OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DECISION NO. B-51-90

DOCKET NO. BCB-1258-90

MARI ANNE HUG, INDIVIDUALLY and on behalf of ALL OTHER POLICE OFFICERS SIMILARLY SITUATED,

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

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INTERIM DECISION AND ORDER

On March 8, 1990, Marianne Hug,[1] individually and on behalf of "all other police officers similarly situated," filed a verified improper practice petition against the Patrolmen's Benevolent Association ("the Union" or "the PBA") and against the City of New York ("the City"). The petition alleges that the PBA failed to bargain in good faith on the Petitioners' behalf, and that the PBA and the City "conspired to deprive petitioner of overtime payments and engaged in retaliatory practices by promulgating multiple duty chart changes within 12 months," in violation of Section 12-306 of the New

[1] Although the caption of the improper practice petition identifies the Petitioner as "Mari Anne Hug," Ms. Hug signed her name at the bottom of the petition as "Marianne Hug." Subsequent pleadings have not resolved this discrepancy. The Decision will refer to the Petitioner by her signed name, Marianne Hug.

York City Collective Bargaining Law ("NYCCBL"),[2] and Articles III (overtime provisions) and XXII (grievance and arbitration procedure) of the collective bargaining agreement between the PBA and the City.

By letter dated April 25, 1990, the Deputy Chairman/General Counsel of the Office of Collective Bargaining advised Petitioner Hug's counsel that in order to add additional petitioners to this proceeding, an amended petition had to be submitted, containing sworn verifications from each of the individuals who wished to join as petitioners. The letter also noted that the second paragraph of the petition listed only the PBA, and not the City, as Respondent. He directed Petitioner Hug's counsel to submit an amended petition correcting the omission if he intended to make the City of New York a party to this proceeding.

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[2] NYCCBL §12-306 provides, in pertinent part, as follows:

> **Improper practices; good faith bargaining.**
> **a. Improper public employer practices.**
> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 1173-4.1 (now re-numbered as section 12-305) of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discourag-ing membership in, or participation in the activities of, any public employee organiza-tion;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.
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> **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 (now re-numbered as section 12-305) of this chapter, or 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.

On June 8, 1990, Petitioner Hug's attorney filed an amended petition, elaborating upon the initial allegations and asserting that the City is a necessary party to this proceeding. This petition was served upon both the PBA and the City. The amended petition also contained sworn verifications from John R. Lapinski, Thomasina Robinson, Vanessa Ferro, Frances Aguino, Dennis Phillips, Max Rosado and Robert Butler seeking to be added as petitioners ("the Petitioners"). In addition, the amended petition contained a new charge alleging that the PBA had neglected to process two of the Petitioners' portal-to-portal pay grievances.

The PBA did not answer, but, instead, submitted a motion to dismiss the petition with an affirmation in support of the motion to dismiss, on July 6, 1990, on the ground that the petition failed to state a cause of action upon which relief may be granted under the NYCCBL.

The City also did not answer and it, too, submitted a motion to dismiss the petition with an affirmation in support of the motion to dismiss, on July 13, 1990, on the ground that the petition failed to state a cause of action that may be considered by this Board.

On August 10, 1990, the Petitioners filed a reply to the Respondents' motions.

BACKGROUND

During the period within which the schedule changes described in the improper practice petitions took place, the Petitioners were assigned to Community Affairs Service Teams throughout police precincts in the Bronx. Before May of 1987, most Community Affairs officers had Saturdays and Sundays scheduled as their regular days off. By memorandum dated May 13, 1987, however, the Bronx Borough Commanding Officer for Patrol established a "1987 Summer Weekends Patrol Program," which rescheduled Team members' days off to weekdays during the summer months.

Responding to this change, PBA Bronx Financial Secretary John Young

filed a grievance with the Department's Office of Labor Policy, contending that the Summer Weekends Patrol Program violated the overtime provisions of the parties' collective bargaining agreement. His letter, dated May 18, 1987, reads, in pertinent part, as follows:

> On behalf of members of the [PBA], especially those assigned to Precinct Community Affairs Team, I wish to grieve their working on Sat-urday and Sunday, here-to-fore scheduled reg-ular days off, and exchanging them for other days off during the week, so as to circumvent the payment of overtime. . . . The practice of changing the above officers' regular days off, and the ordering of them to pick another day off is a violation of the contract. . . .

By memorandum to his PBA delegate dated June 3, 1987, Petitioner Lapinski, a member of one of the Teams, asked the PBA to file an individual grievance on his behalf, contending that the Department had refused to pay overtime after ordering him to work during his regular day off. By the time he wrote the memorandum, however, the Young group grievance had subsumed his request.

On or about July 7, 1987, the Department's Informal Grievance Board denied the Young grievance. The PBA appealed the Board's ruling to the Police Commissioner, who also denied the grievance. In accordance with the parties' contractual grievance and arbitration procedures, the PBA, on or about August 3, 1987, filed a request for arbitration.

Meanwhile, on June 30, 1987, the Department's Chief of Patrol further modified Community Affairs officers' work schedules on a city-wide basis. The Chief's order expressly superseded the Bronx Summer Patrol Program, and it provided that:

> Borough commanders shall implement a program whereby the Community Affairs officers assigned to odd numbered precincts will have Friday and Saturday as regular days off (RDO) and even numbered precincts will have Sunday and Monday as regular days off (RDO). Pre-cincts having two Community Affairs officers will assign one officer to the second platoon and one officer to the third platoon.

On July 2, 1987, the Bronx Borough Commanding Officer for Patrol again

modified the Community Affairs officers' schedules "in order to maintain equal distribution of Community Affairs officers working on weekends throughout the borough and to provide each zone with balanced coverage." The Friday-Saturday and Sunday-Monday RDO's remained in place, but they were redistributed on a zone basis. Finally, on September 21, 1987, the Department Chief of Patrol ordered his June 30th schedule to be made permanent.

At about the same time, PBA and City negotiators appeared to have settled the Young grievance. By letter addressed to Community Affairs Team members in the Bronx, dated October 5, 1987, the PBA Bronx Financial Secretary reported that the Department had agreed to compensate the affected members at time and one-half for weekends worked between May 23 and June 30, 1987.

That did not end the dispute, however, for on January 18, 1988, the PBA filed a second grievance, alleging that Community Affairs officers' tours of duty again had been rescheduled. The Union claimed that on December 8, 1987, officers assigned to odd-numbered precincts, previously scheduled to have Sundays and Mondays off, were rescheduled to have Friday and Saturday as their regular days off; officers assigned to even-numbered precincts, previously scheduled to have Fridays and Saturdays off, were rescheduled to have Sunday and Monday as their regular days off. The grievance pointed out that this was the second time in the last six months that Community Affairs officers' duty schedule had been changed.

On or about February 23, 1988, the Informal Grievance Board denied this second grievance. The PBA appealed to the Police Commissioner, and he denied the grievance as well. On or about April 15, 1988, the PBA filed another request for arbitration.

After receiving several extensions of time, on August 10, 1988, the City filed challenges to the arbitrability of both the Young grievance [docketed at BCB-1076-88 (A-2805-88)] and the January 1988 grievance [docketed at BCB-1075-88 (A-2804-88)] with the Office of Collective Bargaining ("OCB"). The PBA filed its answers on September 1, 1988, and the City filed its replies on

November 21, 1988. In a consolidated decision issued on December 20, 1988, this Board denied the City's challenges and ordered

both grievances to be heard by an arbitrator (Decision No. B-67-88). On December 28, 1988, the OCB Deputy Chairman notified the parties that an arbitrator had been selected from the rotating panel and advised them to schedule hearing dates with the arbitrator directly.

An arbitration hearing began on March 23, 1989, and continued on July 26, 1989. No opinion and award was ever issued, however, and, on November 8, 1989, the parties signed a voluntary settlement agreement. The stipulation of settlement provided, in summary, as follows:

> 1. The grievants and the union withdrew their grievances with prejudice.
>
> 2. Precinct Community Affairs officers whose regular days off were changed pursuant to the July, 1987 chart change were identified, and were given premium pay for each tour that they had worked on their normal days off.
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> 3. Community Affairs officers city-wide would work Monday through Friday, and would have Saturday and Sunday as their regular days off.
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> 4. Two Community Affairs officers in each borough except Staten Island would be required to work weekends at straight pay. They would have substitute regular days off during that week. If volunteers could not be found, the Department retained the right to assign officers as necessary.
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> 5. The Department retained flexibility to schedule additional Community Affairs officers to weekend work for special events.
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> 6. The stipulation expressly released the City from any imputed admission that it may have violated the collective bargaining agreement, and the parties agreed that the stipulation would not be offered into evidence for any purpose except for enforcement of its intrinsic obligations.

On November 9, 1989, the Department's Chief of Patrol issued an order implementing the terms of the settlement.

