

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CLIFTON R. EARP,

DECISION NO. B-53-87

Petitioner,

DOCKET NO. BCB-798-85

-and-

UNIFORMED SANITATIONMEN'S  
ASSOCIATION,

Respondent.

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DECISION AND ORDER

Clifton R. Earp (hereinafter "petitioner") has submitted a verified improper petition in which he charges that the Uniformed Sanitationmen's Association (hereinafter "USA" or "the Union") committed an improper practice in alleged violation of the collective bargaining agreement and the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The Union has filed a verified answer and exhibits. The petitioner has not submitted a reply, although advised by the Trial Examiner of his right to do so.

Background

Petitioner was a probationary Sanitation Worker employed by the New York City Department of Sanitation. It appears that he was suspended from duty for allegedly being absent from his assigned workplace without authorization while working the night shift on or about February 7, 1985. No Union shop steward was present at his workplace at the time of his

suspension. Thereafter, the petitioner's suspension was rescinded, and he was returned to duty. However, the petitioner's employment subsequently was terminated without explanation prior to completion of his probationary period.

The Union notes that while no shop steward was present at petitioner's workplace during the night shift, a Union official was "on call" and could be reached at a telephone number made available to unit members if circumstances required the presence of a union representative to deal with a grievance or a claimed violation of the contract. The Union alleges that on the night of petitioner's suspension, the designated Union official did not receive a call from the petitioner seeking any assistance.

#### Positions of the Parties

##### Petitioner's Position

The petitioner asserts that the manner in which his suspension was effected on February 7, 1985 was violative of several provisions of the applicable collective bargaining agreement. In this regard, the petitioner alleges no shop steward was available for night workers during the period of his employment. Specifically, the petitioner alleges that on the night of his suspension, no Union representative was present to enforce his contractual rights with respect to his suspension from duty. The petitioner states that the Union did not fairly

represent him and, in effect, aided and abetted the employer. The petitioner contends that the Union's failure to have a shop steward present at his work location at the time of his suspension constitutes a denial of equal terms, conditions and privileges as a member of the union.

The remedy requested by the petitioner consists of a written apology by the Union for "improper representation" and the Union's assistance in clearing his record and name.

#### Union's Position

The Union alleges that it fairly represented the petitioner in his relations with his supervisors and management; and that its representatives aided and represented petitioner and interceded on his behalf with management. The USA alleges that the petitioner was supplied with the telephone number of Union trustee Harry Nespoli, together with written information that he could call Mr. Nespoli during the night shift and ask him to come to the Department of Sanitation garage where petitioner worked, to represent him concerning any labor grievance or claimed violation of the collective bargaining agreement. The Union further asserts that on the night of his suspension, the petitioner failed to call Mr. Nespoli to seek assistance.

Through the documents submitted as exhibits, the Union attempts to show that when the petitioner's suspension was brought to the attention of Mr. Nespoli, he arranged to meet

with the petitioner and management and was successful in having the suspension lifted as of the date of the meeting. The documents further purport to indicate that Mr. Nespoli and a shop steward, Anthony Rodriguez, attempted to schedule an earlier meeting concerning the suspension, but were told by the petitioner that he could not come on an earlier date because he "... has other things to do."

Finally, the USA observes that petitioner has filed a complaint against the Union with the New York State Division of Human Rights. This complaint is alleged also to involve a claim that the Union did not fairly represent the petitioner.

#### Discussion

This improper practice proceeding does not involve the merits of management's decision to suspend the petitioner from duty for allegedly being absent from his workplace without authorization. Neither does this case involve the merits of management's later decision to terminate the petitioner's employment prior to the completion of his probationary period.

Both of those decisions were made by agents of the Department of Sanitation, which is not a party to this proceeding.<sup>1</sup>

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<sup>1</sup>A separate improper practice petition filed by the petitioner challenging the Department of Sanitation's actions was dismissed by this Board's Executive Secretary for legal insufficiency, pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules"). Decision No. B-30-85 (ES).

Rather, the petitioner's charges herein relate only to his contention that the Union failed to fairly represent him in connection with his suspension from duty.

This Board long has held that the duty of fair representation is the obligation, co-extensive with the exclusive power of representation, to refrain from arbitrary, discriminatory, or bad faith conduct in the negotiation, administration and enforcement of collective bargaining agreements.<sup>2</sup> In the present case, the petitioner asserts that the USA breached its duty of fair representation by failing to have a shop steward or other union representative present at his work location to assist him in protecting his alleged contractual rights at the time of and in connection with his suspension from duty. The petitioner claims that the manner in which management effected his suspension was violative of provisions of the collective bargaining agreement, and that the Union was not present to insure compliance with the agreement. It is implied by the petitioner that the Union's failure to act is the equivalent of aiding and abetting management.

Based upon the record before us, we are not persuaded that the Union's conduct constituted arbitrary, discriminatory,

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<sup>2</sup>E.g., Decision Nos. B-32-86; B-26-84; B-16-83; B-39-82; B-16-79; see, Vaca v. Sipes, 386 U.S. 171, 65 LRRM 2369 (1967).

or bad faith administration and/or enforcement of the collective bargaining agreement. The Union's submissions, to which the petitioner chose not to reply,<sup>3</sup> demonstrate that the Union supplied petitioner and other employees who work at night, with the telephone number of a Union official who would be available to come to a work site at night, if needed, to handle a grievance or otherwise deal with a claimed violation of the agreement. It is further uncontroverted that the petitioner did not call the designated official, Union trustee Harry Nespoli, the night of his suspension from duty. The record further reflects that Mr. Nespoli subsequently arranged a meeting between the petitioner, himself, and a representative of management, which resulted in the petitioner being restored to duty. It appears from the record that any delay in scheduling the meeting, once the Union was informed of petitioner's suspension, was due to the petitioner's own unavailability.

It seems to be the petitioner's position that the duty of fair representation requires that a union have a representative present in every work location at all times. We

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<sup>3</sup>Section 7.9 of the OCB Rules, a copy of which was printed on the back of the improper practice petition form filed by the petitioner, provides in pertinent part, that: "... Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply. ..." The Trial Examiner reminded the pro se petitioner of his right to file a reply, but none was submitted.

find no precedent to support such a proposition. A union is entitled to broad discretion in determining how to administer and enforce the collective bargaining agreement, provided that its actions are not arbitrary, discriminatory, or in bad faith. While it might be desirable to have the comprehensive representation sought by the petitioner, in our experience it is not unreasonable to expect that grievances will arise, from time to time, outside the presence of a union representative, and that in such cases, an adversely affected employee will have to comply with management's allegedly erroneous order, and inform the union or submit a grievance at the earliest opportunity thereafter. This is the basis for the well-established maxim, "Obey now, grieve later."

In the present case, we find that the Union provided a relatively prompt means of securing representation, of which the petitioner failed to take advantage. Moreover, we find that when the petitioner's problem was brought to the Union's attention, it acted promptly to assist him and, in fact, was successful in having him restored to duty. We find, further, that the petitioner's allegations that the Union aided and abetted the employer are conclusory and without factual support in the petition. Finally, we point out that petitioner's allegations of contract violations are beyond the scope of this Board's jurisdiction in an improper practice proceeding

since, pursuant to Section 205.5(d) of the Taylor Law,<sup>4</sup>

"...the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."

For the reasons stated above, we hold that the petitioner has failed to establish that the Union breached its duty of fair representation. Accordingly, we will order that the improper practice petition be dismissed.

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,

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<sup>4</sup>Civil Service Law, Article 14.



ORDERED, that the improper practice petition filed by Clifton R. Earp be, and the same hereby is, dismissed.

DATED:       New York, N.Y.  
              October 26, 1987

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