

**Proctor, 3 OCB2d 30 (BCB 2010)**

(IP) (Docket No. BCB-2744-09)

(IP) (Docket No. BCB-2745-09).

**Summary of Decision:** Petitioner, in filing two separate petitions, claimed that the Union violated its duty of fair representation by failing to advance a grievance on his behalf related to a positive drug test and by refusing to advocate on his behalf with regard to the drug test results. The Union argued that it represented Petitioner in previous disciplinary matters and provided information and counsel with regard to drug testing results. The City argued that Petitioner failed to set forth a viable claim against the Union and argued that any remaining claim made by Petitioner against DHS should be dismissed for failure to state a claim upon which relief can be granted. The Board held that the Union's actions in the instant matter were not arbitrary, discriminatory, or in bad faith. Accordingly, the petitions are dismissed. *(Official decision follows.)*

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

**In the Matter of the Improper Practice Petitions**

*-between-*

**ROBERT PROCTOR, JR.,**

*Petitioner,*

*-and-*

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 237 and THE NEW YORK  
CITY DEPARTMENT OF HOMELESS SERVICES,**

*Respondents.*

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**DECISION AND ORDER**

On February 12, 2009, Robert Proctor, Jr., an employee with the New York City Department of Homeless Services ("DHS") and a member of the International Brotherhood of Teamsters, Local 237 ("Union" or "Local 237"), filed an improper practice petition, *pro se*, against the Union and its president alleging a violation of New York City Collective Bargaining Law (City of New York

Administrative Code, Title 12, Chapter 3) (“NYCCBL”) §§ 12-306(b)(1) and (3) and 12-306(c)(2) and (3), docketed as BCB-2744-09 (“First IP Petition”). According to Petitioner, Local 237 violated its duty of fair representation by failing to advance a grievance on his behalf related to a positive drug test and by refusing to advocate his position that the drug test resulting in his termination was false-positive. On March 6, 2009, Petitioner filed a second verified improper practice petition, docketed by the Board as BCB-2745-09, alleging that the Union violated NYCCBL § 12-306(b)(3) (“Second IP Petition”) premised on the same facts contained in the First IP Petition.

The Union argues that its actions with regard to Petitioner were not arbitrary, discriminatory, or in bad faith because Local 237 represented Petitioner in previous disciplinary matters and provided information and counsel with regard to Petitioner’s issues with DHS. Further, the Union contends that Petitioner’s recitation of the facts appear to be exaggerated and/or untrue. The City of New York (“City”) argues that, first, Petitioner has failed to state a claim upon which relief may be granted because the two petitions in the instant matter do not demonstrate that Local 237 acted in a manner that violated its duty of fair representation. The City also argues that any claim that could be gleaned from Petitioner’s submissions alleging that DHS violated the NYCCBL should be dismissed because Petitioner failed to articulate a claim upon which relief may be granted.

Because the alleged violations of the NYCCBL contained in the First IP Petition and the Second IP Petition were filed close in time, involve largely the same individuals, and reference the same events, the Board, *sua sponte*, consolidated these two matters. Construing facts most favorable to Petitioner, the Board finds that Local 237’s actions in the instant matter did not violate its duty of fair representation because the Union did not act in an arbitrary, discriminatory, or bad faith manner. Accordingly, we dismiss the instant petitions and further dismiss any derivative claim

against DHS.

### **BACKGROUND**

DHS was created to overcome homelessness in the City of New York. It works toward this goal by attempting to prevent homelessness where possible and provide short-term emergency shelter and re-housing support. DHS employs workers in the civil service title of Special Officer to provide security services to DHS and to enforce New York State and City laws at all DHS-operated facilities. Special Officers are represented by Local 237 that currently has a collective bargaining agreement with the City covering the period from September 13, 2008 to September 25, 2010 (“Agreement”).

On September 23, 2002, Petitioner was hired by DHS as a Special Officer. He was assigned to the 30<sup>th</sup> Street Shelter, a DHS facility, where he worked at all times relevant to these petitions. According to the Union, Petitioner became a shop steward for Local 237 on March 6, 2006. In October or November of 2006, Petitioner borrowed money from a homeless client in the 30<sup>th</sup> Street Shelter. Petitioner repaid a portion of the money owed, but failed to remit full payment. As a result, in March 2007, this client filed a complaint against Petitioner for failing to repay this debt. Shortly thereafter, Petitioner remitted full payment of the debt.

