Evans, 6 OCB2d 37 (BCB 2013)

(IP) (Docket No. BCB-4003-13)

Summary of Decision: Petitioner claimed that the Union violated NYCCBL § 12-306(b)(3) by failing to properly represent him concerning disciplinary charges. The Union asserted that it did not violate its duty of fair representation as it pursued all rights and remedies Petitioner had under the relevant collective bargaining agreement. The City argued that Petitioner's claims should be dismissed as Petitioner did not present any facts sufficient to amount to a breach of a duty of fair representation. The Board found that, granting the Petitioner all favorable inferences, no improper practice could be established on the facts alleged. Accordingly, Petitioner's improper practice petition is denied ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LINDSAY EVANS,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 983, and
THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On August 30, 2013, Lindsay Evans ("Petitioner") filed a *pro se* verified improper practice petition against District Council 37, Local 983 ("Union" or "DC 37") and the New York City Department of Parks and Recreation ("DPR" or "City"), which, as amended, alleges that the Union violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b)(3), by failing to properly

represent him concerning disciplinary charges.[1] Petitioner asserts that the Union representative arrived late to Petitioner's Seasonal Review, failed to properly speak on Petitioner's behalf, and told Petitioner, "you are what you bring to the table, there is very little I could do for you."[2] (Am. Pet. ¶¶ 1-6). 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, a statutory party pursuant to NYCCBL § 12-306(d), argued that Petitioner's claims should be dismissed as he did not present facts sufficient to amount to a breach of a duty of fair representation. We find that, granting the Petitioner all favorable inferences, 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 ("CSA") during the summers of 2006-08 and 2011-13.[3] Employees in the civil service title CSA are represented by DC 37. The City and DC 37 are parties to a collective bargaining agreement ("Agreement") that covers CSAs. Article XX, § 2(b) of the 2008 to 2010 Agreement states:

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[1] On September 5, 2013, the Executive Secretary issued a deficiency letter stating that the petition had been found deficient on the grounds that it did not assert in what manner the acts alleged are claimed to constitute an improper practice in violation of NYCCBL § 12-306, either as to the Union or the employer. For clarity, we refer to the original petition filed on August 30, 2013 as the "Petition," and the amended petition filed on September 18, 2013 as the "Amended Petition."

[2] The paragraphs in Petitioner's Amended Petition are not numbered. For ease of reference, the Trial Examiner used the same paragraph numbers that were added to a copy of the Amended Petition annexed as City's Answer, Exhibit 1. (City Ans., Ex. 1)

[3] According to the City, Petitioner was also employed by DPR as a Job Training Participant from May 19, 2005 to November 19, 2005, and February 25, 2009 to August 9, 2009. (City Ans. ¶ 9)

> 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.[4]

(City Ans., Ex. 2). The parties refer to such a review as a "Seasonal Review." The Agreement does not provide any arbitration rights in disciplinary matters for these seasonal employees.

From May 28, 2013 to July 16, 2013, Petitioner was a CSA in the Parks Enforcement Patrol at the Kosciusko Pool in Brooklyn. Petitioner asserts some complaints about his working conditions on or about July 15, 2013, including working on the top deck in extreme heat, and working without a radio.[5] On that day, Petitioner observed an individual flash what appeared to be a gun. He contends that he told his manager that he saw the individual, but that he did not have a radio to contact command and he could not find a police unit.

On July 16, 2013, Petitioner asserts that he did not show up for work because he was in the hospital from 8:19 AM to 12:31 PM.[6] (Rep. to Union, Ex. 1) Petitioner was terminated that day. Sergeant Daniel Roca completed a Seasonal Evaluation ("July 16 Evaluation") of

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[4] The Union provided Article XX, § 4(b) of the 2005 to 2008 Agreement, which includes the same language. (Union Ans., Ex. B)

[5] The allegation about the extreme heat is only set forth in the initial Petition and was not responded to by Respondents.

[6] The City made an application to the Board requesting that any factual allegations raised for the first time in the Petitioner's reply, specifically those involving Petitioner's hospitalization on July 16, not be considered by the Board. Under the circumstances herein, and because the Petitioner is not represented by counsel, the City's application was denied. However, we do not deem Respondents to have admitted any of the allegations raised for the first time in the reply. Petitioner provided a "Return to Work/School Statement" from the St. Lukes Emergency Department, which corroborates that he was in the hospital on July 16, 2013 during the aforementioned times. (Rep. to Union, Ex. 1)

Petitioner, which stated:

> Mr. Evans is a punctual employee and has never been late or absent with one notable exception, the day after his confrontation with two pool supervisors. Mr. Evans failed to return to work the day after he did not inform all necessary personnel of the presence of deadly weapon(s) at the workplace vicinity. This lapse in judgment by Mr. Evans is critical, dangerous, and had potentially lethal implications in a place and time where there is no room for error. Although Mr. Evans possesses the ability to perform his duties correctly, unfortunately he chooses not to and instead offers excuses and blames others. This conduct is not tolerable from a person responsible for the safety of the public and his own colleagues. As a result, Mr. Evans has voided the trust placed in him by this agency and is no longer needed as a CSA.

(City Ans., Ex. 3) Additionally, the July 16 Evaluation noted the following: Petitioner passed one out of three inspections held, his performance rating was 11 out of 20, and he was not recommended for rehire.[7] According to the July 16 Evaluation form, employees with a performance rating "less than 12 cannot be considered for rehire without written support from a Borough Commissioner or Chief of Operations." (City Ans., Ex. 3)

In an email to DPR's Deputy Director of Labor Relations, dated July 19, 2013, a Union representative, Thomas Testa, requested that Petitioner's termination be reviewed at a Seasonal Review hearing. The letter stated in pertinent part: "[p]lease setup a CSA Review for Lindsay Evans… [t]his member was terminated on 7/15/13." (Union Ans., Ex. A) On July 22, 2013, a letter was sent to the Union representative and Petitioner confirming that a Seasonal Review was scheduled. (*See* Union Ans., Ex. A)

On July 29, 2013, the Seasonal Review was conducted by Labor Relations Analyst Fabio J. Arceyut ("Review Officer"). The following facts about the Seasonal Review are undisputed: the Review Officer, the Union representative, and the Petitioner were present; Petitioner was

[7] Sergeant Roca signed the evaluation, but Petitioner did not. (City Ans., Ex. 3)

given the opportunity to tell his version of the facts; and the whole hearing lasted approximately 20 to 30 minutes.

Petitioner avers, and the Union denies, that the Union representative was 30 minutes late for the Seasonal Review, and he told Petitioner that he did not have any of Petitioner's documents in hand because he was "coming off vacation."[8] (Am. Pet. ¶ 1) Petitioner asserts that, during the review, he testified about the events leading up to his termination, including how he followed an order from his manager, and how he told a manager that he saw a teenager flash what appeared to be a gun. He contends that the Union representative failed to emphasize favorable facts such as: Petitioner could not radio command because he did not have a radio, Petitioner had excellent work habits, and Petitioner had strong evaluations from past seasons as a CSA.[9] Finally, Petitioner alleges, and the Union denies, that after the hearing the Union representative told him "you are what you bring to the table, there is very little I could do for you." (Am. Pet. ¶ 6)

The Union contends that the representative followed his usual practice of stating the Union's position. He argued that the Petitioner should not be terminated under the circumstances. Further, the City maintains that the Union representative stated that "Petitioner had been a CSA for a long period of time, had a good record, and should be considered for

[8] The City denies knowledge or information sufficient to form a basis as to the truth of the factual allegations included in the Petitioner's Amended Petition, except to admit that the Union representative said that he was coming back from vacation. Respondents' argue that even if these allegations are taken to be true, none of them are a sufficient basis for a duty of fair representation claim.

[9] We note that copies of Petitioner's 2011 and 2012 seasonal evaluations from other DPR locations were provided in his Petition. Petitioner received the following rating scores out of a possible score of 20: 18 in July 2011, 16 in June 2012, 16+ in July 2012, and 17 in September 2012. The exhibits are not labeled so we will refer to them as Petition exhibits. (Pet. Exs.)

reinstatement." (City Ans. ¶ 19) In his reply, Petitioner does not deny either of Respondents' representations about the Union representative providing mitigating arguments at the Seasonal Review. [10]

The City alleges that, following the Seasonal Review, the Review Officer spoke to the pool manager Rosa, Sergeant Roca, and Captain Tonya Prince, and they all confirmed that "at the end of Petitioner's tour, Petitioner told Mr. Rosa that he had seen the weapon after the weapon had already been discovered."[11] (City Ans. ¶22) Additionally, the City alleges that the Review Officer reviewed Petitioner's prior performance evaluations before issuing a decision. On August 7, 2013, the Review Officer issued a decision upholding Petitioner's termination. (Union Ans., Ex. C)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that the Union breached its duty of fair representation when it failed to properly grieve his termination from employment and, thereby, violated NYCCBL § 12-306(b)(3).[12] The Union requested a Seasonal Review regarding his termination, but thereafter

[10] In his reply, Petitioner asserts that the Union represented a Sergeant that failed to report a lost wallet, and the employer reinstated him. Additionally, Petitioner asserts that he faxed a letter to the Union representative in advance of the Seasonal Review; and then the Union representative did not bring the letter to the Seasonal Review. Petitioner does not provide any details about the date, subject, or content of the letter.

[11] Petitioner denies this fact and states, "If weapon was recover[ed][,] I CSA Lindsay Evans[,] did his job." (Rep. to City)

[12] 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.

failed to take appropriate action regarding the grievance. More specifically, Petitioner alleges that at the Seasonal Review the Union representative arrived 30 minutes late, did not have any of Petitioner's documents in hand "because [he was] coming off of vacation," did not ask enough questions, and told Petitioner "you are what you bring to the table, there is very little I could do for you." (Am. Pet. ¶¶ 1-6) Additionally, the Petitioner alleges for the first time in his reply to the Union, that a Sergeant failed to report a lost wallet and was suspended. The Union represented the Sergeant and the employer reinstated him. The Petitioner also requests in his Reply to the Union, that the Board order the City to pay Petitioner's wages for the period from July 17, 2013 to September 5, 2013, and restore his employment.

Union's Position

The Union claims that it did not breach its duty of fair representation to Petitioner and complied with the legal standard in representing Petitioner. Contrary to Petitioner's allegations, the Union pursued all rights that Petitioner had under the very limiting Agreement: a Union representative promptly requested a Seasonal Review hearing on Petitioner's behalf, a Union representative appeared with Petitioner at the review as usual, and a Union representative encouraged Petitioner to raise any and all facts and issues that he thought were relevant. Further, the Union argues that the petition does not allege any evidence that the Union acted arbitrarily, or in bad faith, or that the Union did more for others than it did for Petitioner. Accordingly, Petitioner is unable to show that the Union breached its duty of fair representation to him and therefore his 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 any facts

sufficient to establish his claim. Any derivative claims against the City should likewise be dismissed. Accordingly, the petition should be dismissed in its entirety.

DISCUSSION

Initially, we note that "a *pro se* Petitioner may not be familiar with legal procedure, and we therefore take a liberal view in construing such pleadings." *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd., Matter of Rosioreanu v. NYC Office of Coll. Barg.*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd*. 78 A.D.3d 3d 401, (1st Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Here,"[s]ince no hearing was held, in reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, *arguendo*, that the factual allegations are true, analogous to a motion to dismiss." *Seale*, 79 OCB 30, at 6-7 (BCB 2007); *Morris*, 3 OCB2d 19, at 12 (BCB 2010). Taking the above into consideration, we construe Petitioner's claims to be that the Union violated its duty of fair representation by failing to properly represent him concerning the disciplinary charges against him, in violation of NYCCBL § 12-306(b)(3).

Pursuant to NYCCBL § 12-306(b)(3), a union has a duty of fair representation. To establish a breach of that duty, "a petitioner must show that a union engaged in arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Walker*, 6 OCB2d 1, at 7 (BCB 2013). 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). Thus, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Smith*, 3 OCB2d 17, at 8 (BCB 2010); *Rosioreanu*, 1 OCB2d 39, at 15; *Edwards*, 1

OCB2d 22, at 21 (2008). Additionally, we have repeatedly held that the burden of establishing a breach of the duty of fair representation cannot be met "simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007).

Here, Petitioner's claims do not demonstrate that the Union's conduct was arbitrary, discriminatory, or in bad faith. The record establishes that the Union requested a Seasonal Review, advocated on his behalf, and provided him representation at the Seasonal Review, which was the only forum in which Petitioner was entitled to be heard. More specifically, during the review, the Union representative appeared with Petitioner, gave Petitioner a full opportunity to testify, and provided some mitigating arguments to the effect of, "Petitioner had been a CSA for a long period of time, had a good record, and should be considered for reinstatement." (City Ans. ¶ 19) After the Seasonal Review decision was issued, the Union determined that no grievance rights remained because the Agreement does not provide arbitration rights to seasonal employees.[13] *See Smith*, 3 OCB2d 17, at 8-9 (union did not violate its duty of fair representation by declining to take grievant's claims to arbitration where the Agreement did not provide arbitration rights for seasonal employees). Additionally, in light of the wide range of discretion afforded Unions in carrying out the duty of fair representation, we do not find that the alleged failure to ask specific questions about the radio, past performance evaluations, and Petitioner's work ethic at the Seasonal Review, rise to the level of a breach of that duty. Thus, assuming that Petitioner's assertions about the Union representative are true, the facts as pled do not lead to a finding that the Union breached its duty of fair representation.

Finally, Petitioner asserts that the Union represented a Sergeant who failed to report a lost

[13] Petitioner did not dispute the Union's assertions regarding the limits of the Agreement.

wallet, was suspended, and then reinstated. Assuming, *arguendo*, that the Board construed this statement to be an allegation that the Union did more for "similarly-situated" employees, Petitioner's claim must still be dismissed for the following reasons. Petitioner's statement about the Sergeant is not supported by any specific factual allegations. Importantly, Petitioner fails to specify if the employee was seasonal, in a similar situation, and in what manner the employee was treated better by the Union. Further, this Board will not assume that simply because the Union was successful in one case, and not successful in another, the Union's conduct when it was unsuccessful amounted to a breach of its duty. Thus, "where the Union exercised every right Petitioner had under the Agreement, and where [his] allegations of better treatment from "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 [his] claim that the Union breached its duty of fair representation must be dismissed." *Smith*, 3 OCB2d 17, at 10.

For the above reasons, we find that Petitioner did not establish that the Union's representation of Petitioner was arbitrary, discriminatory, or in bad faith. Even while drawing all permissible inferences in favor of Petitioner, the record is devoid of evidence that would demonstrate that the Union breached its duty.

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-4003-13, be and the same hereby is, dismissed.

Dated: December 19, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
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