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

--between--

DECISION NO. B--42--97

WILLIAM LIEBOLD, Pro Se.
Petitioner.

DOCKET NO. BCB-1845-96

--and--

UNIFORMED SANITATIONMEN'S
ASSOCIATION, LOCAL 831, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS and the
NEW YORK CITY DEPARTMENT OF SANITATION.
Respondents.
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DECISION AND ORDER

On July 11, 1996, William Liebold ("Petitioner") filed a verified improper practice petition. In it, Petitioner alleges a breach of the duty of fair representation by the Uniformed Sanitationmen's Association. Local 831, affiliated with the International Brotherhood of Teamsters ("Union"). Petitioner further alleges that the New York City Department of Sanitation ("Department" or "City") committed an improper practice by asking Petitioner to work overtime and noting his decision not to work in his personnel file.

After requests for extensions of time to file, the City filed a verified answer on August 14, 1996. The Union filed a verified answer on August 15, 1996. Petitioner filed a reply to the Union's answer on August 22, 1996, and after requesting an extension of time, filed a reply to the City's answer on September 5, 1996. In his reply to the City's answer, Petitioner asked to amend the petition to include additional claims for events alleged to have occurred August 16

and 26, 1996. The Trial Examiner informed him that the information which he wished to include would be considered within the context of his replies to Respondents' pleadings, obviating amendment of the petition. On April 4. 1997, Petitioner asked to amend the petition to include claims arising from events alleged to have occurred on March 6 and 22, 1997. Neither the Union nor the City sought to amend its answer.

BACKGROUND

Petitioner is employed by the Department of Sanitation in the title of Sanitation Worker. His bargaining unit is represented by the Respondent Union. The Union and the City are parties to a collective bargaining agreement ("contract") for the term October 1, 1991, through January 22, 1995. Its non-economic terms are continued in effect pursuant to the status quo provisions of the NYCCBL. Section 12-311d.

The contract provides for the employer to promulgate a schedule of days off other than Sunday known as the "chart system."[1] The contract provides that work on chart days shall be offered on the basis of district seniority and that each employee shall be selected according to his or her place in order of rotation "previously agreed to by the Employer and the Union."[2] An employee who declines the assignment will not be re-assigned to work a chart day until his or her name next appears in sequence. Except in an emergency, when overtime is deemed necessary by the employer, the employer is to notify the employee next in rotation by the end of his or her

[1] Article VI (Personnel and Pay Practices), Section I (Hours), Subsection (b).

[2] Article VI, Section 2 (Premium Pay and Overtime), Subsection (b).

lunch period of the day on which the overtime is to be worked.[3] The contract provides for premium pay rates for work performed on "chart days."[4] It also provides for a Labor-Management Committee to consider and recommend to the Commissioner changes in unit members" work conditions, but matters subject to the contractual grievance procedure are not "appropriate" for consideration by that Committee.[5]

Petitioner claims that at 5:14 a.m. on June 3. 1996,[6] five hours after the end of his regular shift which ended at 12 Midnight, he was called at home by a fellow employee asking if Petitioner wanted to work a chart day that day starting at 6 a.m. Petitioner declined. Protesting the call. Petitioner asserts that he wrote a letter dated June 19, 1996, to John Peluso. District Superintendent. Brooklyn South -- 15, stating that he would grieve the fact that the call was made to him on the day he was asked to work rather than the day before. Had he accepted the assignment. he said. he would have had to return to work before the eight hours between shifts. for which the contract provides. He further explained that. as shop steward for the night shift, he was not permitted to work a day shift unless the Labor-Management Committee met to approve it.

Petitioner complained to Peluso. and continues to assert in the instant petition that he was

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[3] Article VI, Section 2, Subsection (c).

[4] Article III (Salaries), Section 4.

[5] Article VIII (Labor-Management Committee), Section 1.

[6] The City asserts the date was June 1, 1996. The Union denies that the employee whom Petitioner asserts called him had any contact or conversation with Petitioner on June 3. These discrepancies are not dispositive of the result here.

"wrongfully charged with a refusal for not working [his] chart [day]." In his Step I grievance letter, and in the instant proceeding, he contends that the practice of offering work on chart days "is being used illegally as a daily chart cancellation practice!" He described the practice as an "improper practice (violation of contract)," asserting that it was "imposed on other sanitation workers at Brooklyn South -- 15." Petitioner contends that Union Business Agent James Rosciano told him that "President Scarlatos [of Local 831] made a verbal agreement with the City," and that he believes it to be "illegal."

In the grievance letter. Petitioner also protested, "I believe this [is a] continuing case of improper practice and improper notification to work my chart day and also a case of double standards is being used by the employer illegally as I know of other sanitation districts where this improper practice is not in effect."

Petitioner's grievance letter to Peluso also contained complaints about the Union, specifically, that it violated the contract "between its members and the City of New York Department of Sanitation" and breached its duty of fair representation. He asserted that "whether or not the Union wants this improper practice to continue or our employer, it is the responsibility of both to enforce the collective bargaining agreement (contract) as signed..." He maintained that Day Shop Steward John Barney and Business Agent James Rosciano reftised to "correct the problem."

Petitioner asserts that he encountered the same situation when he was asked to work on August 16 and 26, 1996, and again on March 6 and 22, 1997.

POSITIONS OF THE PARTIES

Petitioner's Position

In the instant proceeding, Petitioner describes the nature of the controversy as "1. Improper notification of work chart (Day Off) Title 61 of the City of New York office of Collective Bargaining, Section 1-07(d) improper practice. 12-306A.(I), B. (1) N.Y.C. Collective Bargaining Law Date charged for chart 6-3-96. 2. Duty of Fair Representation (Breached)." He asserts that it happened again on August 16 and 26, 1996, and March 6 and 22. 1997. As the relief requested, he specifies the following:

1. STOP using improper practice of chart cancellation.
2. Reimbursed for all charts future and present charged improperly.
3. Reimbursed for all mailing and notary expenses.
[4.]Local 831 suspended or penalized for breaching duty of fair representation.

Petitioner claims that a wrongful refusal to process his grievance regarding what he describes as the "improper practice" of assigning of voluntary overtime constitutes a breach by the Union of its duty of fair representation. He argues that it is due to the alleged verbal agreement between the Union and the City that Business Agent Rosciano refused to process his grievance. He does not deny that he spoke with Rosciano "on numerous occasions," but he argues that Rosciano told a supervisor in Petitioner's shop not to accept any grievances he may wish to file on the subject. He contends that "[he] was left with no other choice but to file a breach of fair representation..." In his reply to the Union's answer, Petitioner further disputes that the practice about which he complains is promulgated on a City-wide basis. He states, "[N]ot all districts charge a worker with a refusal when they call in the morning whether or not

they get in touch with the worker."

Union's Position

The Union defends its position by arguing that Petitioner is not complaining about representation so much as about the procedure for assigning voluntary overtime. It asserts that the procedure of charging for chart days has been in effect since 1975, adopted by "the then Negotiating Team." The Union acknowledges that employees may be called in the morning or day of a unit member's chart (day off) but maintains that the procedure is used on a City-wide basis by the Department of Sanitation. The Union states that, as recently as April 16, 1996, when a "Negotiating Team" met, "no motion to change existing policy was put forward for discussion."

Finally, the Union maintains that Petitioner's grievance of June 19, 1996, was investigated fully by Business Agent Rosciano, who determined that Petitioner did not work on the day before he was called to work voluntary overtime and, under the circumstances, the contract clause requiring eight hours between shifts was not violated. The Union concludes that its refusal to process the grievance was appropriate and reasonable. The Union also asserts that "President Scarlatos would welcome the opportunity to discuss this matter with Mr. Liebold at any time at mutual convenience."

City's Position

The City claims that the actions of which Petitioner complains were standard operating procedure for notifying an employee of an opportunity to work voluntary overtime. It claims that the practice of "charging" an employee is simply a record of which employee has been offered overtime, to allow for equitable distribution. It asserts that there are no adverse consequences of

charging and that Petitioner's claim that he was "wrongfully charged" states no claim under the NYCCBL. The City argues that Petitioner's complaint deals with contract interpretation and that it is not within the purview of the Board of Collective Bargaining ("Board").

DISCUSSION

Petitioner claims that the Union has breached its duty of fair representation by failing to process his grievance beyond Step I of the contractual grievance procedure. He also claims that the City's procedure for notifying employees of the opportunity to work voluntary overtime constitutes an improper practice.

The United States Supreme Court recognized the duty of fair representation when it held that where a union is the exclusive bargaining agent for a unit, it has a correlative duty to treat all members fairly,[7] i.e., to refrain from actions which can be construed as "arbitrary, discriminatory, or in bad faith."[8] In Vaca v. Sipes, which concerned the grievance processing, as the case before us, the Court held that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures ... If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined...
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> The Board of Collective Bargaining has also recognized this duty, the scope of which

[7] Steel v. Louisville & Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L-Ed. 173 (1944); Vaca v. Sipes, 386 US 171 (1967).

[8] Vaca v. Sipes, 386 US 171. 64 LRRM 2369 (1967).

extends to the negotiation, administration, and enforcement of collective bargaining agreements.[9] In the area of contract enforcement. which includes processing employee grievances, we have held that a union does not breach its duty of fair representation merely because it refuses to advance a grievance; nor does it breach this duty because the outcome of a settlement does not satisfy a grievant.[10] The Board accords wide latitude to a union in determining whether to process a grievance.[11] The only condition limiting a union's discretion is that a decision not to process a grievance must be made in good faith and in a manner that is neither arbitrary nor discriminatory as to collective bargaining rights under the NYCCBL.[12] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[13] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[14] Moreover, allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[15]

Petitioner in the instant case has failed to establish that the Union acted improperly in assessing whether to pursue his grievance through the contractual process. He has not asserted

[9]Decision Nos. B- 11-95, B- 16-94, B-8-94.

[10]Decision Nos. B-20-97, B-8-94, B-29-93, B-21-93.

[11]Decision Nos. B-34-96, B-31-94, B-8-94.

[12]Decision Nos. B-20-97, B-8-94.

[13]Decision Nos. B-20-97, B-21-93, B-35-92.

[14]Decision Nos. B-20-97, B-21-93, B-35-92.

[15]Decision No. B-28-89: see also Decision Nos. B-55-87 and B-2-87.

that the Union processed such a grievance for other unit members but not for him; thus, there can be no finding that the Union discriminated against Petitioner. The Union asserts and Petitioner admits that Business Agent Rosciano spoke with Petitioner about the grievance on numerous occasions. The Union further argues that in its investigation of the facts asserted in Petitioner's grievance, it determined that no contract violation resulted from the manner by which Petitioner was offered the opportunity to work voluntary overtime. Whether the Union was correct in the rationale set forth or not, it cannot be said that the Union's handling of the matter was arbitrary or perfunctory.

Petitioner also admits that the substance of his complaint concerns a procedure used to assign voluntary overtime. That is a subject which the Union and the City considered during contract negotiations. They have memorialized their agreement on the subject in the applicable contract, and the Union's determination that Petitioner's interpretation of the agreement is incorrect and his grievance not meritorious is a matter within its discretion, in the absence of specific factual allegations showing discriminatory or bad-faith motivation. As stated above Petitioner here has not alleged facts sufficient to make a showing of discrimination or bad faith. As Petitioner has failed to meet his burden with respect to the claim that the Union breached its duty of fair representation, no derivative liability will lie against the City.

We also find that Petitioner has failed to assert an independent claim of improper practice against the City. He has not asserted that he was deprived of any benefit of his terms and conditions of employment, e.g., not receiving pay for work performed or denied leave time. The employer's method of assigning voluntary overtime falls within the managerial prerogative of the

City, under Section 12-307b of the NYCCBL, subject to the restrictions imposed by the parties' collective bargaining agreement. As noted above, any claim that the contract may have been violated may be redressible in the arbitrable forum, not as an improper practice proceeding under Section 12-306 of the NYCCBL, and this Board may not inquire into a union's handling of such a grievance in the absence of claims. which must be specified, that the union's handling of the matter was arbitrary, discriminatory, or done in bad faith.

For these reasons. the instant improper practice petition is dismissed in its entirety.

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- 1845-96 be, and the same hereby is, dismissed in its entirety.

DATED: New York, New York
September 18. 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER