OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Improper Practice Proceeding
-between-

DEBORAH RICHARDSON,
Petitioner Pro Se, DECISION NO. B-24-94

-and- DOCKET No. BCB-1639-94

D.C.37, AFSCME, AFL-CIO,
and the NEW YORK CITY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
Respondents.
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DECISION AND ORDER

Pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] Deborah S. Richardson ("Petitioner" or "Richardson") filed a Verified Improper Practice Petition, on March 7, 1994, against District Council 37, AFSCME, AFL-CIO ("Union," "D.C. 37" or "Respondent"). Petitioner also named the New York City Department of Environmental Protection ("City,"

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[1] Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL") provides, in relevant part:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (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;
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> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of right granted in Section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so . . . .

"DEP" or "Respondent") as Co-Respondent.[2] The Petition alleges that the Union breached its duty of fair representation in the handling of her complaints concerning safety and health issues which she raised at her place of employment. The Union filed an Answer on March 25, 1994. After two requests for an extension of time, the City filed an Answer on April 27, 1994.

A letter posted on June 16, 1994, advised Petitioner of her right to file a Reply to the Respondents' Answers. She was also offered an extension of time to file. Although the return receipt card appended to the letter's envelope was not returned, it had been detached from the envelope and was missing when the letter was returned unopened. Several attempts to reach the Petitioner by telephone were unavailing. By letter dated July 13, posted by regular mail, the Trial Examiner advised the Petitioner of her right to submit a Reply and directed that if no response were forthcoming by July 29, the pleadings would be deemed complete on the basis of papers which had been filed to that date. On August 15, 1994, a letter dated August 3, was received, advising that the Petitioner had resigned from employment in a "severance buyout"[3] and, nonetheless, enlarging the request for relief.

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[2] Civil Service Law, Section 209-a, provides, in pertinent part, as follows:

[I]mproper employee organization practices.

* * *

(3) The public employer shall be made a party to any charge filed under subdivision two [improper employee organization practices] of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

[3] Presumably, Petitioner refers to a citywide, workforce reduction program initiated by the Mayor effective in May, 1994, in which employees were given a cash payment based on years of employment in return for their voluntary severance from city service.

BACKGROUND

Petitioner held the civil service title of Shop Clerk in the New York City Department of Environmental Protection ("DEP"). She worked where the DEP maintains a water and sewer yard located at 5-40 44th Drive, Long Island City, Queens, New York ("site"). At the site is a one-story building, some thirty years old, with two offices and garage bays for DEP vehicles.

The applicable collective bargaining agreement is the 1990-91 Clerical Unit Bargaining Agreement ("Unit Agreement") in effect pursuant to the status quo provisions of NYCCBL § 12-311(d).[4] Petitioner was also covered by the 1990-92 Citywide Agreement ("Citywide Agreement").

Article XIV, § 2(a), of the Citywide Agreement provides that "[a]dequate, clean, structurally safe and sanitary working facilities shall be provided for all employees." Section 2(e) provides that "[t]he sole remedy for alleged violations of this Section shall be a grievance pursuant to Article XV of this Agreement." Article XV provides a four-step grievance procedure.

A Labor Management Health and Safety Committee ("Labor Management Committee") was established by the DEP pursuant to Article XIV § 2(d) of the Citywide Agreement, which requires that a similar committee be established in each agency which is party to the Citywide Agreement. Each committee is

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[4] Section 12-311 of the New York City Collective Bargaining Law ("NYCCBL") provides, in relevant part:

> **d. Preservation of status quo.** During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdown, work stoppages or mass absenteeism nor shall such public employee organization induce any mass resignation, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

required to consist of three to five labor representatives designated by the Union, and not more than an equivalent number of management representatives designated by the agency. Each agency's committee is to meet at least quarterly and at the written request of the labor or management representatives "for the purpose of discussing health and safety problems in the agency and making recommendations for their resolution to the agency head."

On June 3, 1993, DEP's Labor Management Committee heard comments concerning health and safety concerns at the Long Island City site and conducted a site-inspection. Three representatives of the Union participated in the inspection. These health and safety concerns were also discussed at meetings of the Labor Management Committee, on September 23, October 7 and December 2, 1993. These concerns have been the subject of discussion, also, in the Quality of Worklife Oversight Committee ("Oversight Committee"), chaired by the Deputy Commissioner for Management and Budget. The site has been targeted by the Oversight Committee for short-term and long-term capital improvements.

On or about December 7, 1993, Petitioner filed a Step I grievance alleging health and safety violations similar to allegations made in the instant Petition. Two months later, she amended her grievance to add alleged violations.

At the end of February, a short-term capital improvement plan was finalized, earmarking funds to remedy the health and safety concerns of the site. The short-term plan was scheduled to be implemented by July 1, 1994. Implementation of a long-term capital improvement plan was delayed due to the financial constraints of the City.

Positions of the Parties

Petitioner's Position

Petitioner alleges that the Union and the City[5] failed to respond to complaints concerning safety and health issues. In a handwritten attachment to the Petition, Richardson describes unsafe, unsanitary and unaesthetic conditions of her workplace, i.e., pipes leaking over her desk, inadequate storage space contributing to a work backlog, locker space located in a garage area, and rest room facilities offensively close to the locker room and kitchen. Petitioner states, "[T]hese conditions [have] escalated to such a degree that I am unable to function there."

Also attached to the Petition are color photographs of the conditions about which Richardson complains, photocopies of grievance forms signed by the Petitioner reciting the same and similar complaints, as well as forms indicating that Petitioner had been seen by a physician at South Island Medical Associates, P.C., and by personnel at the D.C. 37 Security Plan Personal Service Unit.

As relief, the Petition requests "immediate alleviation of said conditions at yard and full restoration and compensation of my record prior to these conditions arising." Petitioner's letter of August 3 asks for "retribution for every year that I would have been employed with the [City] including what I would have gotten from my pension until my retirement from the [City] and payment for unnecessary mental and physical anguish." The letter also states, "[I]f there's any clause in our contract concerning this matter, I respectfully submit to your participation of this clause . . . . "[6]

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[5] Petition states the "company"; we deem this to mean the "City."

[6] Petitioner's letter of August 3 states that she took a "severance buyout because [she] was being constantly harassed by the [City] and the union, due to unsanitary working conditions on the job, which affected [her] attendance, job performance and physical health in a negative way."

Union's Position

D.C. 37 denies Petitioner's allegations and counters that it "has been addressing and continues to address" health and safety issues at the site in bi-monthly meetings of the Labor Management Committee. The Answer reiterates that Union representatives took part in a "walk through" inspection of the site on June 3, 1993, when problems with the physical plant were identified. The Union determined that the forum in which conditions at the Long Island City site could best be addressed was the Labor Management Committee, although the Citywide Agreement provides for alleged violations to be remedied via the grievance procedure provided in Article XV.

D.C. 37 argues that Petitioner's allegations are devoid of facts which would demonstrate any improper practice on the part of the Union. The Union contends that the handling of Richardson's concerns about workplace conditions has been conducted properly, in good faith, and without arbitrary, discriminatory or hostile considerations. The Union requests that the Petition be dismissed.

City's Position

The City also denies Petitioner's allegations. It counters that the Petition fails to allege facts which show that the City has taken any action for the purpose of frustrating the statutory rights of its public employees or any public employee organization in violation of the NYCCBL. It also counters that the Petition fails to state sufficient facts so as to put the Respondent on notice of any statutory provision allegedly violated.

The City further contends that Petitioner's complaints are more appropriately addressed through either the contractually provided grievance procedure or the DEP Labor Management Health and Safety Committee. The City maintains that the Labor Management Committee has demonstrated a commitment to remedying the health and safety problems that have been brought to its

attention and that it has been actively engaged in addressing those problems. As to improvements which have already been made, the City notes that a fire exit has been installed, a lock has been placed on the bathroom door, a first-aid kit has been put in place, walls have been painted, and leaks have been sealed.

Although the Petition provides no details regarding any failure by the City to respond to specific grievances about the subject at issue, the City notes in its Answer that a failure to respond to a grievance in timely fashion does not constitute an improper practice when relevant contract language allows the grievant to pursue the grievance to the next step in the absence of a response. The City states that such language is found in Article VI, § 9, of the applicable Unit Agreement.[7] The City requests that the Petition be dismissed.

