Wooten v. L.1549, DC37, Melissa Brown, et.al., 53 OCB 23 (BCB 1994) [Decision No. B-23-94 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

James R. Wooten,

Petitioner,

- and -

Local 1549, District Council 37, AFSCME, Melissa Brown and Robert Perez-Wilson, and New York City Department of General Services,

Respondents.
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Decision No. B-23-94

Docket No. BCB-1619-93

DECISION AND ORDER

On November 26, 1993, James R. Wooten ("petitioner") filed a verified improper practice petition. The petition alleged that the Division of Real Property of the New York City Department of General Services ("the Department") violated § 12-306[1] of the New

[1] Section 12-306 of the NYCCBL provides, in relevant part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging of discouraging membership in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified

(continued...)

York City Collective Bargaining Law ("NYCCBL") by breaching a stipulation reached in settlement of a grievance in August 1993. The petitioner alleged further that District Council 37 ("the Union") and its attorneys, Robert Perez-Wilson and Melissa Brown, violated § 12-306 of the NYCCBL[2] by failing to protect the

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[1](...continued)
or designated representatives of its public employees.

Section 12-305 of the NYCCBL provides:

Rights of public employees and certified employee organizations. Public employees have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (1) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

[2] Section 12-306 of the NYCCBL provides, in relevant part:

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 rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;....

petitioner's rights with respect to the stipulation of settlement.

By letter dated November 30, 1993, the Union, having obtained the consent of the petitioner, requested an extension of time to file an answer. The Union filed an answer on behalf of itself and respondents Brown and Perez-Wilson on December 20, 1993. The Department, by the New York City Office of Labor Relations, filed an answer on December 22, 1993.

With the consent of the City, the petitioner requested and was granted an extension of time in which to file a reply, which was filed on January 20, 1994. On January 28, 1994, the petitioner requested that his reply be amended to correct the usage of a word. Without the consent of the respondents, the petitioner also submitted, on January 28, 1994, an affirmation by his attorney in support of his petition. On February 2, 1994, the Union filed a notice of motion to strike or of preclusion in response to the petitioner's filing of an affirmation outside the time prescribed for a reply.

Background

The petitioner was employed by the Department as an Office Associate until 1990, when he was terminated. After hearings at Steps I, II and III of the grievance and arbitration procedure, the Union filed a request for arbitration on January 24, 1992.

On January 29, 1992, the Office of Collective Bargaining ("OCB") acknowledged receipt of the request for arbitration.

By letter dated April 7, 1992 to the Union, the OCB requested that waivers required by the OCB Rules be submitted. A second letter requesting the signed waivers was sent to the Union on August 3, 1992. A waiver signed by the petitioner and dated October 8, 1992 was received by the OCB on October 13, 1992.

By letter dated October 16, 1992, Robert Rosenthal, Esq. informed the OCB that the firm of Rosenthal & Druyan had been retained to represent the petitioner in the arbitration proceeding, and asked that all future communication concerning the case be directed to him. On January 6, 1993, the OCB sent lists of arbitrators to the Union and the City, which were returned to the OCB on January 8, 1993 and January 11, 1993, respectively. By letter dated January 21, 1993, the OCB informed the parties that an arbitrator had been selected.[3]

By letters dated April 29, 1993, May 24, 1993, and May 26, 1993, the petitioner asked Perez-Wilson, as General Counsel of the Union, to retain a stenographer to provide a transcript of the hearing, citing the complexity of the issues and the need to preserve a record for appeal as the reasons for his request. By letters dated May 11, 1993 and May 28, 1993, Perez-Wilson denied the request, stating that it was not the Union's usual practice to provide transcripts of arbitration proceedings and that no

[3] Docket No. A-4086-92.

appeal can be taken from an arbitration award except in the case of fraud or corruption on the part of the arbitrator.

At the beginning of the scheduled arbitration on June 2, 1993, the arbitrator suggested that the parties attempt to settle the case. Present at the subsequent negotiation were Martin Druyan, Esq., attorney for the Union, Fred L. Wallace, Esq., the petitioner's attorney, and the City's attorney. After negotiation, the parties drew up a stipulation of settlement.

Before final agreement was reached, further discussions concerning the language of the stipulation of settlement were held among the petitioner, Druyan and representatives of the City. The petitioner sent Druyan a three-page letter dated June 10, 1993 concerning changes he wished to make in the settlement agreement. The final stipulation of settlement was dated August 10, 1993. It provided that the City pay the petitioner the sum of $30,000, rescind his termination and deem him to have resigned, and expunge from his personnel file documents concerning charges and specifications associated with the disciplinary actions. In addition, the City agreed to give only certain minimal information in response to inquiries concerning the petitioner's employment. The stipulation contained no provision concerning the issue of whether taxes were to be deducted from the settlement payment.

The petitioner subsequently received a City supplementary payroll check in the amount of $17,134.50, representing the

stipulated amount of $30,000 less federal, state and city taxes. On October 18, 1993, the petitioner appeared at Druyan's office and asked him to act to recover the portion of the settlement which had been withheld for taxes. In a letter to the City dated October 18, 1993, Druyan stated:

> On August 10, 1993, the attached stipulation was entered into providing for a $30,000 payment in full settlement of all claims as set forth in the request for arbitration. Mr. Wooten received $17,134.50 after deductions. This was not the stipulation of the parties and we respectfully demand a payment in total of $30,000 as the stipulation provided.

In a letter dated October 29, 1993, the City stated, "all salary is subject to federal, state and local taxes as a matter of law. Your client is certainly free to seek a refund from the appropriate tax authority if that is appropriate."

Positions of the Parties

Petitioner's Position

The petitioner maintains that the Union and its attorneys failed to protect his rights because they did not attempt to enforce the stipulation of settlement, although taxes had been deducted illegally from the settlement payment. He alleges that the Union did not act competently or afford him equal rights and protection when it selected and retained the law firm of Rosenthal & Druyan to represent him at arbitration. He alleges further that Brown knowingly denied him equal rights and protection by retaining an incompetent law firm, because the same

law firm was retained by the Union to represent a grievant who subsequently filed a complaint of professional misconduct. The petitioner claims that these actions constitute violations of CPLR 1200.30 DR 6-101 (1), (2) and (3) and CPLR 1200.3 DR 1-102 (3), (4) and (5).

The petitioner asserts that Perez-Wilson failed to protect his rights and denied him equal protection when he denied the petitioner's request for a stenographic record of the arbitration proceeding. He maintains that the failure to provide such a record proves that Perez-Wilson did not act impartially and denied the petitioner due process, equal rights and equal protection under the law as mandated by the 5th and 14th Amendments of the Constitution of the United States.

In his reply, the petitioner asks the Board to dismiss the Union's answer on the grounds that the Union's attorneys falsely affirmed allegations that the petitioner had received in settlement a sum of $30,000 less taxes deducted from the payment. He alleges that the verifications submitted by the attorneys constituted misconduct in an effort to mislead the Board of Collective Bargaining, which he asserts is a violation of the Professional Disciplinary Rules as mandated by CPLR 1200.3, DR 1-102 (1), (2), (3), (4), (5), (6), and (7).

The petitioner claims that he is not required to pay taxes on the settlement payment because he was not employed at the time that he signed the stipulation of settlement or at the time that

he received the payment. He maintains that the stipulation of settlement was breached because taxes were deducted from his payment, and that the Union had a responsibility to pursue legal proceedings regarding this breach of the settlement. He asserts that, by letter dated October 18, 1993, Druyan requested payment by OLR of the taxes deducted from the settlement payment. The petitioner claims that Druyan took no further action after sending the letter.

The petitioner maintains that Brown and Perez-Wilson falsely affirmed the portion of the Union's answer in which the Union states that it "lacks information or knowledge sufficient to form belief as to the truth of ... the allegations" concerning the petitioner's termination. He claims further that:

> Attorney Perez-Wilson and Attorney Brown delayed the Petitioner's arbitration until June 2, 1993, some two (2) years and five (5) months after the unjust termination in a concerted conspiracy and in an effort to cover up and protect Attorney Leibowitz [Deputy General Counsel of the Department] who Petitioner believes presently has a relative connected with DC-37 [emphasis in the original].

Concerning the hearings at the lower steps of the grievance procedure, the petitioner claims that the Union representative at what he characterizes as his "illegal Step I hearing" was not qualified to represent him because she is not an attorney. Further, the petitioner maintains, the Step I hearing officers "recommended termination of the Petitioner's employment from DGS in the presence of ... three Union DC-37 representatives" [emphasis in original]. He also asserts that, at the Step III

hearing, "Perez-Wilson did not dispute the fact that DGS replaced Attorney Leibowitz with a new attorney ...." [emphasis in original]

In an affirmation in support of the petition, Fred L. Wallace, Esq., the petitioner's attorney at Steps I, II and III, states:

> At the time of the Arbitration, I was preparing a law suit sounding in both law and equity to force the re-hiring of Petitioner and to accord him damages because of the irregularity of his separation from City service.... The rescission of the discharge of Petitioner and the cleansing of the job history was bedrock for the Petitioner and me because I was the lead negotiator in the behalf of Petitioner at the session of June 2, 1993....
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> The rescission would automatically have meant the restoration of back pay from November 15, 1990 thru that date - some $71,806.00 ... It was for that reason that the subsidiary agreement was made that Petitioner would be designated from and after November 15, 1990 through April 30, 1993 as having been on "leave without pay" status. This is the clause and agreement that determined what it was that Petitioner received in regular pay between November 15, 1990 and April 30, 1993 - namely, $0.00. The taxes due or to be withheld in relation to $0.00 wages received by an employee are $0.00....
>
> The $30,000 agreed on to be received by Petitioner was a sum being paid in consideration of his releasing and waiving all of his claims against the City in equity and law to quiet and end the disputes that had raged between him and the City for four years as of that time on the open record ... At the time of the negotiations, I expressed my opinion that the $30,000 agreed to was recompense to Petitioner for the injuries suffered by him as variously expressed in the various litigations outstanding or about to be commenced. I also expressed my opinion that this sum would not be subject to income taxation because it was not wages and did not represent income derived from trade or business of the Petitioner. I am still of that opinion [emphasis in original].

Union's Position

The Union asserts that the Board lacks jurisdiction to determine claims which allege violations of the Code of Professional Responsibility or the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. It argues that the petitioner, having been advised by his own counsel and agreeing to the stipulation of settlement on that advice, is estopped from claiming any breach of a duty owed to him by the Union.

The Union claims that assigning the petitioner's case to the law firm of Rosenthal & Druyan was done properly and in good faith, and without arbitrary, discriminatory or hostile considerations. The Union maintains that although a complaint against Druyan was filed by a former Union member, it was summarily dismissed with no finding of professional misconduct by Druyan.

The Union maintains that the fact that payroll taxes would be withheld was explained to the petitioner during the negotiating session on June 2, 1993, and that the petitioner thereafter signed the agreement with that knowledge. Despite this understanding, the Union asserts, Druyan attempted to address the petitioner's dissatisfaction by sending a letter to OLR.

The Union asserts that the decision not to provide a stenographic transcript of the arbitration proceeding was based

on long-standing, uniform policy, and was made in good faith without arbitrary, discriminatory or hostile considerations. It maintains that, at all times, its agents and employees have handled the petitioner's case, his stipulation and his subsequent complaints properly and in good faith and without arbitrary, discriminatory or hostile considerations.

City's Position

The City maintains that the petitioner has failed to set forth allegations that it has violated the NYCCBL. Insofar as the petitioner claims that the City has not complied with the terms of the stipulation of settlement, the City argues, such a claim does not fall under the NYCCBL and is not a matter within the jurisdiction of the Board of Collective Bargaining. Further, the City states, it has no knowledge of what transpired between the petitioner and the Union and bears no responsibility for damage, if any, incurred by the petitioner if his claims against the Union are sustained.

Discussion

The instant petition includes a variety of allegations of acts by the respondents which the petitioner believes are improper practices under the NYCCBL. The petitioner alleges that the Union and its attorneys violated his rights of due process, equal protection and equal rights under the United States

Consitution. He alleges further that the Union's attorneys acted incompetently and violated the Code of Professional Responsibility.[4]

The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees set forth therein: the right to bargain collectively through certified public employee organizations; the right to organize, form, join and assist public employee organizations; and the right to refrain from such activities. Claims based on the 5th and 14th amendments to the United States Constitution, and claims which allege violations of the Code of Professional Responsibility, are not related to rights protected under the NYCCBL and may not be addressed by this Board.[5]

The remaining allegations in the petition raise the issue of whether the Union has breached its duty fairly to represent the petitioner. The doctrine of the duty of fair representation originated in private sector labor relations and was developed by the federal judiciary under the Railway Labor Act[6] and the

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[4] We note that the petitioner alleges violations of the New York State Civil Practice Laws and Rules ("CPLR"). The CPLR, however, does not contain the Code of Professional Responsibility ("CPR"). We must assume, therefore, that it is provisions of the CPR to which the petitioner refers.

[5] See, e.g., Decision Nos. B-23-91; B-39-88; B-2-82.

[6] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Tunstall v. Brotherhood of

(continued...)

National Labor Relations Act ("NLRA").[7] The United States Supreme Court balanced the Union's right as exclusive bargaining representative with its correlative duty arising from possession of this right, and held that a union must act "fairly" toward all employees that it represents. The Supreme Court, in Vaca v. Sipes,[8] defined the duty of fair representation as:

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

A breach of the duty occurs "only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[10]

A union enjoys wide discretion in its handling of grievances.[11] A union does not breach the duty of fair representation merely because the outcome of a settlement does not satisfy a grievant,[12] provided that the Union's actions were

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[6](...continued)
Locomotive Firemen and Engineers, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944).

[7] Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. (1948).

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

[9] Vaca, at 177.

[10] Vaca, at 190.

[11] Decision Nos. B-29-93; B-5-91.

[12] Decision Nos. B-29-93; B-5-91; B-2-90; B-9-86; B-13-81.

not taken in bad faith and are neither arbitrary nor discriminatory.[13] It is not enough for a petitioner to allege negligence,[14] mistake,[15] or incompetence[16] on the part of the union. Even where a union's action is due to an error in judgment there is no violation, provided that the evidence does not suggest that the union's conduct was improperly motivated.[17]

New York courts recognize the duty of fair representation[18] and have permitted its assertion in state court by public employees.[19] In 1990, the State Legislature enacted an amendment

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[13] Albino v. City of New York, 80 A.D.2d. 261, 438 N.Y.S.2d 587 (2d Dep't 1981).

[14] Smith v. Sipe, 109 A.D.2d 1034, 487 N.Y.S.2d 153 (3d Dep't 1985), rev'd for reasons stated in dissenting memo, 67 N.Y.2d 928, N.Y.S.2d 134, 493 N.E.2d 237 (1986); Shah v. State, 140 Misc.2d 16, 529 N.Y.S.2d 442 (3d Dep't 1988).

[15] Trainosky v. Civil Service Employees Association, Inc., 130 A.D.2d 827, 514 N.Y.S.2d 835 (3d Dep't 1987); Civil Service Employees Association, Inc. v. PERB, 132 A.D.2d 430, 522 N.Y.S.2d 709, 127 LRRM 3122 (3d Dep't 1987), aff'd, 73 N.Y.2d 796, 533 N.E.2d 1051, 537 N.Y.S.2d 22 (1988), 533 N.E.2d 1051 (1988).

[16] Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dep't 1992).

[17] Decision Nos. B-29-93; B-51-90; B-27-90; B-9-86; B-15-83; B-26-81.

[18] Gosper v. Fancher, 49 A.D.2d 674, 371 N.Y.S.2d 28, 90 LRRM 2336 (4th Dep't 1975), aff'd in part, dismissed in part, 40 N.Y.2d 867, 356 N.E.2d 479, 387 N.Y.S.2d 1007, 94 LRRM 2032, 80 Lab.Cas. P 53,940 (1976), cert.den'd, 430 U.S. 915, 97 S.Ct. 1328, 51 L.Ed.2d 594, 94 LRRM 2798, 81 Lab.Cas. P 55,013 (1977); DeCherro v. Civil Service Employees Assn., 60 A.D.2d 743, 400 N.Y.S.2d 902 (3d Dep't 1977).

[19] Civil Service Bar Association, Local 237, IBT v. City of New York, 99 A.D.2d 264, 472 N.Y.S.2d 925 (1st Dep't 1984);

to the Taylor Law, codifying principles already recognized in the decisions of the Public Employment Relations Board, which makes it an improper practice for a public employee organization to breach its duty of fair representation.[20] A union must refrain from arbitrary, discriminatory or bad faith conduct in the negotiation, administration and enforcement of a collective bargaining agreement,[21] but a wide range of reasonableness is granted to a union in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of discretion.[22]

The petitioner claims that the Union breached its duty of fair representation when it failed to prosecute his claim of a breach of the stipulation of settlement due to what the petitioner claims is an illegal deduction of taxes. This Board has jurisdiction over claimed breaches of a union's duty of fair representation. In the instant case, however, the petitioner complains of the Union's failure to commence a court proceeding to enforce claimed rights which are derived, not from a collective bargaining agreement or from the NYCCBL, but from external law.

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aff'd, 64 N.Y.2d 188, 474 N.E.2d 587, 485 N.Y.S.2d 227 (1984).

[20] Laws of 1990, Ch. 467, § 209-a., subd. 2.(c) and 3.

[21] Decision Nos. B-44-93; B-29-93; B-5-91; B-53-89.

[22] Decision No. B-2-90.

To the extent that a union's status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, the union owes a duty to represent fairly the interests of an employee who is unable to act independently to protect his or her own interests. The duty of fair representation, however, does not reach into and control all aspects of the union's relationship with its members; it concerns only the negotiation, administration and enforcement of a collective bargaining agreement.[23] The duty of fair representation, therefore, does not extend to the enforcement of rights which an individual employee may vindicate without the assistance of his or her bargaining representative. Where a union does not solely control access to the forum through which rights may be vindicated, there is no policy reason for it to be held responsible for protecting such rights. Imposing a broader scope of duty upon a union would be unwarranted and unduly burdensome.[24]

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[23] Decisions Nos. B-44-93; B-029-93; B-15-93; B-21-92; B-53-89; B-59-88; B-14-83

[24] Decision Nos. B-34-86; B-26-84; B-14-83; see also Barry v. United Univ. Professions, 17 PERB ¶3117 (1984); Farkas v. Pub. Employees Fed'n, 15 PERB ¶3134 (1982), aff'd sub nom. Farkas v. PERB, 16 PERB ¶7024 (3d Dep't 1983), leave to appeal den'd, 16 PERB ¶7031 (N.Y. Ct. App. 1983); Hawkins v. Babcock & Wilcox Co., 105 LRRM 3438 (N.D. Ohio); Lacy v. Auto Workers Local 287, 102 LRRM 2847 (S.D. Ind. 1979); Black Musicians v. Local 60-471, Am. Fed'n of Musicians, 86 LRRM 2296 (W.D. Pa. 1974), aff'd, 544 F.2d 512 (3d Cir. 1975).

Since the petitioner does not have an automatic right to be represented by the Union in a proceeding concerning a tax claim, we must ascertain whether the Union's refusal to prosecute the claim was arbitrary, discriminatory or made in bad faith. If, for example, the Union makes a practice of representing its members in court proceedings in similar circumstances, a breach of the duty could be found if a petitioner proved that the Union refused to represent him in such proceedings.[25] However, the petitioner herein has failed to show that the Union has represented other unit members in similar proceedings. Without a showing of such discriminatory action, the claim does not rise to the level of a breach of the duty of fair representation.[26] Furthermore, it is unreasonable to fault the Union for the outcome of settlement discussions when the petitioner was represented by a private attorney who acted as "lead negotiator" and, presumably, advised the petitioner to sign the stipulation of settlement. For all of these reasons, therefore, we dismiss the allegation that the Union committed a breach of the duty of fair representation by refusing to prosecute the petitioner's claim of a breach of the stipulation of settlement based on his attorney's belief that the taxes deducted from the settlement check are illegal.

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[25] Decision No. B-11-87.

[26] See, e.g., Decision Nos. B-11-87 and B-34-86.

The petitioner also alleges that the Union breached its duty of fair representation by sending a representative who was not an attorney to his Step I hearing and by not agreeing to provide a stenographic transcript of his arbitration hearing. Again, the petitioner has the burden of showing that the Union represented him in a way that was arbitrary, discriminatory or in bad faith. As we noted above, unions are granted wide latitude in the area of contract administration, which includes the handling of grievances at all steps of the grievance and arbitration procedure, as long as the administration of grievances is fair to all members. Here, the Union represented the grievant at all steps of the grievance procedure, and at arbitration, in its customary manner. Although the petitioner does not agree with the Union's decision not to provide him with a stenographic record of his arbitration hearing, the Union afforded him a reasonable response to his request. Since there is no showing that the Union's actions were discriminatory, arbitrary or taken in bad faith, these claims must also be dismissed.

In sum, there is no basis for a finding of improper practice with respect to the Union's representation of the petitioner. The Union's treatment of his case shows no evidence of hostility or neglect. The petitioner introduced no proof that the Union was in a position to do more for him that it did, nor did the petitioner show that the treatment afforded him by the Union differed in any respect from that received by other bargaining

unit members in similar situations. There was no failure by the Union to communicate with the petitioner as to its handling of the matter. Accordingly, the instant petition is 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 petition docketed as BCB-1619-93 be, and the same hereby is, dismissed.

Dated: New York, New York
October 26, 1994

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Jerome E. Joseph
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER