McNeil, 10 OCB2d 8 (BCB 2017)

(IP) (Docket No. BCB-4193-17)

Summary of Decision: Petitioner alleged that NYCHA retaliated against her in violation of NYCCBL § 12-306(a)(1) and (3) by improperly disciplining her and that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b) by not responding to her request for assistance. The Union argued that it fulfilled its duty of fair representation and that Petitioner fails to state a claim. NYCHA argued that Petitioner's claim against the must fail because her underlying grievance is not meritorious. The Board found that Petitioner failed to allege a *prima facie* case against either party. Therefore, the improper practice petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

TYEISHA McNEIL,

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 237 and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

DECISION AND ORDER

On January 26, 2017, Tyeisha McNeil filed an improper practice petition against the New York City Housing Authority ("NYCHA") and the International Brotherhood of Teamsters, Local 237 ("Union"), alleging that NYCHA retaliated against her by improperly disciplining her in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York

City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Petitioner further claims that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b) by not responding to her request for assistance concerning the allegedly retaliatory discipline. The Union argues that it fulfilled its duty of fair representation and that Petitioner fails to state a claim. NYCHA argues that Petitioner's claim must fail because her underlying grievance is not meritorious and the alleged retaliation is not due to union activity. The Board finds that the Petitioner has not stated a *prima facie* claim of a breach of the NYCCBL against either NYCHA or the Union. Therefore, the petition is dismissed.

BACKGROUND

Petitioner is a Heating Plant Technician, and has been employed by the Heating Operations Services Department of NYCHA since March 11, 1996. The Union and NYCHA are parties to a collective bargaining agreement ("Agreement"). For all times relevant to this proceeding, Petitioner has worked in the Heating Operations Services Department.

On May 3, 2016, while represented by Union counsel, Petitioner pled guilty to five charges brought against her by NYCHA related to incompetency or misconduct. Her penalties included a 40-day suspension without pay, a 12-month period of probation, and treatment under an Employee Assistance Program. Pursuant to the Disciplinary Conference Disposition, the terms of Petitioner's 12-month probation provide that during the probationary period, "an employee who is subject to General Probationary Evaluation Period may be terminated from employment on the basis of incompetency, misconduct or unsatisfactory service without the service of charges or a hearing." (NYCHA Ans., Ex. 1) Nevertheless, Petitioner retained "the right to challenge an

[1] Petitioner filed this action *pro se* but subsequently retained counsel for this matter.

arbitrary or capricious termination during the probation in an appropriate court." (NYCHA Ans., Ex. 1)

On August 23, 2016, Petitioner's supervisor allegedly ordered her to clean an ejector pit. Believing that the order was unsafe, she first called Union Business Agent Vincent Lattimore and then NYCHA's Safety Department to object to the order. In response to her complaint to the Safety Department, Petitioner's supervisor instructed her to not complete the order. Petitioner alleges that she was subsequently targeted for discipline because she registered a complaint with the Safety Department.

Specifically, in September 2016, Petitioner received two counseling memoranda. The first, issued on September 8, 2016 ("First Counseling Memo") alleged that on August 25, 2016, she yelled at an outside vendor and prevented him from servicing the boilers at Seth Low Houses. (Pet. Ex. 5) Petitioner refused to sign the First Counseling Memo and denies the allegations against her. She avers that she refused to sign the vendor's paperwork because she did not clearly understand what he was doing.

The second counseling memorandum, issued on September 19, 2016 ("Second Counseling Memo"), alleged that on September 8, 2016, Petitioner was asleep at her desk and subsequently failed to complete her tank room and boiler room assignments. Petitioner refused to sign the Second Counseling Memo and denies the allegations against her. She avers that she had fainted because of the heat and visited a doctor that day.

Following her receipt of the Second Counseling Memorandum, Petitioner and the Business Agent spoke at least twice. First, on September 20, 2016, Petitioner called the Business Agent and expressed her concern that she would soon be terminated. Petitioner asserts, and the Union denies, that she told the Business Agent that she was being harassed by her supervisors. During that

conversation, the Business Agent said that he would meet with Petitioner. Second, on or around October 25, 2016, the Business Agent met Petitioner at her work location. Petitioner alleges, and the Union denies, that the Business Agent told her that he would meet with her supervisors. Petitioner additionally alleges, and the Union denies, that the Business Agent failed to set up this meeting. Petitioner was terminated later that day.

In a letter dated October 28, 2016, the Business Agent requested that NYCHA's Director of Human Resources reassess Petitioner's termination ("October 28 Letter"). His letter read as follows:

> I am requesting for you to review the termination of Ms. Tyesha McNeil, Heating Plant Technician who was assigned to the Brooklyn Floating Staff.
>
> We feel Ms. McNeil's termination was unfair and should be reviewed.
>
> I would appreciate your attention to this matter.

(Union Ans., Ex. D) It is uncontested that the Union regularly submits such letters to NYCHA management following the termination of a unit member.

On November 1, 2016, Petitioner met Union President Gregory Floyd at the union hall. She alleges, and the Union denies, that she expressed that the Business Agent did not adequately represent her. Petitioner further alleges, and the Union denies, that the Union President told her that the Union would not assist her and that she should "take some responsibility for what happened" and that "time was up" and she "needed to leave." (Pet., at p. 1) She additionally alleges that she never voted for the Union President, was publically critical of him, and that the Union President knew this.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation NYCCBL § 12-306(b)(3).[2] She asserts that the Union did not adequately respond to her requests for assistance concerning NYCHA's alleged improper discipline. Petitioner argues that the Union improperly failed to challenge the factual basis for the First and Second Counseling Memoranda and submitted a "boiler plate letter to the Human Resources department." (Reply at ¶ 2) Further, she alleges that this decision was made in bad faith because she voted for the Union President's opponent in an election.

Moreover, she contends that NYCHA violated NYCCBL § 12-306(a)(1) and (3).[3] Petitioner contends that NYCHA targeted her for discipline because she called the Safety Department to protest an order by her supervisor. She additionally argues that the First and Second Counseling Memoranda were fabricated in order to justify her termination on October 25, 2016.

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[2] NYCCBL § 12-306(b)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter."

[3] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted by section 12-305 of this chapter.
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

Union's Position

Initially, the Union argues that it fulfilled its duty of fair representation. It asserts that it provided Petitioner with counsel when she was previously brought up on disciplinary charges and requested that NYCHA review her termination. The Union contends that it had no obligation to represent Petitioner in disciplinary matters during the period at-issue because she had waived her rights to charges and a hearing by agreeing to a 12-month probationary period. It further asserts that the Union's request that NYCHA review Petitioner's termination while she was a probationary employee satisfied any duty that it owed to her. (Union Br. at ¶ 15) Additionally, the Union alleges that Petitioner has failed to state a cause of action. It asserts that its purported failure to challenge counseling memos on her behalf during her probationary period is not a basis for a duty of fair representation action.

NYCHA's Position

NYCHA contends that Petitioner's claim does not state a cause of action under the NYCCBL. Specifically, Petitioner failed to assert that her termination was retaliatory based on union activity. She alleges only that NYCHA retaliated against her for reporting an unsafe condition, and that she was subsequently disciplined and discharged. NYCHA contends that improper practice claims must be supported with more than "conjecture, surmise, and speculation." (NYCHA Br. at ¶ 26) With respect to the alleged breach of the duty of fair representation, NYCHA argues that Petitioner is unable to bring a meritorious grievance because she had no due process rights as a result of her probationary status.

DISCUSSION

We find that Petitioner has not established that the Union violated NYCCBL § 12-306(b) or that NYCHA has violated NYCCBL § 12-306(a)(1) and (3). Therefore, we dismiss the petition.

Claims Against the Union

Petitioner's claims against the Union concern its alleged failure to challenge the two counseling memoranda and her termination. The duty of fair representation "requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015); *See also Walker*, 6 OCB2d 1, at 7 (BCB 2013). The duty is not breached "simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007). Unless a petitioner shows that the Union did more for others in the same circumstances than it did for the petitioner, or that its actions were arbitrary, even errors in judgment do not breach the duty. *See Gertskis*, 77 OCB 11, at 11 (BCB 2006). Accordingly, to meet this initial burden, a petitioner must "allege more than mere negligence, mistake or incompetence" because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Dillon*, 9 OCB2d 28, at 14 (BCB 2016) (citing *Evans*, 6 OCB2d 37, at 8 (BCB 2013)); *see also Smith*, 3 OCB2d 17, at 8 (BCB 2010).

Petitioner's charges against the Union concern its purported failure to challenge the First and Second Counseling Memoranda and its submission of a letter to NYCHA to address Petitioner's termination. We have consistently held that a union has the discretion to determine whether and how it will address a claim. *See Edwards*, 1 OCB2d 22, at 21 (BCB 2008) ("[T]he union has the implied authority, as representative, to make a fair and reasonable judgment about

whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled."). A union is not required to advance a claim that it has concluded is without merit. *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008) *affd.*, *Matter of Patrolmen's Benevolent Assn v. NYC Off. of Collective Bargaining*, 2009 WL 2481810 (Sup. Ct. N.Y. Co. Aug. 5, 2009) (Figeroa, J.) ("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.") (citations omitted).

Additionally, we note that while the Union disputes many of Petitioner's allegations regarding the Union's representation following her receipt of the First and Second Counseling Memoranda, the factual disputes are not material to the legal issues raised. In the below analysis, we "draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Dillon*, 9 OCB2d 28, at 12 (finding a hearing is not necessary where the factual disputes are not material to the legal claims raised) (internal quotations omitted); *See also Nardiello*, 2 OCB2d 5, at 27 (BCB 2009) (same).

Here, it is undisputed that the Union had two conversations with Petitioner about the Counseling Memos, one of which occurred at Petitioner's work site. After Petitioner was terminated, the Union requested that NYCHA reconsider the disciplinary actions by submitting a letter on her behalf. These actions were within its discretion as Petitioner's representative, particularly since it was aware of Petitioner's probationary status. Petitioner's allegation that the Union did not also challenge factual assertions in the Counseling Memos is an expression of dissatisfaction with the quality of representation, which is insufficient to establish a breach of the duty of fair representation. *See Feder*, 9 OCB 33, 35-36 (BCB 2016) (finding that Petitioner did

not demonstrate bad faith where allegations primarily concern the "level or quality of advocacy"); *Dillon*, 9 OCB2d 28, at 17; *Okorie-Ama*, 79 OCB 5, at 14; *Smith*, 3 OCB2d 17, at 9 (BCB 2010) (explaining that a mere dissatisfaction with the outcome, or questioning the strategic decisions of the union, is insufficient to establish a breach of the duty of fair representation); *Edwards*, 1 OCB2d 22, at 21.

Further, Petitioner's claim fails because she has not alleged facts to show that the Union discriminated against her. *See Gertskis*, 77 OCB 11 at 11. She alleges only that the Union failed to challenge the Counseling Memos issued against her – not that it treated her differently than any other probationary employee. Indeed, with respect to the Union's post-termination letter, Petitioner did not dispute that the Union routinely submits such letters to challenge the termination of probationary employees. Thus, there is no evidence that Petitioner received a level of assistance different from similarly-situated unit members.

Additionally, Petitioner asserts that the Union failed to advocate on her behalf because she voted for the Union President's political opponents in Union elections. However, she does not offer any further factual support for this assertion. Moreover, her allegation is undermined by the fact that in May 2016, after the last election when she was to have supported the Union President's opponents, the Union provided her with representation in connection with her prior disciplinary charges. *See Proctor*, 3 OCB2d 30, at 13 (BCB 2009) (finding that union did not breach the duty of fair representation where union had previously represented unit member in secured more favorable penalty). On this record, we find that this allegation is conclusory and thus insufficient to show bad faith. *See Swakeen*, 5 OCB2d 16, at 13 (BCB 2012) (determining that conclusory allegations are insufficient to make a showing of bad faith); *see also Matter of Rosioreanu v. New York City Office of Collective Bargaining*, 78 A.D.3d 401, 402 (1st Dept 2010), *lv denied*, 17

N.Y.3d 702 (2011) (affirming Board's dismissal of duty of fair representation claim based on "petitioner's conclusory assertion" of bad faith).

Claims Against NYCHA

Petitioner's claims against NYCHA concern her alleged retaliatory termination on October 25, 2016. In resolving discrimination and retaliation claims under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, and requires that a petitioner demonstrate:

> 1. The employer's agent responsible for the alleged discriminatory 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.

Bowman, 39 OCB 51, at 18-19; *see also Edwards*, 1 OCB2d 22, at 16.

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* showing, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008). *See also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

As a threshold issue, Petitioner does not claim to have engaged in union activity. In order for this Board to make a finding of improper practice based on a claim of retaliatory discharge, the petitioner must, among other things, provide evidence that the activity for which he or she was discharged was union-sponsored or union-related. *See Griffin*, 57 OCB 42, at 9 (BCB 1996) ("Implicit in the first prong of [the *Bowman-Salamanca*] test is the threshold issue of whether Petitioner engaged in union activity, protected under the NYCCBL."); *see also Levia*, 9 OCB2d 11, at 14 (BCB 2016) ("Among the employee actions this Board has found to be protected under

the NYCCBL § 12-305 are holding a union position, acting at the union's request, filing a grievance, or advocacy on behalf of other union members.") (internal quotations omitted). Actions that appear to have only an individual purpose and are not union-sponsored or do not promote the collective welfare of the bargaining unit may not be protected. *CWA, L.1182*, 8 OCB2d 18, at 12 (BCB 2015) (discussing the distinction between individual and collective activity).

Petitioner asserts that her supervisor served her with the First and Second Counseling Memoranda in retaliation for complaining about a work assignment to NYCHA on August 23, 2016. The record establishes that Petitioner's call concerned a work order issued only to her and that she was acting solely in her own interest. Upon these facts, we cannot find that she was engaged in union activity protected by the NYCCBL. *See UFA*, 1 OCB2d 10, at 21 (BCB 2008) (explaining that even a Union officer will not be protected if acting solely out of self-interest).

In light of our finding that Petitioner has not offered evidence that she was retaliated against for engaging in activity protected by the NYCCBL, we conclude that Petitioner has not stated a *prima facie* case of retaliation. We find that the allegations do not state facts which would, if proven, establish that NYCHA improperly retaliated against Petitioner, or that the Union breached its duty of fair representation. Petitioner's claims against both parties are dismissed.

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 verified improper practice petition filed by Tyeisha McNeil, docketed as BCB-4193-17, against the New York City Housing Authority and the International Brotherhood of Teamsters, Local 237, hereby is dismissed in its entirety.

Dated: April 19, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

DANIEL F. MURPHY
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER