Shymanski, 5 OCB2d 20 (BCB 2012)

(IP) (Docket No. BCB 2984-11)

Summary of Decision*:** Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to properly represent her in relation to disciplinary charges filed against her. The Union and the City argued separately that the Union did not breach its duty of fair representation. The Board found that the allegations did not state a claim that the Union breached its duty of fair representation. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

TINA SHYMANSKI,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and THE NEW YORK CITY POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On September 28, 2011, Tina Shymanski ("Petitioner") filed a *pro se* verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union"), the City of New York ("City"), and the New York City Police Department ("NYPD").[1] Petitioner asserts that the

[1] After the initial petition was found to be deficient by the Board's Executive Secretary, Petitioner filed an Amended Petition on November 4, 2011, which she further supplemented on December 2, 2011. Petitioner was also permitted to submit additional documentation following a Conference held on April 18, 2012.

Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to properly represent her in relation to disciplinary charges filed against her which led to a 30-day suspension. The Union and the City separately argue that the Union did not breach its duty of fair representation. This Board finds that the allegations do not state a claim that the Union breached its duty of fair representation. Accordingly, the petition is denied.

BACKGROUND

The Union represents NYPD employees in the civil service title of Police Administrative Aide. Petitioner has held this title with the NYPD since September 2002 and was stationed in the Traffic Control Violation Tow Unit at Transit Bureau District 4 in 2007. The relevant claims that will be considered by the Board relate to the Union's representation of Petitioner concerning disciplinary charges that were filed against her by the NYPD.[2]

On April 24, 2008, the NYPD issued disciplinary charges against Petitioner, which stemmed from an incident that occurred on or about April 20, 2008. These charges alleged that Petitioner was discourteous to a NYPD Sergeant while on duty by "stating in sum and substance, 'I don't hear you, I don't want to talk to you, you have been harassing me all day' and 'I'm not talking to you, I'm calling I[nternal] A[ffairs] B[ureau]'" (Amended Pet., Ex.: NYPD

[2] The Petition also encompassed a number of claims which were dismissed pursuant to a Determination of the Executive Secretary as both untimely and precluded by an executed Stipulation of Settlement. *See Shymanski*, 4 OCB2d 66 (ES 2011). These claims related to a number of lawsuits Petitioner filed against the NYPD and the City alleging that she was subjected to discrimination based on a disability as well as various other civil rights violations. The stipulation, which was "so ordered" by the Court on November 2, 2011, stated that the parties agreed to the "discontinuance and dismissal, with prejudice, of any and all right of actions or claims . . . from the beginning of the world to the date of this Stipulation." *See* Stipulation of Settlement, *Shymanski v. City of New York, et al.*, 09 Civ. 507 (RJS) (DCF) (PACER Doc. No. 54).

Disposition of Charges)[3] As a result of this incident, Petitioner was placed on a 30-day pre-hearing suspension while awaiting her disciplinary proceeding. The disciplinary proceeding was held on August 19, 2010, before a NYPD Trial Commissioner. In March of 2010, the Union retained an attorney, Martin Druyan ("Counsel"), to represent Petitioner throughout the proceeding. The Trial Commissioner found Petitioner guilty and recommended a penalty of "thirty days' time already served on suspension." (*Id.*) This penalty was adopted by the Police Commissioner on March 24, 2011.

Thereafter, Counsel filed an appeal to the New York City Civil Service Commission ("Civil Service Commission" or "Commission") on behalf of Petitioner and a hearing was scheduled for September 22, 2011. In an affidavit attached as an Exhibit to the Union's Answer, Counsel asserts that he explained the appeal process to Petitioner. (Aff. of Counsel ¶ 11) Specifically, he stated that he would be given a limited time to present oral argument and that the review would be based on the record of the disciplinary proceeding before the NYPD Trial Commissioner. Counsel stated that, despite his efforts to explain to Petitioner that additional evidence would not be accepted by the Commission, Petitioner "insisted on providing [him] with a compendium of documents regarding her other cases and insisted that she had to testify before the Commission." (Aff. of Counsel at ¶ 12)

Petitioner alleges that approximately two months prior to the appellate hearing she faxed Counsel "about 100 different documents and written arguments which he said he didn't need." (Pet. p. 3) The Union states that the majority of these documents were unrelated to the

[3] As Petitioner submitted hundreds of documents as exhibits which were not ordered or numbered, the Trial examiner has described those exhibits which are referred to herein.