Over a year later, on April 23, 2008, DHS proffered disciplinary charges against Petitioner arising out of this incident alleging that Petitioner violated provisions of the New York City Charter and DHS’s Code of Conduct. On May 28, 2008, Petitioner and a representative from Local 237, Noreen Hollingsworth, attended an informal conference to discuss these charges. As a result of negotiations by this Union representative, DHS withdrew some of the charges and entered into an agreement with Petitioner concerning this matter (“Disposition”).

According to the Disposition, Petitioner admitted borrowing money from the DHS client and repaying the entire loan amount only after the DHS client filed a complaint. Petitioner admitted that the conduct violated New York City Charter § 2604(b)(2), which requires that no public servant have any financial interest that is in conflict with the proper discharge of his/her duties, and § 2604(b)(3) which prohibits public servants from using his/her position to obtain financial gain for themselves. As per the Disposition, Petitioner agreed to a ten-day suspension, a ten-day deduction from his annual leave bank, and a one-year probationary period. The Disposition further provided that Petitioner could be subject to termination for any violation of the term of the Disposition and that by executing this document, Petitioner waived “all rights pursuant to Civil Service Law §§ 75 and 76, the Grievance Procedures in the applicable union contract with the City of New York, and constitutional right to due process regarding any matter arising under the terms and conditions of this Disposition.” (City Ans., Ex. 3). On September 26, 2008, Petitioner, a Union representative, the General Counsel for DHS, and a representative from the New York City Conflicts of Interest Board (“COIB”) executed the Disposition.

Less than two months later, on November 21, 2008, Petitioner was subjected to a random drug test by DHS consistent with its drug testing policy for employees in the title of Special Officer. According to the “Informed Consent & Release of Liability” form signed by Petitioner on that day, Petitioner agreed to submit to this drug test, offering samples of “urine, hair, and saliva for chemical analysis.” (City Ans., Ex. 6). According to the City, but disputed by Petitioner, on December 8, 2008, the laboratory charged with performing these screenings determined that Petitioner’s samples contained the presence of an illegal substance. According to Petitioner, “the drug test results were false or tainted.” (Pet. ¶ 2). On December 11, 2008, Petitioner received a letter from DHS stating

that he had failed the November 21, 2008 drug test and that he violated DHS's "zero tolerance" policy on illegal drug use. This letter further stated that, as of December 12, 2008, DHS terminated Petitioner. (City Ans., Ex. 8).

According to Petitioner, due to his unfair and improper termination, he wanted to challenge the test results and be reinstated. Thus, according to Petitioner, on December 17, 2008, he called the President of Local 237, Gregory Floyd, ("Union President") regarding this situation and was told that a meeting would be scheduled for sometime after the holidays to discuss this matter. According to the Union, no record exists of any call made to the Union President by Petitioner. According to Petitioner, on December 18, 2008, he went to the offices of Local 237 to file a grievance. The Union contends that Petitioner, while at the Union's office, was informed that Local 237 would not likely file a grievance because the Disposition contained a waiver of Petitioner's rights to appeal such a determination. The Union further advised Petitioner that, if he so chose, he could file a grievance on his own.

On December 22, 2008, Petitioner returned to the Union's office and met with at least two Union representatives regarding his situation. According to Petitioner, he informed these Union representatives that the positive drug test result was a false-positive, that he was not a drug user, and that the Union should file a grievance on his behalf regarding his termination. Petitioner further asserted in his petitions that the Union representatives advised Petitioner that, at this stage in the process, the Union would be unwilling to represent him in the grievance procedure because Petitioner had already failed the drug test and because of Petitioner's waiver of his rights that was contained in the Disposition. Although the Union does not specifically deny that this meeting or conversation occurred, the Union pleaded that it had no record that this encounter occurred.

Petitioner alleges that, on January 5, 2009, he attempted to file another grievance with the Union regarding his termination. Petitioner did not provide any documentation supporting this allegation, and the Union contends that Petitioner never filed a grievance with Local 237. On January 24, 2009, Petitioner initiated the instant improper practice proceeding by submitting the First IP Petition, which contained only three paragraphs, cites to NYCCBL § 12-306(b)(3) and § 12-306(c)(2) and (3), and does not articulate any ascertainable claim against DHS. This petition asserts that the Union failed to satisfy its duty of fair representation in handling Petitioner's complaint arising out of his failed drug test and that the Union failed to bargain in good faith. Petitioner seeks, as remedies for these alleged violations of the NYCCBL, "restoration of all medical benefits and annuity funds refunded," among other things, but does not request reinstatement. On March 2, 2009, Petitioner submitted the Second IP Petition that he described as an amendment to the previously submitted petition, in which he reiterates the claims alleged in the First IP Petition. The Second IP Petition does not include any new documentation supporting Petitioner's allegations, and does not seek any additional remedy.

Prior to either the Union or the City submitting their responsive pleadings, on September 4, 2009, Petitioner informed the New York City Office of Collective Bargaining ("OCB") and all other parties that he had moved from the City of New York to North Carolina. On October 5, 2009, the City submitted responsive pleadings to the First IP Petition and the Second IP Petition, respectively. On October 19, 2009, the Union submitted one responsive pleading to both petitions. On November 17, 2009, Petitioner sent an email to OCB requesting an extension of time to file a reply. OCB granted this request and the date for the submission of this pleading was set for December 1, 2009. Having not received Petitioner's reply by December 1, 2009, OCB made several unsuccessful

attempts to contact Petitioner.

On January 7, 2010, OCB sent a letter, via certified mail, to Petitioner indicating that if his reply was not received within ten business days of receipt of this letter, the record in the instant matter would be closed, and the Board's decision would be based solely on the parties' pleadings. OCB received the return-receipt-requested card on January 13, 2010. On January 27, 2010, a representative of OCB contacted Petitioner via telephone, and inquired whether Petitioner intended to submit a reply. He stated that he did not intend to submit a reply and was content to have the instant matter decided based upon the existing record. On March 13, 2010, OCB informed all parties that the record in the instant matter was closed.

### **POSITION OF THE PARTIES**

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

Petitioner argues that Local 237 violated NYCCBL § 12-306(b)(3) because the Union violated its duty of fair representation.<sup>1</sup> Immediately after Petitioner's termination for failing his drug test, he went to the Union offices to discuss this matter and ask the Union to file a grievance disputing the validity of the test results. Instead of receiving assistance on this matter, he was informed by the Union that, due to a previous unrelated disciplinary matter, the Union would not initiate a grievance on Petitioner's behalf. The Union also insisted that Petitioner, rather than fight the validity of the test results, should have submitted to a Local 237 drug treatment program, even though Petitioner does not have a substance abuse problem. Thus, despite Petitioner's attempt to

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<sup>1</sup> NYCCBL § 12-306(b) provides in pertinent part:  
It shall be an improper practice for a public employee organization or its agents:  
(3) to breach its duty of fair representation to public employees under this chapter.

secure Union representation in order to contest the test results, the Union turned its back on Petitioner and allowed him to be terminated.

Petitioner further argues that NYCCBL § 12-306(c)(2) and (3) were violated by Local 237 because Petitioner is entitled to representation by “duly authorized representatives . . . to discuss and negotiate on all matter within the scope of collective bargaining.”<sup>2</sup> Local 237 failed to meet at reasonable times and in convenient locations with Petitioner and, by doing so created an unnecessary delay in securing representation for Petitioner to dispute the drug test results. Accordingly, the Union breached its duties under these provisions of the NYCCBL to its members and, more specifically, to Petitioner.

In the First IP Petition, Petitioner also asserted claims against the Union President claiming that his actions precipitated Petitioner’s claims against the Union and that, as such, he should be held personally responsible for the above-enumerated violations of the NYCCBL.

### **Union’s Position**

The Union argues that the instant petitions should be dismissed because Petitioner fails to establish that Local 237 violated its duty of fair representation to Petitioner. With regard to Petitioner’s claim that the drug testing result was a false-positives, the Union articulated its reason for not filing a grievance on Petitioner’s behalf. Notably, Petitioner executed the Disposition that waived Petitioner’s rights to grieve disciplinary matters, including a failed drug test during his one-

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<sup>2</sup> NYCCBL § 12-306(c) provides in pertinent part:

The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(2) to be represented at negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays.



year probationary period. This rationale was communicated to Petitioner who did not want to accept this determination. A union is granted wide latitude and is only barred from failing to advance grievances for arbitrary, discriminatory, or bad faith reasons. Because the Union's reasoning and conduct did not fall within one of the aforementioned prohibited categories, Local 237 fulfilled its duty of fair representation.

Local 237 also argues that Petitioner's claim is further belied by the fact that the Union provided representation to Petitioner in the past, regarding his previous disciplinary matter. Local 237 was able to secure a reduction in the proffered charges, his reinstatement, and a reduced penalty for conduct that contravened the applicable laws, rules, and procedures governing Special Officers. Additionally, with respect to Petitioner's failed drug test, Petitioner admitted that he was in communication with the Union, which offered him advice. However, Petitioner simply disagreed with the advice provided. The record does not support a finding that Petitioner submitted documents to the Union and had a conversation with the Union President.

The Union further argues that Petitioner, as a Union shop steward, should have known that the Union's refusal to initiate a grievance on his behalf did not preclude him personally from filing a grievance. Petitioner, like all other Local 237 shop stewards, received training from the Union regarding the filing of grievances and should have been well aware of his own personal rights to grieve this matter without the assistance of Local 237. The Union has articulated a sound basis for refusing to represent Petitioner regarding this failed drug test and/or his termination and, accordingly, should not be found in violation of any provision of the NYCCBL.<sup>3</sup>

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<sup>3</sup> In its pleading, Local 237 did not articulate any argument in opposition to Petitioner's allegations that the Union violated NYCCBL § 12-306(c)(2) and (3).

**City's Position**

The City argues that Petitioner's claim against Local 237 for allegedly violating NYCCBL § 12-306(c)(2) and (3) must be dismissed. This claim based upon these two provisions is misplaced as Petitioner lacks standing to bring such causes of action. The rights and obligations contained in these two provisions run directly to a public employer and a public employee organization. Moreover, the duty to bargain in good faith exists solely between these two parties. As such, these claims must be dismissed.

The City also argues that Petitioner failed to set forth a *prima facie* claim against the Union for violating its duty of fair representation. Petitioner failed to plead and/or prove that the Union's refusal to pursue Petitioner's claim against DHS regarding his failed drug test was improperly motivated. The Union acted in a good faith manner and, with respect to not advancing Petitioner's claim against DHS, did not act arbitrarily or discriminatorily.

Finally, the City points out that the instant petitions do not claim that DHS violated any portion of NYCCBL § 12-306(a). As such, the City need not proffer any defense regarding any claimed act that could have arguably violated this provision. Nevertheless, even if a claim against DHS for violating this provision of the NYCCBL can be gleaned from Petitioner's pleadings, the City argues that Petitioner has failed to proffer any allegations and/or evidence supporting his position.

**DISCUSSION**

In the instant matter, Petitioner alleges that Local 237 and the Union President violated NYCCBL §§ 12-306(b)(1) and (3) and 12-306(c)(2) and (3). We dismiss any and all claims asserted

against the Union President, individually, because § 12-306 only addresses improper practices committed by public employers and/or public employee organizations. Public employers and/or public employee organizations may be held responsible for the acts of their agents, while individuals cannot commit an improper practice in their personal capacity. *See Morgan*, 71 OCB 10, at 4 (BCB 2003); *Hassay*, 71 OCB 2, at 2 (BCB 2003). Since the Union President is not a proper party to the instant matter, any alleged improper practice specifically and individually averred against him are dismissed.

Similarly, we dismiss Petitioner's claims against the Union for allegedly violating NYCCBL § 12-306(c)(2) and (3). These provisions, which appear under the statutory sub-heading "Good faith bargaining," provide that good faith bargaining occurs when, *inter alia*, public employers and designated employee organizations are "represented at negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining" and these parties meet at "reasonable times and convenient places as frequently as may be necessary." NYCCBL § 12-306(c)(2) and (3). These provisions are definitional and do not provide public employers, designated employee organizations, or individual employees with a cause of action under the NYCCBL.