Discussion

The allegations in the Petition raise the issue of whether the Union has breached its duty of fair representation with respect to the handling of Petitioner Richardson's grievances about health and safety issues at her place of work. The duty has been recognized as obligating a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[8] New York courts recognize the duty of fair

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[7] The citation provides, in pertinent part:

> [I]f the Employer exceeds any time limit prescribed at any step in the Grievance Procedure, the grievant and/or the Union may invoke the next step of the procedure, except that only the Union may invoke impartial arbitration under Step IV.

[8] Decision Nos. B-8-94, B-44-93, B-29-93 and B-21-93.

representation[9] and have permitted its assertion in state court by public employees.[10] In 1990, the New York State Legislature amended the Taylor Act to codify principles previously recognized in the decisions of the New York State Public Employment Relations Board which make it an improper practice for a public employee organization to breach its duty of fair representation.[11]

In the area of contract administration, which includes processing employee grievances, however, it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance a grievance.[12] The U.S. Supreme Court determined, in Vaca v. Sipes,[13] that:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures . . . If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . . .
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> The applicable standard, then, permits a union wide discretion in

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[9] Decision No. B-8-94; see, also, Gosper v. Fancher, 49 A.D.2d 674, 371 N.Y.S.2d 28, 90 LRRM 2336 (4th Dept., 1975), aff'd in part, dismissed in part, 40 N.Y.2d 867, 356 N.E.2d 479, 387 N.Y.S.2d 1007, 94 LRRM 2032, 80 Lab. Cas. P. 53,940 (1976), cert. den., 430 U.S. 915, 97 S.Ct. 1328, 51 L.Ed.2d 594, 94 LRRM 2798, 81 Lab. Cas. P. 55,013 (1977); DeCherro v. Civil Service Employees Association, 60 A.D.2d 743, 400 N.Y.S.2d 902 (3d Dept., 1977).

[10] Id.; see, also, Civil Service Bar Association, Local 237, IBT, v. City of New York, 99 A.D.2d 264, 472 N.Y.S.2d 925 (1st Dept., 1984); aff'd, 64 N.Y.S.2d 188, 474 N.E.2d 587, 485 N.Y.S.2d 227 (1984).

[11] Laws of 1990, Ch. 467, § 209-a., Subd. 2(c) and 3.

[12] Decision Nos. B-8-94, B-29-93, B-21-93 and B-27-90.

[13] 386 U.S. 171, 64 LRRM 2369 at 2377 (1967).

reaching grievance settlements.[14] A union does not breach its duty of fair representation merely by refusing to advance a grievance, nor does it breach this duty because the outcome of a settlement does not satisfy a grievant.[15] The only condition limiting a union's discretion is that a decision not to process a grievance must be made in good faith and in a manner that is neither arbitrary nor discriminatory as to collective bargaining rights under the NYCCBL.[16] Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation,[17] but the burden is on the petitioner to plead and prove that the union has engaged in such conduct.[18] It is not enough for a petitioner to allege negligence,[19] mistake,[20] or incompetence on the part of the union.[21]

We do not require a petitioner, particularly one who is appearing pro se, to execute technically perfect or detailed pleadings. If a criterion for

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[14] Decision Nos. B-8-94, B-29-93 and B-21-93.

[15] Decision Nos. B-8-94, B-29-93 and B-21-93.

[16] Decision No. B-8-94.

[17] Decision Nos. B-21-93, B-35-92 and B-21-92.

[18] Decision Nos. B-21-93, B-35-92 and B-56-90.

[19] Decision No. 8-94; see, also, Smith v. Sipe, 109 A.D.2d 1034, 487 N.Y.S.2d 153 (3d Dept., 1985), rev'd, 67 N.Y.2d 928, 502 N.Y.S.2d 134, 493 N.E.2d 237 (1986); Shah v. State, 140 Misc.2d 16, 529 N.Y.S.2d 442 (3d Dept., 1988).

[20] Id.; see, also, Trainosky v. Civil Service Employees Association, Inc., 132 A.D.2d 430, 522 N.Y.S.2d 709, 127 LRRM 3122 (3d Dept., 1987), aff'd, 73 N.Y.2d 796, 533 N.E.2d 1051, 537 N.Y.S.2d 22 (1988).

[21] Id.; see, also, Braatz v. Mathison, 180 A.D.2d 1007, 581 N.Y.S.2d 112 (3d Dept., 1992).

viable improper practice claims were the use of certain customary words or phrases such as "arbitrary, discriminatory or in bad faith," it is likely that many otherwise valid claims would never be entertained.[22] It is enough that the Petitioner place Respondents on notice of the nature of the claim; our rules require no more at the pleading stage of the proceeding.[23]

Here, Petitioner alleges that the Union and the City failed to respond to her complaints about safety and health issues at her place of work. The papers and photographs which support the Petition indicate problems with the physical environment in which Petitioner worked. However, the NYCCBL does not empower us to remedy or even consider every perceived wrong or inequity which may arise out of the employment relationship; it mandates only that we administer and enforce procedures designed to safeguard employee rights under the Collective Bargaining Law.[24]

We find that the Union herein has not failed in its duty of fair representation. The Petitioner has failed to allege facts which would establish that the Union's handling of the matter was done arbitrarily, or in a way that discriminates against her insofar as her rights under the Collective Bargaining Law are concerned, or in bad faith. Petitioner presents no evidence that the Union's pursuit of the grievances, although perhaps not to the Petitioner's satisfaction, was improperly motivated in a way that would constitute an improper practice as defined in case law and as contemplated by the drafters of the NYCCBL.

On the contrary, the record establishes no actions rising to the level of bad faith in the way the Union determined that Richardson's complaints would best be handled at the time in the Labor Management Committee. Its

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[22] Decision Nos. B-8-94 and B-15-93.

[23] Decision Nos. B-8-94, B-15-93 and B-21-87.

[24] Decision Nos. B-21-93 and B-59-88.

decision not to pursue Petitioner's grievances under the procedure provided in Article XV of the Citywide Agreement falls within the Union's discretion and does not rise to the level of a breach of its duty of fair representation, as there is no evidence that the decision was handled in a manner violative of the NYCCBL. To the contrary, the Union made efforts to resolve the problems and has been an active participant in efforts to resolve the Petitioner's claims. Equally credible are the City's efforts to correct the health and safety problems, as detailed in the City's Answer. Petitioner has contradicted neither the Union's nor the City's statements in this regard.

Despite Petitioner's contention in her letter of August 3 that she left City service during the Mayor's workforce reduction buyout program allegedly because she "was being constantly harassed by the [City] and the union, due to unsanitary working conditions on the job, which affected [her] attendance, job performance and physical health in a negative way," the Petition fails to allege any facts to support this conclusory statement. The Petitioner also has failed to dispute the allegations of the Union and the City concerning the actions taken by them in response to her safety and health complaints. For all of these reasons, the Petition cannot be sustained.

Insofar as the Petitioner attempts an argument for breach of contract, we must dismiss that claim as well. In her handwritten letter of August 3, she makes an oblique reference to the collective bargaining agreement but to no specific clause. We conclude that the reference is to Article XIV, § 2(a), of the Citywide Agreement, which provides that "[a]dequate, clean, structurally safe and sanitary working facilities shall be provided for all employees," because Petitioner requests relief in the nature of "an immediate alleviation of said conditions at yard and full restoration and compensation of my record prior to these conditions arising."

Pursuant to § 205.5 of the Taylor Act,[25] the Board is prevented from enforcing the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice,[26] which we have determined, on these facts, it does not. Therefore, we must dismiss any action for breach of contract as outside our authority. However, the dismissal of a breach of contract action on the basis of the facts alleged herein is without prejudice to the Petitioner's pursuit of that action in an appropriate forum.

In sum, we find that the Petitioner has not satisfied the requirements for a successful claim of a breach of the duty of fair representation against the Union, and that she has failed to state an independent claim of improper practice against the City. Accordingly, the instant improper practice Petition is 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 petition docketed as BCB-1639-93 be, and the same hereby is, dismissed.

Dated: New York, New York
October 26, 1994

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS

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[25] Section 205.5(d) of the Taylor Act which is applicable to this agency, provides, in pertinent part, as follows:

> [T]he board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[26] Decision Nos. B-21-93, B-46-92, B-51-90 and B-61-89.

MEMBER

JEROME E. JOSEPH
MEMBER

RICHARD WILSKER
MEMBER

SAUL KRAMER
MEMBER