disciplinary matter for which Counsel was retained.[4] On July 12, 2011, Counsel faxed Petitioner back a cover sheet that she had faxed him on July 8. On it he wrote: "Ms. Shymanski, We are not involved in this discrimination case. Thanks. Please do not write us about it!" (Pet., Ex.: July 12, 2011 Facsimile Transmittal Sheet) The Union asserts that throughout Counsel's representation of Petitioner she called him over 200 times. Additionally, Counsel states that he "met with [Petitioner] on some 25 occasions as she often showed up at my office without an appointment." (Aff. of Counsel ¶ 7)

Petitioner further asserts that prior to the hearing Counsel failed to submit a written appeal to the Civil Service Commission. The Union admits that no formal written appeal was filed, but argues that the Commission "only requires a letter stating that the [P]etitioner appeals a final determination of her employer concerning a disciplinary action." (Union Ans. ¶ 4) Counsel states that he explained this procedure to Petitioner "to no avail" and provided her with a copy of the letter. (Aff. of Counsel ¶ 11)

Petitioner also claims that on the date of the hearing Counsel appeared late, thereby denying her the opportunity to confer with him regarding her claims prior to beginning his oral argument. The Union and the City both deny this claim, and Counsel affirmatively states that he arrived at the hearing fifteen minutes early. (*See* Aff. of Counsel ¶ 15) Furthermore, both the Union and the City argue that Counsel and Petitioner discussed her case that day, prior to oral

[4] These documents date from 2007 to 2011. Many concern complaints of harassment and requests for reasonable accommodations that Petitioner made to the NYPD's Office of Equal Employment Opportunity. Others concern various complaints that Petitioner made to the NYPD's Internal Affairs Bureau and the New York State Department of Labor's Public Employee Safety and Health Division. Still others concern the aforementioned legal actions that Petitioner was pursuing in federal and state courts. Additionally, there are various letters from doctors containing diagnoses and a number of Petitioner's handwritten notes describing incidents, which, she alleged, demonstrated that she was subjected to harassment and retaliation.

argument. Specifically, the City states that, before the hearing began, Counsel and Petitioner "went into a room off of the waiting room to talk." (City Ans. ¶ 25)

Petitioner claims, and both the Union and City deny, that Counsel precluded her from speaking at the hearing. Counsel states that, although he was "well aware of the Commission's rules, [he] requested that the [Commission] allow [Petitioner] to speak during the three-minute argument allotted to [him]." (Aff. of Counsel ¶ 13) The Union and the City allege that after Counsel's request was denied, Petitioner walked out of the hearing in the middle of his oral argument. Petitioner does not deny this claim.[5] Nevertheless, she contends that Counsel presented only "a one liner." (Pet. p. 1) The Union and the City deny this claim, and the Union argues that Counsel used the entire brief time allotted to him to present Petitioner's best arguments.

Following the hearing, Petitioner asked Counsel to contact the Police Commissioner to request that her case be re-opened so that she could submit additional documents as evidence of discrimination. Counsel believed it was highly unlikely that the request would be granted due to the fact that the case had been closed and was now pending on appeal before the Civil Service Commission. Nevertheless, he submitted a letter to the Police Commissioner requesting that the case be re-opened. (*See* Union Ans., Ex. C) This request was subsequently denied. On September 29, 2011, the Civil Service Commission affirmed the decision and penalty imposed by the NYPD. (*See* City Ans., Ex. 6)

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[5] We note that in Petitioner's post-answer submissions, she did not respond directly to any arguments or factual assertions raised by the Union or the City in their answers. Thus, these "additional facts or new matter alleged in the answer[s] are deemed admitted." *Rodinella*, 5 OCB2d 13, at 14, n. 14 (BCB 2012) (citing § 1-07(c)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *Turner* 51 OCB 44, at 5 (BCB 1993))

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union did not provide her with fair or good faith representation during her appeal to the Civil Service Commission of the discipline imposed on her by the NYPD. Specifically, she alleges that Counsel: (i) ignored over 100 documents she submitted to him that she believed were critical to her appeal; (ii) yelled at her on the phone, telling her she didn't know what she was talking about; (iii) failed to produce a written appeal to the Civil Service Commission; (iv) showed up late to the hearing, thereby denying her the opportunity to confer with him regarding her case; (v) presented a one-line argument to the Commission during her appeal; and (vi) denied her freedom of speech by preventing her from speaking at the appeal hearing.

Union's Position

The Union argued that there is no evidence that the attorney it retained to represent Petitioner acted in an arbitrary, discriminatory or bad faith manner. While appealing Petitioner's 30-day suspension, Counsel was constrained by the Rules of the City Civil Service Commission ("Commission Rules") set forth in § 76 of the Civil Service Law ("CSL"). According to the Commission Rules, the appeal of an employer's disciplinary action to the Commission requires only a letter and not a written brief. Further, the CSL states that the Commission's determination is based on the record and transcript of the disciplinary hearing and that no new evidence may be submitted at the appeal hearing.[6] Also, petitioners are generally not permitted to speak in these

[6] CSL § 76(2) states that the Commission "shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the [C]ommission may determine." Similarly, Commission Rule § 2-01(c) states that "[w]here an appeal is taken, the Commission shall review the record below and shall afford appellant and the employing agency the opportunity to make an oral presentation and/or to submit written statements to the Commission."

appeals. Counsel explained these procedures to Petitioner on a number of occasions; however, she continued to insist that she be given the opportunity to speak and present her documents at the hearing. Counsel presented Petitioner's request to the Commission, and it was denied.

The Union also asserts that Counsel did not ignore Petitioner's documents. Rather, Counsel determined that they were not relevant to the disciplinary matter that he was retained to work on. Although Counsel repeatedly attempted to explain to Petitioner the documents' relationship or lack thereof to the matter at hand, she continued to present him with irrelevant information.[7] Petitioner's complaint that Counsel did not properly utilize her documents does not amount to a breach of the Union's duty of fair representation, as this duty is not breached merely by Counsel's choice not to pursue a member's desired course of action. Furthermore, Counsel arrived at the hearing approximately fifteen minutes early, conferred with Petitioner before beginning his argument, and used the entire time allotted to him to present her best arguments. Counsel also wrote a letter to the Police Commissioner requesting that Petitioner's disciplinary case be reopened despite the fact that he knew it was highly unlikely that this request would be granted.

In sum, the Union argues that it satisfied its duty of fair representation. Petitioner may be dissatisfied with the representation provided or the outcome of her case, but such is not a proper ground on which to find a breach of the Union's duty of fair representation in the absence of a showing of arbitrary or discriminatory behavior or bad faith motivation.

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[7] Counsel states that, during the eighteen month period in which he represented Petitioner, she sent him approximately "250-500 pages of documents concerning her state and federal court litigation against the NYPD and [the City]." (Aff. of Counsel ¶ 7)

City's Position

The City argues that Petitioner's claims "amount to nothing more than strenuous disagreement and dissatisfaction with the quality of representation" provided to her. (City Ans. ¶ 46) However, Petitioner has not alleged that the Union acted in an arbitrary, discriminatory, or bad faith manner, and, thus, has not demonstrated that the Union breached its duty of fair representation. In a breach of the duty of fair representation case, an employer cannot be found liable unless the Union is liable. Therefore, the petition must be denied in its entirety.

DISCUSSION

"It is the Board's long-established policy that the rules regarding pleadings be liberally construed." *Sciarillo*, 53 OCB 15, at 6-7 (BCB 1994); *see also Andreani*, 2 OCB2d 15, at 19-20 (BCB 2009). Therefore, since *pro se* petitioners "may be unable to execute technically perfect or detailed pleadings[,] as long as the gravamen of the petitioner's complaint may be ascertained by the respondent, the pleading will be deemed acceptable." *Sciarillo*, 53 OCB 15, at 7. Here, Petitioner pleads facts which allege that the Union violated its duty of fair representation. Therefore, we shall construe the petition as alleging violations of NYCCBL § 12-306(b) and (d).[8] *See Seale*, 79 OCB 30, at 7 (BCB 2007).

Petitioner alleges that the attorney provided to her by the Union was deficient in his representation of her during her appeal to the Civil Service Commission of a 30-day disciplinary suspension. The Union and City dispute a number of Petitioner's factual assertions regarding Counsel's actions on the date of the oral argument before the Commission. However, "we are

[8] 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." Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

able to decide upon the record before us as the factual disputes which exist[] are not material to the legal claims raised." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009) (citing *DC 37*, 79 OCB 37, at 8-9 (BCB 2007)). Because a hearing was not held in this case, "in reviewing the sufficiency of the petition, 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." *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citing *Seale*, 79 OCB 30). After a thorough review of the record, we find that the allegations do not state facts which would, if proven, establish that the Union breached its duty of fair representation or that the City violated the NYCCBL.

"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." *Rosioreanu*, 1 OCB2d 39, at 17-18 (BCB 2008), *affd., Matter of Rosioreanu v. N.Y. City Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd*., 78 A.D.3d 401 (2010), *lv denied*, 17 NY3d 702 (2011) (citing *Edwards*, 1 OCB2d 22, at 20 (BCB 2008)). With respect to the grievance process, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Walker*, 79 OCB 2, at 15 (BCB 2007) (citing *Grace*, 55 OCB 18, at 8 (BCB 1995)). Furthermore, "[a] union member's mere dissatisfaction with the outcome of his case is insufficient to ground a claim that a union has breached its duty." *Rivera-Bey*, 73 OCB 20, at 11 (BCB 2004) (citing *Minervini*, 71 OCB 29, at 15 (BCB 2003)). The burden is on the petitioner to plead and prove that that the union has breached its duty of fair representation by acting in an arbitrary, discriminatory, or bad faith manner. *See Nardiello*, 2 OCB2d 5, at 39 (citing *James-Reid*, 77 OCB 29, at 16-17 (BCB 2006); *Minervini*, 71 OCB 29, at 15-16).

The record demonstrates that, on or about March 18, 2010, the Union retained an attorney to represent Petitioner in defending disciplinary charges that were brought against her in April of 2008. After she was found "guilty" at a disciplinary hearing, Counsel filed a letter of appeal with the Civil Service Commission. Although Petitioner protests the fact that Counsel did not file a written appeal, such is not required by either the CSL or the Commission Rules.[9] Further, it has not been demonstrated that Petitioner was harmed in any respect due to Counsel's decision to file a letter of appeal rather than a written brief. Petitioner's dissatisfaction with Counsel's tactics is insufficient to demonstrate a violation of the Union's duty of fair representation. *See Walker*, 79 OCB 2, at 15.

Petitioner also alleges that Counsel "denied her freedom of speech" by not allowing her to speak or submit additional documents at the Civil Service Commission appeal hearing. Again, this claim raises questions concerning the methods or strategy employed by Counsel. Counsel stated in his affidavit that he made a request to the Commission that Petitioner be allowed to speak and submit documentation beyond that which is generally considered. (Aff. of Counsel ¶ 13) This testimony was corroborated by the City and was not denied by Petitioner. (*See* City Ans. ¶ 26) Petitioner has not presented any basis for her contention that she had a right to speak at the hearing or that the Commission's decision not to allow her to speak in any way affected the outcome of her appeal. Moreover, since Counsel conveyed Petitioner's request to speak to

[9] The CSL § 76(2) states, in pertinent part, that an employee who elects to appeal an adverse determination to the Civil Service Commission "shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed." There is no statutory provision that states that a written brief must be submitted. Similarly, there is no Commission Rule requiring that an appealing party submit a written brief, although § 2-01(c) of the Commission Rules provide that "the Commission . . . shall afford appellant . . . the opportunity to make an oral presentation and/or to submit written statements."

the Commission, it was not his actions that interfered with Petitioner's desired opportunity to present additional evidence.

Assuming, *arguendo*, that Counsel otherwise "ignored" some of Petitioner's documents, standing alone, the strategic decision not to utilize certain evidence cannot be viewed as arbitrary, discriminatory, or motivated by bad faith. *See Walker*, 79 OCB 2, at 15. We note that the documents Petitioner sought to be introduced to the Commission largely concerned matters other than her 30-day disciplinary suspension. Thus, while the Board "'will not substitute its judgment for that of a union or evaluate its strategic determinations,'" we note that, in the instant matter, "the Union's decision not to discuss matters outside the purview of the grievance is inherently reasonable." *Rosioreanu*, 1 OCB2d 39, at 17-18 (quoting *Edwards*, 1 OCB2d 22, at 21).

Petitioner's remaining allegations do not state facts which would, even if proven, establish a breach of the Union's duty. Assuming, *arguendo*, that Counsel did "yell" at Petitioner on the phone, arrived late to the hearing, and presented only a "one line" argument to the Commission, at most such actions would speak only to the quality of Counsel's representation. However, Petitioner's "dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation." *Gertskis*, 77 OCB 11, at 11 (BCB 2005) (citing *Whaley*, 59 OCB 41 (BCB 1997); *White*, 57 OCB 37 (BCB 1996); *Brockington*, 37 PERB ¶ 3002 (2004)).

Therefore, while Petitioner's complaints taken as a whole clearly demonstrate that she is dissatisfied with the representation provided to her as well as the outcome of her case, such dissatisfaction simply does not rise to the level of a breach of the Union's duty of fair representation. *See Rivera-Bey*, 73 OCB 20, at 11. Because we find no showing that the Union

acted in an arbitrary, discriminatory, or bad faith manner, we dismiss the instant improper practice petition 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, docketed as BCB-2984-11, filed by Tina Shymanski against District Council 37, AFSCME, AFL-CIO, the City of New York, and the New York City Police Department, hereby is dismissed in its entirety.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

PETER PEPPER
MEMBER