

Harmon v. PBA, 51 OCB 49 (BCB 1993) [Decision No. B-49-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

DECISION NO. B-49-93
DOCKET NO. BCB-1435-91

-between-

CALVIN HARMON,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On November 8, 1991, Calvin Harmon ("Petitioner") filed a verified improper practice petition against the Patrolmen's Benevolent Association ("PBA"). The Petitioner alleged that the PEA failed to support Petitioner "in [a] legal challenge to the charges of wrongful ingestion of cocaine, in the form of financial relief." On December 9, 1991, the PEA moved to dismiss the improper practice petition. The Petitioner filed a response to the motion to dismiss on December 13, 1991. On May 19, 1992, the Board issued Decision No. B-26-92 denying the motion to dismiss and ordering the PBA to file an answer. The PBA filed an answer on June 5, 1992; the Petitioner filed a reply on June 11, 1992. A hearing was held before a Trial Examiner designated by the Office of Collective Bargaining on October 5, 1992. Thereafter, the Petitioner filed a post-hearing brief on November 25, 1992 and the PBA filed a post-hearing brief on December 14, 1992.

BACKGROUND

The Petitioner alleges that the PBA did not provide him with funding for legal counsel of his own choosing when he defended himself against charges of "wrongful ingestion of cocaine." The Petitioner was suspended after testing positive on a random drug test. After becoming dissatisfied with the representation provided him by the law firm retained by the PBA, Lysaght , Lysaght & Kramer, the Petitioner sought private counsel. The Petitioner paid the private counsel and requested reimbursement from the PBA. A legal committee of the PBA denied Petitioner's request for funding.

EVIDENCE

Petitioner's Evidence

Petitioner testified on his own behalf at the hearing. The Petitioner argued that the PBA's constitution and by-laws entitled him to reimbursement for the legal fees he paid to a private attorney. He noted that Article VI, Section 1 of the PBA Constitution, which explains the Legal Assistance Program, does not refer to a specific legal services program, but states only that two dollars per month will be added to a member's dues in order to provide for one. Thus, he contended that legal representation should be provided free of charge, regardless of whether a member uses the PBA's retained law firm, Lysaght, Lysaght & Kramer, or a private attorney. He further claimed that Article VI, Section 2(d)

affords a member a choice to be represented by Lysaghts, Lyzaght & Kramer or a private attorney.

Petitioner also contended that he met the requirement for entitlement to reimbursement contained in the PBA's constitution and by-laws. The PBA's constitution and by-laws state that a member must act within his duties as a Police officer in order to be entitled to reimbursement. Petitioner argued that he met this requirement, as he was ordered to appear for a drug test within his duties as a police officer and was innocent of the charges which resulted from the test. Petitioner claimed that the Law Committee should approve reimbursement when a police officer contends that a positive test result was caused by something other than drug use.

Petitioner argued that a letter dated February 27, 1991 from Neil Cohen, Esq., of Lyzaght, Lysaght & Kramer also demonstrated his entitlement to reimbursement. The letter stated that Mr. Cohen was the attorney assigned by the firm to represent the Petitioner in his disciplinary matter. Petitioner contended that the letter demonstrated a decision by the PBA that he be afforded representation in a disciplinary proceeding based upon his alleged drug use. Thus, Petitioner contended that the PBA breached its duty of fair representation when the Law Committee later denied reimbursement for the private attorney Petitioner retained to defend himself on this charge.

Petitioner similarly contended that paragraph 7 of the PBA'S answer, which states that "Petitioner was eligible to receive legal

representation free of charge, from the PBA, for his defense at the disciplinary tribunal and in further appropriate Court proceedings," demonstrated his entitlement to reimbursement. In addition, Petitioner argued that a letter he received from Raymond Kerno, Exq., an attorney at Lysaght,, Lysaght & Kramer, dated September 2, 1992, supported his claim. Referring to a statement in the letter that "No formal minutes were taken [at the] meeting [of the Law Committee] at which your application [for reimbursement] was discussed," Petitioner contended the statement suggested that the Law Committee did not deliberate regarding his request for reimbursement. Referring to a handwritten document submitted an evidence at the hearing containing dates, names, amount requested and amount received, Petitioner noted that the document had no date and had "the appearance of a makeshift device" (Tr. 24). Petitioner also disputed the amount indicated on the document,, stating that the amount requested was greater than reflected.

