Cunningham v. Dep't of Probation, 51 OCB 15 (BCB 1993) [Decision No. B-15-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

Albert Cunningham, pro se,

Petitioner,

-and-

The New York City Department of Probation,

Respondent.

Decision No. B-15-93
Docket Nos. BCB-1497-92
BCB-1501-92

In the Matter of the Improper Practice Proceeding

- between -

Albert Cunningham, pro se,

Petitioner,

- and-

District Council 37, AFSCME, AFL-CIO,

Respondent.

INTERIM DECISION AND ORDER

On February 22, 1993, District Council 37, AFSCME, AFL-CIO ("the Union") filed a memorandum of law and a notion to dismiss the instant cases and in opposition to their consolidation. The notion to dismiss claims a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The notion in opposition to consolidation claims a violation of due process and of Rule 13.12 of the Revised Consolidated Rules of the office of Collective Bargaining [now RCNY, Title 61, §1-

13(l)].[1] The Union also requests such other and further relief as the Board may deem just and proper.

Background

On June 11, 1992, Albert Cunningham ("petitioner"), pro se filed a verified improper practice petition, docketed as BCB-1497-92, in which he named the New York City Department of Probation as respondent and alleged:

> [o]n 5/7/92 I received a notice and statement of charges from Alfred Siegel, Acting Comm[issioner]. I was ordered to attend an informal conference w/union representative on 5/22/92. I received a notice of determination after informal conference. I did not agree with said recommendation and upon being served with these documents I requested to go for an appeal for a formal conference. I notified Kurt v. Sydow immediately and also on 5/22/92 1 notified my union rep to go forward with Step Two. Union rep relayed she was awaiting date for formal hearing on 5/25/92. On 6/2/92 I received a letter of termination for failure to appeal Step One informal conference decision.

As a remedy, petitioner sought "reinstatement of position at Probation, all back monies due. All time and leave reinstated. Formal letter of apology to go in personnel file."

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[1]RCKY, Title 61 §1-13(l) provides:

> Consolidation or severance. Two or more proceedings may be consolidated or severed by the board on notice stating the reasons therefor, with an opportunity to the parties to make known their positions. For purposes of this subdivision, the term "proceedings" shall include but not be limited to representation, arbitrability, mediation and impasse and improper practice proceedings.

On June 16, 1992, petitioner filed a second improper practice petition, docketed as BCB-1501-92, in which he named the Union as respondent and alleged:

> [f]ailure to represent [me] in out-of-title qrievance procedures in a timely manner. Failure of representation in collective bargaining agreement for litigation and arbitration as cited in the union contract. Failure to pursue harassment allegations and transfer request due to sexual harassment. Failure to provide proper representation in all management disputes. Failure to provide shop steward on premises as cited in union contract.

As a remedy, petitioner sought "review [of] all grievances submitted. Review [of] union's handling of improper termination proceedings. Reinstatement of position held at Probation Department."

The Executive Secretary of the Board of Collective Bargaining reviewed the improper practice petitions and determined that the petition in Docket No. BCB-1497-92 failed to state a cause of action against the employer. She also determined that the petition in Docket No. BCB-1501-92 was sufficient and that the Union should be required to serve and file an answer thereto. Decision No. B-31-92(ES) was issued in Docket No. BCB-1497-92 on July 7, 1992. It states, in part:

> In the instant case, petitioner has failed to state any facts which show that the Department committed any acts which may constitute an improper public employer practice. However, for the reasons stated below, the petition herein will not be dismissed at this time, but will be consolidated with a related petition filed by the petitioner against his Union.
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> In July 1990, the Nev York State Legislature passed a bill concerning claimed breaches of the duty of fair representation [footnote omitted]. This legislation

effected several changes, including an addition to Section 209-a of the Civil Service Law (also referred to as the Taylor law), Section 209-a.3, which provides that:

> The public employer shall be made a party to any charge filed under [the improper employee organization practices section] which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization [emphasis added].

To effectuate Section 209-a.3, Section 205.5(d) of the Taylor Law also was amended to authorize the New York State Public Relations Board ("PERB"), in certain circumstances, to direct the employee organization and the employer to process the employee's claim in accordance with their grievance procedure.[2] Further,

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[2] Section 205 of the Civil Service Law provides, in relevant part:

> 5. In addition to the powers and functions provided in other sections of this article, the board shall have the following powers and functions:
> (d) to establish procedures for the prevention of improper employer and employee organization practices as provided in section two hundred nine-a of this article, and to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article (but not to assess exemplary damages), including but not limited to the reinstatement of employees with or without back pay; provided, however, that except as appropriate to effectuate the policies of subdivision three of section two hundred of this article, the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction ever an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice. When the board has determined that a duly recognized or certified employee organization representing public employees has breached its duty of fair representation in the processing or failure to

(continued...)

Section 205.5(d) authorizes PERB to retain jurisdiction over the matter to apportion any damages assessed as a result of the grievance procedure between the employee organization and the employer. Pursuant to the terms of Section 212 of the Taylor Law,[3] Section 209a.3 and 205.5(d) are applicable to the NYCCBL and its constituent Board of Collective Bargaining.[4]

The above-referenced provisions of the Taylor Law are applicable in the instant case in that the petitioner, on June 18, 1992, filed a verified improper labor practice petition against Local 1070, District Council 37, AFSCME, docketed as BCB-1501-92, in which he alleges that the Union breached its duty of fair representation, in violation of Section 12-306b of the NYCCBL.[5] Specifically, petitioner alleges that the

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(... continued)
process a claim alleging that a public employer has breached its agreement with such employee organization, the board may direct the employee organization and the public employer to process the contract claim in accordance with the parties' grievance procedure. The board may, in its discretion, retain jurisdiction to apportion between such employee organization and public employer any damages assessed as a result of such grievance procedure....

[3]Section 212 of the Taylor law provides, in relevant part, as follows:

> 1. This article, except... paragraph (d) of subdivision five of section two hundred five...section two hundred nine-a ... shall be inapplicable to any government (other than that state or public authority) which,, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this article with respect to the state.

[4]See, Decision No. B-34-91.

[5]Section 12-306b of the NYCCBL provides:

Union failed to represent him in a timely manner in out-of-title grievances; failed to pursue harassment allegations and transfer requests; failed to provide proper representation in all management disputes; failed to provide a shop steward on the premises as required in the union contract, and "failure of representation in collective bargaining agreement for litigation and arbitration as cited in the union contract....”

If the petitioner had not filed a separate claim against the Department, under Section 209-a.3 of the Taylor Law, he would be required to amend his petition against the Union to add the Department. Since the petitioner has filed a separate but related claim against the Department, it would seem to serve no useful purpose to dismiss the petition herein and simultaneously to direct that the Department be made a party to the petition against the Union. The more efficient course, in my view, is to consolidate these two proceedings, and to give the Department an opportunity to respond to those aspects of the duty of fair representation charge which involve its own actions as well as those of the Union. Accordingly, although I find that no legally sufficient independent claim of improper practice has been alleged against the Department, I shall not dismiss the petition. Instead, I hereby give notice that this office intends to consolidate this petition with the petition in the case docketed as BCB-1501-92 for further proceedings....

(continued...)

(... continued)
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 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.

Copies of this decision were sent to the petitioner and the Department on July 8, 1992.

In June 1992, Docket No. BCB-1501-92 Vas assigned to a Trial Examiner. By letter dated July 6, 1992, the attorney for the Union requested an extension of time until August 28, 1992, to file an answer, explaining that she had recently been assigned to the case, that there had been a death in her family, and that she had previously scheduled a vacation during the summer. By letter dated July 8, 1992, the request for an extension was granted.

The Department is appearing by the New York City Office of Labor Relations. On July 17, 1992, the Trial Examiner received a letter from the City's attorney requesting an extension of time of one week in which to file an answer. The letter indicated that a copy had been sent to the petitioner. On July 21, 1992, the Trial Examiner received a letter from the City's attorney asking to amend his request for an extension, and stating:

> [s]ubsequent to my request of July 17, 1992, it has come to my attention that District Council 37, co-Respondent in the Improper Practice Petition, has requested and been granted an extension of time to file its Answer until August 24, 1992.

This letter indicated that copies had been sent both to the petitioner and the Union's attorney.

By letter dated August 3, 1992, the Trial Examiner granted the Department's request for an extension, adding, "[a]s I mentioned in my letter to [the Union's attorney], it is unlikely that further extensions will be granted in this case absent

extraordinary and unforeseen circumstances." Copies were sent to the petitioner and the Union's attorney.

The Department and the Union filed answers on August 24, 1992. The Department's answer was served on the petitioner and the Union. The Union's answer was served on the petitioner and the City. It contained a statement of facts in which it claimed that it had represented the petitioner on numerous occasions and that its representation had been fair, impartial and non-arbitrary. The Union's answer set forth the following affirmative defenses: 1. the petition fails to state a claim upon which relief can be granted because it is devoid of specificity; 2. the petition is devoid of factual allegations relating to bad faith, hostile, arbitrary or discriminatory conduct on the part of the Union; 3. Rule 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining [now RCNY, Title 61, §1-07(e)] requires that a petition be verified, and the petition lacks verification; 4. the Board must defer exercise of its jurisdiction over an improper practice charge which constitutes an alleged contract violation that is subject to final and binding arbitration; 5. an employee cannot bring a cause of action for breach of the duty of fair representation if that employee has not first exhausted his or her remedies provided in the collective bargaining agreement; 6. in a proceeding alleging breach of the duty of fair representation, claims that relate to matters outside of the scope of bargaining

must be dismissed; and, 7. any claims relating to Union conduct that occurred more than four months before the instant petition vas filed with the Board of Collective Bargaining should be dismissed.

Because the petitioner vas appearing pro se, by letter dated September 21, 1992, the Trial Examiner informed him that he was entitled to submit a reply. Copies were sent to the attorneys for the respondents. Although no reply vas received by October 5, 1992, the Trial Examiner determined that a hearing in the case was necessary and scheduled a pre-hearing conference.

The petitioner did not appear at the pre-hearing conference on October 30, 1992. At that time, a discussion took place among the Trial Examiner and the attorneys for the respondents. The Union's attorney expressed her opinion that the case should not go forward to a hearing, and requested that the case be dismissed. In any event, she stated, the City should not have been made a party to the case with the Union.

The Trial Examiner explained that a 1990 amendment to § 209-a.3 of the Taylor Law required that the employer be made a party to the duty of fair representation case against the Union. The Trial Examiner explained that the Executive Secretary of the board of Collective Bargaining had determined that the pleadings in Docket No. BCB-1501-92 were, sufficient and the cases should be consolidated, the Trial Examiner had determined that a hearing was necessary, and the case would not be dismissed. During

approximately twenty minutes of discussion, the Union's counsel never alleged that the Union had not received a copy of Decision No. B-31-92(ES) or the petition in Docket No. BCB-1497-92.

After forty-five minutes, the conference was adjourned. The Trial Examiner stated that she would contact the petitioner to ascertain why he had not appeared and, if his explanation was satisfactory, would schedule another pre-hearing conference. Accordingly, the Trial Examiner wrote to the petitioner on November 18, 1992. Copies of the letter were sent to counsel for the respondents. By letter dated December 12, 1992, the City's attorney inquired about the status of the case, indicating in the letter that a copy had been sent to the Union's attorney. The Trial Examiner subsequently spoke to the petitioner and scheduled a second pre-hearing conference.

All parties were present at the second conference, which took place on January 15, 1993. Also present at the conference were the Executive Assistant to the Chairman of the Board of Collective Bargaining and an intern from Cornell University. The Union's attorney repeatedly expressed her belief that the case should be dismissed. In support of her opinion, she stated that the pleadings were insufficient to put the Union an notice of the charges. During the ensuing discussion, the Trial Examiner ascertained that the Union vas claiming that it had not received a copy of Decision No. B-31-92(ES). The Union's attorney did not refer to the improper practice petition in that case. The Trial

Examiner supplied the Union's counsel with a copy of Decision No. B-31-92(ES), noting that all allegations and the remedy requested in the original petition had been quoted in the decision. The Union's attorney did not request a photocopy of the petition.

The Trial Examiner explained to counsel several times that the case would not be dismissed, for the reasons that the Trial Examiner had given at the first conference in October 1992. The Trial Examiner explained the standard of proof for claims of breach of the duty of fair representation. The Trial Examiner further explained that although the fact that the Union was representing the petitioner in some arbitration hearings could be used by the Union as a defense against the some of the charges, it was not grounds for dismissing all of the charges out of hand.

The Union's attorney stated her intention to move, at the opening of the first day of hearings, that the case be dismissed. She argued that the Union was not on notice as to which incidents related specifically to each of the petitioner's claims. In an attempt to clarify this matter and to address the Union's concerns, the Trial Examiner directed the petitioner to make a concise, written statement of any incidents underlying his petition and to mail it to the Trial Examiner, with copies to the attorneys for the respondents. The Trial Examiner told the petitioner that he need not reiterate any allegations against the Union that were already set forth in his petition. The Trial Examiner cautioned the petitioner that he could base his

allegations only on events which had taken place within four, months of the date on which he filed the petition. The Union's attorney requested an opportunity to file an amended answer upon receipt of the petitioner's clarifications, and the Trial Examiner agreed to the request.

The petitioner complied by sending a letter dated January 20, 1993 by regular mail, directed to the Trial Examiner, with copies to the respondents. The letter stated:

As per your request, I am submitting a brief outline of the charges and dates in question....

1. On 5/4/92 I was written up for smoking although others smoked at the same time.

2. Grievance submitted for out of title work performed from 1-10-92 thru 2-6-92. Also grievance submitted for out of title work from 8/92 thru 1-93.

3. Terminated on 6-2-92 for smoking and non compliance of regulation to follow thru for submission of Step Two formal hearing, although Union was notified to do such on the day decision was made from Step I informal hearing.

4. On several occasions notified Union of disparate treatment and constantly asked for transfer. Dating back to 1990.

5. Rec'd letter of censure 3/13/92 without allegations being proven also had memos to dispute such claim for 1/8/92 incident. Incident for 1/28/92 was also erroneous had written memos to that effect, Union was also aware of these facts.

6. Upon being terminated was asked to sign erroneous evaluation after being dismissed. Former evaluation given to me by supervisor on 2/18/92. Furthermore all previous evaluations were superior or outstanding.

The Union did not file an amended answer.

During the conference, the petitioner asked for assistance in calling witnesses to appear on his behalf. The City's attorney offered to assist the petitioner in having the witnesses released from work in order to testify at the hearing. The petitioner sailed a letter directed to the City's attorney dated January 20, 1993, in which he listed names of witnesses he wished to have appear. Copies of this letter were sent to the Trial Examiner and the Union's attorney.

Hearings in the case are scheduled to take place on April 30th, May 11th and May 18th, 1993. The instant notion to dismiss and in opposition to consolidation was filed by the Union on February 23, 1993. The City does not join the Union in the action.

The Union's Position

The Union states that it was served with the petition in Docket No. BCB-1501-92 on June 26, 1992 and that it answered the petition on August 24,, 1992. It states that on July 7, 1992, a decision was rendered by the Board consolidating Docket No. BCB-2501-92 with Docket No. BCB-1497-92. The Union claims that the petition in BCB-1497-92 has never been provided to the Union, that the Union was not notified of the consolidation before submitting its answer on August 24, 1992, and that the Union was neither placed on notice nor, given an opportunity to make its

position known about the consolidation before it was affected, in violation of Rule 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (now RCNY, Title 61, §1-07(d)].[6] For these reasons, the Union contends, the claims raised by the petitioner relating to allegations in Docket No. BCB-1497-92 should not be considered in the instant matter. Furthermore, the

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[6]RCNY, Title 61, §1-07(d) provides:

> Improper practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of §12-306 of the statute may be filed with the board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the executive secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in §12-306 of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the executive secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the executive secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the executive secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

Union maintains, the decision to consolidate Docket No. BCB-1497-92 with Docket No. BCD-1501-92 must be reversed.

The Union maintains that at the pre-hearing conference held on January 15, 1993, the petitioner was directed to "serve and file" what it characterizes as amended pleadings, and the Union was given leave to respond to this document. The Union claims that what it characterizes as an amended petition was "served on the Union" on January 27, 1993.

The Union maintains that the Board should dismiss the instant petition for lack of jurisdiction. The Union cites Decision Nos. B-59-88, B-60-88, State of New York, 17 PERB 3056 (1984) and § 205.5(d) of the Taylor Law[7] for the proposition that "where an improper practice charge constitutes an alleged contract violation that is subject to final and binding arbitration, the Board must dismiss the charge or defer jurisdiction over it." In the instant case, the Union contends, the claims at issue which constitute contract violations are set forth in paragraphs two and three of what it characterizes as the petitioner's "amended petition" (petitioner's letter of January 20, 1993 to the Trial Examiner). The Union states that the claims in paragraph three of the letter are covered in Article VI §1(g)[8] and §2, Step II[9] of the relevant collective bargaining

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[7]See, footnote 2, supra

[8]Article VI of the collective bargaining agreement between the parties provides, in relevant part:

(continued...)

agreement ("the contract"); and that the claims in paragraph two

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(... continued)
Section 1 - Definition:

The term "Grievance" shall mean:

g. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

[9]Article VI of the collective bargaining agreement between the parties provides, in relevant part:

Section 2.

The Grievance Procedure, except for grievances as defined in sections I(d), 1(e) and 1(g) of this Article, shall be as follows: ...

STEP II An appeal from an unsatisfactory determination at STEP I or STEP I(a), where applicable, shall be presented in writing to the agency head or the agency head's designated representative who shall not be the same person designated in STEP I. The appeal must be made within five (5) work days of the receipt of the STEP I or STEP I(a) determination. The agency head or designated representative, if any, shall meet with the employee and/or the Union for review of the grievance and shall issue a determination in writing by the end of the tenth work day following the date on which the appeal was filed.

of the letter are covered in Article VI § 1(C)[10] and § 2[11] of the contract.

The Union maintains that the claims relating to discharge[12] and out-of-title work from January 10, 1992 through February 6, 1992[13] are pending in the grievance process and subject to binding arbitration. If the arbitrator rules in favor of the union, it maintains, petitioner will be made whole and will have no reason to pursue his claim before the Board. At the minimum, the Union states, in the interest of economy the Board should hold these claims in abeyance pending the outcome of arbitration. The Union cites Republic Steel Corporation v. Maddox[14] for the proposition that any claims raised by the petitioner relating to these pending matters must be dismissed because he has not exhausted his remedies under the contract.

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[10]Article VI of the contract provides, in relevant part:

Section 1. - Definition:

The term "Grievance" shall mean: ...

c. A claimed assignment of employees to duties substantially different from those stated in their job specifications....

[11]Section 2 of the contract provides a grievance procedure culminating in binding arbitration.

[12] Case No. A-4295-92.

[13] OLR File No. 15392.

[14] 370 U.S. 650, 58 LRRM 2193 (1965).

