Anzevino v. Dept. of Environmental, DC 37, 49 OCB 32 (BCB 1992) [Decision No. B-32-92

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	DECISION NO. B-32-92
ANTONIO J. ANZEVINO, Petitioner,	:	DOCKET NO. BCB-1355-92
-and-	:	
THE CITY OF NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION and DISTRICT COUNCIL 37, AFSCME, AFL-CIO, Local 924, Respondents.	:	

DECISION AND ORDER

On January 11, 1991, Antonio J. Anzevino filed a verified improper practice petition against the New York City Department of Environmental Protection ("the Department") and against District Council 37, AFSCME, AFL-CIO, Local 924 ("District Council 37" or "the Union"). The petition alleged that the Department discriminated against the Petitioner with respect to overtime, job transfer assignments, and promotional opportunities, and that the Petitioner's Union made prejudicial errors in processing two of his grievances, thereby interfering with the statutory rights of employees under Section 12-306b. of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] NYCCBL §12-306. provides, in pertinent part, as follows:
Improper practices; good faith bargaining.
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 their rights granted in [§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.

District Council 37 filed its answer on February 27, 1991. The Department, appearing by the City of New York Office of Labor Relations ("the City"), did not answer. Instead, on February 19, 1991, the City filed a motion to dismiss the petition on the ground that it failed to state a cause of action under the NYCCBL.

On June 20, 1991, this Board, in Interim Decision No. B-34-91, ruled that the Petitioner had presented sufficient unrebutted material allegations to withstand the City's motion to dismiss his improper practice petition. Accordingly, it ordered the City to serve and file an answer to the allegation that District Council 37 improperly processed the Petitioner's two grievances. The City filed its answer on July 16, 1991. The Petitioner filed a reply on August 14, 1991.

On September 16, 1991, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing began on December 4, 1991. At mid-day, the Petitioner requested an adjournment, pending the resolution of certain evidentiary stipulations by the parties. On January 9, 1992, the Petitioner appeared with counsel and the hearing reconvened. It continued on January 21 and February 28, and it concluded on March 14, 1992. Witnesses testified under oath. As prearranged, the Petitioner and the Union submitted posthearing briefs on May 20, 1992. The City asked for an extension of time in which to file its brief. After receiving the extension, the City filed its brief on June 2, 1992. Thereupon, the record was closed.

Background and Facts

The Bureau of Water Supply and Wastewater Collection of the Department of Environmental Protection is responsible for public water distribution, and for wastewater collection and treatment. The Bureau is divided in two divisions. The Sources Division distributes the potable water that it obtains from a network of upstate watershed reservoir systems. The Wastewater

Collection Division collects and treats sewage, runoff, and other municipal liquid waste. There are two regions where the Department performs its tasks, the first is within the City proper, the other is located throughout the upstate watershed areas.

The Petitioner has been employed by the Department for approximately thirty-one years. Currently, he is assigned to the Sources Division's East of Hudson district, one of the three upstate watersheds. The Petitioner holds the Civil Service title of Laborer and is designated as a "Laborer Group B" (Laborer assigned to a job location outside New York City.)[2] Group B Laborers are prevailing rate employees whose terms and conditions of employment are governed by Labor Law §220, the Comptroller's Determination issued pursuant to the Labor Law, and a Laborer Agreement (Non-Economic) between the City and District Council 37, covering the titles Laborer, City Laborer and Construction Laborer. These three laborer titles are grouped under one bargaining certificate.[3] "District Council 37, AFSCME, AFL-CIO and/or its affiliated locals" is their certified bargaining representative.

The East of Hudson district is divided into seven units: a north and south field unit, a mechanical shop, an electrical shop, an automotive shop, a technical office of support services, and a sewage treatment plant. Prior to 1984, Laborers usually were assigned to work in one of the field units or in one of the craft shops. In that year, however, the Department established a new broadbanded title, Watershed Maintainer. Although Watershed Maintainers' title qualifications and job requirements exceed those of Laborers, they earn about $8,000 less per year. The Department has been assigning employees in

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[2] Laborer Groups A, B and C+ are not Civil Service designations. The groups were created by a determination of the Office of the Comptroller for the City of New York, dated July 15, 1988, upon the consent of the parties, the City and District Council 37, Local 924.

[3] Certification No. CWR- #17-'67 (as amended).

the new title to fill vacancies in the craft shops as incumbent Laborers have departed. Since 1984, Watershed Maintainers have replaced at least five departed Laborers in these shops.

Supervisors in the Bureau of Water Supply and Wastewater Collection have been grouped into two locals by District Council 37. Supervisory personnel in the Department's water supply division belong to Local 1322. Supervisory personnel working in the wastewater division belong to Local 1157. However, District Council 37, AFSCME, is the common collective bargaining representative for these employees, as it holds a single bargaining certificate for members of both supervisory locals.[4]

Anthony Sessa was District Council 37's senior Council Representative for the Sources Division from 1973 to mid-1991. Prior to his retirement in March of 1990, he was on full-time release from his position as District Supervisor of Water and Sewer Systems. As senior Council Representative, he represented upstate and City-based members of both the laborers' unit and the supervisory unit in grievance proceedings and in other labor-management matters.

By separate letters dated January 4, 1989, the Petitioner requested transfers from the field unit to the mechanical shop or to the electrical shop, to fill vacancies created by the retirement of two incumbent Laborers. His requests were not acted upon. The Petitioner made a third transfer request in response to a vacancy notice in the mechanical shop, by letter dated August 21, 1990. In his letter, the Petitioner contended that "Watershed Maintainers and Laborers perform similar tasks equally and therefore should be treated equally." This request also was not acted upon.

On October 12, 1990, the Petitioner filed two grievances with his immediate supervisor. The first grievance alleged that the Bureau denied his request for reassignment unreasonably. In his second grievance, the

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[4] Certification No. 38A-78 (as amended).

Petitioner alleged that he had not received a fair share of overtime, in violation of "New York City's policy which grants overtime on a seniority basis in title and in an equitable manner." The Petitioner filed his grievances on his own, despite the opinion of the Union's senior Council Representative, who told the Petitioner that he could not cite anything in the rules and regulations, nor could he find any contractual violation, that would support either complaint. The Petitioner signed the grievances listing himself as the union representative of record.

The next day, the Petitioner sent a letter to the senior Council Representative, asking him to arrange a labor-management meeting "at your convenience." The proposed agenda included "Transfers, Overtime, both based on seniority and will include changes in Titles for positions in the upstate watershed." The letter made no mention of the two grievances that he had filed the day before. Acting on the Petitioner's request, the Council Representative arranged for a labor-management meeting to be held on December 10, 1990 in the Valhalla division office.

Meanwhile, in separate letters dated October 23, 1990, the Assistant Chief of the Sources Division denied the overtime grievance and referred the reassignment grievance to the Department's Director of Labor Relations for consideration at the second step. By letter dated November 7, 1990, the Petitioner appealed both grievances to Step II. In his letter, the Petitioner also complained that he had not received a reply concerning the labor-management meeting that he requested.

By letter dated November 28, 1990, the Department's Director of Labor Relations notified the Sources Division that she had scheduled a Step II hearing on both grievances for December 10, 1990 in Valhalla. The hearing would coincide with the labor-management meeting that had been scheduled previously. Without waiting for the hearing, however, the Petitioner, again on his own, appealed his grievances to the third step, by sending a letter to the City's Office of Labor Relations requesting their "review and

consideration."

On December 10, 1990, the Valhalla meeting was held as scheduled. In attendance were the Petitioner, the senior Council Representative, the Assistant Chief of the Sources Division, and the Department's Director of Labor Relations. Although the Director knew that the Petitioner had appealed his grievances, she went ahead with the meeting anyway.

The parties discussed the reassignment grievance first. Midway through the discussion, they decided to change the context of the meeting from a grievance hearing into a labor-management conference. After the Petitioner explained why he wanted to be reassigned to a shop, the context reverted back to a grievance hearing on the question of overtime distribution. The Petitioner contended that overtime was being allocated unevenly, in violation of Executive Order No. 7.[5] In particular, he claimed that Catskill district crews were being given work in his district, resulting in unnecessary overtime for them, and lost overtime for East of Hudson crews.

The Director of Labor Relations did not issue a Step II decision on either grievance. However, on December 19, 1990, the Assistant Chief wrote a memorandum to the Chief of the Sources Division as follows:

> Regarding reassignment of Laborers as assistants to skilled craftsmen. We advise that -- based on broadbanding [of the Water-shed Maintainer title] and the denouement of the Laborer title -- we had made a managerial decision not to reassign Laborers to functions such as plant operator, inspector, and craftsmen assistants. We volunteered to respond to his complaint by revisiting that decision. Mr. Anzevino does not want the matter revisited for Laborers as a group or reassignment to the function of plant operator or inspector. He is only interested in a positive response to his own request to be assigned as a helper to a skilled craftsman. I advised that any reconsideration would be for the title and not for individuals in a title and would be for all functions and not just a specific function.

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[5] Executive Order No. 7, issued on March 26, 1990, is entitled "Control of Overtime and Part-time Hours." Its purpose is to control and equalize the apportionment of overtime hours among similarly-titled employees.

> Since nobody has asked us to revisit the matter as it pertains to all Laborers and all functions, I recommend that we do not revisit this matter at all.

On October 30, 1991, the Office of Labor Relations issued its Step III decision. The discussion section began by noting that "the grievant requested it be noted for the record that he objected not only to the Union's presence but also to the Union's Counsel's continued presence throughout the Step III Hearing." The Review Officer then determined that, with regard to transfers and reassignments, "there has been no violation of contract or written policies and procedures nor was there any other document claimed to have been violated that effects the terms and conditions of employment." Concerning the overtime grievance, he found that the Department's documentation showed that the agency followed Executive Order No. 7 when it distributed overtime at the grievant's work location.

Petitioner's Evidence

The Petitioner testified and presented three witnesses in his behalf, including the senior Council Representative, a supervisor, and a co-worker. Each described the nature of their work and discussed some or all of the allegations made by Mr. Anzevino.

Anthony Sessa, the senior Council Representative, was the first witness that the Petitioner called. He said that he had handled "quite a few" grievances for Mr. Anzevino during the last ten years. Mr. Sessa testified that although he tried to investigate the Petitioner's current grievances, the advance information that he had was inadequate. He claimed that he never received copies of either grievance from the Petitioner, and that when he tried to discuss them before the December 10 meeting, the Petitioner "didn't tell me everything." According to the witness: "knowing Mr. Anzevino, that is not his style to tell you everything until he gets there." Contrary to the Petitioner's allegation, Mr. Sessa strongly denied making the statement that

"we don't have a grievance" in front of management, insisting that "I would never make that statement in my life."

William Foerst, a supervisor in the Sources Division, was the next witness to testify. He was the Petitioner's supervisor until approximately two years ago. Mr. Foerst said that he objected when management ordered the demolition of two buildings by out-of-district employees, because his own East of Hudson district crew could have performed the work. In the witnesses' opinion, the Department favors some of its employees and discriminates against others when assignments are being made. Mr. Foerst stated that the tasks and standards for Laborers require them to assist skilled craftsmen. The work could be inside or outside. He said that Watershed Maintainers basically do the same work, but receive $7,000 or $8,000 less pay. He thought that the last time a Laborer was transferred into a shop was two or two and-one-half years ago, although he knew of no written directive or policy preventing Laborers from such assignments. Mr. Foerst was aware of one Laborer presently working in a shop.

The Petitioner testified next. He said that he "inherited" the position of shop steward when someone else vacated it. He stated that as a shop steward he has represented people at labor-management hearings, which resulted in his being "blackballed" because "I am outspoken." When he filed his grievance, Mr. Anzevino estimated that he had earned about twenty hours of overtime during the preceding quarter, and about sixty-seven hours of overtime during the preceding year. He thought that if he shared the work performed by the out-of-district crews, he could have earned an additional forty hours of overtime. He also said that it had been a past practice for Laborers to work in one of the shops, and that he thought he was qualified for any of the inside jobs.

The witness claimed that he mailed the original copies of his grievances to the senior Council Representative, but when he did not hear from Mr. Sessa, he proceeded to Step II on his own. At about the same time, he decided to ask

for a labor-management meeting. Mr. Anzevino said that he never spoke with the Council Representative between the day he filed his grievances and the December 10 meeting. During the meeting, the Assistant Chief allegedly made a statement concerning the broadbanding of Laborers. According to the Petitioner, immediately after that, the Council Representative, in a loud voice, said: "Then we don't have a grievance." In Mr. Anzevino's opinion, the Representative "accepted statements from management" as far as his grievances were concerned, "and that was the end of that."

Later, the witness sought to explain why he filed a Step III appeal before the Step II hearing or the labor-management that he had requested had taken place:

> Because up to that time I hadn't heard anything from Mr. Sessa. And I felt Mr. Sessa in the past would not be processing the grievance, even though I sent him literature, I sent him the grievance. I didn't feel he would be responding to it, so I was taking the initiative myself.

Mr. Anzevino explained that he attempted to have the Union excluded from the Step III conference because of the Council Representative's statement that he did not have a grievance. The Petitioner claimed that, in the past, had he received a lot of "double-talk" from the Council Representative. He also claimed that the Union routinely allowed the Department to ignore the time limits set in the grievance procedure. According to the Petitioner, if final action on a grievance is not taken within 120 days, the grievance is "null and void." Mr. Anzevino stated that Executive Order No. 7 covers overtime, and that the Administrative Code contains the parties' grievance procedure. Subsequently he changed his answer, claiming that it is the Citywide contract that comes into play when a dispute arises. He said that he borrowed a copy of the Citywide Agreement from someone in the office. He read it himself, but did not discuss it with anybody. He did not know of the existence of the Laborers' contract until he heard testimony about it from another witness.

Rudy Spreckelsen, a fellow Laborer who occasionally works with Mr. Anzevino, was the Petitioner's final witness. He said that no one had ever

told him of the existence of the Laborers' contract. He did not believe that the Laborer title had been broadbanded, nor did he think that any of the other Laborers were under such an impression.

The Union's Evidence

The Union presented two witnesses in its behalf, including the recall of Anthony Sessa. Terry Joseph, the Department's Director of Labor Relations, was the first witness. She specified that the Laborer Agreement (Non-Economic), and not the Citywide Agreement, is the contract covering the Petitioner's title. She said that an unwritten past practice does not fall within the parties contractual definition of a grievance. She also said that the time limits for processing grievances are seldom adhered to; a more normal time frame, depending on peoples' availability, could take weeks or months. According to Ms. Joseph, the Petitioner's understanding of the 120 day rule was incorrect: "there's a 120-day rule for the filing initially at Step I, but there's no time limitation [for the processing] of a grievance."

The witness then stated that there are no contractual provisions governing transfers and reassignments. She explained that the Department has the managerial discretion to make assignments as it sees fit, and that the Sources Division has followed a policy of putting Watershed Maintainers, instead of Laborers, in the shops as vacancies occur. She later added that the title of Laborer is being eliminated.

With regard to overtime, Ms. Joseph testified that an executive order prohibits people from earning more than five percent of their salary in overtime. If they do, certain controls kick in and the agency has to justify the excess overtime to the City. Regulations also provide for equitable distribution of overtime, to the extent possible. She described a citywide payroll system that tracks overtime earnings of all employees. According to two reports that she brought and became part of the record, Antonio Anzevino was one of the highest earning Laborers in the Sources Division for both

calendar years 1990 and 1991. She also noted a trend showing that Laborers in the West of Hudson district earn considerably less overtime than those in the East of Hudson district. Ms. Joseph said that it is a managerial prerogative to assign work from one district to another.

The witness acknowledged that she had served as hearing officer at the December 10 meeting. When she asked the Petitioner and the Council Representative to cite the contractual basis for the reassignment grievance, neither could do so. They then caucused and asked that the context be changed to a labor-management meeting. Ms. Joseph said that Mr. Sessa supported the Petitioner's request to be moved into one of the shops. The discussion then shifted to the overtime grievance. When she asked the Union for specifics, the Petitioner alleged that overtime records had been falsified. He supposedly agreed to forward his information on the falsification to the Department.

In Ms. Joseph's view, both grievances were related because the Petitioner's goal "was to get into a position where he could earn more money." She explained: "He felt that certain assignments in certain shops automatically generated large amounts of overtime and he was interested in getting into an environment like that." Ms. Joseph said that the Council Representative defended the Petitioner's position throughout the discussion. She denied that the Representative said that "Mr. Anzevino had no grievance."

The Union recalled Anthony Sessa as its second witness. He said that he received copies of the Petitioner's grievances from management, and not from Mr. Anzevino. He was familiar with the issues, however, because of previous discussions concerning the Petitioner's desire to be transferred and to have more overtime: "Many many times we discussed avenues to take on these issues with management [but] I could not cite anything that was violated in the rules and regulations."

As the Council Representative prepared for the Step II hearing, he said that he took the Petitioner at his word that he was not getting a fair share

of overtime. However, during the hearing management produced a list showing that he was a very high overtime earner. Mr. Sessa also said that, despite the distances involved, there was nothing to limit management's right to move employees from one district to another. With respect to the transfer issue, the witness said that he impressed upon the City that Mr. Anzevino was qualified to work in a shop, and that he could do the work. Aside from making an argument, the Council Representative said there was nothing else that he could do because the Union has attempted, without success, to negotiate a transfer policy.

Mr. Sessa denied that the Assistant Bureau Chief said that the Laborer title was broadbanded. But he said that it would not have mattered because he knew better. Moreover, according to Mr. Sessa, the statement would have had no bearing on the Petitioner's grievances.

The City's Evidence

The City presented two witnesses in its behalf. It began by recalling the Department's Director of Labor Relations to testify about Laborers' and Watershed Maintainers' earnings. Ms. Joseph said that upon reviewing the Petitioner's prior overtime grievance, she found that he consistently was one of the top overtime earners: "Not the top, but certainly he had earned considerably more than a lot of other people." According to Ms. Joseph, current information also indicates that he is one of the top overtime earners.

Salvatore Olivieri, the Department's overtime analyst, was the City's second witness. He was called upon to point out and explain inconsistencies in the computer reports that the parties used to track Laborers' and Watershed Maintainers' overtime earnings. According to the witness, he has detected many coding errors traceable to corrections in the raw data that were made by personnel at the Department of General Services (DGS). He said that sometime during 1990, his Department converted to an in-house system that no longer accesses or depends upon files that have been changed by DGS personnel.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner points to a prejudicial remark allegedly made by his Union representative at the December 10, 1990 grievance/labor-management meeting as the incident that triggered his improper practice claim. He also contends that the Union has not processed his grievances in timely fashion, and that his Union representative had a conflict of interest.

According to the Petitioner, soon after the December 10 meeting began, the Assistant Chief of the Sources Division said that Laborers had been broadbanded. The Council Representative then allegedly stated to the assembled group that there was no grievance. Despite the Representative's denying having made the statement, the Petitioner contends that the answer filed by the Union gives a clear implication that the statement was made:

> Joseph Zurlo, the union president at the time in the Answer to Anzevino's petition . . . clearly says that Sessa stated that there was insufficient evidence to support a grievance in Paragraph 28.

The Petitioner further contends that although the Representative knew how prejudicial such a statement would be, he was indifferent to the Petitioner's grievances. In the Petitioner's opinion, the Department similarly held his complaints in low regard because of his past willingness to protest about alleged wrongdoings.

Compounding the prejudicial remark, according to the Petitioner, was the "perfunctory manner" in which the Union investigated his complaints. The Petitioner maintains that the senior Council Representative walked into the December 10 meeting completely unprepared. Rejecting the Representative's insistence that he never received the original copies of the grievances, the Petitioner charges that: "So little regarded are Anzevino's grievances by Sessa that Sessa did not even bother to keep the initial document by which Anzevino initiated a grievance." In addition, the Petitioner accuses the Union official of never having bothered to inform the membership of the

existence of a collective bargaining agreement for Laborers, even though the Laborers' contract had been signed three years earlier.

The Petitioner insists that both of his grievances are meritorious. He contends that the question of whether he received a fair share of overtime has not yet been resolved because the Union has not properly researched the issue. According to the Petitioner, no one yet has seen the full documentation on the distribution of overtime. With regard to his transfer requests, the Petitioner argues that Laborers do the same work as Watershed Maintainers. In his view, since the people who work in shops are skilled craftsmen, and because the Comptroller's Determination contains the necessary words, "assists skilled craftsmen," to enable the Department to use Laborers in the same positions as Watershed Maintainers, management erred when it limited job openings in the shops to employees holding the latter title. Referring to testimony that the Laborer title is being phased out, the Petitioner asserts that "an alert union would have immediately seized the larger issue -- that Laborers appear to be precluded from any kind of promotion or transfer because the title is being phased out."

Finally, the Petitioner maintains that the interests of the Council Representative are closer to management's than to unit members'. He notes that the Representative rose from Laborer to the rank of District Supervisor without serving the requisite probationary periods, and that he has not paid union dues during the two years since he retired. In the Petitioner's opinion, the Representative's predisposition "would clearly be in favor of the City which made this possible," and against the Petitioner, "who creates problems."

Union's Position

According to the Union, an arbitrary, discriminatory or bad faith refusal to process a meritorious grievance is the test used to weigh a duty of fair representation claim. In its view, the Petitioner's charge does not meet

this strict standard. This is so, the Union argues, because there is no basis for the Petitioner's claims that the senior Council Representative acted against his interest, or that he blocked access to the grievance arbitration process. To the contrary, the Union asserts that both he and the Union made all of their decisions on the basis of a record that failed to show that the Petitioner's grievances had any merit.

Concerning the Petitioner's conflict of interest charge, the Union asserts that the claim is totally without legal or factual foundation. First, it points out that the Council Representative retired from his City employment six months before the Petitioner even filed his claim. Second, it claims (mistakenly) that the supervisory titles the Representative held prior to his retirement were titles in a mixed unit of supervisory and non-supervisory employees. The Union argues that if the Board of Certification found it appropriate to assign employees in various titles to a mixed unit on the basis of a common community of interest, then it follows that unit members must be free to choose their grievance representatives from amongst themselves, regardless or title or status. Third, it points out that before he retired, the senior Council Representative had been on full-time release from his civil service position for many years, and thus was outside of the chain of command. Finally, the Union notes that supervisors holding the Council Representative's former title do not supervise Laborers who work outside New York City.

The Union then explains why the Petitioner's grievances are not meritorious. It points out that neither the Comptroller's Determination, nor the Laborers' Agreement, nor any rule, regulation, written policy, or order of the City applicable to the Department, contains within it a transfer or reassignment provision. In the absence of such a provision, the Union argues, a Laborer has no contractual right to be reassigned to a shop when a position held by another Laborer becomes vacant. Even if, as the Petitioner believes, it was a past practice for Laborers to work in the shops, an unwritten past practice is not grievable under the Laborers' Agreement, the Union contends.

Similarly, the Union notes that the only written provision governing overtime that the parties identified was Executive Order No. 7, which provides for the even distribution of overtime, where practicable, within each agency or agency subdivision, among all employees who are eligible to perform the overtime work required. The first problem with the Petitioner's overtime grievance concerns timeliness. His chief complaint, according to the Union, stemmed from the assignment of Catskill district crews to work in the Petitioner's district during 1988 and 1989. Yet by the time he filed his grievance, more than 120 days had elapsed since the work was performed. More importantly, however, in the Union's view, is the absence of a written agreement or policy that would limit or circumscribe management's right to move employees from one district to another. The Union observes that, in this case, management's decision to transfer the work apparently was justified, because East of Hudson district personnel, including the Petitioner, had been receiving a greater share of overtime than Catskill district personnel.

Finally, the Union claims that it cannot be found to have breached its duty of fair representation unless it can be shown that its actions foreclosed a grievant from pursuing a meritorious claim through the grievance procedure. Stressing that it did nothing to deny the Petitioner access to the grievance arbitration process, the Union terms "frivolous" his accusation that it handled his grievances in a perfunctory manner. To the contrary, although the Council Representative had "serious doubts," he allegedly still stood ready to assist the Petitioner at the December 10 meeting. This assistance was rendered, the Union points out, despite the facts that the Petitioner filed and moved the grievances to the second and third steps of the grievance process by himself; that he designated himself as the union representative on the grievance forms; and that he did not contact the Union or seek its assistance before appearing at the meeting. Having taken the initiative on his own, the Union argues, the Petitioner cannot now complain that the Council Representative's preparation was not what he would have liked. It insists

that there is no credible evidence supporting the Petitioner's claim that the senior Council Representative said that he had "no grievance," or that he ever took a position against the Petitioner's interest.

City's Position

The City maintains that neither the Petitioner's overtime grievance nor his transfer grievance are meritorious. It contends that in a case where the underlying grievances lack merit, the Union cannot have breached its duty of fair representation in its treatment of a grievant.

With respect the Petitioner's overtime grievance, the City contends that the incidents he complained of involved overtime earnings on three specific projects: a barn demolition in Peekskill, an extension of a building in Mahopac, and the enclosure of a porch in Kensico. It points out that all three projects were completed in Summer and Fall of 1989, and therefore were far beyond the 120-day grievance filing period. In addition, the City argues, even if the Petitioner was able to address the merits of his overtime complaint, he still could not show that he was treated unfairly. It asserts that the evidence reveals that the Petitioner was a higher than average overtime earner, and that he exceeded the five percent cap imposed by Executive Order No. 7 as well. By the City's calculations, the Petitioner's overtime earnings between July 1990 and May 1991 amounted to 4.88% of his base salary, "which happened to be the highest amount of for anyone in the title of Laborer."

Regarding the denial of transfer grievance, the City contends that the Petitioner has not cited any restriction that limits the Department's managerial right to assign or not assign its employees as it sees fit. According to the City, the Petitioner's basis for his grievance was a single clause in the Comptroller's Determination, "assist skilled craftsman." It argues, however, that the clause was only one example of a number of possible tasks that could be performed by a Laborer. In the City's view, the clause

cannot be construed as "a sensible and/or rational basis" for the Petitioner's grievance.

Finally, the City denies that the Union breached its duty of fair representation. Citing various federal and state court rulings and administrative decisions, it asserts that a union cannot be held liable for a breach of this duty on the basis of an error of judgment, an honest mistake, lack of competence, irresponsible conduct, negligent conduct, or even grossly negligent conduct. The City regards a remark allegedly made by the senior Council Representative concerning the validity of his grievances as being the basis of the Petitioner's claim. In addition to denying that the remark was made, the City argues that the Petitioner cannot show that he suffered some real loss or prejudice at any point during the course of his grievance presentations: "The City's position has been, and always will be, that the Petitioner has not presented any valid claims on reassignment and overtime."

Discussion

The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under both the Railway Labor Act and the National Labor Relations Act (NLRA). The earliest cases were decided under the Railway Labor Act.[6] 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

[6] 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).

representation under the NLRA.[7] The Court, in Vaca v. Sipes,[8] defined the duty of fair representation as:

> the exclusive agent's . . . statutory obliga-tion to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[9]

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."[10] New York State courts imposed a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives under the Taylor Law and related local laws such as the New York City Collective Bargaining Law.[11] In 1990 the State Legislature recognized this judicial doctrine by enacting an amendment to the Taylor Law that codifies the duty of fair representation.[12] The new law makes it an improper practice for an employee organization deliberately to breach its duty of fair representation to public employees, and authorizes the Public Employment Relations Board (PERB) to retain jurisdiction and apportion liability between the union and the employer according to the damage caused by the fault of each in cases where the union has been found to have breached its duty by processing grievances improperly.

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

[8] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[9] Vaca at 177.

[10] Vaca at 190.

[11] 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).

[12] Laws of 1990, Ch. 467, adding new subdivisions 2.(c) and 3. to Section 209-a. of the Public Employees' Fair Employment Act.

A union does not breach its duty of fair representation merely because it refuses to advance a grievance.[13] However, its decision on whether to carry a grievance forward must not be "in bad faith, arbitrary or discriminatory,"[14] or "deliberately invidious, arbitrary or founded in bad faith."[15] 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.[16]

To decide whether the responding parties are responsible for breaching the duty of fair representation owed the Petitioner in this case, there are three particular aspects of his claim that we will focus upon: (1) whether the Union's senior Council Representative had a conflict of interest when he appeared for the Petitioner; (2) whether the Union's grievance investigation was perfunctory and whether the Council Representative prejudiced the Petitioner's position; and (3) whether either of the Petitioner's two grievances had arguable merit.

Union Representative's Alleged Conflict of Interest

The Petitioner questions the senior Council Representative's fidelity

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[13] Decision Nos. B-51-90; 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.

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

[15] Standard narrowly reiterated by the Third Department (CSEA v. PERB and Diaz, 132 A.D.2d 430, 522 N.Y.S.2d 709 [1987]), rejecting 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 standard that it had applied (sub nom. CSEA v. PERB, 73 N.Y.2d 796, 537 N.Y.S.2d 22 [1988]).

[16] Decision Nos. B-51-90; B-27-90; B-9-86; B-15-83; and B-26-81.

because he held a supervisory title and was a member of a supervisory bargaining unit when he appeared at the December 10 grievance/labor-management meeting in Valhalla. Although it is true that the Petitioner's title and the Representative's former supervisory title have been certified for collective bargaining under separate bargaining certifications (see notes 3 and 4), it is also true that District Council 37 is the certified employees' representative for both of them. This being so, the Council Representative's civil service status and his membership in the supervisory unit does not, by itself, evince an inherent conflict of interest. There is no intrinsic reason to deny a member of one certified bargaining unit, who is a supervisor, from holding a position as Council Representative for non-supervisory unit members of another affiliated bargaining unit, or to suspect that such supervisory member will not faithfully protect a grievant's best interest when dealing with the public employer.[17]

Moreover, in this case, there is solid evidence showing that the Petitioner's perception that the Council Representative was or might have been affected by any conflicting interest when he represented the Petitioner is without basis in fact. Anthony Sessa testified that he retired from City employment in March of 1990. The Petitioner did not file his grievances at the first step until October 12, 1990. Thus, the Council Representative had completely severed his employment relationship with the Department some five months before the Petitioner began processing his grievances. In addition, the Representative had been on full-time release from his supervisory position for many years before he retired -- and even if Mr. Sessa had not been on full-time release, as a District Supervisor (Water and Sewer Systems), he would not have been in a position to supervise Laborers in the upstate watersheds. Watershed Laborers are supervised by Supervisor (Watershed

[17] Cf. Decision No. B-5-92 (where we held that it was not improper for a supervisor to hold a union office in a mixed unit of supervisory and non-supervisory employees.)

Maintenance) and District Foreman (Watershed Maintenance). In other words, Mr. Sessa was totally isolated from the Petitioner's chain of command during all times relevant to this proceeding. Thus, although the Union's claim that both Mr. Sessa and the Petitioner were members of the same mixed bargaining unit is at best imprecise, we find no support for the Petitioner's contention that Mr. Sessa's services as grievance representative involved a conflict of interest.

Perfunctory or Prejudicial Grievance Handling

The extent to which a union investigates the basis of its members' grievances generally is an internal union affair. We will not assess the thoroughness of a union's grievance investigation unless the evidence shows that the grievance was treated arbitrarily, perfunctorily, or in bad faith.[18]

In this case, the Petitioner concedes that he initiated his grievances himself. Except for asking the senior Council Representative to set up a labor-management meeting on the same issues, the Petitioner did not once contact the Union to ask for information or assistance concerning the investigation or processing of his grievances. Furthermore, the Petitioner designated himself as the Union representative on his grievance forms, and he testified that he had become the shop steward for his area. In these circumstances, we accept the Union's conclusion that the Petitioner wished to proceed independently, and was capable of preparing for the Step II conference on his own.

The Petitioner had a second opportunity to involve the Union when it made its assistance available going into the Step III hearing, but he again eschewed the offer and chose to continue representing himself. Having steadfastly refused to allow his Union any role in the preparation or presentation of his grievances, the Petitioner cannot now complain that the

[18] Decision Nos. B-27-90; B-9-86; B-15-83; and B-26-81.

Union did not investigate his grievances properly, or that it rendered inadequate assistance in preparing them for the Step II or Step III conferences.

With regard to the prejudicial remark attributed to the senior Council Representative, there is no dispute that the Representative informed the Petitioner that he could not cite a contractual violation to support the Petitioner's grievances. The disagreement focuses on whether the Representative rendered his opinion in front of management's representatives during the December 10 meeting. The Petitioner vividly recalls the Representative publicly stating ". . . and I quote his exact words, 'Then we don't have a grievance,' . . . out loud, everybody heard it." The Representative emphatically denies making the statement: "I would never make that statement in my life." The Department's Director of Labor Relations corroborates the Representative's denial. The only other person present during the December 10 meeting, Patrick Murphy, the Assistant Chief of the Sources Division, was not called as a witness.

The testimony from both sides was equally forceful and credible. However, we need not decide which of the two versions is the more probable or plausible. Even assuming that the Council Representative made the statement ascribed to him in the circumstances described by the Petitioner, it would not necessarily have meant that the Union breached its duty of fair representation. The purpose of a multi-level grievance procedure is to encourage discussion of the dispute at each level in an attempt to resolve the issue at the lower steps.[19] During the course of these discussions, a union has very broad discretion as to the manner in which it vindicates the rights of its members.[20] The senior Council Representative testified that he

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[19] Decision Nos. B-55-89; B-40-88; B-35-88; B-21-84; and B-14-84.

[20] Decision No. B-16-83.

honestly believed that there was no basis for prosecuting the Petitioner's grievances. If he held his belief in good faith, and if he stated it in the effort to reduce the dispute to a point at which it might be resolved, his action was not improper. In addition, we note that, in August 1991, a Step III hearing was held before a Review Officer at the City's Office of Labor Relations. The Department made no claim that the Union had conceded that the Petitioner's grievances were without merit during the Step III proceeding. This would tend to support Mr. Sessa's contention that he never made the statement, or at least that he did not make it in the presence of departmental representatives during the earlier conference. In any case, it demonstrates conclusively that even if the Petitioner's claims as to the incident are perfectly accurate, the incident had no adverse affect upon the Petitioner's interests in the grievance process.

Viability of Petitioner's Grievances

The duty of fair representation requires that, in deciding whether to carry a grievance forward, a union's actions must not be arbitrary, discriminatory, or in bad faith (supra, pp. 27-29). In order to evaluate the Petitioner's allegation that his Union acted arbitrarily in failing to pursue his grievances, it is necessary for us to look at the merits of claims that he raised in his underlying grievances. In this regard, it is not our function to determine the ultimate merit of his grievances. Rather, our limited evaluation of their arguable merit will provide a basis for determining whether the Union's failure to pursue the grievances was arbitrary. If arbitrary action is found, sufficient to constitute a breach of the duty of fair representation, then we will direct that the grievance be submitted to an arbitrator for determination of the ultimate merit of the petitioner's claims.

With respect to his overtime grievance, the bulk of the testimony focused on the assignment of outside crews to work in the Petitioner's district. Even if this transfer of work could be challenged successfully, the Petitioner's complaint that Laborers from the Catskill district had performed work in the East of Hudson district was untimely by many months. Thus, the Union's defense that the transfer of work portion of the Petitioner's overtime grievance was hopelessly untimely is reasonable.

Concerning more recent overtime allocations, the Petitioner failed to provide evidence to refute management's assertion that he had been a high overtime earner. Although the testimony of the Department's overtime analyst indicates that the accuracy of the overtime distribution reports is open to question, these reports, in general, appear to confirm that management did not deprive the Petitioner of the overtime to which he was entitled under Executive Order No. 7. The Council Representative testified that he accepted the accuracy of the overtime earnings report that management showed to him at the December 10 meeting. Even if it could be proved that the report was

somewhat inaccurate, it would establish only that the report was an inaccurate basis for proving that the Petitioner received either less or more than his overtime work entitlement. In the absence of independent proof furnished by the Petitioner during the meeting -- and the Petitioner offered no such proof -- we will not hold the Union culpable for its Council Representative's decision, based upon the information that he had before him at the time, that the Petitioner had no prosecutable overtime grievance.

In his transfer grievance, the Petitioner bases his claim on an alleged past practice, and on one of ten "examples of typical tasks" listed for Group B Laborers in the Comptroller's Determination. The definition of the term "grievance" in the parties' collective bargaining agreement does not include an alleged violation of a past practice. The Petitioner offers no other support to show that a deviation from a past practice qualifies as an arbitrable dispute. Under these circumstances, the decision of the Union's representative not to pursue this grievance cannot be said to be arbitrary.

With respect to the typical task "assist skilled craftsman," this is but one example of the type of work that may be assigned to a Laborer. It is not a required task that all Laborers must perform routinely. A reading of the entire statement of duties and responsibilities for Group B Laborers clarifies this point: "Under direct supervision, performs common laboring work, for which physical strength is required in special services as detailed below [under examples of typical tasks]; performs related work." Thus, it appears that the examples do not limit or define exclusively the nature of a Laborer's duties and responsibilities. Similarly, it is not all that clear that only Laborers may be assigned to shops where skilled craftsmen work. The examples of typical tasks merely make it permissible for the employer to assign Laborers to such duties.

The Department's Director of Labor Relations testified that the judgment to phase out the Laborer title was a high level managerial policy decision. Part of the implementation of that policy included assigning Watershed

Maintainers rather than Laborers to the craft shops. In his grievance, the Petitioner objected to the effect that this policy had on him. The senior Council Representative believed that the Petitioner could not show an arbitrable relationship between an example of a typical task that may be assigned to Group B Laborers according to the Comptroller's Determination, and the Petitioner's complaint that the Department had not acted on his request to be assigned to a craft shop. Management had the right to assign Group B Laborers to craft shops, and apparently had done so in the past. The Petitioner maintains, on the basis of these facts, that he was entitled to such a transfer and that management was obliged to grant his transfer request. It was on this point that the grievant and the Council Representative appear to have differed. We find that the Representative's assessment of the Petitioner's denial of transfer grievance was not arbitrary.

Therefore, based upon the record before us, we do not find that the Union committed an improper practice when it counseled the Petitioner that his grievances seemed to be without foundation, based upon the facts and circumstances of which it was aware. We also find that the Council Representative held no apparent or inherent conflict of interest when he appeared with the Petitioner, and that the Union did not handle the Petitioner's grievances in an arbitrary, perfunctory or prejudicial fashion.

We note, however, that the City has granted the Union an extension of time, pending the resolution of this proceeding, to decide whether to exercise its right to seek arbitration. In the event that additional accurate evidence can be assembled and presented on behalf of the Petitioner concerning the allocation of overtime, the arbitral forum would seem to be an appropriate one in which to test the merits of Petitioner's claim that he has been denied an equitable share of overtime amongst similarly titled employees. However, nothing contained in the decision herein shall be construed as a ruling on the arbitrability of any of the Petitioner's grievances.

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 the Petitioner against the City of New York Department of Environmental Protection and against District Council 37, AFSCME,

AFL-CIO, Local 924, docketed as BCB-1355-91 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
July 29, 1992

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

STEVEN H. WRIGHT
MEMBER