

25-92	annulled	N.Y.C. Dep't of Probation & City v. MacDonald, <i>aff'd</i> , 42861 N.Y. Co. S.Ct., 3/31/93, <i>rev'd</i> 205 A.D.2d 372, 613 N.Y.S.2d 378 (1st Dep't 1994).	57
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OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper  
Practice Proceeding

DECISION NO. B-26-92  
DOCKET NO. BCB-1435-91

-between-

CALVIN HARMON,  
Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,  
Respondent.

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**INTERIM DECISION AND ORDER**

On November 8, 1991, Calvin Harmon ("Petitioner") filed a verified improper practice petition against the Patrolmen's Benevolent Association ("PBA"). The Petitioner alleges that the PBA has failed to support Petitioner "in [a] legal challenge to the charges of wrongful ingestion of cocaine, in the form of financial relief." On December 9, 1991, the PBA moved to dismiss the improper practice petition. The Petitioner filed a response to the motion to dismiss on December 13, 1991.

**THE PETITION**

The Petitioner alleges:

Failure of the PBA to support Petitioner in legal challenge to the charges of wrongful ingestion of cocaine, in the form of financial relief. They have to this date not responded in writing as to why denial, despite repeated request for same.

As a remedy,, the Petitioner requests "monies for legal defense totaling \$8,000.00."

Attached to the improper practice petition is a memo from

Petitioner to Phil Caruso, the President of the PBA, regarding the legal committee's denial of funding. In that memo, the Petitioner explains that approximately two weeks after being suspended for testing positive "on a random dope test," he inquired about funding "in order to defend against the charges of [wrongful] ingestion," Petitioner claims that he was informed by the precinct delegate that "in order to obtain funds for counsel if not PBA attorneys," he had to forward a 114911 to the legal committee of the PBA, which would then decide the amount to be dispensed. Petitioner recalls that he specifically asked the delegate whether "there was anything that prevented funding in such a matter." Petitioner alleges that the delegate replied that there was "nothing in the by-laws or otherwise that precluded such."

Petitioner details his subsequent inquiries into this matter. He explains that while one board member expressed some uncertainty as to whether the PBA provided funding in such situations, another stated that the matter would be decided by committee vote, as there were no rules either preventing or mandating such funding. Petitioner also explains that he took issue with the fact that the committee did not meet in July or August.

Petitioner also details a call he made to the Board on the day of its meeting. Petitioner states that he was told the issue would be decided at that evening's meeting. Petitioner alleges that the person he spoke to stated that while the Petitioner should not expect to be totally reimbursed, he would be given something.

Petitioner further alleges that this person called him back an hour later to advise the Petitioner that he had spoken to a committee member and that the Petitioner was not going to receive anything. Petitioner emphasizes that this decision was made before the committee meeting took place. Petitioner alleges that the explanation given for the denial of funding was that the incident occurred while the Petitioner was off duty and that the PBA had never provided funding in such a situation. Petitioner contends that the committee has no support for "its claim that it was caused by something that happened off duty." Furthermore, Petitioner alleges that he "had spoken at length with another member so charged who informed [Petitioner] that after [a] departmental trial and two court appeals, it had not cost him anything .... [because] his legal fees had been paid by the PBA."

### **POSITIONS OF THE PARTIES**

#### **Union's Position:**

The Union requests that the improper practice petition be dismissed on the ground that Petitioner has alleged no facts which support a claim that the PBA has violated the New York City Collective Bargaining Law ("NYCCBL"). The PBA notes that the Petitioner did not retain for his defense the law firm designated by the PBA. The Union points out that the Petitioner specifically asked his precinct delegate how he could obtain funds for legal representation if he chose not to use PBA attorneys. Accordingly,

the Union contends that the petition contains no allegation that the PBA refused to provide the Petitioner with legal representation. The Union also claims that the petition contains no statement which may be construed as withholding benefits from Petitioner. According to the Union, in the absence of such a showing, the petition must be dismissed.<sup>1</sup>

The Union further contends that the petition contains no allegation that the PBA ever interfered with the Petitioner's right to a fair trial or hearing in connection with the charges against him. Citing Decision Nos. B-14-83 and B-27-81, the Union claims that there is no allegation that the PBA prevented Petitioner's case from being heard in the appropriate forum; nor is there an allegation that the PBA took action to influence the outcome of the case to Petitioner's prejudice.

Finally, the Union argues that the Petitioner has not cited any statutory, regulatory, or contractual basis for the relief which he seeks. According to the Union, the Petitioner's rejection of PBA representation and his decision to hire his own attorney and then seek reimbursement from the PBA is not an improper practice.

Petitioner's Position:

In his response to the Union's notion to dismiss, the Petitioner repeats his argument that there is nothing in the

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<sup>1</sup> The Union cites Decision Nos. B-13-82 and B-11-82 in support of this claim.

Union's by-laws which states that complainants may only be represented by PBA designated attorneys; nor is there anything which precludes financial relief for a complainant who retains outside counsel. The Petitioner reiterates that similar benefits have been provided to others in the past. The Petitioner also contends that he should have received an official response regarding this issue sooner. The Petitioner asserts that the motion to dismiss itself "is just a continuation of more and different reasons given each time inquiry is made." Moreover, the Petitioner contends that a conflict of interest exists, since he is paying dues to the organization which opposes him in this action. Finally, the Petitioner argues that the PBA is retaliating because of his "past efforts to spark the PBA into a more positive relationship with its minority members."

### **DISCUSSION**

The PBA's motion to dismiss in the instant case is based upon its argument that the Petitioner has alleged no facts which support a claim that the PBA has violated the NYCCBL. When making a motion to dismiss, the moving party concedes the truth of the facts alleged by the Petitioner.<sup>2</sup> In addition, the petition is entitled to every favorable inference and will be taken to allege whatever may be implied from its statements by reasonable and fair

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<sup>2</sup> Decision Nos. B-11-92; B-32-90; B-34-89; B-7-89; B-38-87; B-36-87; B-7-86; B-12-85; B-20-83; B-17-83; B-25-81.

intendment.<sup>3</sup>

Section 12-306b of the NYCCBL<sup>4</sup> has been construed by the Board as providing a cause of action for the breach of a union's duty of fair representation. It is well settled that a union breaches its duty of fair representation when it acts arbitrarily, discriminatorily, or in bad faith.<sup>5</sup>

The Petitioner contends that the PBA failed to provide him with funding when he retained non-PBA counsel to defend himself on a charge of wrongful ingestion of cocaine. Petitioner maintains that another member charged with the same offense did not have to pay anything [because] his legal fees had been paid by the PBA." Petitioner further suggests that the PBA is retaliating against him because of his "past efforts to spark the PBA into a more positive relationship with its minority members."

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<sup>3</sup> Decision Nos. B-11-92; B-32-90; B-34-89; see also, Westhill Exports. Ltd. v. Pope, 12 N.Y.2d 491, 496; 240 N.Y.S.2d 961, 964 (1963); Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121, 127 (1st Dept., 1964).

<sup>4</sup> Section 12-306b states as follows:

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 12-305 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.

<sup>5</sup> Decision Nos. B-56-90; B-51-90; B-27-90; B-72-88; B-25-84; B-16-79.

Construing these allegations in a light most favorable to the Petitioner, we find that the Petitioner has stated an arguable claim that the PBA breached its duty of fair representation. Accordingly, the instant motion to dismiss is denied.

**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 Patrolmen's Benevolent Association's motion to dismiss the improper practice petition filed by Calvin Harmon be, and the same hereby is, denied, and it is further,

ORDERED, that the Patrolmen's Benevolent Association shall serve and file an answer to the petition within ten days of receipt of a copy of this Interim Decision and order.

Dated: New York, New York  
May 19, 1992

MALCOLM D. MacDONALD  
Chairman

DANIEL G. COLLINS  
Member

GEORGE NICOLAU  
Member

JEROME E. JOSEPH  
Member

THOMAS GIBLIN  
Member

DEAN L. SILVERBERG  
Member

GEORGE BENJAMIN DANIELS  
Member