

**Walker, 6 OCB2d 1 (BCB 2013)**

(IP) (Docket No. BCB-3039-12).

*Summary of Decision:* Petitioner alleged that the Union violated NYCCBL § 12-306(b)(1) and (3) by failing to assist him in filing a grievance concerning his assertion that, in reviewing and denying his leave request, his supervisors mistreated him. Petitioner also alleged that the Union did not sufficiently respond to his inquiries concerning filing a grievance. The Union and NYCHA both argued that Petitioner did not establish a breach of the duty of fair representation because the Union advocated on Petitioner's behalf by speaking with Petitioner's supervisor, and, as a result, his leave request that was previously denied was then granted leaving no issue to grieve. NYCHA argued that, because Petitioner did not establish his claim against the Union, he could not establish derivative claims against NYCHA. The Board found that Petitioner did not establish that the Union or NYCHA violated the NYCCBL. Accordingly, the petition was dismissed. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**LEWIS WALKER,**

*Petitioner,*

*-and-*

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

*Respondents.*

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**DECISION AND ORDER**

On August 13, 2012, Lewis Walker ("Petitioner") filed a verified improper practice petition alleging that International Brotherhood of Teamsters, Local 237 ("Union"), violated § 12-306(b)(1) and (3) of the New York City Collective Bargaining

Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by failing to assist him in filing a grievance against the New York City Housing Authority (“NYCHA”) concerning his assertion that, in reviewing and denying his leave request, his supervisors mistreated him. Petitioner also asserts that the Union did not sufficiently respond to his inquiries about filing a grievance on his behalf. The Union and NYCHA both argue that Petitioner did not establish a breach of the duty of fair representation because the Union advocated on Petitioner’s behalf by speaking with Petitioner’s supervisor, and, as a result, his leave request that was previously denied was then granted and there remained no issue to grieve. The Union further asserts that it sufficiently responded to the Petitioner’s concerns about the denial of his leave request. NYCHA argues that, because Petitioner did not establish his claim against the Union, he could not establish derivative claims against NYCHA. The Board finds that Petitioner did not establish that the Union or NYCHA violated the NYCCBL. Accordingly, the petition is dismissed.

### **BACKGROUND**

Petitioner is employed by NYCHA as a Caretaker (J) at the Washington-Lexington Houses in Manhattan and is a member of the Union. NYCHA and the Union are parties to a collective bargaining agreement (“Agreement”), which sets forth a grievance procedure in § 44 that states, in pertinent part:

- c. A dispute or claim that meets the definition [of a grievance] shall be administered in accordance with the following procedure:
  - i. STEP I – An employee on a level below Division Chief may present a grievance orally or in writing

to the Division Chief, (or in the case of developments, to the Housing Manager) not later than ninety (90) days after the grievance arose.

- ii. STEP 2 – If the grievance is not resolved at Step 1 within two (2) working days after its presentation, the grievant may appeal to the Director of Human Resources or his/her designee by filing a written statement of the grievance within seven (7) working days after the presentation of the grievance at Step 1.
- iii. STEP 3 – The grievant has the right to appeal the determination of the Director of Human Resources to the General Manager or his/her designee (pursuant to written designation filed in the Office of the Secretary) by filing a written statement of such an appeal within five (5) working days after the decision in Step 2 has been issued.
- iv. STEP 4 – An appeal from an unsatisfactory determination at Step 3 may be brought solely by the Union within thirty (30) calendar days from receipt of such determination to the Office of Collective Bargaining for impartial arbitration by an arbitrator on the register of the Board of Collective Bargaining under procedures established by such Board.

(NYCHA Ans., Ex. A) (emphasis added).

NYCHA's Human Resources Manual, Chapter 1, § III(C), states that:

Annual Leave, except in cases of sickness and other emergencies approved by the department Director, shall be taken at the convenience of the Authority . . . If the interests of the Authority so dictate, any absence may be investigated and corroborating evidence may be required.

(NYCHA Ans., Ex. B)

Petitioner was absent from work from April 27, 2012, through May 4, 2012. On May 7, 2012, Petitioner submitted a Leave of Absence Request asking that his annual leave be charged for the days he was absent. Petitioner's Leave of Absence Request was

initially disapproved because his supervisor found that the doctor's note that he submitted was too vague. As a result, NYCHA marked him AWOL and advised him that they were going to dock his pay. Beginning on May 25, 2012, Petitioner contacted the Union on multiple occasions by telephone and by mail. He repeatedly asked the Union to file a grievance against his supervisor for questioning him about his sickness and thereby invading his privacy.

On June 12, 2012, three days after receiving a letter from Petitioner, a Union representative met with Petitioner's supervisor at NYCHA. The following day, the Union representative told Petitioner that the outcome of his meeting with NYCHA was that his previously denied Leave of Absence Request was now approved, and as a result, his pay would not be docked. Determining that the issue had been resolved, the Union representative informed Petitioner that there remained no outstanding contract issue to grieve, and thus that it would take no further action on his behalf.

Nevertheless, the Union received subsequent requests from Petitioner to file grievances on his behalf regarding the same issue. Petitioner claims that he made several attempts to contact the Union but did not receive a response to his concerns nor did the Union ever meet with him or represent him. He also claims that the Union representative promised that would come to his work site to pick up the grievance form on June 22, 2012, but he never came and did not contact him. The Union alleges, and Petitioner denies, that the Union representative visited Petitioner's work location and called his cell phone and work radio in an attempt to reiterate to Petitioner that it would not be filing a grievance for him because it saw no grievable issue, but could not reach him.

## **POSITIONS OF THE PARTIES**

### **Petitioner's Position**

Petitioner desires to grieve the fact that his supervisor demanded further documentation to justify his absence, which would invade his privacy, and recorded him as AWOL with all of the attendant negative consequences. Petitioner does not believe that the fact that his Union managed to reverse the supervisor's demand for additional documentation and get NYCHA to record his absence as justified, avoiding being found AWOL, moots his grievance.

Petitioner asserts that NYCHA's inquiries into his sickness and the reason for his leave violated his rights. Petitioner asserts that if the Union met with NYCHA regarding his grievance, the Union was also required to meet with him. He stated that he exercised his right to advance his grievance as much as he was permitted but, because he received no response regarding his grievance, he could not appeal any determination made by NYCHA. Petitioner acknowledges that his pay was not docked; however, this fact does not address the matter of his grievance. He believes that his privacy was invaded during a meeting with his supervisor because his supervisor questioned him as to why he was sick. Petitioner also alleges that because he wanted to file a grievance against NYCHA, he was "moved him from his [his] original work assignment and given heavier work duties as punishment."<sup>1</sup> (Pet. at 2).

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<sup>1</sup> The facts recited in the improper practice petition relate entirely to Petitioner's allegation that the Union did not adequately respond to his desire to file a grievance. In a section of his petition concerning relief requested, however, Petitioner asserts that, because he attempted to file a grievance, NYCHA he has been "moved from [his] original work assignment and given heavier work duties as punishment." (Pet. at 2). Affording the *pro se* Petitioner the broadest possible reading of his petition, we read such as alleging that NYCHA violated NYCCBL § 12-306(a)(3). At the conference in this

Petitioner also alleges that the Union breached its duty of fair representation by not responding to his request to file a grievance against NYCHA. He states that although he made several attempts to contact the Union, he did not receive a response to his concerns nor did the Union ever meet with him or represent him.

As relief, Petitioner requests that his grievance be filed as soon as possible, and that he receive acknowledgement that his rights were violated and that he was discriminated against. He asks that his manager and supervisors be held accountable for their actions. He also requests that he be transferred to the position of Plaster Helper on the Upper East Side of Manhattan, which would relieve him from working under the supervision of his manager and supervisor.

### **Union's Position**

The Union asserts that Petitioner has not established that the Union breached its duty of fair representation, and, therefore, all of his claims must be dismissed. The Union responded to Petitioner's request for action on his behalf. It advocated for him and communicated to him the reason it would not further pursue a grievance on his behalf. Specifically, the Union informed him that a Union representative spoke with his supervisor at NYCHA, and as a result, his Leave of Absence Request, which was previously to have been denied, was approved. Therefore, the Union determined that there remained no contract issue to grieve.

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matter, Petitioner was given an opportunity to provide further specific facts. When asked why he believed NYCHA retaliated against him, he stated possibly his age or longevity, but provided no specific facts. Thus, to the extent Petitioner's alleged that NYCHA violated NYCCBL § 12-306(a)(3), we find that the allegations are purely conclusory and unsupported by facts sufficient to make out a retaliation claim.