Petitioner further argued that the case of Police Officer "X"¹, who also challenged the discipline imposed upon him when he tested positive for drug use, supported his claim. However, Petitioner noted, Officer "X" was represented in his disciplinary proceeding by an attorney from Lysaght, Lysaght & Kramer, the law

¹ The Petitioner identified the Officer in question. The officer's name is not used herein since the Board is not aware of the ultimate disposition of the disciplinary charges brought against him. For the purposes of this Decision, he is referred to as Officer "X".

firm retained by the PBA. Petitioner acknowledged that the PBA does not dispute that it will provide counsel free of charge through its retained law firm when a member is involved in a disciplinary proceeding as a result of a positive drug test. Accordingly, the Petitioner contended that members defending against similar charges who choose to be represented by their own private counsel should be reimbursed by the PBA for their legal expenses.

On cross-examination. Petitioner testified that he received charges and specifications alleging that he ingested a controlled substance. Petitioner acknowledged that the charges did not involve his refusal to take the drug test, nor a failure to obey an order; the charges alleged he was in possession of cocaine and that he ingested cocaine. Petitioner stated that two days after he was suspended he had a consultation with an attorney from Lysaght, Lysaght & Kramer, the law firm retained by the PBA. Petitioner admits that he had a disagreement during this consultation with the PBA attorney, resulting in his opting to retain private counsel. Tr. 32-33.

Petitioner testified that Lysaght, Lysaght & Kramer did not deny him legal assistance and that he received a letter from that firm stating that an attorney had been assigned to represent him. Petitioner testified that he has no evidence that the attorney assigned to him by Lysaght, Lysaght & Kramer was not qualified counsel.

Petitioner testified that he was aware the PEA retained Lysaght, Lysaght & Kramer in order to provide members of the PBA with legal assistance, but that he was not aware of the exact type of legal assistance available. He stated that he was informed about the Legal Assistance Program through a PBA delegate. Petitioner testified that the delegate told him in order to use outside counsel he must submit a 0490 to the Law Committee with a detailed description of the bill and that the Law Committee at a meeting decides the amount of funds, if any, to be given.

Petitioner stated that the basis of his request for another firm was personal preference. Petitioner further stated that he had "no idea" (Tr. 47) whether others similarly situated to himself received reimbursement from the Law Committee.

Petitioner suggested that the denial of his claim was based upon letters he had written to PBA officials critical of their attitude toward minority members and community people. Petitioner concluded that "there must have been some other reason, other than a legitimate reason for me not receiving benefits" (Tr. 49) because the PBA never responded to his request for reimbursement.

PBA's Evidence

Joseph Dwyer, who holds a position in the PBA as Brooklyn South Financial Secretary, testified for the PEA. Mr. Dwyer is also cc-chairman of the Law Committee. Mr. Dwyer testified that all members of the PBA receive legal assistance through the PBA's

retained law firm, Lysaght, Lysaght & Kramer. According to the witness, this representation is provided when members contest administrative violations, including disciplinary matters, and for criminal allegations until arraignment. Mr. Dwyer testified that, in deciding whether to afford a member representation, on-duty and off-duty conduct are distinguished. Mr. Dwyer stated that a positive result on a drug test is considered off-duty conduct. However, Mr. Dwyer noted, the PBA does provide representation when a member is involved in a disciplinary proceeding as a result of a positive drug test through its retained law firm, Lysaght, Lysaght & Kramer. When Mr. Harmon questioned Mr. Dwyer about how the committee can decide "whether [an incident is] on or off-duty without deciding whether it has occurred?" (Tr. 59), the witness responded that the Law Committee decided Mr. Harmon's conduct was not in the line of duty based on the charge against him and his application for relief. Mr. Dwyer admitted there was no evidence proving that Mr. Harmon used drugs,, only an allegation he did.

The witness testified that the PBA will provide reimbursement "[s]trictly after it's been determined that a conflict of interest exists" (Tr. 56). The witness elaborated that in a case of conflict of interest a member would be entitled to reimbursement, but not if the member simply chose private counsel. Mr. Dwyer testified that it was determined that Mr. Harmon was not entitled to any reimbursement. The witness noted that Mr. Harmon was offered counsel through Lysaght, Lysaght & Kramer and could have

been represented by that firm without a conflict of interest; instead, Mr. Harmon chose outside counsel. The witness concluded Ar. Harmon I s claim was denied because "preference for another counsel" (Tr. 59) is not a, claim for which reimbursement is provided.

