Brown, 75 OCB 30 (BCB 2005)

[Decision No. B-30-2005] (Docket No. BCB-2458-05)

Summary of Decision: Petitioner alleged that in violation of NYCCBL § 12-306(b) the Union breached its duty of fair representation with regard to Petitioner's complaints about heat in the female locker facility and that DOC derivatively violated the NYCCBL. The Board of Collective Bargaining finds insufficient allegations to support a *prima facie* case of improper practice by the Union or by DOC. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DONNEZZETTA BROWN,

Petitioner,

-and-

CORRECTION CAPTAINS ASSOCIATION
&
THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.

DECISION AND ORDER

On February 15, 2005, Donnezzetta Brown filed a verified improper practice petition against the Correction Captains Association ("Union") and, derivatively, the New York City Department of Correction ("DOC" or "City"), alleging that the Union breached its duty of fair representation concerning the handling of her complaints about adequate heat in the Captain's locker room. Petitioner asserts that the Union violated § 12-306(b)(2) and (3) of the New York

City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union claims that it attempted to resolve Petitioner's complaints in good faith. The City also asserts that efforts to resolve Petitioner's complaints were carried out in good faith and that Petitioner has failed to demonstrate that the Union's conduct breached its duty of fair representation, a precondition to derivative employer liability. This Board finds insufficient factual support for Petitioner's claim that the Union breached its duty of fair representation, and we deny the instant petition in its entirety.

BACKGROUND

Petitioner was hired in 1984 by DOC as a Correction Officer and was promoted to Captain (Correction) in 1995. She is a member of the bargaining unit represented by the Union. Article XV, Section 2, of the collective bargaining agreement between the Union and the City ("Agreement") provides:

> All commands and other Departmental places of assignment shall have adequate heating, hot water and sanitary facilities. The Union shall give notice to the Department of any failure to maintain these conditions. If not corrected by the Department within a reasonable time, the Union may commence a grievance at Step 2 of the grievance procedure concerning that failure.

At the time period relevant to this proceeding, Petitioner was assigned to the Eric M. Taylor Center on Rikers Island ("EMTC"). In May 2004, DOC built a new locker room for EMTC staff and, two months later, female Captains started using this facility.

Petitioner alleges, and the Union denies, that on October 19, 2004, she notified Union Executive Board Member William Inman that the new locker room did not have adequate heat. On November 30, 2004, Petitioner was treated for bronchitis. Petitioner claims that this

condition was due to a lack of heat in the locker room facility.

Petitioner alleges, and the Union denies, that on December 1, 2004, she advised Union Executive Board Member Albert Seda that there was no heat in the locker room. According to Petitioner, Seda told Petitioner that Inman would handle it and that she "should watch what comes out of [her] mouth."

According to the Union, in the fall of 2004, Petitioner made verbal complaints with regard to the temperature in the locker room. Union Delegate Randy Wheeler investigated and determined that in the evenings, the new locker room did not have sufficient heat. He repeated this to Seda and Inman. They visited the facility and brought the matter to the attention of Warden Frank Squillante. According to the City, in December 2004, Squillante became aware that female Captains were complaining about the temperature in the locker room.

The Union claims that Wheeler, Seda, and Inman had a labor-management meeting with Squillante. At the meeting, Squillante advised them that female Captains could utilize the old locker room until the condition was rectified and that the Warden would seek to remedy the problem. According to the City, Squillante contacted the Department of Design and Construction in order to resolve the temperature issue.

From December 20, 2004, until January 7, 2005, Petitioner was on jury duty. She claims that when she returned on January 10, 2005, the heat was still inadequate and that she went out on sick leave until January 19, 2005. She claims that on that date, the temperature in the locker room was 60.1F and that she made a complaint to the City by calling 311. In her reply, she claims that the alternate space was not provided until the end of January.

The Union did not file a grievance and the petition does not allege that Petitioner

expressly asked the Union to do so. At the time the City's answer was filed, on March 24, 2005, the problem was still under review.

Petitioner seeks adequate heating and cooling in the female Captains' new locker room, protection of the interests of all members of the Uniformed force, and full "recognition and enjoyment" of the rights and working conditions to which members of the bargaining unit are entitled.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that, in violation of §§ 12-306(b)(2) and (3) of the NYCCBL, the Union failed to respond in a timely and adequate manner to her complaint regarding heat in the women's locker room.[1] Petitioner argues that the Union may file a grievance if DOC fails to correct a heating deficiency, and she attaches a copy of Article XV, § 2, of the Agreement concerning the Union's duty to notify DOC of any failure to maintain adequate heating.

Union's Position

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[1] Section 12-306(b) of the NYCCBL provides, in pertinent part:
It shall be an improper practice for a public employee organization or its agents:
* * *
(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer;
(3) to breach its duty of fair representation to public employees under this chapter. for a public employer or its agents.

Section 12-305 of the NYCCBL provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing. . . .

The Union contends that, when its delegate received word of Petitioner's complaints in the "fall" of 2004, he investigated and found the complaints had merit. He reported his findings to two executive board members who visited the facility, confirmed the findings, and brought the matter to the attention of the Warden at a labor-management meeting. Union representatives at the meeting were told that female Captains could use their old locker facility while the heating problem was under repair. The Union did not file a grievance because it determined that DOC was making a good-faith effort to resolve the issue and was providing alternate locker-room space which complied with contractual requirements.

City's Position

The Union's failure to file a grievance over the heating problem does not, of itself, articulate a breach of the Union's duty of fair representation. The Union determined in good faith that a labor-management meeting was the proper forum for addressing this particular complaint. As Petitioner has failed to describe any conduct that falls below the standard of good faith by the Union, DOC cannot be derivatively responsible for any violation of the NYCCBL. Moreover, Petitioner fails to allege that DOC independently violated the NYCCBL. To the contrary, DOC has fulfilled its obligation: it investigated the problem, provided an alternate locker facility, and acted to resolve the heating issue.

Petitioner's citation of NYCCBL § 12-306(b)(2) is misplaced, as the City's duty to bargain in good faith is not owed to an individual member of a bargaining unit, such as Petitioner. Petitioner has no standing to assert such a claim.

DISCUSSION

The issue in this case is whether the Union violated its duty of fair representation by the manner in which it addressed Petitioner's complaints about heat in the female locker room. This Board finds that the instant petition fails to state a *prima facie* claim that the Union breached its duty of fair representation towards Petitioner. Consequently, the derivative claim against DOC also must fail.

The duty of fair representation requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Burtner*, Decision No. B-1-2005 at 14; *Rocke*, Decision No. B-5-2004 at 10; *Fabbricante*, Decision No. B-30-2003 at 27. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation, but the burden is on the petitioner to plead and prove that the union has engaged in such conduct. *Watkins*, Decision No. B-23-2005 at 12; *Hassay*, Decision No. B-2-2003 at 10-11. A union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious, and to evaluate the degree of prosecution to which it is entitled, *Hug*, Decision No. B-51-90 at 16, and is entitled to broad discretion in determining whether to pursue an employee's complaint through a labor management meeting, a grievance, or some other method of resolution. *Richardson*, Decision No. B-24-94 at 10-11. A union does not breach its fair representation duty merely because the outcome of a union's good faith efforts to resolve a unit member's complaint does not satisfy the member. *Hassay*, Decision No. B-2-2003 at 11; *Whaley*, Decision No. B-41-97 at 12.

In this case, Petitioner does not dispute either the Union's contention that it investigated her complaint or the City's contention that DOC responded by investigating the matter, calling

for repairs, and offering another locker room when the Union brought the problem to the Warden's attention. Petitioner also does not dispute that she was apprised of the availability in January 2005 of the alternative locker room. She complains only that the Union and DOC did not respond to her complaints fast enough or thoroughly enough to satisfy her needs and the perceived needs of other female Captains.

Under these facts, we find no breach of the duty of fair representation. Here, the Union investigated the matter and determined that the complaint had merit. Union representatives brought the complaint to the attention of EMTC's Warden who conducted his own investigation, took action to seek correction of the problem, and offered alternative space while the problem was under review. Although the Union's response may not have taken place as quickly as Petitioner would have liked, its judgment – that no grievance was needed because DOC was responding – was within the latitude which allows a union to conduct its affairs, including the administration of the applicable Agreement. The record is simply devoid of facts which demonstrate that the Union's actions were arbitrary, discriminatory or in bad faith.

Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail.[2] *Sweeney*, Decision No. B-9-2004 at 4-5. Finally, Petitioner's reliance on NYCCBL § 12-306(b)(2) is misplaced. The duty to bargain in good faith runs between the employer and the Union and is enforceable by each of those

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[2] NYCCBL § 12-306(d) provides:
The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly 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.

parties under NYCCBL § 12-306(b)(2) (breach of a union's duty) and § 12-306(a)(4) (breach of employer's duty). Although the assertion by an individual employee of a failure to bargain claim under § 12-306(b)(2) is a matter of first impression, we have previously held that an individual lacks standing to raise a claim under § 12-306(a)(4) because this section creates a duty to bargain in good faith between the employer and the union. *Cf. Robinson*, Decision No. B-43-2002 at 6; *Edwards*, Decision No. B-35 2000 at 10; *Lopez,* Decision No. B-31-97 at 11. In our view, the same principle applies whether an individual is asserting a breach by the employer or the employee organization. Therefore, we hold that an individual lacks standing to raise a failure to bargain claim under § 12-306(b)(2).

Accordingly, the instant petition is dismissed 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, BCB-2458-05, filed by Donnezzetta Brown, be, and the same hereby is, dismissed in its entirety.

Dated: October 20, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER