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

ALFRED H. KHALIL, DECISION NO. B-30-68

Petitioner,

DOCKET NO. BCB-960-87

-and-

LOCAL 1199, RWDSU, AFL-CIO,

Respondent.
- - - - - - - - - - - - - - - - - - - X
In the Matter of
ALFRED H. KHALIL,
Petitioner, DOCKET NO. BCB-997-87

-and-

LOCAL 1199, RWDSU, AFL-CIO,

Respondent.
- - - - - - - - - - - - - - - - - - - X

DETERMINATION AND ORDER

On May 22, 1987, Alfred H. Khalil (hereinafter it petitioner") filed an improper practice petition charging that "since on or about March 2, 1987", Local 1199, RWDSU, AFL-CIO (hereinafter "Local 1199" or "respondent")

> has failed in its duty to represent me fairly by refusing to process a grievance concerning Kings County Hospital's unfair change of my job shift from night to day after 14 years on the night shift.[1]

[1] On the same date, petitioner filed a separate improper practice petition (Docket No. BCB-959-87) charging that Kings County Hospital refused to bargain in good faith when it reassigned him to the day shift. Upon review by the Executive Secretary, pursuant to section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), that petition was dismissed because, on its face, it failed to allege facts sufficient to constitute an improper practice within the meaning of the New York City Collective Bargaining Law ("NYCCBL").

After several extensions of time to respond to the petition, respondent filed an answer on July 22, 1987. Petitioner requested an extension of time and filed a reply on August 14, 1987. A hearing was scheduled to take place on September 8, 1987. After two adjournments requested by the respondent, hearings were held on October 5, and November 9, 1987 before a Trial Examiner designated by the Board of Collective Bargaining ("Board").

Factual Background

Petitioner, a licensed pharmacist, has been employed at Kings County Hospital Center ("KCHC") since 1973. In 1975, he was appointed as a permanent civil service Pharmacist. In 1976, he was appointed as a provisional Senior Associate Pharmacist and was assigned to supervise two Pharmacists and two Pharmacy Interns on the night shift.

In or about September 1986, petitioner contacted Harold Hopkins, a KCHC delegate for Local 1199, to discuss problems petitioner was having with his supervisor, Anthony Ricchiuti. These problems apparently stemmed from conflicts between petitioner and one of the Pharmacy Interns under his supervision. Ricchiuti, the Director of Pharmacy, had warned petitioner that he might lose his job because

---

Decision No. B-27-87(ES).

of these conflicts. In response to petitioner's request, a "counseling session" was scheduled which continued over a three-day period. At various times, the pharmacists and interns on petitioner's shift were present, as were the delegate Hopkins and Phyllis Harris, a Local 1199 organizer.

Thereafter, apparently in response to complaints that the pharmacists and interns filed against him,.[2] petitioner was directed to report to the KCHC Office of Labor Relations to discuss his involvement in a number of incidents during the night shift. This meeting took place on November 7, 1986 in the presence of Felix Cappadona, Assistant Personnel Director/Labor Relations at KCHC and Local 1199 organizers Harris and Joe Chisolm. After the meeting, it was determined that petitioner should be reassigned to his permanent civil service position of Pharmacist. He was directed to report to work on November 18, 1986 in the lower title and on the day shift, despite the fact that he had worked on the night shift for some fourteen years.

---

[2] The complaints alleged, inter alia, that petitioner refused to co-sign narcotic prescriptions, that he slept during his shift and directed others to do the same, that he forced people to falsify time records by having them take days off but indicate that they had worked on those days, that he cursed at and threatened employees, and that, on one occasion, hospital security had to be summoned.

On November 17, 1986, in a letter to Marshall Garcia, Executive Vice-President of Local 1199, petitioner sought respondent's assistance in preventing the change in his job assignment and, particularly, in restoring him to the night shift. Mr. Garcia directed Ms. Harris to see what she could do to get petitioner his job back. Ms. Harris appealed several times to Mr. Cappadona on an informal basis in recognition of petitioner's provisional status[3] and of management's right to reassign its employees. She was unsuccessful.

On November 18, 1986, petitioner did not report to work as directed. He asserts as the reason for his failure to report a back injury that he allegedly sustained at home. Petitioner was out on sick leave for several months during which time he continued to seek respondent's assistance in getting his job back. Mr. Garcia explained to petitioner that the union would not take his case to arbitration because there was evidence that pharmacists had been sleeping on petitioner's shift. Garcia also advised petitioner that he could appeal the union's decision to the Brooklyn Area Hearing Board pursuant to a procedure in respondent's constitution. Petitioner alleges that, by letter dated December 31, 1986, he requested that Garcia arrange for

[3] Under section 75 of the Civil Service Law, provisional employees are not entitled to charges or a hearing before being removed from their positions.

a meeting of the hearing board to reconsider his grievance. Garcia denies that he received petitioner's letter. No appeal was made.

On January 5, 1987, petitioner, still on sick leave, was observed working at a Brooklyn pharmacy owned by his wife. Although petitioner denied that he was working, he was thereafter directed to return to work or be subject to disciplinary action for falsification of medical reports. On the same day as petitioner was observed at his wife's pharmacy, he submitted a written request to the hospital for a light duty assignment, i.e., one involving tasks that would not place undue strain on his back. Petitioner also indicated that he "expected" a night shift assignment. Petitioner's request was denied.

On or about January 12, 1987, petitioner met again with Mr. Garcia. Garcia advised him to report to work and to request a light duty or night shift assignment at that time. Petitioner reported to work on January 13 but, when his request for a night shift assignment was denied, he left.

On February 4, 1987, petitioner wrote to Mr. Garcia requesting reconsideration of his case and suggesting that Garcia might have received untrue information from Ms. Harris who was "reacting against" him. Petitioner

stated that he was "forced to be on leave of absence status" and that "grievances" he had submitted to Messrs. Cappadona and Ricchiuti had been denied.

On February 24, 1987, Garcia wrote to petitioner advising him that the union would not pursue his request for light duty because petitioner was seen lifting iron gates and working at his wife's pharmacy. Garcia also explained:

> Another reason I will not pursue this matter in a Grievance procedure is that there is no contractual [sic] or other "right" to light duty. If you can show me where it is written or where you might otherwise have a right to light duty, please show it to me. In the meantime if you disagree with my determination in this matter, please write to me requesting that I convene the Brooklyn Area Hearing Board. You can take your "claim" to this body, if you so desire.
>
> Please find enclosed a copy of the 1199 Constitution. I refer you to Article IX, Section 7 of this Constitution.

Petitioner did not invoke the hearing board procedure. Instead, on March 2, 1987, he wrote to Garcia requesting that a grievance be filed seeking a night shift assignment and suggesting that "night duty could be considered light duty." Mr. Garcia did not respond.

Throughout this period, until the end of March 1987, petitioner continued to be on leave, having obtained

permission to use his accumulated sick and annual leave time. On or about March 30, 1987, however, petitioner's leave allowances were exhausted and he was directed to return to work on the day shift. Petitioner reported, as directed, but told Ricchiuti that he needed a leave of absence. When the request was denied, petitioner left.

As a result of petitioner's failure to remain at work on March 30, 1987, or to return to work thereafter, on May 4, 1987, formal disciplinary charges were served on petitioner. A conference was scheduled for June 15, 1987. Petitioner, who had engaged a private attorney to represent him in the disciplinary matter, requested that the conference be postponed due to the unavailability of his attorney on that date. The hearing was rescheduled for July 23, 1987. However, on the adjourned date, petitioner failed to appear and the hearing went forward in petitioner's absence. Although Local 1199 organizers Harris and Chisolm were present at the outset of the conference, they left when petitioner failed to appear. On August 17, 1987, a decision issued recommending that petitioner be terminated.[4]

[4] Subsequent to the conclusion of the disciplinary conference, a mailgram was received at the KCHC Office of Labor Relations stating that petitioner requested another postponement due to the unavailability of his attorney who was undergoing surgery that morning. The Hearing Officer noted, in his opinion, that petitioner had ample time to inform all parties of this event and that a further postponement would serve no purpose.

Positions of the Parties

Petitioner's Position

Petitioner contends that Local 1199 breached its duty of fair representation by refusing, in bad faith, to pursue his grievance concerning a night shift assignment. Petitioner further alleges that there were "deals" between the delegate Hopkins and Ricchiuti and also between Ms. Harris and Ricchiuti which prevented respondent from fairly representing him.

Petitioner charges respondent with numerous specific failures and omissions, including:

- failure to provide him with copies of complaints that his colleagues had lodged against him;
- failure to return telephone calls or respond to requests for assistance;
- discouraging him from raising the issue of alleged improprieties by his supervisor at the meeting on November 7, 1986 after which he was "demoted" and reassigned;
- failure to invoke the Brooklyn Area Hearing Board in response to his December 31, 1986 request;
- failure to report to him on decisions taken regarding the handling of his case;
- failure to communicate with him at all after February 1987.

As a remedy for the alleged breach of the duty of fair representation, petitioner seeks an order directing that he be made whole and that arbitration be commenced.

Respondent's Position

Local 1199 denies that it violated the duty of fair representation or committed any improper practice in its dealings with the petitioner. Respondent points out that provisional employees are not entitled to receive charges and a hearing before being removed from their positions. Despite this, however, because of petitioner's long service as the Senior Associate Pharmacist on the night shift, it attempted informally, albeit unsuccessfully, to have him restored to his position.

With respect to petitioner's request that the union grieve management's denial of a light duty or night shift assignment, Local 1199 asserts that it took petitioner's grievance "as far as the established procedures allowed," given that there was no contractual right to such assignment. Thereafter, respondent asserts, it was up to petitioner to appeal the decision not to request arbitration to the area hearing board which, it is alleged, petitioner failed to do. Respondent notes that it is not obligated to take every grievance to arbitration.

Local 1199 denies that it failed to respond to petitioner's phone calls or requests for representation. Mr. Garcia and Ms. Harris testified to numerous meetings and conversations with petitioner in which they explained that his rights were limited because of his provisional status; that management had the right to change his assignment; that informal efforts to restore him to the night shift had been made but were unsuccessful; and that petitioner's own conduct, i.e., taking an extended sick leave during which he was observed working at his wife's pharmacy, made it difficult for respondent to do more.

Respondent emphasizes that it owes a duty of fair representation to all members of the bargaining unit[5] In the instant matter, there were other pharmacists and interns involved and their interests also had to be considered by respondent.

Respondent concludes that it represented petitioner fairly and zealously, that its decision not to take his grievance to arbitration was not arbitrary or discriminatory and that its conduct therefore cannot be deemed to constitute a breach of the duty of fair representation.

[5] Local 1199, RWDSU is the certified collective bargaining representative for a unit which includes dietician and pharmacy titles, including Pharmacy Intern, Pharmacist, and Senior Associate Pharmacist, among others. Cert. No. 66-78.

Discussion

The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-abritrarily in negotiating, administering and enforcing collective bargaining agreements.[6] In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to bring all employee grievances to arbitration.[7] However, the decision not to process a grievance must not be made in bad faith or in an arbitrary or discriminatory manner. Arbitrarily ignoring a meritorious grievance or processing a grievance in perfunctory fashion may constitute a violation of the duty of fair representation.[8]

Applying these principles to the instant case, we conclude that petitioner has failed to establish a breach of the duty of fair representation. The record demonstrates that Local 1199 was fully aware, in November 1986, of the impending termination of petitioner's provisional appointment as a Senior Associate Pharmacist at KCHC. Respondent investigated the matter and concluded that petitioner had no legal or contractual right to remain

[6] Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Decision No. B-13-81.

[7] Decision Nos. B-13-82; B-25-84; B-32-86.

[8] 64 LRRM at 2377

in his provisional position or to be assigned to the night shift. Despite this, Ms. Harris, at Mr. Garcia's direction, made several informal attempts to have petitioner restored to the night shift, which was petitioner's paramount and immediate concern. When she was unsuccessful, Harris explained to petitioner the reasons for management's refusal as well as the basis for respondent's decision that, given management's rights in the matter, there was nothing further that the union could, or would, do.

In January 1987, when petitioner, threatened with disciplinary action if he did not return to work, renewed his request for union assistance, this time seeking a "light duty" assignment, respondent again investigated, determined there was no basis for a grievance, and explained to petitioner the reasons for its decision. (Since petitioner had been observed lifting heavy gates and working in his wife's pharmacy, it was doubtful that be could prevail and, in any event, there was no contractual right to a light duty assignment.) Our examination of the applicable collective bargaining agreement persuades us that it was reasonable for respondent to conclude that there was no basis on which to grieve the denial of petitioner's request for light duty, or for that matter, denial of a night shift assignment. Under all of the circum-

stances recited above, we conclude that respondent's failure to arbitrate these issues was not arbitrary or perfunctory.

We have previously noted that an employee representative cannot be expected, nor is it empowered, to create or enlarge the rights of a class of employees, such as provisionals, whose rights are limited by law. We have gone so far as to hold that the termination of a provisional employee is not a matter with respect to which the obligation of fair representation arises.[9] Nevertheless, a union owes a duty of non-discriminatory, evenhanded treatment to all members of its bargaining unit.[10] In this connection, we have considered petitioner's allegations that respondent's agents were biased against him because of "deals" between them and petitioner's supervisor and that they "reacted against" him as a result of this bias. We find, however, that petitioner has failed to substantiate his claims of bias or to show that respondent treated him differently from any other similarly situated unit member.

With respect to petitioner's allegation that Local 1199 failed to respond to requests for assistance, the record establishes that, to the contrary, respondent did

[9] Decision Nos. B-13-82; B-14-84.

[10] See, Barry v. United University of Professions, 17 PERB ¶3117 at 3179 (1984).

inform petitioner that it would not process his grievances because it deemed them to be without merit. Insofar as petitioner claims that, by his letter of December 31, 1986, he asked Mr. Garcia to invoke the union's internal appeal procedure to review Garcia's refusal to pursue a claim on his behalf, and that Garcia did not respond or convene the area hearing board, we note that petitioner did not establish that Garcia received the December 31 letter and Garcia unequivocally denied having received it. Therefore, we are unable to conclude that there was any omission on the part of respondent in this regard. In any event, we note that the alleged omission occurred in excess of four months before the petition in this matter was filed and therefore is untimely asserted under §7.4 of the OCB Rules. [11]

Further, insofar as petitioner claims that Local 1199 failed to respond to his request of March 2, 1987

---

[11] Section 7.4 of the OCB provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof ....

to process a grievance concerning KCHC's change of his job shift, we conclude that while this allegation appears to be true, given the extensive history of this matter prior to March 2, 1987, it does not appear to the Board that respondent's omission can be characterized as perfunctory conduct constituting a breach of the duty of fair representation. Well before March 2, 1987, respondent had made it clear to petitioner that it had evaluated his request for a grievance on the job shift issue and had determined not to pursue it.[12] As respondent correctly observes, it is not obligated to process every complaint made by a unit member.

Because of the serious allegations raised by petitioner in this matter and because of his pro se representation status, we afforded petitioner considerable leeway in presenting his case. We now find, however, that petitioner's allegations are, to a considerable degree, based upon

[12] The fact that petitioner had earlier requested a "light duty" assignment while, on March 2nd, he specifically sought "night duty" is not significant. Respondent was on notice as far back as November 1986, that petitioner's overriding concern was to be restored to the night shift. Respondent advised petitioner that he had no right to such assignment and that management had refused to return him to the night shift voluntarily. Petitioner's request on March 2, 1987 to grieve the matter, therefore, was merely redundant.

a misconception of the nature, quality and degree of a union's obligation to a unit employee. Since petitioner has not established that Local 1199 acted in an arbitrary, perfunctory or discriminatory manner with respect to the processing of his grievances, and since petitioner has failed to demonstrate that respondent's conduct toward him in any other respect constitutes a basis for a finding of improper public employee organization practice under the NYCCBL,[13] we shall dismiss the petition in its entirety.

Additionally, we take this opportunity to dispose of the allegations contained in a second improper practice petition filed by this petitioner against his union on September 17, 1987 (Docket No. BCB-997-87). There, petitioner alleged that Local 1199 negligently failed to represent him in the informal disciplinary conference

---

[13] Section 1173-4.2b of the NYCCBL provides:

> **b. Improper public-employee organization practices**. 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.

held on July 23, 1987, after which it was recommended that he be terminated. We find that the allegations of this petition are conclusory at best and therefore are insufficient as a matter of law to state an improper practice. Even if we were to consider this petition on its merits, however, to the extent that the proceedings in BCB-960-87 shed light on the events of July 23, 1987, it does not appear that petitioner could establish a breach of the duty of fair representation. First, the record establishes that petitioner had engaged a private attorney to represent him at the conference, originally scheduled to take place June 15, 1987, and it does not appear that petitioner sought respondent's representation with respect to this hearing. The record also establishes that petitioner, without notifying respondent, failed to appear at the rescheduled conference and sent a mailgram which was not received until after the close of the conference, seeking a further postponement on account of his attorney's unavailability. Under these circumstances, and in the absence of any facts that arguably would support his allegations against respondent, we shall dismiss the petition in BCB-997-87 without further proceedings.

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 Alfred H. Khalil in the matter docketed as BCB-960-87, on which matter hearings were held before a Trial Examiner designated by the Office of Collective Bargaining, be and the same hereby is, dismissed; and it is further

ORDERED, that the improper practice petition filed by Alfred H. Khalil in the matter docketed as BCB-997-87 be, and the same hereby is, dismissed without further proceedings.

DATED: New York, N.Y.
June 30, 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

PATRICK F.X. MULHEARN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER