

**Cook, 7 OCB2d 24 (BCB 2014)**

(IP) (Docket No. BCB-4031-14).

**Summary of Decision:** Petitioner alleged that the Union breached its duty of fair representation by failing to provide adequate support and information regarding her termination in violation of NYCCBL § 12-306(b)(1) and (3). She also claimed that her termination from NYCHA was unwarranted. Respondents argued that the Union did not breach its duty of fair representation and that Petitioner failed to plead an actionable claim because, as a probationary employee, she was not entitled to grieve her termination. The Board found the Union's representation was not arbitrary, discriminatory, or in bad faith, and thus did not find a breach of the duty of fair representation. Therefore, 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 Petition**

*-between-*

**SHANEAL COOK,**

*Petitioner,*

*-and-*

**CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS and the NEW YORK CITY  
HOUSING AUTHORITY,**

*Respondents.*

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**DECISION AND ORDER**

On April 22, 2014, Shaneal Cook ("Petitioner") filed an amended improper practice petition *pro se* against the City Employees Union, Local 237, International Brotherhood of Teamsters ("Union") and the New York City Housing Authority ("NYCHA") alleging that the Union breached its duty of fair representation by failing to challenge her termination and by failing to properly communicate with her, in violation of § 12-306(b)(1) and (3) of the New York

City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).<sup>1</sup> She also claims that her termination from NYCHA was unwarranted. The Union argues that it did not breach its duty of fair representation. Respondents state that Petitioner failed to plead an actionable claim because, as a probationary employee, Petitioner was not entitled to any disciplinary rights under the parties’ collective bargaining agreement (“Agreement”) and therefore cannot establish the right to bring a grievance or otherwise appeal her termination. The Board finds the Union’s representation of Petitioner was not arbitrary, discriminatory, or in bad faith and thus does not find a breach of the duty of fair representation. Therefore, the petition is dismissed.

### **BACKGROUND**

Petitioner was hired by NYCHA on November 5, 2012, and worked as a caretaker at the Unity Plaza Development. She was a member of the Union, which is the exclusive bargaining representative for several titles employed by NYCHA, including Caretaker. Petitioner was subject to the Agreement between the Union and NYCHA. Section 43(a)(i) of the Agreement contains a disciplinary rights provision, which states: “Employees in the labor class title of Caretaker (HA) who successfully complete their probationary period shall be accorded the same disciplinary rights as permanent competitive class employees.” (Union Ans., Ex. B) Both the Union and NYCHA assert that Union members accrue disciplinary and due process rights only after the successful completion of a one year probationary period.

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<sup>1</sup> To the extent the petition alleges any violation of NYCCBL § 12-306(a) with regard to Petitioner’s termination, we do not find any support for such a claim in the record and would therefore dismiss that allegation.

Petitioner admits that although she was within weeks of becoming a permanent employee, she was still serving a probationary term when she was terminated on October 18, 2013. On October 21, 2013, Petitioner met with Union Representative Cheryl Hart (“Union Representative”) to discuss her termination. At that meeting Petitioner told the Union Representative that she was terminated because of allegations that she falsified her time records by having another employee clock her in to work when she was not present. Petitioner told the Union Representative that she was led to believe that her employer had video footage of the alleged misconduct; however, she claimed that the employer did not charge anyone else for allegedly clocking Petitioner into work. Petitioner had cooperated with the Department of Investigation (“DOI”) regarding the allegation of misconduct, which concluded without the Inspector General taking “investigative action” after reviewing related documents. (Pet., Ex. A) Petitioner informed the Union Representative that she was harassed by her supervisor and the development manager while she was employed at Unity Plaza. She contended that in July 2013, she was falsely accused of being late three times in July, even though her time records reflected that she was not late in July and only late twice in the month of June.

During the October 2013 meeting the Union Representative contacted Petitioner’s former manager, Ms. Balize. The Union Representative learned that one of Petitioner’s coworkers claimed that Petitioner bragged about the alleged misconduct and reported Petitioner to the DOI. The Union Representative told Petitioner that the development manager said she had not seen a video of the events. The Union Representative then told Petitioner that she would try to contact a Unity Plaza administrator to see if he would look into the allegations further. The Union Representative also told Petitioner that she would send a letter to Ms. Samuels, the Deputy Director of Staff Relations at NYCHA, to ask Samuels to review Petitioner’s termination.

Petitioner admits that someone at NYCHA told her that the Agreement did not provide disciplinary rights for probationary employees, but states that the Union Representative did not inform her of this at the October 2013 meeting.<sup>2</sup>

Petitioner asserts that she attempted to contact the Union Representative “on countless occasions [following the October 2013 meeting] to no avail.” (Pet.) She states that she left the Union Representative numerous messages, but received no response. In November 2013, Petitioner spoke with a Union shop steward, who spoke with the Union Representative on Petitioner’s behalf. The shop steward told Petitioner that the Union Representative said the matter was still under investigation. Following that interaction, Petitioner attempted to contact the Union Representative again but she was unable to reach her.

## **PARTIES’ POSITIONS**

### **Petitioner’s Position**

Petitioner argues that the Union failed to represent her when she was terminated within weeks of becoming a permanent employee. As a Union member, Petitioner paid biweekly dues and all requested fees, but she claims she received deficient and disparate representation. She argues that she is entitled to the same representation as any other member despite her probationary status. Petitioner believes that she was not afforded due process or a fair and impartial investigation and that she was terminated without just cause. Petitioner notified the Union Representative that she had encountered repeated harassment from her supervisors and previously dealt with misinformed accusations regarding her timeliness. Petitioner also

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<sup>2</sup> This statement was made at a conference with Petitioner and counsel for NYCHA and the Union. It was clarified for the record in a subsequent e-mail to the parties.

highlighted an inconsistency in her manager's story regarding her termination. Initially, she was told that her termination was based on a video recording showing her committing the alleged misconduct. However, Petitioner was never shown the video, and her manager admitted to the Union Representative that she did not see a video.

Furthermore, Petitioner asserts that she was ignored by the Union Representative after their initial meeting on October 21, 2013. Petitioner argues that she was led to believe the Union Representative would continue investigating her termination by contacting her supervisors and other involved parties. However, she did not answer or return numerous phone calls and voicemails from Petitioner. Then, when Petitioner had a Union shop steward try to contact the Union Representative, she seemed unaware of the details of Petitioner's case, specifically that she had already been terminated. Despite answering the shop steward's call, the Union Representative did not answer subsequent phone calls from Petitioner.

### **Union's Position**

The Union argues that Petitioner failed to allege probative facts in support of her claim that the Union violated the NYCCBL by breaching the duty of fair representation. Petitioner must show that the Union engaged in arbitrary, discriminatory, or bad faith conduct. However, Petitioner has not shown that the Union's failure to pursue a remedy under the collective bargaining agreement constituted a breach of that duty. As a probationary employee, Petitioner was not entitled to disciplinary rights. She could be terminated without a hearing and without stated reasons. The Union asserts that it could not have legally challenged Petitioner's dismissal. The Union argues that because Petitioner was not entitled to disciplinary rights and that she failed to show that her termination was "constitutionally impermissible," its conduct in this case

did not breach its duty of fair representation. (Union Ans. ¶ 24) The Union therefore requests that the Board dismiss the petition.

### **NYCHA's Position**

NYCHA argues that the petition failed to allege probative facts regarding the claim against the Union, and therefore the derivative claim against NYCHA must be dismissed. It argues that there is no actionable claim against a union for breach of the duty of fair representation where the grievance lacks merit. Probationary employees can be terminated in good faith for any legal reason. The Union could not have brought a meritorious grievance on Petitioner's behalf because, as a probationary employee, Petitioner was not entitled to grieve her termination and she has "not made an adequate showing of unconstitutionality surrounding her termination." (NYCHA Ans. ¶ 35) Petitioner included in her petition, at most, conclusory allegations of harassment to challenge her termination. However, mere conjecture and speculation is insufficient to support a claim that her termination constituted an improper practice. NYCHA argues that Petitioner was also unable to show that the Union treated her differently than other probationary employees.

Additionally, NYCHA argues that, to the extent Petitioner challenges NYCHA's interpretation of the Agreement's disciplinary rights provision, this Board does not have jurisdiction to decide that issue. The underlying issue raised by Petitioner, that she was wrongfully terminated in violation of the Agreement, is an issue related to the enforcement of a collectively bargained agreement which cannot form the basis of an improper practice.

### **DISCUSSION**

Pursuant to NYCCBL § 12-306(b)(3), a union has a duty to provide its members with fair representation.<sup>3</sup> This duty requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement. *See Walker*, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5 (BCB 2007). For the Board to find that a union breached this duty, a petitioner must “allege more than negligence, mistake or incompetence” to meet his or her initial burden because a union “enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.” *Evans*, 6 OCB2d 37, at 8 (BCB 2013); *see also Turner*, 3 OCB2d 48 (BCB 2010); *Smith*, 3 OCB 2d 17 (BCB 2010).<sup>4</sup>

Where an employee claims that a union breached this duty by failing to take specific actions on his or her behalf, the employee must first demonstrate that he or she had the right to the requested procedure or relief. *See Rondinella*, 5 OCB2d 13, at 17 (BCB 2012) (finding a union’s determination that there was nothing under the contract it could do for petitioner because he was a probationary employee and therefore not entitled file a grievance was not arbitrary,

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<sup>3</sup> NYCCBL § 12-306(b)(3) provides that: “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.”

<sup>4</sup> While a petitioner bears the burden of pleading facts sufficient to establish a violation of the NYCCBL, this Board will “take a liberal view in construing [his or her] pleadings” as the petitioner “may not be familiar with legal procedure” where a petitioner appears *pro se*. *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 401, (1<sup>st</sup> Dept. 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Furthermore, in reviewing the sufficiency of the pleadings in cases where a hearing was not held “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 OCB 19, at 12 (BCB 2010) (citations omitted).

discriminatory, or in bad faith) (*citing Sicular*, 79 OCB 33 (BCB 2007); *Howe*, 79 OCB 23 (BCB 2007)). Furthermore, the Board has made clear that “a 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.” *Morris*, 3 OCB2d 19, at 10 (BCB 2010) (*quoting James-Reid*, 1 OCB2d 26 (BCB 2008)).

Here, Petitioner claims that the Union breached its duty of fair representation by failing to adequately represent her following her termination. It is undisputed that the Union met with Petitioner in October 2013. During that meeting the Union Representative reached out to Petitioner’s supervisor to discuss the situation. The Union Representative also informed Petitioner that she would send a letter to the Deputy Director of Staff Relations asking her to reconsider Petitioner’s termination.<sup>5</sup> The Union did not grieve Petitioner’s termination, but it is clear from the record that Petitioner was not entitled to file a grievance regarding her termination. The Agreement contains a disciplinary rights provision by which caretakers accrue disciplinary and due process rights only after the successful completion of a one-year probationary period. Petitioner was terminated during her probationary period and thus had not accrued disciplinary rights and could be terminated for any lawful reason. In light of these facts, we find that the Union’s actions on behalf of Petitioner were not arbitrary, discriminatory, or in bad faith.

To the extent Petitioner alleges that the Union breached its duty of fair representation by failing to communicate with her following the October 2013 meeting, we do not find that the record supports this claim. In general, the duty of fair representation requires a Union to adequately communicate with its members. Specifically, a “Union has an affirmative duty to

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<sup>5</sup> At a conference between the parties, Petitioner did not dispute that the Union Representative sent this letter, though it was not provided by the Union.



inform a member *whether or not* it will pursue a grievance on [his or her] behalf.” *Nardiello*, 2 OCB 2d 5, at 40 (BCB 2009) (citing *Edwards*, 1 OCB 22 (BCB 2008)) (emphasis in original) (internal quotation omitted); *Fabbricante*, 69 OCB 39, at 19 (BCB 2002) (citing *Social Service Employees Union, Local 371*, 11 PERB ¶ 3004 (1978) (finding a *prima facie* violation of the duty of fair representation, despite the union’s argument that the grievance concerned a non-grievable issue, where petitioner offered evidence of discrimination by union officials and showed that the union ignored petitioner’s request to file a grievance). Also, a union must respond to a member’s request for information that is not merely redundant or onerous. *UFT*, 5 OCB2d 28 (BCB 2012) (citing *Bd. of Ed. of the City School Dist. of the City of New York*, 23 PERB ¶ 3042 (1990)).

However, we have also stated that this Board will not find a breach of the duty of fair representation based on a union’s alleged failure to communicate where that alleged failure did not prejudice or injure the petitioner. *See Walker*, 6 OCB2d 1 (2013) (finding no violation for alleged failure to sufficiently respond to petitioners’ repeated communications where the petitioner failed to demonstrate any basis on which the union could further pursue his grievance); *Lein*, 63 OCB 27 (BCB 1999) (finding no violation where the union failed to notify petitioner that it canceled the arbitration related to his grievance after a good faith assessment that the grievance likely lacked merit). Similarly, in *Shenendehowa Central School District*, 29 PERB ¶ 4607 (1996), the Acting Director of PERB dismissed a duty of fair representation petition stating: “[the petitioner] alleges no facts which would establish that the failure of CSEA to advise him of the status of his request for information for a period of approximately two and one-half months was arbitrary, discriminatory or in bad faith, or that his rights were prejudiced thereby.” PERB also found that a union did not violate the duty of fair representation by not

responding to petitioner's moot request to file an untimely grievance within two and one-half weeks. *See Bd. of Ed. of the City School Dist. of the City of New York*, 33 PERB ¶ 3062 (2000).

In this case, the Union did communicate with Petitioner. At the October 21, 2013 meeting, the Union Representative met with Petitioner, learned the facts of Petitioner's situation, and outlined the actions she would take on Petitioner's behalf, namely writing NYCHA to ask it to reconsider the termination. The record does not indicate that Petitioner believed the Union Representative would file a formal grievance. After the October 2013 meeting Petitioner alleges to have left several voicemail messages for the Union Representative seeking further information regarding the actions taken on her behalf. In November 2013, a Union shop steward advised Petitioner that she "was still under investigation." Nothing in the record indicates that the Union had additional information at any time. On these facts, we do not find that the Union breached its duty of fair representation because it did not respond to some or all of Petitioner's phone calls after the October 2013 meeting. Moreover, as in *Walker*, there was no basis upon which the Union could pursue a grievance or other action since Petitioner did not have disciplinary rights under the Agreement. Therefore, the record indicates that Petitioner was not prejudiced by any alleged failure of the Union Representative to return her phone calls after the October 2013 meeting.

On these facts, we do not find the Union's representation of Petitioner following her termination to have been arbitrary, discriminatory, or without good faith, and thus we find that the Union did not breach its duty of fair representation.

**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 filed by the Petitioner Shaneal Cook, docketed as BCB-4031-14 be, and the same hereby is, denied.

Dated: September 09, 2014  
New York, New York

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLNES  
MEMBER

PETER PEPPER  
MEMBER

GWYNNE A. WILCOX  
MEMBER