**NYCHA's Position**

NYCHA argues that the petition does not contain sufficient probative facts to support a finding that the Union breached its duty of fair representation. Petitioner was not denied use of his leave for the dates he was absent, and, thus, no grievance existed for the Union to pursue. In any event, this case concerns an internal union matter, which should be considered outside the realm of the duty of fair representation. Should the Board find that the duty of fair representation claim against the Union does not stand, the derivative violation against the employer must also be dismissed.

Further, to the extent that the petition suggests a violation, misinterpretation or misapplication of NYCHA's rules and regulations, such a question would be properly raised as a contractual grievance, in accordance with the Agreement. Such allegations must be raised in the proper forum and lie outside the jurisdiction of the Board.

**DISCUSSION**

Petitioner alleges that the Union breached its duty of fair representation to him because, although it resolved the matter of his leave and ensured that his pay would not be docked, the Union did not file a grievance regarding the fact that his supervisors questioned him about his illness and thereby invaded his privacy. He also complains that the Union did not respond to his repeated efforts to discuss the Union's decision not to file a grievance on his behalf.

To establish a breach of the duty of fair representation, a petitioner must show that a union engaged in "arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, 79 OCB 5,

at 14 (BCB 2007)). A petitioner “must allege more than negligence, mistake or incompetence to meet a prima facie showing of a union’s breach.” *Turner*, 3 OCB2d 48, at 15 (BCB 2010) (editing marks omitted). Rather, a union “enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.” *Edwards*, 1 OCB2d 22, at 21 (2008).

The record does not establish that the Union’s decision was arbitrary, discriminatory, or made in bad faith, and “we will not substitute [our] judgment for that of a union or evaluate its strategic determinations.” *Edwards*, 1 OCB2d 22, at 21. At the outset, we underscore that a Union representative spoke with Petitioner’s supervisors on his behalf, after which Petitioner’s supervisor reversed her decision to deny his Leave of Absence Request. The Union examined the substance of Petitioner’s claims and spoke directly to his supervisor to address the denial of his Leave of Absence Request. Once that denial was reversed, the Union determined that no grievance remained.

Although Petitioner is dissatisfied with the Union’s representation and its decision not to file a grievance, a union “does not breach the fair representation duty 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 (BCB 2008), *affd.*, *Matter of Rosioreanu v. N.Y.C. Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401(1<sup>st</sup> Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Petitioner may have been unhappy that his supervisor questioned him about the reason for his leave and may have felt as though his privacy was violated. However, he provided no basis upon which we could find that these facts could establish a grievance pursuant to the Agreement or any other source of right that the Union is involved in protecting on behalf of its members. A union’s “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 (BCB 2007) (quoting *Sicular*, 77 OCB 33, at 15 (BCB 2006)). We find no grounds upon which to conclude that the Union’s decision not to file a grievance could be deemed to have been discriminatory or made in bad faith.

Petitioner does not dispute that the Union notified him that it successfully intervened on his behalf with his supervisor, and that in its opinion no grievable claim existed and it would not to pursue a grievance. He nevertheless complains that the Union did not respond sufficiently to his repeated efforts to communicate about his desire to file a grievance. However, we find that the Union did fully respond to his concerns, and that his dissatisfaction with the Union’s level of communication does not amount to a breach of the duty of fair representation. *Turner*, 3 OCB2d 48 (BCB 2010) (finding that the petitioner’s dissatisfaction with the quality of communication did not amount to a breach of the duty of fair representation where the record failed to show that the union did not keep the petitioner informed). Moreover, Petitioner has not demonstrated any basis upon which the Union could further pursue a grievance, or any legally cognizable prejudice stemming from the Union’s alleged failure to respond to Petitioner in a manner he found satisfactory. Indeed, there is no breach of the duty of fair representation “where a petitioner cannot establish that he has been, or will be, prejudiced or injured by any failure to inform.” *Lein*, 63 OCB 27, at 9 (BCB 1999).

For the above reasons, we find that Petitioner did not establish that the Union breached its duty of fair representation. As there is no viable claim against the Union, there are no derivative claims against the NYCHA.

Accordingly, the 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-3039-12, be and the same hereby is, dismissed.

Dated: January 31, 2013  
New York, New York

MARLENE A. GOLD  
CHAIR

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

GWYNNE A. WILCOX  
MEMBER