The Petitioners object to the settlement, claiming that it was negotiated in bad faith; that it is contrary to contractual requirements and arbitral precedent; that it provides arbitrary and inadequate compensation; that it was either the result of bad judgment or of a retaliatory conspiracy

by the City and the PBA; and that it was signed without the knowledge or consent of many of the grievants.

Petitioners Hug and Lapinski also object to the PBA's alleged neglect in processing their portal-to-portal pay grievances, which they imply they could have won. The Commissioner had dismissed Petitioner Hug's grievance on May 10, 1990, in part, as being untimely. There is no record regarding the disposition of Petitioner Lapinski's grievance.

POSITIONS OF THE PARTIES

PBA's Position

In its motion to dismiss the improper practice petitions, the PBA asserts that it is incumbent upon the charging party to show exactly how the PBA violated its fiduciary responsibility, by supplying facts evincing bad faith, or showing that it acted in an arbitrary or perfunctory manner. According to the Union, beyond the most conclusory of allegations, the Petitioners have not established that the Union violated the NYCCBL. To the contrary, it argues that the recital of facts contained in the Petitioners' papers show that the Union acted properly and in conformance with regular procedures throughout all stages of the grievance proceedings.

The PBA points out that it had responsibly negotiated the Young grievance, the resolution of which, it believed, was favorable to all Union members, including the Petitioners. It notes that when the Department "recast" the schedule for Community Affairs officers, it immediately filed a second grievance. The PBA maintains that it did not decline to institute a proceeding, nor did it refuse to raise issues involving the Community Affairs officers.

The PBA concludes that the Petitioners are dissatisfied with the terms of the stipulation of settlement. It argues, however, that a union is "vested with a quantum of discretion" in representing its membership at grievance proceedings, and that the prerogative of entering into settlement agreements

of contractual disputes is within its discretion. In its view, without evidence of bad faith, arbitrariness or irrationality, the authority to enter into a stipulation of settlement is "invulnerable to attack." In this case, according to the Union, the Petitioners' submissions are "barren of any showing of a lack of proper investigation and a lack of care in a submission and negotiation process."

The PBA also contends that the Petitioners' incorrectly raised their charge concerning the duty to bargain in good faith. This duty, according to the PBA, is not intended to create an independent right or cause of action for the benefit of a third party, even if the third party is a member of the collective bargaining unit. To do so, it argues, would undermine the concept of exclusive representation.

Finally, the PBA contends that the improper practice petition should be dismissed on various public policy grounds. According to the Union, granting the requested relief would inhibit or prevent the voluntary settlement of grievances, add unnecessary formality, and develop undue reliance on the use of counsel to the detriment of lay union representatives.

City's Position

In its motion, the City contends that the Petitioners have not alleged any conduct on its part that violated any of the Petitioners' rights granted under the NYCCBL. According to the City, the Petitioners' claims of "retaliatory conduct," and that it is "a necessary party," are conclusory statements unsupported by any factual allegations.

The City regards the improper practice petitions as containing two separate sets of charges. The first set, according to the City, charges the PBA with breaching a fiduciary duty allegedly owed to the Petitioners. The second set of charges concerns a change in Community Affairs officers' duty schedules that allegedly breached the collective bargaining agreement.

With respect to the first set of charges, the City contends that the

Petitioners have not shown how the City violated Section 12-306 of the NYCCBL. It points out that the Petitioners limited their allegations to claimed actions or inactions by the PBA; they assertedly contain no recitation of facts that would establish a violation of the statute by the City.

The second set of allegations, the City notes, involves the Department's unilateral decision to change the Petitioners' regularly scheduled days off. The City argues that the Petitioners' complaint, that a duty chart change violates the Agreement, focuses on matters concerning the interpretation and application of the contract, and not the NYCCBL. Accordingly, the City argues, since this Board does not have the authority to remedy an alleged contractual violation that does not otherwise state an improper practice under the NYCCBL, the Petitioners failed to state a cause of action upon which relief may be granted.

Petitioners' Position

The Petitioners maintain that the PBA engaged in a pattern of conduct which, at a minimum, constituted gross negligence, and, at a maximum, "amounts to a conspiracy" by the City and the PBA to deprive the Petitioners of their rights to fair representation. Relying upon a recent Nassau County Supreme Court decision,[3] the Petitioners argue that a union breaches its duty of fair representation when it engages in perfunctory, arbitrary, grossly negligent, negligent, or discriminatory conduct, as well as conduct that is motivated by bad faith. The PBA, according to the Petitioners, has violated all these standards.

The Petitioners assert that the PBA acted in a perfunctory manner by allowing "totally inaccurate calculations" to be included in the November 8, 1989 stipulation of settlement, and because the Union did not negotiate "numerous breaches of the contract" that were part of the initial grievance

[3] Adams v. Civil Service Employees Association, 22 PERB ¶7518 (1989).

filed by Officer Young. They assert that the Union acted arbitrarily because it settled grievances for one group of grievants while excluding other grievants without informing them. The Petitioners contend that the PBA acted in bad faith because it "lied to the grievants regarding the status of grievances," gave preferential treatment to Union officials, and "allowed its members to be coerced by the Police Department into the new status of weekend 'volunteers'."

The Petitioners also contend that the PBA acted with gross negligence by its alleged failure to file grievances, or by allegedly filing them late. Moreover, they assert that the Union discriminated against them by "intentionally" excluding members of the Community Affairs unit from the stipulation, and by failing to process Petitioners Hug and Lapinski's portal-to-portal pay grievances. Thus, according to the Petitioners, the stipulation "restrained and coerced" them in the exercise of their rights under Section 12-305 of the NYCCBL.

Finally, the Petitioners deny that they are asking this Board to enforce a contractual right. In their view, they simply are seeking compensation for actions taken by the City and the PBA that allegedly violated rights guaranteed to them by the NYCCBL.

Discussion

When making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by the petitioner. In addition, the petition is entitled to every favorable inference, and it will be taken to allege whatever may be implied from its statements by reasonable and fair intendment.[4] In the instant proceeding, both the City and the PBA base their motions to dismiss upon the premise that the petition contains no facts that could lend support to the Petitioners' assertions that their

[4] Decision Nos. B-32-90 and B-34-89.

conduct constituted a prima facie improper practice under the NYCCBL.

There are two distinct events or results that the Petitioners find objectionable. The first concerns the voluntary settlement by the PBA of two pending grievances that challenged the rescheduling of Community Affairs officers. The second concerns Petitioners Hug and Lapinski's allegations that the PBA refused or neglected to process their portal-to-portal pay grievances. We shall first discuss the duty of fair representation in general, and then we shall discuss each of these individual causes of action alleged by the Petitioners.

The Duty of Fair Representation

The duty of fair representation is a doctrine developed by the federal judiciary based upon the fact that unions are certified as exclusive bargaining representatives under both the Railway Labor Act and the National Labor Relations Act (NLRA). The leading cases originated and were decided under the Railway Labor Act.[5] The Supreme Court balanced the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right, and held that a union must act "fairly" toward all employees that it represents. Subsequently, the Supreme Court recognized and adopted the duty of fair representation under the NLRA.[6] The Court, in Vaca v. Sipes,[7] defined the duty of fair representation as:

> the exclusive agent's authority to represent all members of a designated unit includ[ing] a statutory obligation to serve the interest of all members without hostility or discrim-ination toward any, to exercise its discre-tion with complete good faith and

[5] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 65 C.Ct. 226, 89 L.Ed. 173 (1944), and Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

[6] Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

[7] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

honesty, and to avoid arbitrary conduct.[8]

A breach of the duty "occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[9] Although New York State and its political subdivisions are not covered by NLRA, the state courts have imposed a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives.[10]

Commonly there are three parties in a duty of fair representation action: the employee, the union and the employer. Charges against the employer may be incidental to an alleged breach of the duty by the union. The employer is properly a respondent although it may have done nothing to prevent a grievance from being processed, provided a petitioner alleges that the union breached its duty of fair representation in handling the grievance. The reasoning is that if the employer wronged the employee by violating the agreement, the grievance procedure could have remedied the breach, were it not for the union's alleged wrongful refusal to pursue the claim. Thus, the employee is given a chance, if successful in his action against the union, to further press the initial claim against the employer.[11]

A union does not breach its duty of fair representation merely because it refuses to advance a grievance.[12] However, although a union is not required to take all grievances to arbitration, its determination whether to

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[8] Vaca at 177.

[9] Vaca at 190.

[10] Matter of Civil Service Bar Association, Local 237, I.B.T. v. City of New York, 64 N.Y.2d 188, 196, 485 N.Y.S.2d 227, 230 (Ct.App., 1984).

[11] See Nikiel v. City of Buffalo, 75 A.D.2d 1017, 429 N.Y.S.2d 332 (4th Dept., 1980).

[12] Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; B-34-86; B-32-86; B-25-84; B-2-84; and B-16-79.

do so must not be "in bad faith, arbitrary or discriminatory,"[13] or "deliberately invidious, arbitrary or founded in bad faith."[14] Therefore, even where a union may have been guilty of an error in judgment, there is no violation, provided the evidence does not suggest that the union's conduct was improperly motivated.

We recognize the contradiction between the Albino-Diaz standards, affirmed by two appellate Departments, and the decision of a Nassau County Supreme Court justice, heavily relied upon by the Petitioner, in Adams v. CSEA. We note, however, that in Adams, Justice Becker expressly acknowledged his disagreement with the Third Department ("The aberrant nature of this [Diaz] decision is inexplicable and indeed surprising in light of [the Court's] previous holding"),[15] and his criticism of it ("[t]he Court's avoiding a negligence standard is not in the best interests of the union.")[16] Inasmuch as two appellate courts have made contrary rulings, we respectfully decline to follow the Adams decision. Moreover, we note that no judgment was ever entered in the Adams case. Therefore, any precedential standing that it might otherwise be entitled to is very much in doubt.

A union enjoys wide discretion in reaching grievance settlements as well.[17] It does not breach its duty of fair representation simply because the

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[13] Albino v. City of New York, 80 A.D.2d 261, 438 N.Y.S.2d 587 (2nd Dept., 1981).

[14] Standard narrowly adopted by the Third Department (CSEA v. PERB and Diaz, 132 A.D.2d 430, 522 N.Y.S.2d 709 [1987]), relaxing the "gross negligence" standard that the PERB had applied below (18 PERB ¶3047 [1985]). The Court of Appeals affirmed the Third Department decision on other grounds, without comment on the appropriateness of the more relaxed standard (sub nom. CSEA v. PERB, 73 N.Y.2d 796, 537 N.Y.S.2d 22 [1988]).

[15] Adams at p.7531.

[16] Id.

[17] Barry v. United University Professions, 22 PERB ¶3013 (1989), Faculty Association of Hudson Valley Community College v. Dansereau, 15 PERB ¶3080 (1982), and Nassau Educational Chapter of Syosset School District CSEA v. Marinoff, 11 PERB ¶1978.

settlement outcome does not satisfy the grievant.[18] A union is recognized as having the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled.[19] Thus, an employee organization is entitled to broad latitude in determining whether to enforce its right to negotiate collectively, absent improper motivation in the making of such determinations.[20] A violation of the Taylor Law does not take place simply because some union decisions may adversely affect some bargaining unit members.[21]

Similarly, in circumstances such as these involving a small group of grievants who are members of a larger interested group, a union does not breach its duty of fair representation because it did not notify or consult with members of the smaller group before reaching a negotiated settlement of the larger group grievance. The duty to inform has been given narrow application by the courts,[22] by the PERB,[23] and by this Board.[24] It arises only when a union's failure to disclose is without rational basis or was reckless and extremely prejudicial.[25]

Contractual Violations as Improper Practices

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[18] Decision Nos. B-2-90; B-9-86; and B-13-81.

[19] Hudson Valley at 3124.

[20] Barry at 3033.

[21] Decision No. B-42-87.

[22] See Robesky v. Quantas Empire Airways, 573 F.2d 1082, 98 LRRM 2090 (9th Cir. 1978) and Robinson v. Marsh Plating Corp., 433 F. Supp. 811, 97 LRRM 2527 (E.D. Mich 1978).

[23] See Hudson Valley at 3124 and State of N.Y. and PEF v. Engles, 16 PERB ¶4653 (H.O. 1983).

[24] Decision Nos. B-9-86 and B-15-83.

[25] Robesky at 98 LRRM 2090.

Alleged contractual violations may be subject to various forms of redress, but they may not be rectified through the filing of improper practice charges.[26] Section 205.5.(d) of the Taylor Law specifically precludes this Board from exercising its jurisdiction over a claimed contractual violation that does not otherwise constitute an improper practice.[27]

Settlement of Petitioners' Rescheduling Grievances

For the purpose of considering the Respondents' motions, we must accept as true the Petitioners' contentions that the PBA did not consult with them before entering into the November 8, 1989 settlement agreement with the City; that the settlement contravenes terms of the collective bargaining agreement; and that the provisions of the settlement agreement do not operate in their best interest. Even if proved, however, these claims would constitute a basis for a finding of an improper practice only if the PBA acted in an arbitrary, discriminatory, or bad faith manner in administering or enforcing the collective bargaining agreement.[28]

We have carefully considered the Petitioners' allegation of improper practice in the overall context of the multiple duty chart changes visited upon Community Affairs officers by the Police Department during the Summer and Fall of 1987. We are convinced that the PBA acted diligently and responsibly in seeking to defend its members' rights. Not only were group grievances properly filed, processed and taken to arbitration, but the Union defended its

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[26] Decision Nos. B-61-89; B-53-89; B-47-89; B-55-88; B-46-88; B-45-88; and B-24-87.

[27] Section 205.5(d) of the Taylor Law provides, in pertinent part, as follows:

> [T]he board shall not have authority to en-force 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 . . . .

[28] Supra, notes 12 and 13.

position against two arbitrability challenges before this Board as well. Furthermore, the officers' major common objection focused on the loss of weekends as their regular days off, a complaint which the settlement agreement expressly addressed.

In light of the burden that the Petitioners must overcome in establishing a prima facie breach of the duty of fair representation, we find the Petitioners' claim that the Respondents retaliated against them to be wholly conclusory and unsupported by any evidence whatsoever. It is not our function to evaluate the strategic determinations made by the Union. Indeed, even if asked, we could not do so, for we were not privy to the weight of the evidence and arguments introduced during the arbitration proceeding. We are persuaded by the facts that are not disputed, however, that the Petitioners received fair treatment, and that neither malice nor hostility motivated the Union's acceptance of the settlement agreement.

Finally, to the extent that the Petitioners' are claiming that their contractual rights are being violated, as we have discussed above, such a claim must be raised as a grievance, and not as an improper practice charge.

We therefore find that the PBA, in settling the rescheduling grievances, did not breach its duty of fair representation. We also find that the Petitioners have demonstrated no basis upon which they can be permitted to advance their claims independently against the City. In this regard, we find that the Petitioners' allegations of a conspiracy between the PBA and the City are wholly conclusory. Accordingly, we shall dismiss the Petitioners' improper practice charge against both the PBA and the City with respect to the PBA's handling and settlement of the two rescheduling grievances.

Petitioners' Portal-to Portal Pay Grievances

For the purposes of deciding the Respondents' motions concerning Petitioners Hug and Lapinski's portal-to-portal pay grievances, we must accept the Petitioners' contentions that they asked the PBA to pursue the matter on

their behalf, that the Union either filed their grievances in an untimely fashion or not at all, and that the PBA won a similar grievance involving "Operation Marlin" officers in arbitration.

As we have already said, a union does not breach its duty of fair representation merely because it refuses to advance a grievance to arbitration. However, the duty requires 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.[29] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[30]

With regard to this portion of the Petitioners' improper practice claim, we are satisfied that they have presented sufficient unrebutted material allegations to withstand the Respondents' motions to dismiss. Although incomplete, the Petitioners' claim as a whole manifests a cause of action cognizable under the NYCCBL, and sufficiently puts the PBA and the City on notice of the charges to be met to enable them to formulate meaningful responses.

We find, therefore, with respect to the portal-to-portal pay grievances, that the Petitioners' have stated a prima facie claim of improper practice within the meaning of Section 12-306 of NYCCBL. We shall order the PBA and the City each to serve and file answers with respect to this claim within ten days of receipt of this determination.

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[29] Supra, notes 7, 12 and 13. See also Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; B-30-88; and B-2-84.

[30] Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; and B-30-88.

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 motions of the Patrolmen's Benevolent Association of the City of New York and the City of New York to dismiss the improper practice petitions filed by the Petitioners individually named herein be, and the same hereby are, granted, to the extent that the petitions charge the Respondents with having breached the duty of fair representation with regard to the settlement of the rescheduling grievances filed in behalf of certain Police Department Community Affairs officers; and it is further

ORDERED, that the motions of the Patrolmen's Benevolent Association of the City of New York and the City of New York to dismiss the improper practice petitions filed by the Petitioners individually named herein be, and the same hereby are, denied to the extent that the petitions charge the Respondents with having breached the duty of fair representation with regard to the late filing or non-filing of two portal-to-portal pay grievances in behalf of Petitioners Hug and Lapinski; and it is further

ORDERED, that the Patrolmen's Benevolent Association of the City of New York and the City of New York shall serve and file an answer to the alleged late filing or non-filing of the two portal-to-portal pay grievances within ten (10) days of receipt of this Interim Decision and Order.

DATED: New York, N.Y.
September 17, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH

MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER