

Turner v. COBA, 51 OCB 44 (BCB 1993) [Decision No. B-44-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper  
Practice Proceeding

- between -

OSCAR E. TURNER,

Petitioner,

- and -

THE CORRECTION OFFICERS BENEVOLENT  
ASSOCIATION,

Respondent.

Decision No. B-44-93  
Docket Nos. BCB-1587-93  
BCB-1588-93

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In the Matter of the Improper  
Practice Proceeding

- between -

OSCAR E. TURNER,

Petitioner,

- and -

THE NEW YORK CITY DEPARTMENT  
OF CORRECTIONS,

Respondent.

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**DECISION AND ORDER**

\_\_\_\_\_ On June 18, 1993, Oscar E. Turner ("the petitioner") filed an improper practice petition, Docket No. BCB-1587-93, against the Correction Officers Benevolent Association ("the Union"). On the same day, the petitioner filed another improper practice petition, Docket No. BCB-1588-93, against the New York City Department of Corrections ("the City"). The petitions, which are

identical in content, allege that the Union breached its duty of fair representation. The Union and the City filed answers on July 9, 1993 and July 19, 1993, respectively. The petitioner did not file a reply to either answer.

The above-described petitions have been consolidated for decision herein as they involve the same parties, events and underlying factual circumstances.

### **Background**

In his improper practice petitions, the petitioner makes the following allegations:

The Union COBA, as my designated representative failed to act in good faith on my request for representation on February 3, 1993. I contacted Stan Israel of the union and he failed to respond to my requests for assistance. I also contacted Lenny Holmes and he failed to do his job. I was terminated from my employment as a Correction Officer with the [D]epartment on February 3, 1993. The union's actions are in violation of N.Y.C. Collective Bargaining Law, [Section 12-306b].

The Union, in its answer, offers a different account. According to the Union, the petitioner, who was a probationary employee, did contact the Union on February 3, 1993 seeking assistance with his termination. However, the Union alleges that it responded to the request by referring the petitioner to the law firm that serves as its general counsel. On the same day, the petitioner met with a representative of the law firm to discuss his termination. Thereafter, the case was assigned to an

attorney associated with the firm. The attorney prepared a Notice of Petition and Petition for an Article 78 proceeding challenging the termination, and scheduled a time for the petitioner to review and sign the documents. When the petitioner arrived to review the documents, he informed the associate that he had retained another firm to represent him and would no longer need her firm's representation. The associate contacted the firm that the petitioner had retained to confirm their representation of the petitioner. After receiving confirmation, she closed the file.

### **POSITIONS OF THE PARTIES**

#### **Petitioner's Position**

Petitioner contends, in essence, that the Union breached its duty of fair representation because its officers failed to respond to him concerning his requests for representation.

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

The Union argues that it did not breach its duty of fair representation since its conduct was not arbitrary, discriminatory or in bad faith. The Union maintains that it treated the petitioner in the same manner that it treats all bargaining unit employees terminated during their probationary periods; through its counsel, it reviews the merits of the case and determines whether an Article 78 challenge would be

appropriate. In the case of this petitioner, the Union asserts, its attorneys had prepared a Notice of Petition and Petition under Article 78 and were prepared to file them, when they were informed that the petitioner had obtained independent representation.

### **City's Position**

The City maintains that, barring a determination by the Board of Collective Bargaining that it must retain jurisdiction over the City as a party to an allegation that a Union has breached its duty of fair representation, this petition should be dismissed. The City argues that the petition fails to allege facts that would constitute a violation, by the City, of Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL").

Furthermore, the City argues, should petitioner's claim against the Union be sustained, the City bears no responsibility for any damage incurred by the petitioner.

### **DISCUSSION**

The duty of fair representation balances the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right.<sup>1</sup> It is the duty of a union, under this doctrine, to act fairly toward

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<sup>1</sup> Decision Nos. B-5-91; B-51-90.

all employees that it represents without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.<sup>2</sup> A breach of the duty occurs when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.<sup>3</sup> When alleging a breach of the duty of fair representation, the petitioner bears the burden of proof.<sup>4</sup>

The OCB rules provide that "additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."<sup>5</sup> Since the petitioner did not file a reply, the additional facts alleged by the Union in its answer must be deemed admitted. Under these circumstances, we find that the petitioner has not proved that the Union failed to represent him for reasons that were arbitrary, discriminatory or in bad faith. On the contrary, based upon the facts alleged by the Union, the petitioner was afforded the same representation received by other similarly situated employees, i.e., he was referred to counsel, his case was reviewed by counsel, and a petition for an Article 78 challenge was prepared. Further action was not taken only

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<sup>2</sup> Decision No. B-29-93, quoting from Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

<sup>3</sup> See, Decision No. B-5-91.

<sup>4</sup> Decision No. B-15-93.

<sup>5</sup> 61 RCNY §1-07(i)

because the petitioner retained other representation. Under these circumstances, we cannot find that the Union's discontinuance of its representation of the petitioner was arbitrary, discriminatory, or in bad faith.

Accordingly, the petition must be dismissed.

**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 of Oscar E. Turner be, and the same hereby is, dismissed.

DATED: New York, New York  
October 19, 1993

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Malcolm D. MacDonald  
CHAIRMAN

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George Nicolau  
MEMBER

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Daniel G. Collins  
MEMBER

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Thomas J. Giblin  
MEMBER

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Steven H. Wright  
MEMBER

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