The Union contends that the petition is devoid of specificity,, contrary to well-established case law and Rule 7.5 of the Revised Consolidated Rules of the Office Of Collective Bargaining (now RCNY,, Title 61, §1-07(e)].[15] it claims that the petition fails to state facts upon which to base a charge of broach of the duty of fair representation. The Union states:

> there is not one allegation in all six paragraphs of the amended complaint that sets forth facts stating that the Union acted in bad faith, or in a hostile, arbitrary, discriminatory or deliberately invidious manner. In short, the instant petition should be dismissed for failure to state a claim upon which relief can be granted because paragraphs one, two, four, five and six lack specificity as required by the Board's own case law and rules. Additionally all six paragraphs are devoid of any allegations concerning bad faith or hostile, arbitrary, discriminatory or intentionally invidious conduct.

The Union adds that since the Trial Examiner directed the petitioner to file "amended pleadings" alleging specific facts, the Board should regard the "amended petition, served on January 27, 1993," as constituting the extent of the pleadings in the

instant case. The Union contends, however, that "if the Board considers any of the allegations in the original petition. ..as constituting part of the pleadings it must, nonetheless, grant a dismissal for failure to state a claim upon which relief can be granted."

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[15] RCNY, Title 62, §1-07(e) provides:

> Petition - contents. A petition filed pursuant to §§1-07(b), (c) or (d) shall be verified and shall contain:
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> (1) The name and address of the petitioner;
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> (2) The name and address of the other party (respondent);
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> (3) A statement of the nature of the controversy, specifying the provisions of the state, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
>
> (4) Such additional matters as may be relevant and material.

The Union argues that in order to state a cause of action for breach of the duty of fair representation, the petitioner must bear the burden of proof to demonstrate that his or her union acted in bad faith, or in a hostile, arbitrary or discriminatory manner. The Union maintains that "there is not one allegation in all six paragraphs of the amended complaint that sets forth facts stating that the Union acted in bad faith or in a hostile, arbitrary, discriminatory or deliberately invidious manner."

The Union argues that the Board should dismiss all allegations in the instant petition that relate to matters outside the scope of the contract. It alleges that, in the instant matter, the claim concerning the failure to transfer in "paragraph four of the amended petition" is such a claim. Under the contract, the Union contends, it cannot effect the transfer of an employee, since that is a managerial right. Similarly, the Union maintains, the Board must dismiss claims regarding sexual harassment, the necessity of representing the petitioner in all disputes, and the failure to provide a shop steward at the petitioner's work site. Furthermore, the Union states, the

contract does not contain a "no discrimination" clause and, therefore, the claim regarding disparate treatment must be dismissed.

The Union argues that any claims relating to Union conduct that transpired more than four months before an improper practice petition is initiated must be dismissed, pursuant to Rule 7.4 of the Revised Consolidated Rules of the office of Collective Bargaining [now RCNY, Title, 61, §1-07(d)].

Discussion

At the outset, we will address the Union's contention that the petitioner's clarification of the underlying charges, which he sent to the Trial Examiner in January 1993, constitutes an "amended pleading" which supersedes the original petition and to which it is responding de novo. In the instant motion to dismiss, the Union addresses each paragraph of the letter and depicts it as an independent improper practice charge based on a contractual violation. We note, however, that the petitioner was asked only to write a concise statement of specific incidents as they related to the improper practice charges set forth in the petition. He was told explicitly that it was not necessary for his to repeat the improper practice allegations. This is evidenced by the first paragraph of the petitioner's letter, which states "[as] per your request, I an submitting a brief outline of the charges and dates in question."

The petitioner vas asked to write this document in response to the union's complaint that it could not ascertain which incidents formed the bases of his charges of improper practice. The document vas solicited by the Trial Examiner in an effort to obtain more specific allegations of the bases for the petitioner's claims, so that the Union would have greater notice of the matters with which it vas charged. The Union requested that it be allowed to submit an amended answer and the request vas granted. Instead, it filed the instant notion to dismiss and asks us to deem the petitioner's letter of clarification to be an "amended pleading" containing all of the petitioner's allegations.

We do not agree with the Union that the petitioner's statement of facts, submitted as such at the Trial Examiner's request, constitutes an independent, amended petition, nor do we agree that it supersedes the original pleadings and that the Union should be permitted to respond to it de novo. We deem the petitioner's pleadings to be the original petitions consolidated in Decision No. B-31-92(ES), as augmented by the statement of facts he submitted in January 1992.

The Union's motion also opposes consolidation, claiming violation of its due process rights because it did not have notice of consolidation. When the Union's attorney arrived at the first pre-hearing conference in October 1992, she argued that the cases should not be consolidated. That, together with the

fact that the City attorney's letter of July 22, 1992 indicates that he had discussed the cases with the Union-in July 1992, strongly suggests that the Union)mew of the consolidation before October 1992.

It is true that formal notice of consolidation inadvertently was not served on the Union before the pre-hearing conference was held. Even if the Union had been unaware before October 1992 of our decision to consolidate, however, it was made aware of it at the first pre-hearing conference. It is disingenuous for the Union to oppose consolidation four months later on the sole ground that its due process rights were violated by a lack of timely notice of consolidation. The Trial Examiner gave the Union ample opportunity to submit an amended answer after it learned of the consolidation and after it received the petitioner's written clarification of his claim. Instead, the Union made the instant notion to dismiss. Moreover, the Union has yet to offer any substantive reason why these matters should not be consolidated.

Section 209-a.3 of the Taylor Law requires us to join the City as a party in Docket No. BCD-1501-92.[16] In 1990, the State Legislature passed a bill concerning claimed breaches of the duty of fair representation.[17] It authorized the Public Employment Relations Board ("PERB") to retain jurisdiction and apportion

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[16] Supra, at 3 to 6.

[17] Laws of 1990, Ch. 467.

liability between the union and the employer according to the damage caused by the fault of each in cases here the union has been found to have breached its duty by processing grievances Improperly. For example, even though an employer say not have been responsible for a union's failure or refusal adequately to enforce the contractual rights to which it agreed in the collective bargaining agreement, it still is liable, at least in part, if it is proven that it breached the agreement. Even if the breach could have been mitigated or prevented by prompt and effective action by the employee's representative (i.e., in the absence of the Union's breach of the duty of fair representation), the employer should not be shielded by wrongful union conduct from the natural consequences of its breach.[18] Pursuant to Section 212 of the Taylor Law, the provisions of the 1990 Taylor Law amendments pertaining to the duty of fair representation apply to this Board.

Consolidation of proceedings is authorized under § 1-13(1), Title 61 of the Rules of the City of New York.[19] In consolidating these cases, the Executive Secretary considered that the improper practice claims set forth in both petitions rested on the same facts, involved the same incidents, and likely would require identical witnesses and documents at an evidentiary hearing. The petitions were brought by the same petitioner, both

[18]Decision No. B-4-93.

[19]See footnote 1, supra.

challenged the process which led to the termination of his employment, both referred to the Union's role in that process, and both requested the remedy of reinstatement to his position. Although the Executive Secretary found that the petition in BCB-1497-92 did not state an independent cause of action against the employer, she recognized that it contained allegations which related both to the claim against the Union set forth in BCB-1501-92 and specifically to one of the underlying grievances (the wrongful termination charge) as to which it was alleged that the Union provided inadequate representation.

We consolidate to avoid unnecessary costs or delays when the cases involve a common question of law or fact, and where the parties will not be prejudiced by consolidation. As we stated above, the Union has failed to put forth any reason, other than the technical matter of notice, why we should not consolidate; in fact, it has not argued that it would be prejudiced by consolidation. For these reasons, the notion to oppose consolidation is denied.

In response to the petitioner's original petition in Docket No. BCB-1501-92,[20] the Union filed an answer that contained a statement of facts and presented affirmative defenses.[21] Based on the contents of the petition and the Union's answer, we determined that questions of fact had been presented which

[20]Supra, at 3.

[21]Supra, at 8.

required an evidentiary hearing. We were aware, however, that the Union vas entitled to greater specificity in order to prepare a defense. It was for this reason that the Trial Examiner directed the petitioner to submit a written clarification of the specific incidents underlying his allegations. Taken together, the Petition and the clarification provide the respondents with sufficient notice to proceed to a hearing. The Trial Examiner also allowed the Union to submit an amended answer in response to the petition and clarification. The Union chose, instead, to file the instant notion to dismiss.

It is well-settled that for purposes of evaluating a motion to dismiss, we must deem the factual allegations of the petition to be true and limit our inquiry to whether, taking the facts as alleged, the petition states a cause of action under the NYCCBL.[22] A respondent may not assert facts contrary to those alleged in the petition in support of the notion to dismiss.[23] It is not the function of this Board, in considering a notion to dismiss, to resolve questions as to the credibility and weight to be given to each of two or more inconsistent versions of a disputed factual matter. Those questions are properly determined after an evidentiary hearing is held.[24]

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[22] Decision Nos. B-6-91; B-32-90; B-34-89; B-7-89; B-36-87; B-20-83; B-17-83; B-25-81.

[23] Decision Nos. B-6-91; B-20-83; B-25-81.

[24] Decision Nos. B-6-91; B-20-83; B-25-81.

With regard to the instant notion to dismiss, we deem the moving party to concede the truth of the facts alleged by the petitioner. 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 intendment.[25]

The Union maintains that it was unfairly deprived of its rights because we allowed a petition "devoid of facts" to go forward. As we stated above, we are satisfied that the petitioner has asserted facts sufficient to present a claim cognizable under the NYCCBL. The test of sufficiency is whether the respondent is given notice of the proposed area of inquiry.[26]

Here, the petitioner was directed to submit a clarification of his petition, and did so in a timely manner. Both respondents received copies of the document. The letter of clarification, when read with the original petitions, provides facts sufficient to put the Union on notice of the claims about which evidence will be offered at an evidentiary hearing.

The Union argues that the original petition did not expressly allege that the Union acted in bad faith or in an arbitrary, capricious or otherwise invidious manner. We do not require a petitioner, particularly one who is appearing pro se, to execute technically perfect or detailed pleadings. If a

[25] Decision Nos. B-4-93; B-36-91: B-34-91; B-32-90; B-34-89.

[26] Decision No. B-59-88; see also, Decision Nos. B-46-92; B-78-90; B-28-89; B-56-88; B-20-83.

criterion for viable Improper practice claims were the use of "magic words" such as arbitrary, discriminatory or in bad faith," it is likely that many otherwise valid claims would fall at the first hurdle. In the instant case,, the petitioner claims that the Union failed adequately to represent his with respect to certain identified employment-related matters. It is enough that the petitioner places the respondent on notice of the nature of the claim; our rules require no more at the pleading stage of the proceeding.[27]

The Union is correct in asserting, however, that the petitioner bears the burden of proof when alleging a breach of the duty of fair representation. The petitioner made allegations of improper practice that were disputed by the Union in its answer. In order to prevail, he must prove at a hearing that the Union failed to represent him for reasons that were arbitrary, discriminatory or in bad faith. The purpose of holding an evidentiary hearing is to afford the petitioner an opportunity to present evidence upon which we may make an informed decision. Whether or not the Union believes that affording the petitioner such an opportunity is necessary, or economical, is immaterial; the petitioner is entitled to present his evidence.

The Union contends that the original petition contains no verification and should be dismissed. We find this argument to

[27] Decision Nos. B-21-87; B-8-85; B-23-82.

be without merit because the original petition submitted to the Office of Collective Bargaining was duly notarized.

We consolidated Docket Nos. BCB-1501-92 and BCB-1497-92 for the sole purpose of determining whether the Union violated its duty of fair representation. The Union argues that where an improper practice charge constitutes an alleged contract violation that is subject to final and binding arbitration, the Board must dismiss the charge or defer jurisdiction over it." Section 205.5(d) of the Taylor Law, cited by the Union, clearly states, "the board shall not have the authority to enforce 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" [emphasis added]. The Union appears to base its argument on an assumption that our jurisdiction over a charge of a breach of the duty of fair representation depends on the possibility of resolution of the underlying grievances. Such an assumption is erroneous, and in contradiction of the statute and case law."[28] In an appropriate case, for example, we might find that by its conduct a union

[28]In Herkimer County BOCES Teachers Ass'n v. Herkimer County BOCES, 20 PERB 3050 (1987), PERB held that "[t]he mere act of filing a contract grievance by a charging party which alleges the same facts as an improper practice charge does not necessarily constitute an irrevocable and exclusive election of forums which divests PERB of jurisdiction"; see also, Decision No. B-68-90.

breached its duty whether or not the petitioner prevails in arbitration.[29]

Furthermore, the cases cited by the Union in support of dismissal are inapposite. In each of these cases, this Board or PERB dismissed a claim against an employer because the petitioner alleged a violation of the collective bargaining agreement. In each case, the petitioner was found to have failed to allege an improper practice within the jurisdiction of the Board.

In Decision No. B-59-88, the petitioner sought relief directly from the Board for out-of-title work and "other breaches of the collective bargaining agreement." We refused to exercise jurisdiction over any part of the petitioner's grievance that required interpretation of the collective bargaining agreement. In Decision No. B-60-88, we declined to rule on the petitioner's claim that the employer had violated the collective bargaining agreement, as did PERB when it characterized a petitioner's claim

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[29] If the Union was found to have handled the grievance in a way that was arbitrary, discriminatory or in bad faith, it would have violated its duty of fair representation.
See, e.g., State of New York and Local 418. CSEA. v. Luis Diaz, 19 PERB 3047 (1985), aff'd, 73 N.Y.2d 796t 522 N.Y.S.2d 709 (1988) (Appellate Division, dismissing charges against the Union, examined only its conduct in failing to file a timely petition for arbitration, and did not look to the merits of the underlying grievance) ; Nassau Education Chapter of the Syosset Central School District, CSEA v. Martin Marinoff, 11 PERB 3010 (1978) (rejecting the Union's argument as to the merits of the underlying grievance as "not material to its basic offense of neglect of [its] duty".)

as "a question of contract interpretation which is beyond the jurisdiction of the Board."[30]

The petitioner's statutory cause of action arose at the time that he claims that the union breached its duty of fair representation, and is separate and apart from any claim of a violation of the collective bargaining agreement. The question of whether the employer violated the agreement may be relevant to a defense that the Union determined that the petitioner's grievance was not meritorious, and to the matter of a remedy if a breach of the duty of fair representation is established. It is not a matter which we must resolve at this stage of the proceeding.

In the instant case, we must decide only whether the facts as alleged by the petitioner may be sufficient to establish that the Union may have breached its duty of fair representation, and not whether the employer has breached the collective bargaining agreement. The Union appears to argue that the petitioner may not assert a claim of a breach of the duty unless the underlying merits of the claim have been proven. This issue comes before us on a motion to dismiss, before the petitioner has had an opportunity to present evidence supporting his claims. In addition, the petitioner has presented two different types of

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[30] State of New York (Department of Correctional Services) CSEA, v. Local 655, 17 PERB 3056 (1964).

claims; two are currently proceeding to arbitration, while the balance are not.

As to the two claims which the Union asserts are proceeding to arbitration, the petitioner may have a claim which arose prior to the time that the Union agreed to take the underlying claim to arbitration. The balance of the petitioners& claims are not proceeding to arbitration. Our limited evaluation of their arguable merit will provide a basis for determining whether the Union's failure to pursue the grievance 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 claim.[31]

New York courts recognize the duty of fair representation owed by public sector unions,[32] and have permitted its assertion in state court by public employees.[33] In McClary v. Civil Service Employees Association. Inc.,[34] the plaintiff was held not to have standing to claim a breach of the duty where he alleged that the union breached a general duty to union members; rather,

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[31] Decision No. B-32-92.

[32] Gosper v. Fancher, 371 N.Y.S.2d 28, aff'd, 387 N.Y.S.2d 1007, cert.den'd. 430 U.S. 915 (1975); DeCherro v. Civil Service Employees Assn., 400 N.Y.S. 2d 902 (1977).

[33] Civil Service Bar Association. Local 237. IBT v. City of New York, 485 N.Y.S.2d 227 (1984), 474 N.E.2d 587 (1984).

[34] 520 N.Y.S. 88 (1987).

he had to assert that he was singled out and discriminated against. It in not enough to allege mere negligence,[35] mistake,[36] or incompetence[37] on the part of the union, nor does the union have to pursue every grievance,[38] as long as it can show that such failure or refusal was the result of plain error or a decision not to pursue the grievance on the merits.

Ruzicka v. General Motors Corp.,[39] which has been followed by many jurisdictions and by this Board,[40] holds that negligent handling of a grievance unrelated to the merits of the grievance may be "a clear example of arbitrary and perfunctory handling of a grievance" which would constitute a breach of the duty of fair representation. A union must make good faith and nonarbitrary decisions as to the merits of the grievance; an unexplained failure to do so breaches the duty. Ruzicka v. General Motors, et. al.[41] clarified the first decision, explaining that a union's

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[35] Smith v. Sipe, 487 N.Y.S.2d 153, rev'd for reasons stated in dissenting memo, N.Y.S.2d 134, 493 N.E.2d 237; Shah V. State, 529 N.Y.S.2d 442 (1988).

[36] Trainosky v. Civil Service Employees Association. Inc., 514 N.Y.S.2d 835 (1987); Civil Service Employees Association. Inc. v. PERB, 522 N.Y.S.2d 709 (1987), 537 N.Y.S.2d 22 (1988), 533 N.E.2d 1051 (1988).

[37] Braatz v. Mathison, 581 N.Y.S.2d 112 (1992).

[38] Margolin v. Newman, 520 N.Y.S.2d. 226 (1987).

[39] 523 F.2d 306, 90 LRMM 2497 (6th Cir. 1975).

[40] Decision No. B-16-79.

[41] 649 F.2d 1207, 107 LRRM 2726 (6th Cir. 1981).

failure to act on an employee's grievance is a breach of the duty only when the failure to act results from more than ordinary negligence. The conduct must intend to harm, or evince reckless disregard for the rights of, the individual employee. It also defined an "arbitrary decision" as "one which arises from caprice or is without reason."

In his dissent in Smith v. Sipe,[42] Justice Mahoney wrote:

> Whether the duty of fair representation is breached by mere negligence on the part of the labor organization is a developing area of law. Some courts have extended the duty of fair representation to situations involving mere negligence [Ruzicka v. General Motors Corp.]. However, it appears that a majority of jurisdictions have not extended the duty of fair representation to include a duty of due care on the part of the labor organization which would be breached by mere negligence (citations omitted] ... [I]n those cases where negligence was held to breach the duty of fair representation, the negligent conduct of the union was more significant than incorrect advice (see Ruzicka v. General Motors Corp. [union officials failed to timely file document required by grievance procedure of collective bargaining agreement after twice having been granted extensions]; Jackson v. Regional Tr. Serv., 388 N.Y.S.2d 441 [union officials failed to timely name arbitrator pursuant to grievance procedure of collective bargaining agreement and then failed to timely seek judicial review); McKay v. Smith, 400 N.Y.S.2d 708 [union officials failed to timely file written particulars of grievance)].

The negligence standard was also addressed in Civil Service Employees Association Inc. v. PERB.[43] The court rejected PERB's decision that a failure adequately to train a union

[42] 487 N.Y.S.2d 153, rev'd for reasons stated in dissenting memo, 502 N.Y.S.2d 134 (1986), 493 N.E.2d 237 (1986).

[43] 522 N.Y.S.2d 709 (3rd Dept 1987), aff'd on other grounds, 537 N.Y.S.2d 22 (1988).

representative to file grievances constituted gross negligence, and thus was a breach of the duty of fair representation. It hold that the conduct did not "rise to the level of the arbitrary, discriminatory or bad faith conduct required to establish an improper practice by the Union" and defined the standard of gross negligence as "a showing that the activity, or lack thereof, which formed the basis of the charges ... was deliberately invidious, arbitrary or founded in bad faith...." The court also indicated that perfunctory handling of a grievance could be a basis for an allegation of a breach of the duty.

This Board follows the standards set forth in Vaca v. Sipes.[44] In Decision No. B-16-79, we considered the following criteria to find that the petitioner had presented no evidence of an improper practice:

1. The union's treatment of [petitioner's] case showed no evidence of hostility or neglect.

2. The union's inquiry into the facts and its reasonable interpretation of the pertinent contract language demonstrated that its conduct was not arbitrary.

3. [Petitioner) introduced no proof that the union was in a position to do more for him than it did, or that the treatment afforded him differed in any respect to that received by fellow employees in similar situations.

4. The union did not fail to communicate with [petitioner] as to its handling of the matter.

Before holding an evidentiary hearing, it is not possible for this Board to decide whether the petitioner has shown adequate

[44]386 U.S. 171, 64 LRRM 2369 (1967).

proof of a breach of the duty on one, several or all of his claims.

Regarding the Union's demand that we defer hearings until after arbitration, we note that deferral is discretionary.[45] When a party asks us to defer a charge of improper practice, we must examine the relevant facts and circumstances on a case by case basis and weigh the consequences of deferral. We favor deferral in appropriate cases, notably those where the "dispute in its entirety arises from the contract between the parties" and can be resolved in a manner prescribed by the contract.[46] We do not agree, however, with the Union's contention that, should it prevail in arbitration, the petitioner will necessarily and automatically be made whole for his claims of improper practice. A union's conduct in arbitration may mitigate liability and have a bearing on the eventual remedy, but it does not relieve a union of its liability for any breach of the duty of fair representation which already may have occurred. We find, therefore, that this case does not present circumstances warranting deferral to arbitration.

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[45] Decision Nos. B-57-87; B-3-85; see also, Addison Central School District v. Addison Teachers' Ass'n NEA/NY, 17 PERB 3076 (1984) at 3116, wherein PERB held, "[d]eferral is discretionary and is not usually applied when a violation of § 209-a.1(a) is alleged, as it is here. We are remedying flagrant violations of § 209 ... of the Law."

[46] Collyer Insulated Wire, 192 NLRB 837, 77 L1RRM 1931 (1971); see also , United Technologies Corp., 268 NLRB 557, 115 LRRM 1049 (1984).

Following the precedent set by the decisions of this Board and PERB,, the Now York State courts, and national labor policy,, and for the reasons stated above, we decline to defer jurisdiction over the petitioner's claims regarding the Union's handling of matters which the Union says are pending in the grievance and arbitration process.[47] We find that the claims in question "center upon on entirely different issue,"[48] the issue of alleged improper employee organization practices. "In this sphere" we are "vested with the exclusive, nondelegable jurisdiction to prevent such practices,"[49] and the improper practice provisions of our own statute provide an adequate and appropriate framework for the resolution of the instant controversy.[50]

The Union cites Republic Steel in support of its argument that any claims raised by the petitioner relating to matters pending in the grievance and arbitration procedure must be dismissed because he has not exhausted his remedies under the contract. Section 209-a.3 of the Taylor Law provides, "in applying this section, fundamental distinctions between private

and public employment shall be recognized# and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent." Upon reviewing the case cited by the Union, however, ve find no need to consider whether ve should follow precedent established by the Federal courts; the facts, issues and holding in the cited case are not relevant to the instant case.

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[47] The Union has identified two claims, which it characterizes as contract violations," as pending in the grievance and arbitration process. It is unclear whether all the matters of which the petitioner complains are pending.

[48] City of Albany. et.al. v. Public Employment Relations Board, 395 N.Y.S.2d 502 (1977), aff'd, 404 N.Y.S.2d 343 (1978).

[49] Ibid.

[50] Decision No. B-57-87.

In Republic Steel, the plaintiff was a coal miner whose place of employment vas closed by the employer. Rather than follow the established grievance and arbitration procedure, the plaintiff sued the employer for breach of contract to recover lost wages. He did not file a charge of breach of the duty of fair representation against his union, nor was the union a party to the case. The issues decided by the Court were whether an employee could avoid the grievance and arbitration procedure by suing the employer for breach of contract, and whether state or Federal law applied in the case. The Court held that an employee must first exhaust all remedies against the employer derived from the contractual grievance and arbitration procedure before he or she may proceed in the courts.

We reiterate that the petitioner's cause of action is a statutory one, which arose at the time that he claims that the union breached its duty of fair representation and is separate and apart from any claim of a violation of the collective bargaining agreement. The question of whether or not the

petitioner exhausted his remedies in the contractual grievance and arbitration procedure is irrelevant. The doctrine of exhaustion of contractual remedies is applicable to claims against the employer. Here, the petitioner is not accusing the Union of breaching the contract, but of failing adequately to represent him. The petitioner is pursuing his remedies regarding the separate, statutorily-derived improper practice allegations.[51]

The Union argues that any claims relating to Union conduct that occurred more than four months before the instant petition was filed with the Board should be dismissed. This is correct. It was for this reason that the Trial Examiner explained to the petitioner at the pre-hearing conference that some of his allegations might be time-barred. The petitioner was instructed to include in his clarification only incidents which were the bases of allegations of improper practice that had occurred less than four months after he had originally filed his petition.

The Union contends that any of the petitioner's claims that relate to matters outside of the scope of the collective bargaining agreement must be dismissed. if the Union is referring to the scope of its duty of fair representation, rather than the scope of collective bargaining, it is correct. The duty

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[51] We note that if the Union prevailed in this argument, it is likely that most petitioners' claims for a breach of the duty of fair representation could arguably be time-barred by our statute of limitations before the contract grievances had been resolved.

of fair representation roaches only to the negotiation, administration and enforcement of a collective bargaining agreement and not to every aspect of the employment relationship.[52]

The Union's original argument on this point, in its answer filed in August 1992,, was as follows: Nit is axiomatic that in a proceeding alleging breach of the duty of fair representation, claims that relate to matters outside of the scope of collective bargaining must be dismissed. Therefore, any such claims must be dismissed [citations omitted]." In the petitioner's original petition against the Union, Docket No. BCB-1501-92, he alleged:

> [f]ailure to represent [me] in out-of-title grievance procedures in a timely manner. Failure of representation in collective bargaining agreement for litigation and arbitration as cited in the union contract. Failure to pursue harassment allegations and transfer request due to sexual harassment. Failure to provide proper representation in all management disputes. Failure to provide shop steward on premises as cited in union contract.

All of the allegations to which the Union objects as being outside its duty of fair representation were contained in the original petition, which was served on the Union in June 1992. The Union has augmented its argument to a degree in the instant notion to dismiss. Although it is unusual to encounter such issues at this stage of the proceeding, we will address the Union's objections to the specific allegations.

[52] Decision Nos. B-59-88: B-18-86; B-26-84; B-23-84.

Petitioner alleges that the Union failed to "pursue harassment allegations and transfer request due to sexual harassment." We agree with the Union that transfer is a managerial right which is outside the scope of the union's duty of fair representation.[53] Here, there has been no agreement between the parties to limit management's statutory right to effect voluntary transfers. In addition, there is no provision in the contract for remediation of sexual harassment. The term "grievance," therefore, does not encompass charges of sexual harassment. For these reasons, we will dismiss the petitioner's allegation that the Union breached its duty of fair representation when it failed to pursue his request concerning a transfer because of sexual harassment. Such dismissal is without prejudice to the petitioner's submission of his sexual harassment complaint in some other, appropriate forum.

The Union maintains that "the contract does not contain a 'no discrimination' clause and therefore, the claim in paragraph four relating to disparate treatment must be dismissed. See Exhibit B."[54] The Union appears to assume that disparate treatment is synonymous with discriminatory treatment, but we are not convinced that this is always the case. For example, an

[53]Section 12-307b of the NYCCBL; Decision Nos. B-50-90; B-28-66; B-11-82.

[54]Exhibit B of the Union's notion to dismiss is a complete copy of the contract between the Union and the City on behalf of clerical workers employed by agencies of the City, including the Department.

employee may be treated in an unequal, but non-discriminatory, manner by his employer. In such an instance,, the Union's duty of fair representation could include the duty to represent the employee in a wrongful disciplinary proceeding.[55] Here, the petitioner alleges that he was terminated for smoking, although others who smoked were not terminated. The petitioner's allegation that the Union failed to proceed with his complaint of disparate treatment in connection with his termination may fall within the Union's duty of fair representation; therefore, it will not be dismissed.

In its motion to dismiss, the Union contends that "although the Board should not look at any claims beyond those set forth in the amended complaint, if it considers the claims in the original complaint, those allegations which are set forth in sentence two concerning litigation, in sentence three regarding sexual harassment and transfer, in sentence four regarding the necessity of representing an employee in 'all' management disputes, and in sentence five concerning the 'need to provide a shop-steward (sic)' should all be dismissed since they are related to matters outside the scope of the contract. See Exhibit B."

As we stated above, the duty of fair representation reaches only to the negotiation, administration and enforcement of a collective bargaining agreement and not to every aspect of the employment relationship. The Union maintains that the

[55] See, e.g., Decision No. B-26-92; but see, B-28-89.

petitioner's allegations concerning litigation and representation in all management disputes should be dismissed because they are related to matters outside the scope of the contract. The petitioner has not yet been afforded an opportunity to present evidence concerning these issues. We remind the parties, however, that it is well-established that a union does not breach its duty of fair representation merely because it refuses to process every complaint made by 'a unit member; the law requires only that the refusal to advance a claim be made in good faith and in a manner that is not arbitrary or discriminatory.[56] The Union is not required to represent the petitioner in all litigation, arbitration and management disputes,[57] but we will afford the petitioner the opportunity to present evidence that the Union did or did not process his claims in a manner consistent with the NYCCBL and case law.

The petitioner alleges that the Union breached its duty of fair representation by failing to provide a shop steward at his work site. The Union appears to argue that because this is not a subject covered in the contract, it is not within its duty of fair representation. We have long held that we have no jurisdiction over internal union matters unless it can be shown that such matters affect the employee's terms and conditions of

[56]Decision Nos. B-32-92; B-21-92; 8-35-91; B-56-90; B-27-90; B-72-88; B-58-88; B-50-88; B-25-84; B-2-84; B-12-82.

[57] See, e.g., Decision Nos. B-32-92; B-9-88; B-11-87; B-34-86; B-32-86; B-5-86; B-14-83; B-12-82.

employment or the representation accorded by the union with respect to his or bar employment.[58] The petitioner framed his allegation as a failure to provide shop steward on promises as cited in union contract." Although we are willing to give the petition every reasonable inference, we cannot infer that it claims that by not providing a shop steward, the Union breached its duty of fair representation and that the petitioner's terms and conditions of employment or union representation have been affected by such a breach. We have held previously that:

> [w]hile it might be desirable to have the comprehensive representation sought by the petitioner, in our experience it is not unreasonable to expect that grievances will arise, from time to time, outside the presence of a union representative, and that in such cases, an adversely affected employee will have to comply with management's allegedly erroneous order, and inform the union or submit a grievance at the earliest opportunity thereafter. This is the basis for the well-established maxim, "Obey now, grieve later."[59]

Accordingly, the petitioner's allegation that the Union breached its duty by not providing a shop steward at his work site is dismissed.

The instant motion to dismiss and in opposition to consolidation is granted in part and denied in part. We will not dismiss the petition on the grounds of lack of jurisdiction, nor will we defer jurisdiction. We will not "reverse" the consolidation of Docket Nos. BCB-1501-92 and BCB-1497-92. We

[58] Decision Nos. B-56-91; B-26-90; B-23-84; B-18-79; B-1-79.

[59] Decision No. B-53-87, at 7.

will dismiss only the allegations which ve find to be outside the Union's duty of fair representation: the allegations regarding sexual harassment and transfer and failure to provide a shop steward. We find that in regard to all other allegations, the petitioner has stated an arguable claim for which relief may be granted.

INTERIM ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law it is hereby,

ORDERED, that the notion to dismiss the instant improper practice petition by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; except that the claims of "failure to pursue harassment allegations and transfer request due to sexual harassment" and "failure to provide shop steward on premises as cited in union contract" are dismissed.

Dated: New York, New York
April 8, 1993

MALCOLM D. MACDONALD
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GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME JOSEPH
MEMBER

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MEMBER

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