Smith, 3 OCB2d 17 (BCB 2010)

(IP) (Docket No. BCB-2804-09).

Summary of Decision: Petitioner claimed that the Union violated NYCCBL § 12-306(b)(3), by allegedly failing to grieve and arbitrate her termination. Petitioner also alleged that the City and the Department of Parks and Recreation ("DPR") violated NYCCBL § 12-306(a)(1) by interfering with her ability to assist the Union's effort to process, investigate, and grieve the termination of her employment. The Union claimed that it did not violate its duty of fair representation as it availed itself of all rights and remedies Petitioner had pursuant to the relevant collective bargaining agreement. The City argued that Petitioner's claims should be dismissed as Petitioner did not present sufficient facts to support her claims. The Board found that, in view of the limited rights afforded seasonal employees under the applicable agreement, and in the absence of specific factual allegations to support a claim that either the Union or the City discriminated against Petitioner, or otherwise impaired her rights under the NYCCBL, no improper practice could be established on the facts as alleged. Accordingly, Petitioner's improper practice petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

GWENDOLYN SMITH,

Petitioner,

- and -

DISTRICT COUNCIL 37, LOCAL 983, AFSCME, AFL-CIO, and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On October 16, 2009, Gwendolyn Smith ("Petitioner") filed a verified improper practice petition, pro se, claiming that District Council 37 ("Union" or "DC 37") violated the New York City

Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b)(3), by allegedly failing to grieve and arbitrate her termination, because, among other reasons, the Union allegedly provided better treatment to "similarly situated employees who are non-black or male." (Pet., Ex. 1). Petitioner also alleged that the City of New York ("City") Department of Parks and Recreation ("DPR") violated NYCCBL § 12-306(a)(1). The Union claimed that it did not violate its duty of fair representation as it pursued all rights that Petitioner had based upon the relevant collective bargaining agreement. The City argued that Petitioner's claims should be dismissed as Petitioner did not present sufficient facts to support any of her claims. We find that, in view of the limited rights afforded seasonal employees under the applicable agreement, and in the absence of specific factual allegations to support a claim that either the Union or the City discriminated against Petitioner, or otherwise impaired her rights under the NYCCBL, no improper practice could be established on the facts alleged. Accordingly, Petitioner's improper practice petition is denied.

BACKGROUND

Petitioner was employed by DPR as a City Seasonal Aide from the year 2000 through July 2, 2009. Employees in the civil service title City Seasonal Aide are represented by DC 37. The City and DC 37 are parties to a collective bargaining agreement ("Agreement") that covers City Seasonal Aides. Article XX, § 4(b) of the Agreement states:

> When a City Seasonal Aide, who has completed one season, and who has worked at least ninety (90) cumulative days in a seasonal capacity, is terminated, the employee or union representative may request a review by the designated representative of the Commissioner within ten (10) calendar days of such notification.

(Union's Ans., Ex. B). The parties commonly refer to such a review as "Step II." No arbitration rights are provided for these employees in the Agreement. (*Id.*).

As a City Seasonal Aide, Petitioner patrolled a portion of Far Rockaway Beach. Her primary function was to ensure that the beaches were not used after designated swimming hours when there is no lifeguard on duty. City Seasonal Aides are not permitted to leave their post without permission from a supervisor. On July 1, 2009, Petitioner's partner told her supervisor that Petitioner was putting gasoline in a DPR vehicle. Petitioner asserts that she remained on patrol and that she was not putting gasoline in her vehicle. Petitioner alleges that her partner got out of the vehicle in order to consume alcohol and asked Petitioner to come to pick him up later. She also alleges that other officers saw her patrolling during the time she was allegedly putting gasoline in the vehicle and that the garage log would confirm this as well. The City asserted that during the period of time in question, Petitioner's supervisor was unable to reach her on a two-way radio and that members of the public were on the beach while Petitioner was off post.

Thereafter, Petitioner met with her supervisors. Petitioner stated that she reported her partner's drinking to her supervisor and that her partner was operating a vehicle after drinking. She stated that her partner was possibly angry at her for telling him to turn over the wheel to her, and she explained to her supervisor that, as her partner had been drinking, his "perception was distorted." (Pet., Ex. 3). According to Petitioner, after she related this information to her supervisors, they were "[s]hocked and embarrassed because they knew [her partner] consumed alcohol on the job on a daily basis but they decided it was best to just terminate me." (*Id.*). Petitioner's supervisor wrote a memorandum memorializing this conference, dated July 7, 2009, summarizing the events as follows:

> On July 1, 2009, at 7:30 PM, [Petitioner] left her partner and post to get gas . . . she also didn't have a radio and [a supervisor] could not get in touch with her. There were people swimming in the . . . beach. She was written up for this matter. When she was given the write up, she became very loud, screaming . . . at her supervisor.

(City's Ans., Ex. 3). Petitioner was terminated effective July 2, 2009.

Petitioner stated that she spoke with a Union representative on July 2, 2009 regarding these events and told him that she wanted to gather evidence and present it at the hearing. According to Petitioner, her Union representative told her that the agency has the burden of proof and therefore there was no need to gather evidence. Further, Petitioner alleges that she went to the garage to request a copy of the log sheet for July 1, 2009, but discovered that the log sheet for that date was missing.

In a letter to DPR's Director of Labor Relations, dated July 7, 2009, a Union representative sought to appeal Petitioner's termination and requested that this decision be reviewed at a Step II hearing. The letter stated in pertinent part:

> Please schedule a step II for the above member who was terminated on July 2[], 2009[,] the union would like the opportunity to appeal this case. This member has worked for the agency since April 2000.

(Union's Ans., Ex. C).

A Step II hearing was held. At the hearing, Petitioner told her version of the facts to the hearing officer. The supervisors who had made accusations about her were not present at the hearing and no evidence was presented against her at the hearing. On July 16, 2009, the Step II hearing officer issued a decision upholding Petitioner's termination.

Petitioner contacted the Union President after the Step II decision was issued and told him that she "did not have an explanation as to why the action still [stood]" and that she did not think she

received proper representation from the Union. Petitioner stated that the Union President told her that DPR's labor relations did not have to explain the reason for its decision and advised her that she could seek other legal counsel if she did not think she had received proper representation.

Petitioner stated that she thereafter sent an e-mail to DPR's Director of Labor Relations in which she related her belief that a full investigation had not been performed as she believed that the labor relations analyst did not gather information from witnesses or check the log sheet. Petitioner stated that DPR's Director of Labor Relations told her he would look into it. After not hearing back from DPR's Director of Labor Relations, Petitioner contacted him again and he responded that he continued to investigate the matter.

In response to a union representative's request for information on behalf of Petitioner, on November 2, 2009, the Union's legal department issued an internal memorandum stating that it did not recommend bringing Petitioner's case to arbitration because pursuant to the Agreement, Petitioner did not have arbitration rights. The memorandum states in pertinent part:

> The Legal Department has reviewed the attached file. It is our recommendation that this matter should <u>not</u> proceed to arbitration. [Petitioner] is a City Seasonal Aide. Pursuant to the Seasonal Agreement, she is only entitled to a review by the Parks Department for her termination. As you now, City Seasonal Aides cannot arbitrate their disciplines.

(Union's Ans., Ex. F).

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that the Union breached its duty of fair representation when it refused to grieve or arbitrate her termination from employment and, thereby, violated NYCCBL § 12-306(b)(3).[1] The Union received a Step II determination regarding her termination but thereafter failed to take action regarding the grievance. She alleges that the Union brings grievances to arbitration for other "similarly situated employees who are non-black or male," while refusing to do so for Petitioner. (Pet., Ex. 1).

Petitioner alleges that DPR interfered with her ability to assist the Union's effort to process, investigate, and grieve the termination of her employment, in violation of NYCCBL § 12-306(a)(1).[2] She also alleges that DPR restrained her rights under NYCCBL § 12-305 when it refused to reinstate her after she grieved her termination. Further, according to Petitioner, DPR does not so treat "similarly situated employees who are non-black or male." (Pet., Ex. 1).

Union's Position

The Union claims that it did not breach its duty of fair representation to Petitioner and that Petitioner did not satisfy the legal standard for demonstrating such a breach of duty. Because the

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[1] NYCCBL § 12-306(b) provides that it shall be an improper practice for a public employee organization:

> (3) to breach its duty of fair representation to public employees under this chapter.

[2] NYCCBL § 12-306(a) provides, in pertinent part, that it is an improper practice for an employer to:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . .

Agreement does not provide for arbitration rights for employees within the title of City Seasonal Aide, Petitioner did not have the right to arbitrate discipline. Contrary to Petitioner's allegations, the Union pursued all rights that Petitioner had under the Agreement: a Union representative requested a Step II hearing on her behalf, represented her at her hearing, and consulted with the Union's legal department regarding other possible recourse, of which there was none. Accordingly, Petitioner is unable to show that the Union breached its duty of fair representation to her and therefore her claim should be dismissed.

City's Position

Regarding Petitioner's duty of fair representation claim against the Union, the City asserts that the petition should be dismissed because Petitioner failed to allege sufficient facts to establish her claim. Any derivative claims against the City should likewise be dismissed. Further, the City asserts that Petitioner failed to alleged sufficient facts to establish that DPR violated NYCCBL § 12-306(a)(1) or (3). The City also argues that several of her claims, which the City described as whistleblower and race and gender discrimination claims, do not fall within the Board's jurisdiction, but would more properly be considered under other City and New York State statutes.

DISCUSSION

Under NYCCBL § 12-306(b)(3), a union has a duty of fair representation that requires it "to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Rosioreanu,* 1 OCB2d 39, at 15 (BCB 2008) (internal quotations omitted); *D'Onofrio*, 79 OCB 3, at 19-20 (BCB 2007). In the context of providing representation in disciplinary procedures, "we have consistently required a showing that the Union's

actions here were arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, 1 OCB2d 26, at 21-22 (BCB 2008), aff'd*, Patrol. Benev. Assn. v. NYC Office of Coll. Barg*, Index No. 116942/2008 (Sup. Ct. N.Y. Co. Aug. 5, 2009) (quoting *James-Reid*, 77 OCB 29, at 16 (citing, *inter alia*, *Burtner*, 75 OCB 1, at 13-14 (BCB 2000)); *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004); *see also, Okorie-Ama*, 79 OCB2d 5, 14 (BCB 2007); *Samuels,* 77 OCB 17, at 12 (BCB 2006)*; Del Rio,* 75 OCB 6, at 12 (BCB 2005); *Whaley,* 59 OCB 41, at 12 (BCB 1997)). In the absence of such arbitrary, discriminatory, or bad faith motivation, such duty is not breached merely by a union's choosing not to pursue a course of action desired by a member, such as "failing to pursue a grievance if the decision is not perfunctory and the union informs the grievant." *D'Onofrio*, 79 OCB 3, at 19-20 (BCB 2007). The duty of fair representation is not breached "merely because the outcome of a union's good faith efforts to resolve a member\'s complaint does not satisfy the member." *Rosioreanu,* 1 OCB2d 39, at 16 (internal quotations omitted). Thus, "a union enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Id.* at 15 (internal quotations omitted).

Against the backdrop of undisputed facts here, Petitioner's allegations against the Union are not sufficient to make out a breach of the duty of fair representation. Petitioner has not pleaded facts that would establish that the Union acted in an arbitrary, capricious, or discriminatory manner. She does not dispute the Union's assertions regarding the limits of the Agreement, specifically that the Agreement does not provide arbitration rights to seasonal employees such as Petitioner. Given those limits, the record establishes that the Union acted on Petitioner's behalf, to the extent permissible. The Union requested a Step II hearing for Petitioner. A Union representative appeared with her at this hearing. Thereafter, when the Step II determination was issued upholding her termination, a Union

attorney examined Petitioner's rights and the Agreement and wrote an internal memorandum laying out the fact that Petitioner did not have the right to bring her grievance to arbitration.

We have repeatedly held that 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." James-Reid, 1 OCB2d 26, at 25 (quoting *Sicular*, 77 OCB 33, at 15 (BCB 2006)); *see also James-Reid*, 77 OCB 29, at 18; *Gibson*, 29 OCB 13, at 4 (BCB 1982) (union's reasoned decision that proceeding with a grievance would be fruitless could not constitute a breach of the duty of fair representation). Petitioner may desire a different outcome, however, "[t]he burden of establishing a breach of the duty of fair representation cannot be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *James-Reid*, 77 OCB 29, at 16 (BCB 2006).

Petitioner alleges that the Union arbitrates the termination of "similarly-situated" members that are not black or that are male. However, the Agreement does not provide grievance rights for any seasonal employees, like Petitioner. Petitioner's conclusory allegations are unsupported by any specific factual allegations, and therefore do not establish a *prima face* case of such discrimination. *See*, *e.g.*, *Howe*, 79 OCB 23, at 11-12 (BCB 2007). Therefore, to the extent that such employees were seasonal employees, like Petitioner, they would have no grievance rights under the Agreement. A duty of fair representation may be shown to have been breached where a petitioner demonstrates that the Union "did more for others in the same circumstances than it did for the petitioner." *D'Onofrio*, 79 OCB 3, at 20; *Howe*, supra. In this case, where the Union exercised every right Petitioner had under the Agreement, and where her allegations of better treatment for "similarly-situated" employees are entirely conclusory and fail even to specify in what manner these other members received better

treatment, Petitioner cannot make such a showing, and her claim that the Union breached its duty of fair representation must be dismissed.

As to Petitioner's claim against DPR, we reiterate here that allegations of an improper practice on the part of the employer must be based upon "specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion." *Feder*, 1 OCB2d 27, at 16 (BCB 2008). Petitioner has not plead any facts to demonstrate that DPR violated NYCCBL § 12-306(a)(1). Given that the Union took every possible action it had available under the Agreement, DPR has not been shown to have in any way interfered with the Union's representation of Petitioner.

Petitioner also made claims concerning discrimination on the basis of race or gender and also alleges DPR mistreated her in retaliation for the safety-related reports that she made to her supervisors. Still, regardless of whether Petitioner's claims would be meritorious under other statutes, none of her claims would constitute improper practices under the NYCCBL. Our jurisdiction is limited to the NYCCBL; therefore such claims fall outside of our purview.

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 Gwendolyn Smith docketed as BCB-2804-09, be, and the same hereby is denied.

Dated: April 6, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER