STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ERIC G. BROCKINGTON,

Charging Party,

- and - **CASE NO. U-23951**

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

ERIC G. BROCKINGTON, *pro se*

KENNEDY, SCHWARTZ & CURE P.C. (ANDREA L. LAZAROW of counsel), for Respondent

MARTIN SCHNABEL, GENERAL COUNSEL (MICHELLE SHERIDAN of counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Transport Workers Union, Local 100 (TWU) and the New York City Transit Authority (Authority)[1] to a decision of an Administrative Law Judge (ALJ), on an improper practice charge filed by Eric G. Brockington, which held that the TWU violated §§209-a.2(a) and (c) of the Public

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[1] The Authority is made a statutory party to this proceeding pursuant to §209-a.3 of the Act.

Employees' Fair Employment Act (Act) in its handling of a grievance arbitration for Brockington.

EXCEPTIONS

The TWU excepts on the grounds that the ALJ made an erroneous finding of fact, that Brockington failed to establish a *prima facie* case and that the burden of proof was erroneously shifted to the TWU. The Authority excepts on the grounds that the ALJ's decision was incorrect as a matter of law.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision[2] and are adopted by the Board, except to the extent specifically addressed herein.

Brockington's charge, as amended, alleged that TWU failed to adequately represent him at a Step 1 grievance hearing, failed to obtain evidence he requested, failed to secure the attendance of witnesses for his disciplinary arbitration hearing, and intentionally misled him with erroneous advice concerning the strength of the Authority's disciplinary case against him and the possible outcome thereof. He also claimed that he was discharged for abandoning his train whereas other Authority employees similarly charged suffered lesser penalties.

Brockington was the only witness to testify in this proceeding. His testimony, in narrative form, was initially unspecific and conclusory as to the manner in which TWU

[2] 36 PERB ¶4593 (2003).

"misrepresented" him. He testified that the TWU did not allow him to bring witnesses with relevant testimony to his disciplinary grievance arbitration, did not allow him to present photographs of non-working Authority telephones and prevented him from producing evidence that other employees of the Authority committed offenses similar to his and were either cleared of the charges or received lesser disciplinary penalties.

His later testimony was somewhat more specific when describing the events that took place "before the case was pushed to the arbitration hearing". Prior to the hearing, he spoke to TWU officers Clarence Little and Irwin Lee and TWU attorney, Ed Pachardo. He claimed he told Pachardo "everything that I would need to clear me of these charges. . . ." Specifically, Brockington testified that Pachardo did not obtain the sign-on log sheets for the date in question, did not secure the attendance of witnesses[3] and did not move into evidence the photographs of the inoperable phones. Brockington testified that, after speaking with Parmar, he knew Pachardo had not even contacted Parmar.

DISCUSSION

In *Civil Service Employees Association v. PERB and Diaz, (hereinafter, Diaz)*[4] the Appellate Division rejected PERB's holding that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation. The court held there that "in order to establish a claim for breach of the duty of fair representation by a union, there must be a showing that the activity, or lack thereof,

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[3] Brockington requested that TWU call Parmar, his partner on the date in question, Thompson, a flagman who worked at the site in question, and an unnamed supervisor who issued radios to him that day.

[4] 132 AD2d 430, 20 PERB ¶7024 (3rd Dep't, 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith."[5]

Here, it is uncontroverted that Brockington asked the TWU or its agents to secure certain witnesses and other evidence for his disciplinary grievance arbitration hearing and that those requests were not acted upon. The ALJ acknowledged that PERB is loathe to substitute its judgment for that of a union in the processing of grievances[6] and that mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.[7] Negligence or an error in judgment is insufficient to form the basis of a violation.[8]

The ALJ also acknowledged that "[t]here has been no showing of discrimination or claim that the TWU handled Brockington's case differently than it handled the same cases for other employees."[9] However, the ALJ erroneously concluded that the absence of any demonstration by the TWU that it acted with "reason and good faith" warrants a finding of arbitrariness or bad faith. In so finding, the ALJ has, in effect, reversed the burden of proof on a necessary element of the charge without any basis in law.

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[5] 132 AD2d at 432, 20 PERB ¶7024, at 7039.

[6] *Public Employees Fed'n, AFL-CIO and State of New York (Dep't of Health) (Reese)*, 29 PERB ¶3027 (1996).

[7] *Amalgamated Transit Union, Div. 580, AFL-CIO and Central New York Reg. Transp. Auth.*, 32 PERB ¶3053 (1999).

[8] *CSEA (Kandel)*, 13 PERB ¶3049 (1980).

[9] 36 PERB ¶4593, at 4807 n.15.

The Act[10] and numerous decisions[11] hold that a charging party has the burden to prove the necessary elements of the charge; i.e., that the union's actions were arbitrary, discriminatory or in bad faith. Brockington's hearing proof fails on all counts. While Brockington's charge, as amended, may have alleged some deliberate behavior, his hearing evidence fails to establish any. No attempt is even made to establish arbitrariness or bad faith. Simply put, his testimony and the exhibits introduced fail to establish arbitrary, discriminatory or bad faith conduct on the part of the TWU in its representation of him.

The cases cited by the ALJ are clearly factually distinguishable from the facts in the instant case. *New York City Transit Authority and Transport Workers Union*[12] involved the Board's reversal of an Assistant Director's deficiency dismissal of a charge. The Board held that the union's deliberate adjournment of a disciplinary grievance arbitration, under circumstances where it would have otherwise been dismissed in favor of the employee-union member *could, if true,* evidence arbitrary conduct. The reversal merely gave the charging party an opportunity to present his case. Here, Brockington has had a full opportunity to prove the allegations asserted in his pleadings. In *Social Services Employees' Union, Local 371*,[13] the Board found a violation of the Act in the union's refusal to consider or process a grievance request and refusal to give an explanation. However, the case hinged upon the Board's acceptance of the hearing

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[10] Act, §209-a.2(c).

[11] *See, e.g., Grassel v. PERB*, 301 AD2d 522, 36 PERB ¶7002 (2d Dep't 2003); *UFT, Local 2, AFT, NYSUT, AFL-CIO (Oparaji)*, 35 PERB ¶3042 (2002).

[12] 27 PERB ¶3007 (1994).

[13] 11 PERB ¶ 3004 (1978).

officer's finding that the union failed to process the grievance because of animus toward the charging party. One of the union's officials obstructed the grievance request because he felt the charging party was going to testify against the union in an unrelated proceeding. In the instant case, we have no proof of such a bad faith motive.

The TWU's representation of Brockington for his disciplinary grievance may have been deficient, but we have no factual basis upon which to determine whether that deficiency was the result of negligence, gross negligence, incompetence or some other cause. As the record in this matter contains no evidence of arbitrary, discriminatory or bad faith conduct by TWU in its handling of Brockington's case, there is no violation of §§209-a.2(a) and (c) of the Act established.

Based upon our review of the record, we grant the exceptions filed by TWU and the Authority and reverse the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed in its entirety.

DATED: January 23, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHAMPTON TOWN PUBLIC SAFETY BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5248

TOWN OF SOUTHAMPTON,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

SCHLACHTER & MAURO (REYNOLD A. MAURO of counsel), for Petitioner

VINCENT TOOMEY and CHRISTINE A. GAETA, ESQS., for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Southampton Town Public Safety Benevolent Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing a petition filed by the Association seeking, as amended, to fragment, for purposes of representation, eighteen public safety dispatchers (hereafter,

dispatchers)[1] from a long-standing unit of approximately 230 employees of the Town of Southampton (Town), represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

EXCEPTIONS

The Association excepts to the ALJ's decision on the law and the facts. The Association contends that the ALJ misinterpreted the facts and, thereby, misapplied our case law on uniting criteria. The Town and CSEA support the ALJ's decision.

Based upon our review of the record, we affirm the ALJ's decision, dismissing the petition.

FACTS

The facts are fully set forth in the ALJ's decision[2] and are repeated here only as necessary to our consideration of the exceptions.

The Association's petition, as amended, alleges that CSEA should be decertified as the representative of the dispatchers and that the Association should be certified as the exclusive bargaining representative of the dispatchers. The Association argues in support of its petition that CSEA has inadequately represented the dispatchers by excluding them from the negotiating process, by agreeing to "give back" items won in grievance arbitration affecting dispatchers only, by refusing to process valid dispatcher grievances and by ineffectively processing membership applications from dispatchers.

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[1] The in-issue titles are Town Public Safety Dispatcher I and Town Public Safety Dispatcher II.

[2] 36 PERB ¶4016 (2003).

The Association was organized in 1988. At the time of filing the instant petition, the CSEA unit that includes the dispatchers had existed for approximately 30 years. On May 16, 1988, the dispatchers filed a petition seeking to be removed from CSEA's unit and have certified a new exclusive bargaining agent for a unit of dispatchers, arguing inadequate representation by CSEA. The Town and CSEA opposed that petition. In his decision,[3] the Director of Public Employment Practices and Representation (Director) found that, while some of the dispatchers were dissatisfied with CSEA's representation and internal affairs, that sentiment alone was not sufficient to justify the fragmentation of the dispatchers from a long-standing unit, over the Town's objection on administrative convenience grounds.

As then, the dispatchers' primary duties continue to be to operate radio equipment, to relay information for the Town Police, as well as for police in other localities, and to maintain records concerning these calls. The dispatchers work at police headquarters and their work schedule and supervision are the same as that of police officers, who are represented by another employee organization. They also wear uniforms similar to those of police officers. While they are not the only uniformed personnel in CSEA's unit, they are the only unit members required to work on a 24-hour basis.

The Association's president, John Baucum, testified, that the principal reason that the Association filed the petition was the dispatchers' dissatisfaction with the proposed work schedule that was agreed upon in the negotiations for the 2001-2004

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[3] *Town of Southampton*, 22 PERB ¶4026, *aff'd*, 22 PERB ¶3052 (1989).

collective bargaining agreement. The other reason was a restriction in that agreement placed on compensatory time received by some dispatchers for the half-hour meal period. Lastly, the dispatchers felt that they were not being represented properly because, for example, the current unit president, David Wilcox, at a grievance arbitration over compensatory time for worked lunch periods, made a comment that the dispatchers were "double dipping",[4] and that some former CSEA unit presidents had made disparaging remarks because dispatchers work fewer days per year than other unit members.[5]

Guy DiCosola, a CSEA labor relations specialist, testified about the negotiated change in the work schedule. He stated that, during the second negotiating session for the 2001-2004 collective bargaining agreement, the Town had submitted a proposal that changed the dispatchers' work schedule. Prior to the third session, Linda Armstrong, a dispatcher and negotiating team alternate, submitted to DiCosola a proposal from the dispatchers. He recommended against offering the proposal to the Town in negotiations because it was merely a codification of a favorable arbitrator's award and he feared that the Town would make a counterproposal that would negate the benefit of the arbitrator's award.[6] Armstrong's proposal would establish a new limit of 242 days for dispatchers hired after 1998. Over DiCosola's reservations, Armstrong insisted that the proposal be

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[4] Transcript, p. 64.

[5] Transcript, p. 75.

[6] The February 2000 arbitration award was the result of a grievance brought by CSEA on behalf of the dispatchers. The award held that the Town could increase the work schedule of dispatchers hired after February 18, 1998, by nine days a year without additional compensation. Dispatchers hired prior to that date would continue to work between 232 and 236 days a year.

submitted and DiCosola acquiesced. The Town then submitted a counterproposal to change the two-tier maximum number of days set forth in the collective bargaining agreement to a work schedule of 260 days for all dispatchers.

Armstrong testified that during the negotiations the meal break allowance for dispatchers was changed. An arbitration award had provided dispatchers hired prior to 1998 with a one-half hour lunch break without the loss of compensatory time.[7] Eliminating the differential was an issue insisted upon by the Town in negotiations.

The parties negotiated on all the proposals until impasse was declared. It then became apparent that the negotiations would not result in an agreement and would likely go to a legislative imposition unless certain concessions sought by the Town with respect to the dispatchers were agreed upon, specifically the changes in the schedule and the meal break allowance. A compromise proposal of a 245-day work schedule for dispatchers guaranteed that dispatchers hired after 1998, who were the majority of dispatchers, would not work more than 245 days. The dispatchers were also to receive overtime retroactive to the commencement of negotiations (18 months) at a new higher hourly rate. Also, the night differential for dispatchers was made retroactive to January 1, 2001. No other group of employees within the bargaining unit received retroactive payments as the result of these negotiations. In addition, the entire unit, including the dispatchers, obtained gains in compensation, health insurance[8] and other areas. The

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[7] Transcript, p. 485.

[8] CSEA obtained a major concession regarding health insurance with the Town agreeing to pay 100% of the cost of the individual health coverage effective January 1, 2003.

negotiating committee did not make a recommendation on the proposed collective bargaining agreement when it was presented to the membership for a vote.

The record establishes that, of the six or seven regular members of CSEA's negotiating team, one member was a dispatcher. Also, out of three alternate members of the team, one alternate was a dispatcher. In the total unit, there are approximately fifteen dispatchers in the Town Police Department and between 260 and 280 total unit members.

Amstrong, Linda Tarpey and Dale Simchick all testified about their respective union positions. Armstrong was a shop steward for CSEA unit members covering a period of about 16 years. She also identified other dispatchers who served as shop stewards (Simchick, Tarpey and John Bandrowski). Armstrong ran for election to the position of unit vice-president; however, she lost by one vote. She admitted that she encountered no interference from CSEA in seeking union office.

Tarpey testified that, during her 13 years of employment with the Town, she was not aware of any instance where a dispatcher was not permitted to run for office in the CSEA unit. She was elected vice-president of the CSEA unit. Simchick testified that she was elected recording secretary to the executive board of the CSEA unit. In that position, she kept notes of executive board meetings and negotiation sessions.

Wilcox testified that, once it was brought to CSEA's attention, he recognized a problem with certain membership cards. However, this problem was not unique to the

dispatchers. It was a unit-wide problem that Wilcox has corrected with the help of the Town and the CSEA unit treasurer.[9]

DISCUSSION

This petition is the second effort by the dispatchers to decertify CSEA and obtain a separate bargaining unit of employees in the titles of Town Public Safety Dispatcher I and Town Public Safety Dispatcher II. We dismissed the first petition in 1989, finding that the record failed to establish inadequate representation sufficient to warrant fragmentation of the dispatchers from the overall CSEA unit.[10] In that petition, a conflict of interest and inadequate representation were also alleged.

In this petition, the Association has recast these arguments by alleging that the dispatchers have been excluded from the bargaining process, that CSEA agreed to "give back" items won through grievance arbitration, that CSEA has failed to process grievances and, lastly, CSEA has been ineffective in representing the unique interests of dispatchers.

> This Board has long adhered to two ruling principles in deciding uniting questions. First, we have held that "[i]t is the policy of the Act to find appropriate the largest unit permitting for effective negotiations." (citation omitted) The second long-standing principle to which we have adhered is that fragmentation of existing bargaining units will not be granted in the absence of compelling evidence of the need to do so. (citation omitted) We have held that compelling need is generally established by proving the existence of a conflict of interest or inadequate representation. (citation omitted) When these principles have been applied in the creation and continuation of appropriate units, they have, at the very least, contributed to stability in public sector labor relations and have

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[9] Transcript, pp. 601-02.

[10] *Supra* note 3.

> focused the parties' attention on substantive negotiations rather than on the process of adding to or subtracting from units.[11]

On this record, we find no evidence of inadequate representation by CSEA of the dispatchers. In support of its allegation of inadequate representation, the Association points to Dicosola's lack of support for the dispatchers' work schedule proposal and the alteration of that work schedule and their lunch break compensatory time in the 2001-2004 collective bargaining agreement. The Association also relies on Wilcox's remarks that dispatchers were "double-dipping" concerning the compensatory time received for the meal break, and, that they work fewer hours than other unit employees. The Association further contends that CSEA denied the dispatchers representation in negotiations, but the record fails to support this contention. Tarpey was a permanent member of the negotiating team, as well as an officer in the unit. Armstrong, a former CSEA shop steward, and Baucum were alternates or participants as advisors. We do not find, under the circumstances, that CSEA ignored the dispatchers as a group within the unit.

What is clear from the record is that this round of negotiations between CSEA and the Town was difficult. CSEA obtained a major concession regarding health insurance. DiCosola's testimony outlined the negotiations culminating with mediation. While he was aware of the dispatchers' adamant position with respect to the work schedule and compensatory time, the compromise proposal worked out with the mediator was a recognition that the interests of a minority of the bargaining unit must

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[11] *State of New York (Long Island Park, Recreational and Historical Preservation Comm.)*, 22 PERB ¶3043, at 3098 (1989).

sometimes be subordinated to the interests of the majority in order to bring closure to the negotiating process.[12] In the bargaining process, it is simply not possible to satisfy all the interests of a subgroup all of the time.[13]

Based upon the foregoing, we deny the Association's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the petition for certification/decertification must be, and it hereby is, dismissed in its entirety.

DATED: January 23, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[12] *Deer Park Union Free Sch. Dist.*, 22 PERB ¶3014 (1989).

[13] *State of New York*, *supra* note 11, at 3099.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PROFESSIONAL EDUCATORS OF CORNING COMMUNITY COLLEGE,

Petitioner,

-and-

CASE NO. C-5331

CORNING COMMUNITY COLLEGE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Professional Educators of Corning Community College has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time teaching faculty.

Excluded: Division chairpersons, faculty on administrative assignment who teach less than 50% of a full-time teaching load.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Professional Educators of Corning Community College. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 23, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member