Mr. Dwyer testified that Mr. Harmon first communicated with the PEA about reimbursement on June 10, 1991; Mr. Harmon also wrote to PBA President Caruso on October 15, 1991 and communicated with the Legal Committee by letter on January 2, 1992. Mr. Dwyer stated that Mr. Harmon's request for reimbursement was tabled in October 1991 because the law Committee did not have the communication. The witness testified that the request was considered at the Law Committee's subsequent meeting in January 1992.

POSITIONS OF PARTIES

Petitioner's Position:

Petitioner contends that he presented un rebutted evidence and arguments establishing his entitlement to reimbursement. Petitioner claims that no challenge was made to his case, thus establishing the truth of his evidence and arguments.

Petitioner argues that Mr. Dwyer in his testimony contradicted the reason set forth in the PBA's answer for the denial of his claim. Whereas the answer indicated the reason for the denial was that the conduct did not occur in the line of duty, Petitioner

claims Mr. Dwyer disavowed any connection with the said basis for denial." Petitioner argues that Mr. Dwyer's repudiation of the PBA's stated reason demonstrates improper conduct by the PBA. Moreover, according to Petitioner, any explanation was belatedly given. Thus Petitioner contends that the PBA was unable to present any credible evidence or arguments disposing of Petitioner's claim or in defense of the reason offered in its answer. Since the reason set forth in the answer was disavowed by Mr. Dwyer on the stand, Petitioner argues it was a creation of counsel and that no reason has ever been given by the Law Committee.

Petitioner contends that all argument raised by the PEA is personal opinion, not evidence. Petitioner claims he has been characterized by the PEA as a drug user, despite the fact that the PRA's own witness stated there was no proof of this accusation. Petitioner contends that this characterization supports his claim for relief because it demonstrates the PBA considered him guilty.

Petitioner contends that the PBA committed an improper practice by not properly considering his request, unreasonably denying it, and providing belated justification for its actions.

PBA's position:

The PBA notes that Petitioner, a former New York City Police Officer, was served with disciplinary charges and specifications in connection with a positive reading on a randomly administered

drug test. According to the PBA, Petitioner was contacted by the law firm retained by the PBA,, Lysaght,, Lysaght & Kramer, which represents members in disciplinary proceedings. The PBA claims that after being offered union counsel, Petitioner declined to avail himself of such representation. According to the PBA, Petitioner, after rejecting union counsel and opting to obtain private counsel, is now asking the PBA to reimburse him for his legal fees. The PBA argues that as the Petitioner's claims are without basis, the instant proceeding should be dismissed.

The PBA explains it arranges for the legal representation of its members in matters concerning on-duty conduct. This representation includes providing legal defense to members who are charged with violating the administrative rules of the Police Department. The PBA explains that its "Legal Assistance Plan" is utilized mostly for instances of minor infractions of the Police Department's Patrol Guide. However, legal defense is also provided when a member is charged with a serious crime arising from the performance of an official duty. The PBA explains that "[t]he mere fact that an incident occurred on duty is not solely dispositive as to whether or not the concerned member will receive the benefit of the Legal Assistance Plan" (PBA Br. at 4). The PBA notes that in order for a member to be eligible for the benefit of the Legal Assistance Plan, the incident giving rise to the necessity for counsel must occur in the performance of official duties. However, if a member while on duty commits a willful criminal act, s/he is

not covered under the Legal Assistance Plan.

The PBA notes that in the instant case the Petitioner acknowledged he conferred with a PEA attorney,, whose services he later declined. Referring to Article VI , Section 2 (d) of the PBA's constitution,, the PEA contends it adhered to its mandate to provide legal representation to the Petitioner. In support of this contention, the PEA notes that the Petitioner himself acknowledged that he conferred with a competent attorney provided to him as part of the PBA's Legal Assistance Plan. The PBA argues that the "Petitioner has sought to infuse his own interpretation of the Respondent's constitution and bylaws when he sought reimbursement for those legal expenses he unilaterally incurred in the defense of an administrative violation which did not arise within the scope of his official duties" (PBA Br. at 5). The PBA argues that the use or unlawful possession of a controlled substance is not related to the official duties of a police officer.

The PBA further contends that there is nothing in its constitution which provides for payment of a member's legal defense fees in the event that the member is displeased with the counsel provided by the PBA's Legal Assistance Plan. Responding to Petitioner's allegation that the denial of his claim for reimbursement was arbitrary, capricious or in bad faith, the PBA explains that the Law Committee was established to deal with cases of conflict of interest -- for example, when two or more members are involved in the same incident and separate counsel is needed

for each. In such a case, the Law committee reimburses an appropriate amount to the member who retains outside counsel. The PBA states that Petitioner's case did not involve a conflict of interest, requiring counsel other than the law firm retained by the PBA. The PBA also argues that the Petitioner presented no evidence in support of his allegation that another member similarly situated was provided with funds to retain counsel of his choice.

DISCUSSION

Petitioner, a former New York city Police officer, was served with disciplinary charges and specifications after testing positive on a randomly administered drug test. Lysaght, Lysaght & Kramer, the law firm retained by the PBA, represents members involved in disciplinary proceedings. After meeting with an attorney from Lysaght,, Lysaght & Kramer, Petitioner opted to retain his own private counsel. He subsequently requested reimbursement from the PBA for his legal fees. Petitioner alleges that the PBA is in breach of its duty of fair representation because it has failed to reimburse Petitioner for his legal fees.

The PBA provides legal representation to its members free of charge an matters within the scope of their employment through its retained law firm, Lyzaght, Lysaght & Kramer. There is no dispute that Petitioner was able to avail himself of this representation: he received a letter stating that a PBA attorney had been assigned to represent him in his disciplinary proceeding; he not with this

attorney and admits that this attorney was "qualified counsel" (Tr. 37). Petitioner argues that because the PBA provides counsel free of charge through its retained law firm when a member is involved in a disciplinary proceeding as a result of a positive drug test, members, defending against such charges who choose to be represented by their own private counsel should be reimbursed by the PBA for their legal expenses.

Section 209-a.2(c) of the Public Employees' Fair Employment Act ("Taylor Law") makes it an improper practice for an employee organization "to breach its duty of fair representation." In accordance with §212 of the Taylor Law, this Board must enact provisions and procedures which are "substantially equivalent" to those of the Taylor Law. Section 12-306b of the NYCCBL², which identifies union improper practices, has been construed by the Board as prohibiting violations of the judicially recognized duty of fair representation doctrine. The duty of fair representation doctrine requires a union to treat all members of the bargaining unit in an evenhanded manner and to refrain from arbitrary,

²Section 12-306b states as follows:

It shall be an improper practice for a public employee organization or its agents: (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so; (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

discriminatory and bad faith conduct. It is well settled that a union breaches its duty of fair representation when it acts arbitrarily, discriminatorily, or in bad faith.³

Although the Board of collective Bargaining clearly has jurisdiction to remedy a breach of a union's duty of fair representation, we do not have jurisdiction to inquire into internal union affairs or to remedy a claimed violation of a union's constitution and bylaws.⁴ We have stated that the duty of fair representation is coextensive with a union's exclusive authority to deal with the employer on behalf of bargaining unit employees.⁵ To the extent that a union's status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, such as negotiation with the employer, the union owes a duty to represent fairly the interest of the individual employee. However, the duty of fair representation does not reach into and control all aspects of the Union's relationship with its members.

In the instant case,, Petitioner argues that the PEA should reimburse a member who retains private counsel in contesting charges of drug use, even though the PBA will provide free representation to members who contest the same charges through

³ Decision Nos. B-56-90; B-51-90; B-27-90 B-72-88; B-25-84; B-13-82.

⁴ Decision Nos. B-27-90; B-26-90; B-9-86; B-23-84; B-18-84; B-15-83; B-1-81; B-18-79; B-1-79.

⁵ Decision No. B-23-84.

representation provided by Lysaght, Lysaght & Kramer. The Petitioner points to inconsistencies in the PBA's constitution and by-laws, which he argues support his claim. In making this claim, Petitioner is, in essence, asking this Board to expand the duty of fair *representation doctrine to include alleged violations of a union's constitution and by-laws. This we cannot do.

In the Interim Decision and Order in this matter, Decision No. B-26-92, we determined that construing the allegations in a light most favorable to the Petitioner, Petitioner stated an arguable claim that the PBA breached its duty of fair representation. We based this conclusion upon Petitioner's allegations that another member charged with the same offense received reimbursement for his legal fees and that the PBA was retaliating against Petitioner because of his advocacy on behalf of minority members of the PBA.

The parties agreed at the hearing that the member Petitioner was referring to in his improper practice petition was Officer "X". Neither party disputed that Officer "X" paid no legal fees when contesting disciplinary charges based on alleged drug use because Officer "X" was represented by the law firm retained by the PBA, Lysaght, Lysaght & Kramer. Thus, Petitioner and officer "X" were not similarly situated, as Petitioner used private counsel in contesting his disciplinary charges and Officer "X" used the PBA's retained law firm. In addition, there is no dispute that both officer "X" and Petitioner were afforded the opportunity to use counsel provided by Lysaght, Lysaght & Kramer; Petitioner, having

not with an attorney from Lysaght, Lyzaght & Kramer, opted to retain his own private counsel. Accordingly, there is no evidence that the treatment of Petitioner was in any way arbitrary, capricious or in bad faith.

At the hearing, Petitioner argued that the distinction between Officer OX". who was represented by Lysaght,, Lysaght & Kramer, and himself was irrelevant because the PBA's constitution and by-laws entitled him to reimbursement. Petitioner noted that the constitution and by-lava state that legal assistance is available to defend actions of Police Officers which occur "in the line of duty." Petitioner contended that he reported for a drug test in accordance with his duties as a Police Officer, but that the results falsely read positive. Thus, he argued that the PBA could not deny him benefits on the basis that he did not act within his duties as a Police Officer, since he reported for the test as instructed and maintained he was innocent of the charges that resulted from the test. In addition,, Petitioner argued that in order to deny him funding for not acting within his duties as a Police Officer the PBA had to first determine that he was guilty of the act with which he was charged. Petitioner also noted that the constitution and by-laws mention only one legal program; thus, the Petitioner maintained that the PBA could not have separate rules for members who contest charges through privately retained counsel, rather than through Lyzaght, Lysaght & Kramer. Petitioner cited Article VI . Section 2 (d) of the PBA constitution and bylaws

in support of his argument that members may choose their own counsel.

Petitioner,, in these arguments, alleges violations of the union's constitution and by-laws. Matters relating to a union's governance of itself are generally regarded as internal union affairs.⁶ Accordingly, this Board has not asserted jurisdiction over alleged violations of a union's constitution and by-laws, finding that they relate to a union's internal governance of itself.⁷

For example, in Decision No. B-23-84, we found an internal union matter to be involved when several Petitioners alleged that an amendment to the union's constitution,, which had the effect of changing the term of office of the Union's elected officers from two years to four years, was invalidly adopted. Similarly, in Decision No. B-15-83, we determined that a Petitioner's allegation that his union failed to hold monthly meetings in violation of its constitution was an internal union matter. Accordingly, in both of these decisions, the Board declined to find a violation of the duty of fair representation, noting that the doctrine does not

⁶ See, e.g., Decision No. B-26-90 (Board found that a Petitioner's allegation that the PBA had breached its duty of fair representation by soliciting contributions to a memorial fund and printing the names of those who did not contribute in the PBA newsletter was an internal union matter not subject to the Board's jurisdiction). The Board regularly declines to exercise jurisdiction over internal union matters. See, e.g., Decision Nos. B-27-90; B-9-86; B-23-84; B-18-84; B-15-83; B-1-81; B-18-79; B-1-79.

⁷ Decision Nos. B-23-84; B-15-83.

extend to internal union matters. In declining to exercise jurisdiction over this aspect of the instant matter, we note that neither the New York City Collective Bargaining Law ("NYCCBL") nor the Taylor Law regulate the internal affairs of unions.⁸

For all of the reasons stated above, we find that the Union did not breach its duty of fair representation when it refused to reimburse Petitioner for his legal fees. Petitioner did not demonstrate that the PBA's treatment towards him was arbitrary, capricious and in bad faith by comparing himself to Officer "X" because Officer "X" was not situated similarly to Petitioner. Moreover, Petitioner's claim that the PBA, in refusing to reimburse his, violated its constitution and by-laws may not be addressed by this Board, which does not have jurisdiction to remedy internal union matters.

Furthermore, Petitioner provided no facts in support of his allegation that the PEA was retaliating against him because of his advocacy on behalf of minority members of the PEA and minority community members. Petitioner's suggestion that "there must have been some other reason, other than a legitimate reason" (Tr. 49) for his not receiving reimbursement, is not, in absence of supporting factual allegations, sufficient evidence of retaliation.

To the extent that Petitioner argued that delay and the lack of a formal response to his request for reimbursement indicated arbitrary, capricious and bad faith conduct on the part of the PBA,

⁸ See Decision No. B-26-90 and the cases cited therein.

we note that we have not found a breach of the duty of fair representation to exist based solely on delay⁹ or the lack of formality of a response.¹⁰

For the reasons set forth above, we will dismiss the petition herein.

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 Calvin Harmon is denied.

Dated: November 23, 1993
New York, New York

MALCOLM D. MacDONALD
Chairman

GEORGE NICOLALU
Member

CAROLYN GENTILE
Member

STEVEN WRIGHT
Member

⁹ Decision No. B-31-91.

¹⁰ Decision No. B-21-93.