Brown, 45 OCB 27 (BCB 1990) [Decision No. B-27-90 (IP)], aff'd, Brown v. Office of Collective Bargaining, No. 42146/91 (Sup. Ct. N.Y. Co. Nov. 1, 1991), aff'd, 1993 N.Y. App. Div. Lexis 5583 (1st Dep't May 20, 1993).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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IN THE MATTER OF THE IMPROPER PRACTICE PROCEEDING

-between-

Meredith Brown,
Petitioner,

Decision No. B-27-90
Docket No. BCB-1248-90

-and-

SSEU, Local 371,
Respondent.

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DECISION AND ORDER

On February 5, 1990, the Petitioner, Meredith Brown, appearing Pro Se, filed a verified improper practice petition against SSEU, Local 371 ("the Union"), in which she alleged that the Union had breached its duty of fair representation. The Union filed a verified answer on March 23, 1990.[1] The Petitioner filed a reply on April 3, 1990. The Petitioner subsequently filed an addendum to her reply on April 12, 1990.

BACKGROUND

The Petitioner was hired as a provisional Program Officer by the New York City Department for the Aging ("the Department") on August 22, 1988. In January 1989, the Petitioner's supervisor, Linda Whitacker, rated her overall performance as being

[1] We note that the Petitioner opposed the extension of time which was granted to the Union in order to file its answer.

"Unsatisfactory" in a written performance evaluation. The Petitioner was thereafter terminated on January 20, 1989.

On February 15, 1989, the Union submitted a grievance at Step I of the grievance procedure on behalf of the Petitioner. In this grievance, the Union alleged that the Petitioner had not been evaluated pursuant to the requisites of the New York City Sub-Managerial Performance and Evaluation Procedure ("the Evaluation Procedure"). It also alleged that the Department violated Article V of the Unit contract, and Article X of the Citywide Agreement when it terminated the Petitioner.[2] The grievance was denied on March 13, 1989, on the ground that the Petitioner's discharge, due to her unsatisfactory performance, was proper.

The Union thereafter submitted the grievance at Step II on March 14, 1989. The grievance was denied at Step II on March 29, 1989, on the ground that the Petitioner had discussed her performance rating with her supervisor in an evaluation interview, and was precluded from appealing her performance evaluation because of her status as a provisional employee.

On April 4, 1989, the Union submitted the grievance at Step III of the grievance procedure. The grievance was dismissed at

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[2] Article V of the Unit contract establishes a Grievance/Arbitration Procedure for alleged violations of the written policy of the Employer.

Article X of the Citywide Agreement, entitled "Evaluations and Personnel Folders," establishes a contractual performance evaluation procedure.

Step III in a decision dated May 2, 1989, wherein the Step III hearing officer determined that as a provisional employee, the Petitioner did not have standing to appeal her termination.

On May 22, 1989, the Petitioner and her personal advisor, Mr. Shellman P. Johnson, met with Jeffrey Kreisberg, counsel to the Union, in order to review the merits of her grievance and to discuss the advisability of pursuing it in arbitration. Kreisberg subsequently had several telephone conversations with the Petitioner regarding her case. During these conversations he informed her that the issue of whether provisional employees could arbitrate alleged violations of the Evaluation Procedure was pending for resolution by the Board of Collective Bargaining. He advised the Petitioner that the Union would make a final decision as to whether to pursue her grievance in arbitration, if and when the Board ruled in the Union's favor on this issue. Kreisberg confirmed these conversations in a letter to the Petitioner, dated June 5, 1989.

The record indicates that the Petitioner was in constant communication with Kreisberg, and Beverly Brown, her union representative, during the following months. On June 20, 1989, she and Johnson met with Brown in order to discuss her grievance. On or about June 26, 1989, Kreisberg mailed the Petitioner a copy of Section 12-312 [formerly section 1173-8.0] of the New York City Collective Bargaining Law which the Petitioner had requested from Brown. By letter dated July 18, 1989, Kreisberg responded

to several questions raised by the Petitioner in a letter to Brown, dated July 5, 1989.

The Petitioner summarized her position in a memorandum to Brown, dated July 20, 1989. She asserted therein that she had been evaluated maliciously and prematurely, and that her evaluation interview was "a sham". By letter, dated August 17, 1989, Kreisberg responded to several legal questions which the Petitioner had raised in a letter to him, dated July 20, 1989.

In Decision No. B-39-89, dated July 19, 1989, the Board of Collective Bargaining consolidated four cases docketed as BCB-1128-89; BCB-1129-89; BCB-1132-89; and BCB-1135-89 for resolution, and upheld the right of provisional employees to arbitrate alleged violations of the Evaluation Procedure. On or about September 25, 1989, Kreisberg met with the Petitioner and Johnson to reexamine the merits of the Petitioner's grievance. In a letter to Kreisberg, dated September 29, 1989, the Petitioner referred Kreisberg to her memorandum of July 20, 1989 to Brown, and reiterated her position. She also expressed her concern that Brown had not attended the aforementioned meeting.

Thereafter, in a seven page letter to Dorothy Baker, Vice - President of the Union's Grievance and Legal Service Department, dated October 31, 1989, Kreisberg recommended that the Union refrain from arbitrating the Petitioner's grievance. In his opinion letter, Kreisberg evaluated the violations which had been alleged by the Petitioner, and determined in relevant part, as follows:

[U]ntil our recent victory in the Blount et, al. cases [Decision No. B-39-89], [the Petitioner] . . . would not have been entitled to proceed to arbitration in this matter. . . . [T]he limited issue for consideration at this point is whether we can establish in arbitration that [the Petitioner] . . . was terminated on the basis of violations by the Department of its Sub-Managerial Performance Evaluation Policy and Procedure . . .

These alleged violations are as follows:

1. Page 2, objectives A, B, C, D. [The Petitioner] . . . alleges that the Department did not meet its objectives in her performance appraisal . . . In my opinion, the objectives state only general goals to be achieved by the evaluation process and do not constitute specific procedures upon which a grievance could be maintained. . . .

2. Page 2, Evaluation Procedures, Evaluation Period. The policy and procedure specifically states that the evaluation period is for a period of one year . . . The evaluation period actually utilized for [the Petitioner] . . . was August 22, 1988 through January 22, 1989. . . . [T]here is nothing in the procedure which prohibits evaluations on a more frequent, or earlier basis for provisional employees. There is nothing in the policy and procedure or in the law which prohibits the termination of a provisional employee prior to a period of one year. . . . [emphasis in original]

3. Page 3, A, The Evaluation Interview. This provision states that towards the end of the evaluation period the supervisor will prepare an evaluation form and conduct an evaluation interview to discuss the employee's performance and to review the ratings assigned . . . [O]ne must again bear in mind that [the Petitioner] . . . was a provisional and not a permanent employee. . . . Accordingly, it is my opinion that an arbitrator would conclude that the Department's failure to comply with this provision, for the reason that a determination had been made to terminate [the Petitioner] . . . was not improper.

[The Petitioner] . . . also claims a violation of the provision of this section which states that within five calendar days of the evaluation interview . . . the employee and the supervisor shall sign the form . . . . Where, as here, a provisional employee is discharged based upon the evaluation, there is no reason for the signature by the employee and the supervisor of the evaluation form. Accordingly, it is my opinion that an arbitrator would not find this to be a violation.

4. Page 7, Paragraph E, Plans to Improve Employee's

> Performance. This section provides that the supervisor shall indicate in writing specific actions . . . to improve unsatisfactory employee performance to acceptable standards . . . [S]ince the Department made a determination to terminate [the Petitioner] . . . and since she was a provisional employee subject to termination at any time, it is my opinion that there was no violation of this paragraph.
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> 5. Page 7, Paragraph F, Employee Records. This paragraph provides . . . that any individual employee shall have the right to review his or her own performance evaluations. . . Since the subject performance evaluation was the first and only one done on [the Petitioner] . . . there would be no other performance evaluations to review, and thus no violation of this paragraph. . . . It is my opinion that . . . a request [under the Freedom of Information Law] should be made on [the Petitioner's] . . . behalf, if she would like us to do so.
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> 6. Page 8, Paragraph H, Employee Statements and Appeals. This paragraph describes the appeal rights of employees who are dissatisfied with an evaluation . . . In my opinion, this claim presents the closest question of any violations of the procedure alleged by [the Petitioner] . . . . Upon careful consideration, however, I am of the view that the Department's position would in all likelihood prevail in arbitration on this issue. Fundamental to this analysis is the fact that [the Petitioner] . . . was a provisional employee and thus, subject to discharge at will . . . .
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> [W]hile I am sympathetic to [the Petitioner's] . . . complaints, I do not believe we could successfully challenge her termination. . . . In view of the above, it is my recommendation that the Union not proceed to arbitration in this case. . . .

In conclusion, Kreisberg noted that several claims regarding the Petitioner's discharge had been raised in other forums and were proceeding. Kreisberg also indicated that, in addition to having reviewed all the correspondence from the Petitioner, he had discussed the case with Brown and reviewed her notes prior to reaching his conclusion. A copy of Kreisberg's opinion letter was provided to the Petitioner.

In a letter to Baker, dated November 6, 1989, the Petitioner raised several substantive objections to Kreisberg's opinion letter. She also advised Baker that Brown's failure to attend both of her meetings with Kreisberg had seriously damaged her position in seeking to present her grievance in arbitration.

By letter dated November 13, 1989, Baker informed the Petitioner that, based upon Kreisberg's recommendation, the Union had determined not to proceed to arbitration on her behalf. In her letter, Baker noted that all the information which the Union possessed regarding the Petitioner's grievance had been shared with Kreisberg. She also stated that after having discussed the case with Kreisberg, she agreed with his recommendation.

On or about November 17, 1989, Baker verbally repeated the Union's position to the Petitioner and to Johnson. In a letter dated November 21, 1989, the Petitioner asserted several objections to the Union's determination. Baker responded in a letter dated December 11, 1989, and reiterated the Union's decision to refrain from arbitrating the Petitioner's claim.

Petitioner's Position

The Petitioner contends that the Union has breached its duty of fair representation by refusing to present her claims in arbitration, and effectively "abandon[ing]" her grievance after it was dismissed at Step III of the grievance procedure. She argues that her grievance is essentially the same as the

grievances which were presented before the Board of Collective Bargaining in Decision No. B-39-89, and determined by the Board to be arbitrable therein. Consequently, she maintains that the Union can have no plausible justification for adopting Kreisberg's recommendation and failing to pursue her grievance in arbitration.

The Petitioner also maintains that the Union did not fully investigate her complaints and the facts underlying her grievance. She asserts that the Union did not interview any witnesses at her former job site and did not meet with Whitaker to discuss her case. The Petitioner also alleges that the Union did not investigate the possibility that her termination was precipitated by her pregnancy, or the "stigma" which she suffered as a result of having been terminated.

Moreover, the Petitioner substantively challenges the recommendations set forth in Kreisberg's opinion letter. She asserts that she was denied access to information obtained by Kreisberg from Brown, and was not included in all the discussions which took place between them regarding the merits of her grievance. Thus, she argues that she was deprived of the opportunity to refute the information obtained from Brown, and that she was not fully involved in the final determination of whether her grievance should be arbitrated.

The Petitioner further alleges that Brown's absence from her meetings with Kreisberg was violative of the Union's obligation

to represent her during all stages of the preparation of her case. The Petitioner contends that Kreisberg's characterization of Johnson as her representative in his opinion letter, clearly indicates that the Union did not assist her in preparing for arbitration. The Petitioner asserts that Johnson's involvement in the discussions with Kreisberg was "strictly observational", and that as a result of Brown's failure to participate in those discussions "the union's position was not part of the grievance discussion" upon which Kreisberg based his final recommendation to the Union.

Union's Position

The Union argues that the documentary evidence presented in this case proves that its decision not to proceed to arbitration on the Petitioner's behalf was made fairly, impartially, non-arbitrarily and in good faith on the basis of its attorney's opinion. It asserts that "the Petitioner does not show by any credible evidence that the decision was made on any other basis. Rather, she makes only bald allegations of bad faith and arbitrariness." The Union therefore concludes that it is "clear beyond a doubt" that it has fulfilled its duty of fair representation to the Petitioner.

Discussion

The duty of fair representation has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[3] In the area of contract administration, including the processing of employee grievances, it is well settled however, that a union does not breach its duty of fair representation merely because it refuses to advance a grievance.[4] We note that the Supreme Court determined in Vaca v. Sipes[5] that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures. . . . If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . .

Nevertheless, the duty of fair representation mandates that a union's refusal to advance a unit member's grievance be made in good faith, and in a non-arbitrary, non-discriminatory manner.[6]

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[3] Decision Nos. B-51-88; B-1-88; B-53-87; B-11-87; B-49-86.

[4] Decision Nos. B-72-88; B-58-88; B-50-88; B-30-88; B-34-86; B-32-86; B-25-84; B-18-84; B-2-84; B-42-82; B-16-79.

[5] 386 U.S. 171, 64 LRRM 2369 at 2377 (1967).

[6] Decision Nos. B-72-88; B-58-88; B-50-88; B-30-88; B-2-84.

Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[7]

The Petitioner initially contends that the Union violated its duty of fair representation when it refused to pursue her grievance in arbitration. We reject this contention on the ground that the Petitioner has failed to establish that the Union's determination was effected arbitrarily, discriminatorily or in bad faith.

Through her own correspondence, the Petitioner indicates that the Union was aware of her complaints, and based its final decision to refrain from arbitrating her grievance on the advice of its attorney. It is well established that a union's determination not to arbitrate a grievance, when reasonably based on the good faith advice of counsel, does not constitute a breach of the duty of fair representation.[8] Inasmuch as the record is devoid of any evidence which would demonstrate that the Union's determination to adopt Kreisberg's recommendation was reached in an arbitrary or bad faith manner, we are satisfied that the Union has complied with its responsibility to the Petitioner.

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[7] Decision Nos. B-72-88; B-58-88; B-50-88; B-30-88.

[8] Decision Nos. B-50-88, B-20-88; B-2-84; B-12-82. See also, Hewlett - Woodmere Administrative Supervisory Association and Howard Herman, 13 PERB ¶4505 (1980) (compliance with the duty of fair representation is not determined by whether the Union's judgment on the merits of a grievance which it refuses to advance is correct).

Moreover, we note in any event, that Kreisberg's final recommendation to the Union was not inappropriate under the circumstances of the Petitioner's termination. This Board has recognized that a union cannot be expected, nor is it empowered to create or enlarge the rights of special classes of employees such as provisional employees.[9] We have also determined that a provisional employee may be terminated at will.[10]

Contrary to the Petitioner's contention, our holding in Decision No. B-39-89 does not mandate that the Union pursue the Petitioner's grievance in arbitration. In Decision No. B-39-89 we consolidated four requests for arbitration which were challenged by the City as being beyond the scope of the agreement to arbitrate which it had negotiated with the Union. We determined therein that the grievances in question, which had been brought on behalf of four provisional employees who alleged that they had not been evaluated properly, were within the scope of the arbitration clause set forth in the parties' collective bargaining agreement.

Clearly, the circumstances underlying our holding in Decision No. B-39-89 are distinguishable from those underlying the instant case. In this case, the Union has determined not to advance the Petitioner's grievance, whereas in Decision No. B-39-89, the City challenged the arbitrability of grievances which the

[9] Decision Nos. B-30-88; B-5-86; B-18-84; B-42-82.

[10] Decision No. B-18-84.

Union was actively seeking to pursue. Inasmuch as the advancement of grievances is within a union's discretion, our determination in Decision No. B-39-89 does not extend to situations such as this one, wherein a union refuses to pursue a grievance involving alleged violations of the Evaluation Procedure.

We also note that although the grievances which we considered in Decision No. B-39-89 were filed on behalf of provisional employees who were alleging violations of the City's performance evaluation policy, the specific claims raised therein were different from the claims raised by the Petitioner, as they are set forth in her memorandum to Brown, dated July 20, 1989, and in Kreisberg's opinion letter. Three of the grievances considered in Decision No. B-39-89 involved the City's alleged failure to provide the grievants with requisite notice of their Tasks and Standards, and the fourth grievance therein alleged that the City had not evaluated a grievant in a timely fashion pursuant to the terms of an internal memorandum from the Director of the Office of Municipal Labor Relations which mandated that provisional employees with two years of continuous service be evaluated prior to June 1, 1988.[11] Thus, any claim by the Petitioner that the Union treated her differently than similarly

[11] The memorandum which was alleged to have been violated in Decision No. B-39-89 was distributed for the purpose of outlining the substance and procedural compliance aspects of a letter agreement between the City and D.C. 37.

situated unit members is unsupported by the record.

Furthermore, even though the Petitioner may not have had access to all the information upon which Kreisberg based his final recommendation to the Union, we are satisfied that Kreisberg did not treat her case in an arbitrary or perfunctory manner. We note in this respect, that prior to rendering his recommendation, Kreisberg reviewed and responded to a plethora of correspondence from the Petitioner, met with her on two occasions, and obtained information regarding the grievance from Brown. Moreover, Kreisberg's advice to the Union was based on his opinion that the Petitioner, as a provisional employee, could not successfully challenge her termination by pursuing alleged violations of the Evaluation Procedure in arbitration.[12] Therefore, we are satisfied that Kreisberg's recommendation, as set forth in a seven page written evaluation of the Petitioner's contentions, was based on his informed, rational analysis of the merits of her case.

We further reject the Petitioner's allegation that she was wrongfully denied Union representation during her meetings of May 22, 1989 and September 25, 1989 with Kreisberg. Although Kreisberg ultimately determined that the Petitioner's grievance

[12] We emphasize that Kreisberg's determination was based on his evaluation of the merits of the claims being asserted by the Petitioner. He did not render any advice to the Union which was antithetical to our holding in Decision No. B-39-89. On the contrary, Kreisberg specifically informed the Union that the Petitioner's grievance was arbitrable within the precedent established therein.

would not prevail in arbitration, the meetings between the Petitioner, Kreisberg and Johnson were not of an adversarial nature. Those meetings were conducted for the purpose of evaluating the merits of the Petitioner's grievance, with Kreisberg acting as the Union's representative therein. We note in this respect, that Kreisberg did in fact obtain information regarding the Petitioner's grievance from Brown prior to drafting his opinion letter to the Union. Therefore, we find that Brown's absence from the aforementioned meetings did not constitute a violation of the Union's duty of fair representation.

Finally, we reject the Petitioner's contention that the Union violated its duty of fair representation by failing to fully investigate the underlying circumstances of her grievance. The extent to which a union investigates the basis of its members' grievances is an internal union affair which we will not evaluate absent the existence of evidence supporting a prima facie determination that the grievance was treated arbitrarily, perfunctorily, or in bad faith.[13]

In the instant case, the record indicates that the Petitioner discussed her grievance with Brown on June 20, 1989, and with Kreisberg, acting as the Union's agent, on May 22, 1989 and September 25, 1989. In addition, during the summer of 1989, Kreisberg at all times responded to the Petitioner's inquiries and kept her apprised of the Union's position regarding her

[13] Decision No. B-9-86; B-15-83; B-26-81.

grievance. Therefore, we find that the Union did not treat the Petitioner's case arbitrarily, perfunctorily or in bad faith. Consequently, we will not evaluate the extent to which the Union investigated the underlying basis of her grievance.

Accordingly, we dismiss the improper practice petition asserted herein.

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, docketed as BCB-1248-90 be, and the same hereby is dismissed.

Dated: May 24, 1990
New York, N.Y.

MALCOLM D. MACDONALD
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MEMBER

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MEMBER

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