To the extent that Petitioner attempted to plead a cause of action against Local 237 under NYCCBL § 12-306(b)(2) for violating the duty to bargain in good faith, we have held that individual employees lack standing to initiate a claim of the failure to bargain in good faith. *Brown*, 75 OCB 30, at 7-8 (BCB 2005) ("an individual lacks standing to raise a failure to bargain claim under § 12-306(b)(2)"); *McAllan*, 31 OCB 15, at 15 (BCB 1983) ("the duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not the union's members"). As

such, to the extent that Petitioner articulated a claim against Local 237 for failing to bargain in good faith by citing to NYCCBL § 12-306(c)(2) and (3), we must dismiss these claims.

Petitioner also claims that Local 237 breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(3), in its handling of Petitioner's failed drug test and refusal to initiate a grievance over his termination. We have "long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Finer*, 1 OCB2d 13, at 10-11 (BCB 2008) (quoting *Okorie-Ama*, 79 OCB2d 5, 14 (BCB 2007)); see also *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board). Arbitrarily ignoring a meritorious grievance or processing such a grievance in a perfunctory fashion constitutes a violation of the duty of fair representation. See *Mora-McLaughlin*, 3 OCB2d 24, at 13 (BCB 2007); see also *Watkins*, 75 OCB 23, at 12 (BCB 2005).

However, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Sicular*, 79 OCB 33, at 13 (quoting *Wooten*, 53 OCB 23, at 15 (BCB 1994) (citing *Page*, 53 OCB 31, at 11 (BCB 1994)). As we explained in *Sicular*, the "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." *Id.* (citing *Hug*, 45 OCB 51, at 16 (BCB 1990)). "Allegations of mere negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of its duty of fair representation." *DelRio*, 75 OCB 6, at 13 (BCB 2005); see also *Schweit*, 61 OCB 36 (BCB 1998). Furthermore, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Grace*, 55 OCB 8, at 8 (BCB 1995).

In the instant case, the facts asserted in the instant petitions simply do not allege acts or omissions on the part of the Union to support a breach of the duty of fair representation. Petitioner contends that the Union violated its duty of fair representation by not challenging the results of Petitioner's drug test and by failing to initiate a grievance against DHS for terminating him based upon false/tainted drug testing results. However, based upon the record before us, we find that Petitioner's allegations do not indicate that Local 237 acted in an arbitrary, discriminatory, or bad faith manner.

Petitioner admitted that he borrowed money from a client of DHS and thereby violated DHS's rules and procedures. The Union appeared in these disciplinary proceedings on Petitioner's behalf, negotiated a settlement of these charges, and secured a more favorable penalty. However, as a condition of the Disposition, Petitioner agreed to be placed on a one-year probationary period and waived his rights under §§ 75 and 76 of the N.Y. Civil Service Law and the Grievance Procedures set forth in the Agreement. Thus, when Petitioner failed the drug test less than two months later and went to Local 237 for assistance, the Union advised him that it would not file a grievance on Petitioner's behalf because of Petitioner's waiver of rights contained in the Disposition. *See DC 37 L. 1549, 77 OCB 13, at 11 (BCB 2006)* (denying request for arbitration because the employee, who had been placed on probation pursuant to a last chance agreement, forfeited his right to grieve subsequent disciplinary action during this probationary period); *UMD, L. 333, 75 OCB 12, at 8 (BCB 2005)*.

The Union responded to Petitioner and communicated its reasons for its decision not to process a grievance to Petitioner. *See Finer, 1 OCB2d 13, at 13* ("conclusory and vague pleadings are insufficient to state a cause of action under the NYCCBL"); *see DEA, 79 OCB 40, at 23 (BCB*

2007) (quoting *Collella*, 79 OCB 27, at 54 (BCB 2007)). In the end, the Union made a judgment as to whether or not to bring a grievance which was founded on a rational, non-discriminatory basis. *See James-Reid*, 1 OCB2d 26, at 24-25 (BCB 2008). Accordingly, we find that the facts asserted in the instant petitions simply do not support a claim of a breach of the duty of fair representation.<sup>4</sup>

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<sup>4</sup> Since we find that the Union did not violate NYCCBL § 12-306(b)(3), its duty of fair representation, we also find that any derivative claim against DHS pursuant to NYCCBL § 12-306(d) must also be 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 improper practice petitions filed by Robert Proctor, Jr. docketed as BCB-2744-09 and BCB-2745-09 be, and the same hereby is dismissed in its entirety.

Dated: New York, New York  
June 29, 2010

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

PETER PEPPER  
MEMBER