Miller v. Sewage Treatment & L.1320, SSTW, 53 OCB 21 (BCB 1994) [Decision No. B-21-94 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between- DECISION NO. B-21-94

KIAH MILLER, DOCKET NO. BCB-1635-94
Petitioner,
-and-

SEWAGE TREATMENT AND SENIOR
SEWAGE TREATMENT WORKERS,
LOCAL 1320,
Respondent.
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DECISION AND ORDER

On February 8, 1994, Kiah Miller, pro se (the "Petitioner"), on his own behalf and on behalf of "several of the New York City Sewage Treatment and Senior S.T.W.'s" filed a verified improper practice petition against Local 1320, Sewage Treatment Workers and Supervisors ("the Union"), an affiliate of District Council 37, AFSCME, AFL-CIO. The petition alleged that the Union did not represent its members properly during contract negotiation and ratification, thereby violating their statutory rights under Section 12-306b. of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] NYCCBL §12-306. provides, in pertinent part, as follows:
Improper practices; good faith bargaining.
b. Improper public employee organization practices.
It shall be an improper practice for a public employee organization or its agents:
(1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in [§12-305] of this chapter, or to cause, or attempt to cause, a public employer to do so;
(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

The Union, by District Council 37, filed its answer on March 25, 1994. The Petitioner, now represented by counsel, filed a reply on May 3, 1994.

On May 18, 1994, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing commenced and concluded on June 15, 1994. Witnesses testified under oath. As prearranged, the parties submitted posthearing briefs on August 12, 1994. Thereupon, the record was closed.

Background and Facts

Local 1320, Sewage Treatment Workers and Supervisors, is one of fifty-six local unions affiliated with District Council 37. The local is the certified collective bargaining representative for approximately 850 Sewage Treatment Workers and Senior Sewage Treatment Workers employed by the New York City Department of Environmental Protection.

Members of the Local 1320 bargaining unit are "prevailing rate" employees whose terms and conditions of employment are governed by Section 220.3. of the New York State Labor Law. This section provides that wages of laborers, workers or mechanics must be at the prevailing rate (rate of wages paid in a locality to a specified percentage of employees in the same occupation who are working under collective bargaining agreements), and that supplements or benefits must follow prevailing practices in the area. Pursuant to Section 220.5.e. of the Labor Law, the Comptroller of the City of New York has the authority to decide the appropriate wage scale for prevailing rate employees. However, in lieu of the Comptroller's determination, Section 220.8-d. of the Law requires the City to bargain in good faith with certified public employee organizations covered by the prevailing rate provisions. If the parties cannot agree on the terms of wages and supplements, the employee organization may file a request for a wage determination with the Comptroller. Once such a determination is made, it is binding upon all members of the bargaining unit.

In March of 1993, District Council 37, many of its affiliate locals, and numerous other municipal unions entered into an economic agreement with the City (the Municipal Coalition Agreement). The Agreement covers a thirty-nine month period and provides the following:

1) A one-time pensionable cash payment of $700 that was not added to base salary.

2) Effective July 1, 1993, a 2% increase over the previous salary base.

3) Effective July 1, 1994, a compounded 2% increase in the salary base.

4) Effective December 1, 1994, a compounded 3% increase in the salary base.

5) Increased City contribution and increased benefits in employees' welfare funds.

The Agreement is not applicable to employees whose titles are covered by the prevailing rate requirements of Section 220 of the Labor Law.

After concluding the Municipal Coalition Agreement, the City sought to negotiate economic agreements with the various public employee organizations covered by the Labor Law's prevailing rate provisions. Local 1320 was part of this group. The City closely modeled its proposed unit economic agreements for prevailing rate employees on the Municipal Coalition Agreement.

Instead of negotiating over the City's offer, however, Local 1320's bargaining committee sought a three-step graduated pay rate for its members. On September 24, 1993, the parties reached a mediated settlement that was built around a step pay plan. Under the tentative agreement that would be retroactive to July 1, 1993, Sewage Treatment Workers with less than two years of service (Level I) would be paid a rate of $12.00 per hour (increasing to $12.36 per hour effective December 1, 1994). Sewage Treatment Workers with more than two years but less than three years of service (Level II) would receive a rate of $17.44 per hour (increasing to $17.79 per hour effective October 1, 1993). Sewage Treatment Workers with more than three years of service (Level III) would be paid a rate of $18.15 per hour (increasing in two

escalations to $19.25 per hour effective December 1, 1994). Senior Sewage Treatment Workers would receive a rate of $20.46 per hour (increasing in two escalations to $22.13 per hour effective December 1, 1994). This economic package also included a favorable change in overtime computation, an increase in the City's contribution to the Union's welfare fund, and pay protection for provisional employees who are laid off and then rehired. However, the terms of the settlement also provided that the hourly rate of pay for incumbent Level I employees would be rolled back from $17.44 per hour to $12.36 per hour, effective January 1, 1994.

Before the wage settlement could be implemented, the Union's constitutions required that the membership ratify it. Accordingly, on October 4, 1993, the Union convened a special general membership meeting during which the terms of the tentative agreement were explained to those in attendance. Contract ratification ballots were mailed out, and the returns were counted by a ratification committee on October 21, 1993. Of the 850 ballots mailed out, 684 were returned. Fourteen were voided. Of those remaining, there were 339 votes to reject the proposed settlement, and 331 votes in favor of approving it.

On November 17, 1993, at a Union general membership meeting, the ballot ratification committee chair reported the results of the vote to the members. During the floor discussion that followed, someone questioned whether agency shop fee payers had received mail ballots. After reviewing the records, the ballot committee reported that eleven agency shop fee payers had, in fact, voted. A motion was made and carried directing the ballot committee to obtain a legal opinion on the propriety of agency shop fee payers participating in a contract ratification vote, and to have the committee act in accordance with that opinion.

By memorandum dated November 22, 1993, Richard Ferreri, Associate General Council of District Council 37, advised the Union that it was improper for nonmembers of Local 1320 to have voted. He recommended that the October

vote be invalidated and that only members of Local 1320 receive and cast ballots during a new ratification vote.

In early December, new ballots were mailed to the members of record in the Union. On December 21, 1993, the ballot ratification committee reconvened to tally the vote. This time, 694 ballots were returned. The proposed step pay plan carried by a vote of 398 in favor and 296 opposed. Another special general membership meeting was called the next evening, during which the members were informed of the second voting results.

On December 23, 1993, the Union president notified the City that the membership had approved the settlement. The City, in turn, began preparing the paperwork that it had to submit to the Comptroller for his approval, as the Labor Law requires, before the agreement could be implemented. On February 18, 1994, the Comptroller approved the consent determination.

At that point, however, an unanticipated problem surfaced. The tentative agreement called for a roll-back in the hourly rate of Level I employees, effective January 1, 1994. Due to the ratification delay, the agreement was not implemented until February 18, 1994, some six weeks late. As a result, employees who were to be paid at the new Level I rate of $12.36 per hour were still receiving their old rate of $17.44 per hour during this time. The City informed the Union that it intended to recoup the excess monies it had been paying Level I employees by deducting $100 per week from each of them until the overpayment was reimbursed. This high amount was necessary because the City insisted that all outstanding monies had to be recouped during the current fiscal year. To mitigate the impact of this recoupment, the Union decided to take money from its Line of Duty Injuries fund and place it into a special fund created to defray fifty percent of the net amount the affected members were obligated to repay. This subsidy reduced the weekly deduction of affected employees from $100 to $50, and halved their outstanding debt as well.

The Petitioner was first employed as a provisional Sewage Treatment

Worker on January 6, 1992, at a starting salary of $17.44 per hour. He currently holds a permanent appointment in that title. Because of the new step pay plan, his hourly rate was reduced from $17.44 to $12.36 effective January 1, 1994, and remained so until he completed two years of service. He also was forced to return an overpayment to the City at the $50 per week rate. It is the Petitioner's contention that the new economic agreement was negotiated and ratified in bad faith, and that it was designed to benefit the most senior members of the Union at the expense of new hires.

Petitioner's Evidence

The Petitioner testified and presented a co-worker as second witness in his behalf. In addition, his attorney engaged the Union president in lengthy cross-examination. Each witness gave his version of the contract ratification process and discussed the impact of the step pay plan on themselves and on other members of the bargaining unit.

Woody VanDeinse was hired as a provisional Sewage Treatment Worker on June 1, 1992, at a rate of pay of $17.44 per hour. In Spring of 1993 he heard from a shop steward that the Union intended to seek a wage package that was better than the Municipal Coalition Agreement. He said that he first learned about the step pay plan at a Union meeting in October, 1993, during which the members were told that the Union was trying to bring the pay scale for senior employees into line with that in other agencies. The witness said that there was an uproar amongst the membership after the tentative settlement was explained because of the devastating pay cut it included for Level I employees. He knew that the first ratification vote had failed by a slim margin and that there was to have been a re-vote without agency shop fee payers participating.

Mr. VanDeinse estimated that there are approximately 200 employees in Level I, and that about ninety of them took the brunt of the rate cut. By his calculations, employees with less than two years seniority lost $217 per week

in base pay. In addition, their overtime rate dropped from $26 to $18 per hour. He stated that because of the contract's late implementation, he personally owes the City $2,267.47 in overpayment. The witness estimated that there are about 250 Senior Sewage Treatment Workers who are receiving the bulk of the pay increase under the step pay plan. He said that they are appointed to those positions; promotions are not automatic.

Mr. VanDeinse acknowledged that shortly after he was hired, the Union president spoke and distributed membership applications to all present during a three-day orientation program. He said that he completed the application and sometime later received a membership card and explanation of union benefits from Local 1320.

The Petitioner testified next. He also acknowledged that the Union president spoke during his orientation, and that he applied and became a member of Local 1320 shortly after that.

The Petitioner said that he attended the October 1993 general membership meeting and raised a question about the composition of the Union's bargaining committee. The President replied that he appointed the committee, and that it was made up of shop stewards and other union officers. A Union exhibit subsequently showed that all of its officers and executive board members were at the highest or next to highest step when the step pay plan took effect.

The Union's Evidence

James Tucciarelli, President of Local 1320 for eleven years, was the Union's only witness. He said that the Union's bargaining committees traditionally had been made up of its officers and executive board members, as was this one. According to the President, when he first informed the members that the City had proposed a wage agreement that would parallel the Municipal Coalition Agreement during a general membership meeting in Spring of 1993, they "basically told us to shove the package." He said that the Petitioner did not attend this meeting.

As a result, the negotiating committee went back to the bargaining table with the City. Also during this time, the local was engaged in labor-management committee discussions with Department of Environmental Protection regarding management's proposal to create a trainee program for apprentice sewage treatment workers who would start at a rate of about $8 per hour. The President said that he knew the proposal was serious, because the Department had done the same thing once before with construction laborers. He was concerned that the City was "looking to destroy the civil service merits of our job title." Of equal concern to him was the refusal of the Department to commit itself on its plans for provisional employees who currently were in the unit workforce.

The President testified that a third problem confronted him as well. He claimed that there was a lengthy backlog in wage determination cases at the Comptroller's Office, and that, in all likelihood, Sewage Treatment Workers would be compared with Con Edison utility workers when their wage rates finally were set. The Union obtained copies of the Con Edison collective bargaining agreement and learned that utility workers' starting pay rate was only $9.63 per hour. The company awards subsequent pay increases based solely upon technical training achievement and merit evaluations by supervisors. The President said he feared that the Department might hold merit increases back if an employee had a personality clash with a supervisor.

The President testified that after consulting with his board, the shop stewards, and the membership, the bargaining committee tried to devise a proposal that would address all these competing interests -- trainee entry, protection of provisionals, and avoidance of the utility workers' wage scale. He said that after intense negotiation and mediation, the City agreed to the step pay plan. It also agreed that overtime would begin to accrue after eight hours of work, instead of after forty cumulative hours.

Finally, the President recounted the difficult contract ratification process within the local. He said that agency fee payers inadvertently

received the first ballot. He admitted that he did not know that they were ineligible to vote because different people, now retired, had handled previous elections, and because, in his experience, there had never before been such a closely contested contract ratification vote. The President went on to state, however, that the Union announced that any agency fee payer who wanted to vote would receive a second ballot, provided they were willing to sign a dues deduction authorization card. As a result, the local acquired thirteen new members.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner notes that the issue of whether a union has violated its duty of fair representation in any particular instance essentially is a factual determination. Here, the Union's action after reporting the tabulation of first ratification vote assertedly was arbitrary because, contrary to the Union's constitution, one individual took it upon himself to invalidate the vote of the entire union membership. The Petitioner claims that it was predictable that the President would permit the vote to be invalidated because he personally stood to gain a salary increase of 15% instead of 7%. In the Petitioner's view, the self-serving nature of the contract is too blatant to ignore. Equally blatant is the President's alleged explicit approval of mailing ballots to agency fee payers until the vote went against his interest. According to the Petitioner, once the ratification was found to have been lost by only eight votes, it was "very convenient" to uncover thirteen alleged agency fee payers and invalidate their ballots. In addition, the Petitioner contends that the agency fee payers did not even know that they were not union members until after it became a contested issue. After completing a minimum of paperwork, all thirteen allegedly voted in the second ratification election. There assertedly was no substantive change in their status -- only a computer entry was changed after they signed new

authorization cards.

The Petitioner concludes that the Union's President, its bargaining committee, and its ballot ratification committee all acted in a self-serving manner. Their actions, according to the Petitioner, were arbitrary and came at the grave expense of a minority of the unit members.

Union's Position

According to the Union, a petitioner must show that the union acted in bad faith, or in a hostile or discriminatory manner to establish a claim for the breach of the duty of fair representation. It contends that the Petitioner's evidence does not meet this strict standard.

With respect to the contractual agreement between Local 1320 and the City, the Union maintains that labor organizations enjoy considerable latitude in negotiating wage agreements, and that a union does not breach its duty of fair representation simply because an agreement favors one group of employees over another, or because all employees in a unit are not satisfied with a particular outcome. It further points out that by the time that the Local 1320 agreement expires in 1995, the "vast majority" of incumbents will have reached the third and final step in the pay plan, which amounts to $0.56 per hour more than they would have been earning under the terms of the Municipal Coalition Agreement. In the Union's view, the agreement assertedly is rational, accomplishes a number of pre-set goals, and falls well within the range of reasonableness that the law accords unions in collective bargaining.

With respect to animus, the Union argues that there is no evidence that the bargaining committee harbored hostile or discriminatory feelings toward the Petitioner or anyone else when it fought for the step pay plan. To the contrary, the Union maintains that the plan promotes legitimate bargaining objectives concerning compensation, job security, and civil service protection. It adds that Local 1320's willingness to make partial reimbursement to Level I employees from money taken out of the Line of Duty

Injuries fund provides further evidence that the Union harbors no hostility toward the Petitioner or other new incumbents.

Finally, the Union argues that its decision to conduct a second ratification vote relates solely to the internal workings of the local, and not to its relationship with the City. Therefore, according to the Union, the decision to nullify the first ballot was an internal union affair over which this Board assertedly lacks jurisdiction. Additionally, the Union points out that it acted only after counsel advised it that agency fee payers were not eligible to vote, and that the actions it took were fully consistent with its internal constitutions, rules and procedures.

Discussion

The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under both the Railway Labor Act and the National Labor Relations Act (NLRA). The earliest cases were decided under the Railway Labor Act.[2] The Supreme Court balanced the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right, and held that a union must act "fairly" toward all employees that it represents. Subsequently, the Supreme Court recognized and adopted the duty of fair representation under the NLRA.[3] The Court, in Vaca v. Sipes,[4] defined the duty of fair representation as:

> the exclusive agent's . . . statutory obliga-tion to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[5]

A breach of the duty "occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[6] New York State courts imposed a similar fair representation obligation on public sector unions, based upon their role as exclusive bargaining representatives under the Taylor Law and related local laws such as the New

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[2] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 65 C.Ct. 226, 89 L.Ed. 173 (1944), and Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

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

[4] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[5] Vaca at 177.

[6] Vaca at 190.

York City Collective Bargaining Law.[7]

In 1990 the State Legislature recognized this judicial doctrine by enacting an amendment to the Taylor Law codifying the duty of fair representation.[8] The 1990 amendments affirmed the principle that a breach of duty of fair representation constitutes an improper practice within the meaning of the law; confirmed PERB's jurisdiction over DFR claims; and authorized the PERB to retain jurisdiction and apportion liability between the union and the employer according to the damage caused by the fault of each in cases where the union has been found to have breached its duty by processing grievances improperly. Pursuant to Section 212 of the Taylor Law ("the local option section"), which authorizes the existence of the NYCCBL and of the Office of Collective Bargaining, the provisions of the 1990 amendments pertaining to the duty of fair representation are applicable to this Board.

The 1990 Taylor Law amendments did not alter the well-established elements of unions' duty of fair representation obligations. The pivotal issue in determining the existence of a breach of the duty of fair representation is whether the union acted arbitrarily, discriminatorily or in bad faith in the negotiation, administration or enforcement of a collective bargaining agreement.[9] In the area of contract negotiation and interest disputes, a union does not breach its duty simply because all the employees in a bargaining unit are not satisfied with a negotiated agreement.[10] The duty

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[7] Matter of Civil Service Bar Association, Local 237, I.B.T. v. City of New York, 64 N.Y.2d 188, 196, 485 N.Y.S.2d 227, 230 (Ct.App., 1984).

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

[9] Decision Nos. B-2-90; B-53-87; B-42-87; B-34-86; and B-16-83.

[10] Decision Nos. B-2-90; B-9-86; and B-13-81.

to represent all employees impartially does not necessarily prevent a union from making a contract that is disadvantageous to some members of the unit in relation to others.[11] Consequently, the existence of contract terms that affect individual employees differently does not mean that the bargaining agent has failed to meet its legal obligations, since the Union is allowed considerable latitude in this respect.[12] The central question is whether the bargaining representative has acted in bad faith -- a determination, as the Petitioner correctly observes, that essentially must be made according to the facts in a particular case.

After carefully evaluating the record here, it is clear to us that the leadership of Local 1320 believed that it was acting for the benefit of most of the employees in the bargaining unit when it negotiated the step pay plan. The negotiating committee bargained for the plan in response to the wishes of the general membership not to accept the wage pattern set by the Municipal Coalition Agreement, a sentiment that they expressed during an open union meeting in Spring of 1993. In addition, the Union President testified credibly that the committee was very concerned with other serious matters, including the protection of provisional incumbent employees; avoidance of a trainee program that could fracture the wage scale and circumvent protections of the civil service laws; and the looming possibility that, should failed negotiations reach the Comptroller's Office for a wage determination, Sewage Treatment Workers would suffer an unfavorable wage comparison with Con Edison utility workers.

It is not within our province to second-guess the Union's estimate of the gravity of these concerns. We will go no further than to recognize that

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[11] See Decision No. B-26-81, relying upon Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953) and Matter of PSC and Adjunct Faculty Assoc., 7 PERB 4529 (1974); See also Decision Nos. B-42A-87; B-9-86; and B-15-83.

[12] Decision Nos. B-26-81 and B-13-81.

the terms of the collective bargaining agreement between Local 1320 and the City fall within the purview of a legitimate business judgment made by the Union. The Petitioner, for his part, has not shown that the Union discriminated against him, or against any minority interest in the unit when it reached a settlement that was more favorable to some employees than it was to him. There is no evidence that the Union acted in a way that was arbitrary or improperly motivated. The circumstantial fact that there were no junior incumbents on the Union's executive board, its negotiating committee, or the ballot ratification committee, is not sufficient to raise an inference of, let alone prove, discrimination. Union officials' seniority status does not, by itself, evince favoritism or an inherent conflict of interest. There is no intrinsic reason to suspect that senior employees who serve as union officials will not faithfully protect all the members' best interests when dealing with the public employer.

Having found no indication of discriminatory motivation against the Petitioner, we will not examine the soundness of a seemingly non-arbitrary business decision of a union.[13] We reiterate, in determining a question of fair representation, it is not our task to evaluate or to pass judgment upon bargaining tactics and strategy, or upon the business decision of a union to pursue one set of negotiation proposals at the expense of other desirable ends.[14] Because a group of unit members may be disadvantaged, in the short term, on account of the step pay plan does not amount to a breach of the duty

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[13] See, Air Line Pilots Ass'n. International v. O'Neill, 499 U.S. 65, 111 S.Ct 1127, 136 LRRM 2721 (1991), where the U.S. Supreme Court held unanimously that in matters of contract negotiation as well as contract administration, a union's actions are arbitrary so as to constitute a breach of the duty of fair representation, only if in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a wide range of reasonableness as to be irrational.

[14] Decision Nos. B-22-93; B-9-86; and B-26-81.

of fair representation.

With respect to the Union's decisions not to present the Municipal Coalition Agreement package proposal to the members for a formal vote, and its disqualification of agency shop fee payers from the first step pay plan ratification vote, thus making necessary a second vote, our conclusion is the same. The circumstances under which membership ratification is required are not defined by the NYCCBL, but constitute a matter internal to the Union. As we have often said, the duty of fair representation does not extend to internal union affairs unless they have an adverse effect on the nature of the representation accorded the employees by the union with respect to negotiating and maintaining terms and conditions of employment.[15] In this case, there has been no proof that the Union's failure to submit the Coalition package proposal for a membership referendum, or its decision to hold a second ratification vote after discovering that agency shop fee payers participated in the first one, was made in bad faith or affected the nature of Local 1320's representation of the Petitioner. Although the Petitioner argues that the disqualification of agency fee payers was "an arbitrary excuse to invalidate the vote," we find the evidence insubstantial to impute bad faith on the Union's part. With no evidence to the contrary, we will not assume that the initial inquiry on voting eligibility of agency fee payers was anything more than a legitimate question posed by an interested union member. President Tucciarelli was candid and credible when he admitted that he did not know that agency fee payers were not eligible to vote in a contract ratification election. The Union took no action until it sought and obtained an independent opinion and recommendation by one of District Council 37's senior attorneys. Only then, following counsel's recommendation, did it invalidate the first ratification vote. These circumstances do not support an allegation

[15] Decision Nos. B-22-93; B-11-93; B-5-92; B-56-91; B-26-91; B-22-91; B-26-90; B-9-86; B-23-84; B-15-83; B-1-81; B-18-79; and B-1-79.

of bad faith by Local 1320 or any of its officials.

In conclusion, we find that the record contains no evidence of intentional or hostile discrimination against the Petitioner or other similarly situated employees by Local 1320, or that the Union's leadership acted in bad faith, or in a way that was arbitrary or improperly motivated. Accordingly, we shall dismiss the improper practice petition.

ORDER

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

ORDERED, that the improper practice petition filed by the Petitioner against Local 1320, Sewage Treatment Workers and Supervisors, docketed as BCB-1635-94 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 26, 1994

MALCOLM D. MACDONALD
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