# *Martinez*, 10 OCB2d 11 (BCB 2017)

(IP) (Docket No. BCB-4194-17)

***Summary of Decision:*** Petitioner alleged that the Union breached its duty of fair representation by failing to assist her in obtaining a collectively-bargained wage increase. The Union and the City argued that the Union did not breach its duty of fair representation. The Board found that Petitioner's claim fails to establish that the Union breached the NYCCBL. Accordingly, the petition was dismissed. ***(Official decision follows.)***

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**OFFICE OF COLLECTIVE BARGAINING**
**BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

***-between-***

**BENJULKYS B. MARTINEZ,**

***Petitioner,***

***-and-***

**SEIU, LOCAL 300, THE CITY OF NEW YORK, and NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,**

***Respondents.***

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## DECISION AND ORDER

On January 27, 2017, Benjulkys B. Martinez filed a verified improper practice petition, *pro se*, against SEIU, Local 300 ("Union"), the City of New York "(City"), and the New York City Administration for Children's Services ("ACS").[1] Petitioner alleges that the Union breached its

[1] We amend the caption to include the City, which was not named in the petition but is a necessary party to this matter. *See* § 1-07(c)(1)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"); *Dixon*, 8 OCB2d 9, at 1 n. 1 (BCB 2015).

duty of fair representation pursuant to § 12-306(b)(3)[2] of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to assist her in obtaining a collectively-bargained wage increase.[3] The Union and the City argue that the Union did not breach its duty of fair representation. The Board finds that Petitioner's claim fails to establish that the Union breached the NYCCBL. Accordingly, the petition is dismissed.

## BACKGROUND

The Union is the certified bargaining representative for employees in the civil service title of Procurement Analyst. The City and the Union are parties to a Memorandum of Agreement for the period from February 23, 2011 through June 22, 2018 ("Agreement"), which covers the Procurement Analyst title. The Agreement provides for, among other things, a wage increase of 2.5 percent for all covered employees, effective as of August 23, 2016.

Petitioner has worked in the title of Procurement Analyst since December 2014. She was employed by the New York City Human Resources Administration ("HRA") until approximately September 9, 2016.[4] The City's Payroll Management System shows, and Petitioner

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[2] Petitioner did not specify which provisions of the NYCCBL the Union allegedly violated. Based on her allegations, we construe the petition to allege a violation of NYCCBL § 12-306(b)(3). *See Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (Board draws from the pleadings "all permissible inferences in favor of" a *pro se* petitioner).

[3] Petitioner also alleged that ACS failed to honor the wage increase to which she was entitled. By letter dated February 3, 2017, the Executive Secretary for the Office of Collective Bargaining notified Petitioner that the claim was deficient under NYCCBL § 12-306(a). Petitioner did not file an amended petition or otherwise respond to the letter. Accordingly, by letter dated February 23, 2017, the Executive Secretary notified her that any claims against ACS were deemed withdrawn.

[4] HRA is now known as the Department of Social Services ("DSS"). However, for purposes of this Decision and Order, it will be referred to as HRA.

acknowledges, that she received the 2.5 percent salary increase, effective August 23, 2016, while employed at HRA. (*See* City Ans., Ex. 7.)

On September 12, 2016, Petitioner began employment with ACS in the same title and with no break in service. Petitioner asserts that, at some point prior to commencing employment at ACS, she negotiated an 8 percent salary increase, effective upon her start date at ACS. Petitioner stated that the 8 percent increase was based on her pre-August 23, 2016 salary, without taking into consideration the 2.5 percent contractual raise.[5] The Union asserts that it had no knowledge of Petitioner's salary and transfer negotiations nor from what base salary the increase was negotiated.

By email dated September 14, 2016, Petitioner contacted Carol Jacobs, an Employee Compliance Supervisor in ACS's Office of Personnel Services, to find out if there was someone she could speak to regarding her "2.5% union salary increase?" (Pet. at 6)[6] That same day, Jacobs sent Petitioner a responsive email stating that "[y]our raise was done at your previous agency because your union title raises were effective 8/23/2016." (*Id*.) Petitioner responded to Jacobs by email, stating that she would like to know "why the union increase isn't included in my salary at the current agency," and asked if Jacobs knew the appropriate person to speak with regarding salary and wages. (Pet. at 5)

On September 16, 2016, Petitioner emailed Sherbreina Watson, ACS's Director of Compensation, Audit & Management Reporting, asking whether the 2.5 percent salary increase would be reflected on the next week's paycheck and, if not, who she could contact to "ensure that

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[5] Petitioner made this statement at a May 8, 2017 conference held by the Trial Examiner.

[6] The petition consists of numerous pages of unnumbered attachments. For ease of reference, the Trial Examiner numbered the attachments from one through nine, and we cite to those page numbers.

it is reflected in my current position at ACS?" (Pet. at 5) Watson responded that same day, stating that "[y]ou began employment with ACS on September 12, 2016. The contractual increase was effective August 23, 2016. Since you were not an employee of this agency serving in the Procurement Analyst title as of August 23, 2016, you are not entitled to the August 23, 2016 increase." (*Id.*) Petitioner responded to Watson's email shortly thereafter, stating:

> I have been a permanent procurement analyst and have been before this contract was signed. I was given an 8% raise starting from, September 12, 2016. Which should have included the 2.5% in question from August 23, 2016. This seems to have not been the case. I am trying to ascertain the necessary steps to correct this oversight.
> Is there a document you need from myself or my previous employer, HRA, displaying my salary on my last day or any such information? I am happy to assist as I am sure like myself you endeavor for a smooth transition.

(Pet. at 4)

On October 4, 2016, Petitioner sent an email to the City's Office of Labor Relations ("OLR") Step III Filings email address stating that ACS "won't honor the 2.5% percent union raise because [] I didn't start at this agency before [A]ugust 23" and asking "how should I proceed or can you please provide me with the appropriate channels to file a grievance." (Pet. at 3) The following day, OLR Chief Review Officer Gail Rowan responded to Petitioner's email and suggested that she contact the Union to discuss the matter. Rowan copied the Union and ACS' Director of Labor Relations on the email.

Petitioner alleges that on October 6, 2016, she had a telephone conversation with Union Secretary-Treasurer Mary Walker in which she discussed her 2.5 percent union increase but that "no resolution was given."[7] (Rep. to Union Ans. at 2) On January 25, 2017, Petitioner sent an

[7] Petitioner alleges for the first time in her Reply that she spoke to the Union prior to January 25, 2017 about the payroll matter. Accordingly, Respondents did not have an opportunity to formally

email to the Union at its general mailbox address. The email stated, in part:

> My previous employe[r] was [HRA]. I departed that agency on 09/09/2016 and started new employment with [ACS] there was no break in service. I am serving in the same title. The issue that I am currently having with ACS is they won't honor the 2.5% union raise because, I didn't start at this agency before August 23, 2016. My concern is that since this is a labor agreement with all city agencies, and there was no break in service I am due my contracted union increase. Please reply to this email stating why I shouldn't file a grievance with my current agency.

(Pet. at 8) According to the Union, Secretary-Treasurer Walker immediately called Petitioner and explained to her that her 2.5 percent increase would have come from HRA on August 23, 2016, and not from ACS after she transferred there in September 2016. After speaking to Walker, Petitioner sent another email later that day stating:

> Per our phone conversation, you stated that I am not entitled to my 2.5 union raise because I started working for ACS in September. Therefore, I [am] not entitled to the union raise, I do not believe this is a documented citywide policy. This Citywide Agreement covered all employees under the title of procurement analyst. You stated that my raise should have come from my previous agency (HRA), yet you have made no attempts to retrieve the amount owed or offer me any direction to that end.
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> Thank you for the phone call as you can provide no means of regress [sic] I will seek my own options. Thank you.

(*Id.*)

## POSITIONS OF THE PARTIES

### Petitioner's Position

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respond to the allegation. Notwithstanding, the allegation does not alter our findings and conclusions.

Petitioner alleges that the Union breached its duty of fair representation when it failed to "assist me with my grievance or find alternative resolution" regarding ACS' alleged refusal to provide her with the 2.5 percent contractual raise.[8] (Pet. at 1) Petitioner acknowledges that she received the contractual 2.5 percent increase on August 23, 2016, while she was an HRA employee. She asserts that her 8 percent salary increase was based on her pre-August 23, 2016 salary but contends that it should have been based on her post-August 23, 2016 salary. Petitioner alleges that she was attempting to file a grievance regarding ACS' alleged failure to honor the contractual increase and that she contacted the Union to obtain assistance in doing so, but contends that she could not since she "was unaware of the procedure or without any union assistance in this matter." (Rep. to Union's Ans. at 3)

**Union's Position**

The Union denies that it committed an improper practice by failing to assist Petitioner with her grievance or find a resolution to her claimed dispute with the ACS. It argues that there is no evidence to establish any unlawful motivation on its part or any refusal to process a grievance on Petitioner's behalf. The Union notes that it responded to Petitioner's inquiries and that Petitioner did not request that it file a grievance on her behalf. Moreover, the Agreement provides Petitioner with the right to file a grievance on her own behalf, which she did not do. Therefore, the petition does not establish a *prima facie* violation of the NYCCBL.

The Union further argues that it was not privy to Petitioner's salary negotiations with ACS and was unaware, until Petitioner contacted the Union on January 25, 2017, that she had negotiated

[8] NYCCBL § 12-306(b)(3) provides that it shall be an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter."

an 8 percent salary increase. The Union further asserts that it has no knowledge of whether the 8 percent salary increase was based upon Petitioner's salary before or after she received the August 23, 2016 contractual wage increase. Notwithstanding, the Union asserts that Petitioner's post-transfer salary at ACS exceeds the minimum salary set forth in the Agreement; accordingly, ACS is not violating the Agreement regardless of whether the 2.5 percent contractual increase was subsumed within the 8 percent salary increase. Therefore, the Union asserts, there was no contract violation warranting a grievance.

**City's Position**

The City argues that Petitioner has failed to establish that the Union's actions were arbitrary, discriminatory, or in bad faith. It asserts that the evidence is clear on its face that Petitioner received the 2.5 percent increase set forth in the Agreement. Moreover, Petitioner failed to provide any evidence that she requested that the Union move forward with a grievance on her behalf. The petition is otherwise devoid of any facts showing that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Accordingly, the claim against the Union, and the derivative claim against the City, must be dismissed.[9]

## DISCUSSION

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be

[9] The City also argues that Petitioner's claim against ACS is time-barred because she knew more than four months prior to filing the petition that there was an alleged discrepancy regarding the 2.5 percent contractual wage increase to which she believed she was entitled. However, because the claims against ACS and the City have been deemed withdrawn, we need not consider this defense.

carried simply by . . . questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citation and quotation marks omitted). The duty of fair representation "does not reach into and control all aspects of the Union's relationship with its members." *McAllan*, 31 OCB 14, at 30 (BCB 1983). Rather, a union has a duty "to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Smith*, 3 OCB2d 17, at 7 (BCB 2010) (citation omitted).

It is well-established that a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Proctor*, 3 OCB2d 30, at 12 (BCB 2010) (citation omitted); *Nealy*, 8 OCB2d 2, at 16. Thus, a "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *Morris*, 3 OCB2d 19, at 10 (BCB 2010) (quoting *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008)). A union is not obligated to advance every grievance, and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Moreover, "[e]ven errors in judgment do not rise to the level of a breach of this duty, unless it can be shown that the union's actions were arbitrary, discriminatory, or in bad faith." *Feder*, 9 OCB2d 33, at 34 (2016) (citations omitted).

On the facts presented, we do not find that the Union breached its duty of fair representation by failing to assist Petitioner in filing a grievance or otherwise resolving her alleged dispute with ACS. The evidence is clear that the Union fulfilled its duty "to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Smith*, 3 OCB2d 17, at 7. The record reflects that the Union promptly

responded to Petitioner's January 25, 2017 email regarding her wage dispute with her employer. Union Secretary-Treasurer Walker contacted Petitioner that same day and explained that HRA was responsible for issuing her contractual salary increase, not ACS. Shortly thereafter, Petitioner sent an email to Walker that acknowledged this information, concluded that the Union could not provide her with "any means of re[d]ress," and stated that "I will seek my own options." (Pet. at 8) Petitioner thus communicated to the Union that she would pursue the matter further without its assistance.

Further, the Union was under no obligation to resolve the dispute or even to file a grievance on Petitioner's behalf, as such matters are within the Union's discretion. *See Proctor*, 3 OCB2d 30, at 12 ("[A] union enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.") The crux of Petitioner's complaint concerns the salary she received when she started working at ACS on September 12, 2016. According to Petitioner, this salary should have included an 8 percent raise from her post-August 23, 2016 salary. However, Petitioner's starting salary at ACS was not contractually mandated but rather an agreement she reached separately with ACS. The Union points out that it was not involved in establishing the Petitioner's ACS salary, and the salary she received was above the minimum contractual rate for her title. Therefore, it reasonably exercised its discretion to conclude that the salary she was paid by ACS did not violate the Agreement. Accordingly, we find no basis upon which to conclude that the Union's failure to further address the Petitioner's complaint was arbitrary, discriminatory, or in bad faith. *See Smith*, 3 OCB2d 17, at 7.

In light of the above, we find that Petitioner's claim that the Union breached the duty of fair representation must fail, as must the derivative claim against the City and ACS pursuant to NYCCBL § 12-306(d). *See Nardiello*, 2 OCB2d 5, at 42. Because all other claims against the

City and ACS were deemed withdrawn, the 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 filed by Benjulkys B. Martinez and docketed as BCB-4194-17, against SEIU Local 300 and the City of New York and the Administration for Children's Services, be, and hereby is, dismissed.

Dated: June 22, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

CHARLES G. MOERDLER
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