

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding	:	
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-between-	:	
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SELBOURNE A. REID,	:	Decision No. B-21-2000
Petitioner,	:	Docket No. BCB-2085-99
	:	
-and-	:	
	:	
UNITED PROBATION OFFICERS ASSOCIATION	:	
and DEPARTMENT OF PROBATION,	:	
	:	
Respondents.	:	

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**DECISION AND ORDER**

Pursuant to § 12-306 of the New York City Collective Bargaining Law (“NYCCBL”),<sup>1</sup> Selbourne Reid (“Petitioner”) filed a verified improper practice petition on August 24, 1999, against the United Probation Officers Association (“UPOA” or “Union”) alleging a breach of the duty of fair representation. Pursuant to § 12-306(d), Petitioner also named the Department of Probation as a respondent (“Department” or “City”).<sup>2</sup> The City filed a verified answer on

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<sup>1</sup> Section 12-306(b) of the NYCCBL provides in pertinent part:  
**b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:  
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(3) to breach its duty of fair representation to public employees under this chapter.  
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<sup>2</sup> Section 12-306(d) of the NYCCBL provides:  
**d. Joinder of parties in duty of fair representation cases.** The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such

October 4, 1999 and the UPOA filed a verified answer on October 6, 1999. Petitioner then filed a verified reply on October 19, 1999.

### **Background**

The Petitioner, Selbourne Reid, was employed by the Department in the civil service title of Probation Officer. On March 24, 1997, the Petitioner was served with formal disciplinary charges. On April 2, 1997, an informal conference was held before Assistant Commissioner Richard Roberts and on April 3, 1997, Roberts issued a notice of determination recommending termination of Reid's employment with the Department. On April 7, 1997, attorney for the UPOA, Howard Wien, notified Assistant Commissioner Roberts in writing that the UPOA would commence a grievance on behalf of Reid. On April 10, 1997, David J. Vogel of the Department's Advocate's Office notified Wien of the scheduling of a Step II/B conference before Acting Associate Commissioner Sherry Wilmes that would take place on April 14, 1997. On April 15, 1997, Acting Associate Commissioner Wilmes sent Reid a Notice of Decision upholding the penalty of termination, from which Reid had ten days to elect to appeal. On April 23, 1997, Wien negotiated a stipulation with Vogel to skip a Step III/C hearing before the Office of Labor Relations and proceed directly to arbitration pursuant to the rules of the Office of Collective Bargaining ("OCB"). The stipulation was executed on April 24, 1997, and was sent to the OCB along with a request for arbitration. By letter dated May 28, 1997, the parties were given the opportunity to choose an impartial arbitrator for the hearing.

By letter dated June 12, 1997, Arbitrator Miriam Lipton was informed of her selection by

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employee organization.

the parties. On September 22, 1997, in preparation for the hearing, Wien made a second request for numerous documents in order to support Reid's grievance. Hearings were scheduled for August 4, 1998, and then rescheduled for November 6, 1998. After several days of the hearing, the City concluded its case on April 26, 1999. The Union alleges that at the conclusion of the City's case, Wien informed the Petitioner that in his opinion the case was going poorly and that the evidence already in the record demonstrated that the grievance lacked merit. On April 28, UPOA President Dominic Coluccio spoke with Wien about whether Wien believed that the grievance would succeed as well as Reid's desire to proceed with the case. Coluccio instructed Wien to stop the arbitration and to inform Reid that he should contact Coluccio about the possibility of resigning from the Department. In a letter dated April 28, 1999, Wien informed Reid of Coluccio's instructions. On May 12, 1999, Wien advised the City, Arbitrator Lipton, and the OCB in writing that the grievance and request for arbitration were being withdrawn. A copy was sent to Reid along with a letter stating the reasons for the withdrawal.

### **Positions of the Parties**

#### **Petitioner's Position**

The Petitioner states that he was a permanent employee of the City of New York for nine years and a Probation Officer for approximately five years. The Petitioner alleges that the UPOA failed to appropriately represent him and conspired with the Department to terminate him. Petitioner alleges that on or about April 17, 1997, he was dismissed from his job as a Probation Officer without the benefit of a hearing or the opportunity to exculpate himself. The Petitioner suspects that the Union's President and Vice President conspired with branch chiefs and one of

his supervisors to have him dismissed. Petitioner believes that this is the result of an argument that he had with the President of the Union in early 1995 when the Petitioner questioned the manner in which union officers were elected.

Petitioner alleges that between June 26, 1995 and February 1997, he was subjected to an “illegal type of treatment” and made several reports to the Union’s President and Vice President but did not receive any response. The Petitioner alleges that on March 24, 1997, he was served with charges and summoned to attend a hearing on April 2, 1997, before Assistant Commissioner Roberts. The Petitioner claims that he contacted Vice President Jeph Oyeku who told him that he would attend the hearing. At the hearing, the Petitioner alleges that the charges were “taken as read” and that he was given the choice of one of three penalties — termination, fine, or fine and probation. The Petitioner argues that he would not accept any of the penalties because he did not hear the evidence against him and was not given an opportunity to exculpate himself. The Petitioner alleges that he was told that the conference would be recommending that he be terminated from his job. Petitioner contacted Howard Wien, an attorney at the firm that represents the UPOA.

The Petitioner explains that he then attended another hearing on April 14, 1997, before Assistant Commissioner Sherry Wilmes and Wien appeared with him at the hearing.

On April 17, 1997, the Petitioner claims that he was at work when Supervisor Diane Marks came into his office accompanied by Frank Bermejo, an investigator, who told him that he was dismissed, demanded his badge, and ordered him to leave without his belongings.

According to the Petitioner, Wien initiated arbitration proceedings on his behalf in

November 1997. After the hearing began, Wien told the Petitioner that the President and Vice President of UPOA were against proceeding with the arbitration. Wien told the Petitioner that he would continue to represent him as long as the UPOA would allow. The Petitioner argues that Wien told him that the UPOA was his client and that his job was to carry out the wishes of the UPOA.

According to the Petitioner, the hearing was held on approximately seven dates between November 18, 1997 and April 26, 1999. The Petitioner alleges that on April 26, 1999, during one of the breaks in the hearing, Wien told the Petitioner that the Department was willing to expunge the charges if the Petitioner would resign. The Petitioner claims that since the City refused to pay him for lost wages, he would not agree to resign.

The hearing was to continue on May 17, 1999 and July 23, 1999, but the dates were canceled. The Petitioner alleges that he received two letters from Wien dated April 28, 1999 and May 12, 1999, stating that the Union had withdrawn the request for arbitration and the future hearing dates were canceled.

The Petitioner claims that he called President Coluccio about the situation and Coluccio explained that he believed that Petitioner should resign. He also told the Petitioner that the City would not pay him for lost wages. The Petitioner also alleges that he asked Vice President Oyeku if he could apply for unemployment and was told that he was “not entitled to any benefits from unemployment.”

In his reply, the Petitioner asserts that during the Step I and II conferences, he was not given an opportunity to hear the evidence in support of the charges placed against him.

Furthermore, the Petitioner asserts that the Department and UPOA conspired to abort the proceedings before the Arbitrator could make a decision in his favor. The Petitioner asserts that the Respondents foresaw that he would win the case at arbitration, so they decided to “short circuit the proceedings.”

The Petitioner further alleges that David Vogel, the Department’s Advocate and the UPOA received Petitioner’s letters from July 3, 1995 through September 1997. He claims that the UPOA’s assertion that it only became aware of Petitioner’s complaints beginning March 1997 is false. The Petitioner also alleges that during the hearing, the City’s chief witness lied about the days on which he met with the Petitioner and that his supervisor committed perjury. Furthermore, the Petitioner asserts that contrary to the allegations in the evaluation reports, the Department’s records indicate that the Petitioner handled certain cases appropriately, but the UPOA did not pursue this matter.

### **Union’s Position**

The Union contends the Petitioner’s allegations fail to demonstrate a breach of the duty of fair representation. The Union explains that the Petitioner’s allegations all stem from the UPOA’s decision to withdraw the grievance and request for arbitration challenging the Department’s decision to terminate his employment. According to the Union, the decision to pursue or withdraw the grievance at any time during the proceedings is well within the discretion of the UPOA. The Union argues that it did not act in an arbitrary or perfunctory manner in evaluating the grievance.

The Union argues that once Reid received notice of his termination, the UPOA was

quickly involved in bringing a grievance on his behalf. The grievance was processed until it reached arbitration. According to the Union, during the arbitration, the City presented substantial evidence in support of its decision to terminate Reid. Only at that time, upon the advice of counsel, the Union exercised its discretion to withdraw the grievance because it believed that it would not succeed at arbitration. The Union claims that withdrawal at that point was not arbitrary and was based upon a substantial record of testimony and exhibits. Such decision, according to the Union, does not breach the duty of fair representation because the decision to withdraw was neither based upon animus nor was it arbitrary. The UPOA claims that it did not treat the Petitioner differently from any other probation officer and that it is not uncommon for a grievance to be withdrawn when it has no demonstrable merit.

### **City's Position**

The City asserts that the Petitioner fails to allege facts sufficient to maintain a charge that it has taken actions for the purpose of frustrating the statutory rights of the Petitioner in violation of the NYCCBL. The City claims that the Petitioner has not provided facts to substantiate his claim that either the UPOA or the City interfered with his rights provided in §12-305 of the NYCCBL.

The City contends that the Union's decision to withdraw the grievance does not constitute a breach of the duty of fair representation. Furthermore, the City argues that while the Petitioner has made numerous allegations concerning the alleged failure to represent him, he has not demonstrated a violation §12-306. The City asserts that the Petitioner's allegations are mere speculation.

### Discussion

The petition alleges that the UPOA breached its duty of fair representation when it withdrew Petitioner's grievance from arbitration on May 12, 1999 — in the midst of arbitration proceedings. The duty of fair representation requires a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.<sup>3</sup> In the area of contract administration, including the processing of employee grievances, it is well-settled that a union does not breach its duty of fair representation merely because it refuses to process every complaint made by a unit member.<sup>4</sup> The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and non-discriminatory. It is only when a union arbitrarily ignores a meritorious grievance or processes a grievance in a perfunctory fashion that the union violates the duty of fair representation.<sup>5</sup> The burden is on the petitioner to plead and prove that the union has engaged in such conduct.<sup>6</sup>

In the present case, the Petitioner has failed to establish that the Union's decision to withdraw the request for arbitration in the midst of arbitration proceedings, thereby canceling any scheduled future dates for the hearing, was effected arbitrarily, discriminatorily or in bad faith.

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<sup>3</sup> *Perlmutter v. Uniformed Sanitationmen's Assoc. et al.*, Decision No. B-16-97 at 5; and *Allcott v. Local 211 et al.*, Decision No. B-35-92 at 7.

<sup>4</sup> *Id.*

<sup>5</sup> *Jiminez v. New York City Health and Hospitals Corp. et al.*, Decision No. B-25-98 at 8; *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11-12; and *Allcot v. Local 211 et al.*, Decision No. B-35-92 at 7.

<sup>6</sup> *Lucchesse v. Local 237 et al.*, Decision No. B-22-96 at 11.



The Petitioner has not established that the Union's determination to withdraw the request for arbitration was in any way improperly motivated. Rather, the evidence indicates that the Union's determination was reached in good faith after assessing the circumstances of the Petitioner's situation. The UPOA represented the Petitioner through each step of the grievance process. Furthermore, the Union even represented the Petitioner during several days of an arbitration hearing. After the City concluded its case on April 26, 1999, UPOA attorney Howard Wien told the Petitioner that he felt that the case was going poorly and that the evidence in the record demonstrated that the grievance "lacked merit." Wien subsequently spoke with UPOA President Dominic Coluccio to discuss the likelihood of winning the case and based upon Wien's analysis that there was a "very minimal prospect of succeeding," Coluccio instructed Wien to withdraw the grievance from arbitration. Where, as here, the evidence does not suggest that the union was improperly motivated, there is no violation of the duty of fair representation.<sup>7</sup>

Since the Petition against the Union fails, the derivative claim brought against the City pursuant to § 12-306(d) of the NYCCBL cannot stand. Accordingly, the instant improper practice petition is hereby 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 be, and the same hereby is, dismissed in its entirety.

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<sup>7</sup> See, *Cromwell v. New York City Housing Authority et al.*, Decision No. B-29-93 at 13-14.

Dated: July 24, 2000  
New York, New York

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MARLENE A. GOLD  
CHAIR

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DANIEL G. COLLINS  
MEMBER

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GEORGE NICOLAU  
MEMBER

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RICHARD A. WILSKER  
MEMBER

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EUGENE MITTELMAN  
MEMBER

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BRUCE H. SIMON  
MEMBER