

Perlmutter v. L. 831, USA & Dep't of Sanitation, 59 OCB 16 (BCB 1997) [Decision No. B-16-97 (IP)]

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In the Matter of the Improper      :
Practice Proceeding                :
-                                  :
- between -                        :
Ronald Perlmutter,                 :   Decision No. B-16-97
                                   :   Docket No. BCB-1826-96
      Petitioner,                  :
                                   :
      and                          :
                                   :
Uniformed Sanitationmen's          :
Association, L.831 and New         :
York City Department of           :
Sanitation,                       :
                                   :
      Respondents.                 :
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#### **DECISION AND ORDER**

On April 15, 1996, Ronald Perlmutter ("the petitioner"), pro se, a Sanitation Worker at the Brooklyn South 15 garage, filed a verified improper practice petition against Local 831 of the Uniformed Sanitationmen's Association ("the Union") and the New York City Department of Sanitation ("the Department"). The Department filed an answer on May 23, 1996. The Union did not file an answer.

#### **Background**

During emergencies such as snow storms, when the Department requires the services of more employees than are scheduled to be on duty, it calls off-duty employees at home according to their order on a chart. There are no disciplinary penalties if an

employee cannot be reached, but he or she will lose the opportunity to work overtime. The Department records it as a refusal to work overtime and that employee's name goes to the bottom of the list.

The petitioner alleges that because there have been instances when he was called and was not at home, he has been deprived of opportunities to work overtime. For this reason, he said, he has lost rights that should have accrued to him based on his seniority. He suggested an alternative method by which the Department could call employees for emergency overtime.

At a conference held on November 25, 1996, the Union's president and business agent claimed, and the petitioner did not deny, that they had discussed his complaint several times and that they had explained to him why they chose not to proceed on it. During the discussion, the petitioner complained that a contract provision had been violated. The petitioner read the relevant contract provisions with the Union's representatives and counsel for the Department.

It became clear that the petitioner understood that the Department was following the contractual procedure but that he did not like that procedure and wished the Union to change it. The Union explained that the petitioner's proposed procedure made it easier to abuse the process and give out overtime assignments based on favoritism; in its judgment, the procedure now used is

more fair to the majority of its members.

### Positions of the Parties

#### Petitioner's Position

The petitioner alleged that the Union and the Department deprived him of seniority rights in scheduling chart changes. In particular, he claimed that the way in which the Department notified employees to work overtime on days off during emergencies violated the contract and cost him opportunities to work overtime. The petitioner also alleged that Union representatives refused to discuss his complaint and hung up on him when he called. In letters to Union officials attached to the petition, the petitioner claimed that the Union refused to act upon his complaints or file a grievance on his behalf.

#### City's Position

The City claims that this procedure allows the Department to keep track of overtime hours offered to each employee, so that employees are offered overtime assignments equally. It contends that it also enables the Department to demonstrate to any employee the amount of overtime the employee has been offered. If an employee fails to accrue a certain amount of overtime, it

maintains, it is not because of the Department's failure to offer it but because of the employee's refusal to accept it.

The City claims that the petitioner must satisfy the two-part Salamanca test, and that he has not done so. It contends that he has failed to demonstrate that he engaged in protected union activity of which the Department was aware.

In addition, the City asserts, the petitioner's claim of a breach of the duty of fair representation by the Union is also unfounded because there is no underlying grievance. It maintains that the chart-day system was made part of the contract between the parties and that all calls made by the Department to the petitioner were made in strict compliance with the contract provisions. For this reason, it contends, the Union correctly determined that there was no contract dispute.

#### Discussion

Where a violation of Section 12-306a(3) has been alleged, we have adopted the test set forth by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985). Thus, in cases involving a claim of discrimination, the petitioner is required to prove that (1) the employer's agent responsible for the challenged action had knowledge of the employee's union activity, and (2) the employee's union activity was a motivating factor in the employer's decision. If the petitioner

has made a prima facie case of improper motivation, then the burden of persuasion shifts to the respondent either to refute the petitioner's showing on one or both of the elements, or to establish that its actions were motivated by legitimate business reasons.<sup>1</sup>

Here, the petitioner has not shown any protected union activity that could be the basis of an improper practice charge. Although he refers to the Department's disputed procedure as an "improper practice," it is not "improper" as contemplated by the statute.

In addition, he has not shown that there was any alleged contractual violation that could have formed the basis of a grievance and, thus, that the Union had breached its duty of fair representation by not proceeding on such a grievance. In fact, it was apparent that the parties had discussed the issue before and that the Union had decided that there was no legitimate grievance.

The duty of fair representation obligates a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. In the area of contract administration and grievance processing, a union does not breach its duty merely because it refuses to advance a

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<sup>1</sup>Decision No. B-8-89.

grievance. A union is permitted wide discretion in contract administration, as long as its refusal to act on a complaint is made in good faith and in a non-arbitrary, non-discriminatory manner. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may breach the duty of fair representation. The burden, however, is on a petitioner to plead and prove that the union has engaged in such conduct.<sup>2</sup> In addition, the extent to which a union investigates the basis of its members' grievances is an internal union affair that the Board will not evaluate, unless the petitioner shows that the complaint was treated arbitrarily, perfunctorily, or in bad faith.<sup>3</sup> The petitioner here has not made such a showing.

Accordingly, for all of these reasons, the instant improper practice petition is denied.

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<sup>2</sup>Decision No. B-21-93.

<sup>3</sup>Id.

**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 docketed as BCB-1826-96 be, and the same hereby is, dismissed.

Dated: New York, New York  
March 25, 1997

Steven C. DeCosta  
CHAIRMAN

Daniel G. Collins  
MEMBER

George Nicolau  
MEMBER

Robert H. Boqucki  
MEMBER

Saul G. Kramer  
MEMBER

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