's request for sabbatical leave was not a breach of the duty of fair
(continued...)

Even assuming that he had been denied the same service that was provided to the other workers, petitioner has failed to establish that the Union's decision was improperly motivated, irresponsible, or grossly negligent. There is no basis upon which to conclude that the Union's decision was either irresponsible or grossly negligent. The only evidence in the record suggests that the Union was motivated by cost considerations, rather than any unlawful bias against petitioner. While we sympathize with petitioner's frustration in not being able to establish the innocence he so fervently maintains, we simply cannot find that the Union has breached its duty of fair representation under the circumstances present here.

For the foregoing reasons, the improper practice petition herein is dismissed.

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representation, where the refusal was based on the union's policy of not filing grievances on denials of such leaves because of the employer's discretionary powers in this area; in the absence of an allegation that the policy was discriminatorily applied, the policy per se does not constitute a breach of the duty of fair representation.)

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 herein be, and the same hereby is, dismissed in all respects.

DATED: New York, N.Y.
April 30, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
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