

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

WESLEY M. DIAS, JR.,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION  
LOCAL 371, Affiliated with DC 37,  
AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

Wesley M. Dias, Jr. ("petitioner") filed an improper practice petition against Social Service Employees Union Local 371, affiliated with DC 37 AFSCME, AFL-CIO ("the Union") on September 15, 1988. After being granted an extension, the Union filed its answer to the petition on November 1j 1988. Petitioner did not file a reply.

Background

The petitioner was hired on or about November 9, 1987, as a per diem institutional aide assigned to the Ft. Washington Men's Shelter. During the period of his employ, he was represented by the Union and covered by the Union's Institutional Services collective bargaining agreement ("the Agreement.") He was discharged from his position on or about July 7, 1988.

Positions of the Parties

Petitioner

Petitioner contends that the Union violated its duty of fair representation by not grieving his termination. Specifically, he alleges that when he approached the Union after he was notified that he was being terminated, a Union official told him that he was not a member of the Union and, thus, the Union would not grieve his discharge.

He argues that because he was a dues-paying member of the Union, he was entitled to representation with respect to his discharge.

Union

The Union denies that one of its officials told petitioner that he was not a member of the Union and because of such non-membership, the Union could not help him with anything concerning his employment. Indeed, the Union admits that he was a member of the Union at the time of his discharge, but because he was a per diem employee, it was unable to grieve his discharge under the Agreement. Specifically, Article VI, §10 of the Agreement provides, in relevant part, the following:

Grievances relating to a claimed wrongful disciplinary action taken against a non-competitive employee shall be subject to and governed by the following special procedure.

The provisions contained in this section

shall not apply to any of the following categories of employees covered by this contract:

(a) per diem employees.

Because petitioner was a per them employee, the Union contends that pursuant to the Agreement, he was not covered by its grievance procedure and was thus an at-will employee subject to discharge without cause.

#### Discussion

The duty of fair representation obligates a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.<sup>1</sup> While a union may not refuse to process a grievance for arbitrary or discriminatory reasons, it is well-settled that a union does not breach its duty of fair representation merely by refusing to bring a grievance to arbitration.<sup>2</sup> Moreover, where an employee or class of employees has no legal or contractual right to have a discharge arbitrated, an employee organization cannot be expected nor is it empowered, to create or enlarge those employees' rights. Petitioner belonged to such a class of employees whose rights are contractually limited.

It is undisputed that petitioner served as a per diem

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<sup>1</sup> Decision Nos. B-50-88; B-30-88; B-13-81.

<sup>2</sup>

Decision Nos. B-50-88; B-30-88; B-32-86; B-25-84; B-13-82.

employee throughout the period of his employment and at the time of his termination. The Agreement between the parties clearly excludes disputes regarding the discipline of per them employees from the contractual grievance procedure. A determination by the Union not to pursue petitioner's grievance to arbitration in reliance on that portion of the Agreement cannot be characterized as arbitrary or as evidencing bad faith.<sup>3</sup>

Petitioner has otherwise failed to allege any facts which implicate a breach of the Union's duty of fair representation has not shown that other similarly situated employees in the bargaining unit were accorded greater or different representation than petitioner. Under these circumstances, there is no basis for a finding of improper practice. Accordingly, we dismiss the petition.

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 filed by Wesley

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<sup>3</sup> See Decision Nos. B-34-86; B-32-86.

M. Dias, Jr., be, and the same hereby is, dismissed.

Dated: New York, New York  
December 20, 1988

MALCOLM D. MacDONALD  
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