Del Rio v. DC37, L. 2507 & FD, 75 OCB 6 (BCB 2005) [Decision No. B-6-05 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

GERMAN DEL RIO,

Petitioner,

Decision No. B-06-2005
Docket No. BCB-2424-04

-and-

DISTRICT COUNCIL 37, LOCAL 2507 and THE NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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DECISION AND ORDER

On August 20, 2004, German Del Rio ("Petitioner") filed a verified improper practice petition against District Council 37 AFSCME, AFL-CIO, Local 2507 ("Union" or "DC 37") and the New York City Fire Department ("FDNY" or "City"). Petitioner alleges that in violation of New York City Collective Bargaining Law (New York City Administrative Code, Tile 12, Chapter 3 ("NYCCBL") § 12-306(b)(3), the Union breached its duty of fair representation by: failing to have FDNY rescind its disciplinary charges against Petitioner; failing to have FDNY revoke Petitioner's restricted duty designation; and failing to provide informed and adequate counsel throughout the entire disciplinary process. Petitioner also alleges that FDNY referred him for counseling and placed him on restricted duty in violation of the Civil Service Law ("CSL") and in retaliation for exposing overtime irregularities and abuses committed by his superiors. The Union contends that Petitioner's allegations are unfounded because the Union

investigated Petitioner's claims, advised him of his rights, represented him in dealings with management, kept Petitioner informed at all times, and provided him with experienced counsel. The City argues that the petition must be dismissed because Petitioner's allegations fail to state a claim of improper practice under the NYCCBL and are merely manifestations of his dissatisfaction with the results of the disciplinary proceedings and his attempt to present personal complaints about FDNY in another forum. We find that Petitioner's speculative and conclusory claims do not state a *prima facie* violation for the breach of the Union's duty of fair representation or for any claim of retaliation by FDNY. Therefore, we dismiss the instant petition.

BACKGROUND

In 1988, Petitioner became an Emergency Medical Specialist – Paramedic ("Paramedic"). In 1996, when the Emergency Medical Services ("EMS") was functionally transferred from the New York City Health and Hospitals Corporation to FDNY, Petitioner was reclassified as Paramedic with the FDNY.

On December 3, 2003, after Petitioner's regularly scheduled tour, Lieutenant Anthony Rosiello assigned Petitioner mandatory overtime, which began at 1400 hours and was not to exceed eight additional hours. Petitioner refused to comply with this direct order and wrote:

> As always, I have other things to do after work – to keep my sanity and health, I come to work, do my eight hrs. not to be overworked [*sic*]. Even if I stay I will not stay anything over 4 hrs. I will not stay.

For his failure to comply with a direct order, the Lieutenant issued Petitioner a Command Discipline ("CD") for "Misconduct – Failure to remain on duty for mandatory overtime."

Petitioner declined to accept the CD's disciplinary findings and penalty, and, instead, opted to proceed through the formal disciplinary process. Upon recommendation from the Lieutenant, Captain John Boyle prepared formal departmental charges against Petitioner.

The following day, the Division Commander met with Petitioner to discuss the differences between a CD and formal departmental charges, and to explain Petitioner's contractual and procedural obligations to comply with his superiors' orders, including mandated overtime assignments. Petitioner acknowledged the Commander's statements but continued to refuse the CD's findings and penalty. Accordingly, the Division Commander referred the matter to FDNY's Bureau of Investigations & Trials ("BITs"), which is responsible for the investigation and prosecution of administrative disciplinary matters.

On January 2, 2004, BITs informed Petitioner that two formal charges had been proffered against him, "Failure to perform duties" and "Failure to obey an order," both of which stemmed from the CD issued on December 3, 2003. FDNY scheduled a Step One conference in which Petitioner was entitled to legal counsel or union representation.

In preparation for the conference, Donald Faeth, the Union's Vice President and Petitioner's Union representative ("Representative"), met with Petitioner.[1] Petitioner insisted that the Lieutenant ordered him to work eight hours of overtime without canvassing for volunteers prior to the order, and that non-work related obligations prevented him from working more than four hours of the assigned overtime.

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[1] As Vice President of the Union, one of Mr. Faeth's primary duties is the representation of the Union's membership at disciplinary conferences. Since becoming Vice President, he has represented approximately 1,000 members at Step One conferences.

On April 20, 2004, Petitioner met the Representative immediately prior to the conference, and repeated the same version of the incident. The Representative then spoke with Mr. John Clappin, FDNY advocate at BITs ("FDNY Advocate"). After, the Representative emphasized Petitioner's exemplary work record and 18 years of service, and, in consideration of this, the FDNY Advocate offered a loss of one day of annual leave as a penalty. Petitioner rejected this settlement offer. Then, in a final attempt to resolve this matter, the Representative spoke with Captain Roberta Post, who was the BITs adjudicator ("BITs Adjudicator") assigned to this matter. She offered a formal reprimand as penalty, but Petitioner rejected this offer and insisted upon having a hearing.

At the Step One conference, Petitioner asked to read a lengthy statement that he authored into the record, in response to the charges levied against him. Contrary to the Representative's advice, Petitioner read the statement, which made references to his health, sanity, fatigue, and stress. Petitioner contended that these maladies were caused by unsympathetic and abusive superiors, hostile and stressful working conditions, overtime procedure abuses, and incompetent and derelict partners. Petitioner insisted that these conditions caused his job performance to suffer and thereby jeopardize his ability to perform patient care.

At the conclusion of the conference, the BITs Adjudicator, concerned about Petitioner's physical and mental well-being, and the well-being of the public, stated that no disposition would be made on the proffered charges. Rather, the BITs Adjudicator sought and received authorization from the Assistant Commissioner of BITs to order Petitioner to the Counseling Service Unit ("CSU") for evaluation and any necessary treatment based on the substance of Petitioner's statement.

As a result of Petitioner's referral to CSU, he was placed on restricted duty. According to FDNY and the Union, when a Paramedic is ordered to attend CSU for evaluation and treatment, that Paramedic is placed on restricted duty. BITs has the discretion to refer employees to CSU if it is determined that the employee poses a risk to himself, his partner, or the public. Whenever a Paramedic complains of heightened stress, BITs refers that Paramedic to CSU. Removal from restricted duty occurs only when CSU reports to BITs that the individual has attended CSU and is complying with the recommended treatment plan. BITs does not request details regarding the content or type of treatment.

Immediately following the Step One conference, the Representative explained to Petitioner his available avenues of recourse regarding both the alleged overtime abuse by FDNY and the resolution of the disciplinary charges, including the use of grievance arbitration and/or a formal hearing before the Office of Administrative Trials & Hearings ("OATH"). Despite Petitioner's objection to the validity of the CSU referral and his restricted duty designation, the Representative again explained that the order to attend CSU was separate and distinct from Petitioner's challenge to the disciplinary charges. BITs referred Petitioner because of his own statements of heightened physical, emotional, and psychological stress, and not his refusal to work mandated overtime.

The following day, Petitioner began attending sessions at CSU in accordance with the BITs' referral. Shortly thereafter, the BITs Adjudicator informed the Representative that Petitioner had reported to CSU as ordered. However, Petitioner had refused to allow CSU to disclose to FDNY whether Petitioner was complying with his treatment program. As a consequence, Petitioner would not be restored to unrestricted duty at that time.

After this conversation and an examination of the relevant facts, the Representative informed Petitioner of the conversation with the BITs Adjudicator and of the Union's shared concern for Petitioner's well-being. The Representative stated that he believed BITs acted within its discretion by referring Petitioner to CSU. The Representative further advised Petitioner to authorize CSU to inform BITs of his attendance and compliance with the treatment program so that his restricted duty designation could be rescinded. Petitioner vehemently disagreed with the Representative's advice and stated that release of treatment plan compliance was confidential and inconsequential to his placement on restricted duty.

Due to Petitioner's dissatisfaction with the positions of the Union and FDNY, on April 30, 2004, he wrote to the Executive Director of DC 37. On May 6, 2004, the Representative wrote Petitioner to express his disappointment with "your attempt to distort facts and your continued inability to comprehend the issue at hand." The Representative's letter "memorialized" his repeated explanations to Petitioner, which included: (a) placement on restricted duty is not a suspension; (b) such placement was in direct response to the statement Petitioner read at the Step One conference; (c) BITs would lift the restricted duty designation if Petitioner permitted CSU to confirm his compliance with their program; (d) the Citywide contract does not limit overtime assignments to four hours; and (e) Petitioner has the right to take his disciplinary case to OATH or arbitration. In addition, the Representative offered Petitioner the option of requesting a different delegate to handle this matter as well as legal counsel from the Union to help prosecute Petitioner's claim. According to the Union, Petitioner has refused such requests for additional assistance.

After Petitioner wrote another letter making the same complaints, the Professional

Division Director of DC 37, on May 28, 2004, wrote Petitioner that the Union's Legal Department was reviewing the matter and that it would receive special attention. On July 14, 2004, Special Counsel for DC 37 invited Petitioner to make an appointment to discuss his case, but, Petitioner never made an appointment.

Despite repeated inquiries from FDNY to CSU to determine if Petitioner complied with the attendance and treatment plan, he refused to authorize disclosure of this information. Ultimately, after waiting more than eight months after the issuance of the charges, during which time FDNY attempted to ascertain Petitioner's compliance, on August 9, 2004, FDNY Advocate informed Petitioner by letter that the BITs Adjudicator found him guilty of the disciplinary charges and imposed a penalty of a loss of two days of annual leave. As of the close of this record, Petitioner had not appealed this determination.

On August 20, 2004, Petitioner filed the instant petition against the Union alleging violations of NYCCBL § 12-306(b)(3),[2] and named the City as a co-respondent, pursuant to NYCCBL § 12-306(d).[3] Petitioner requests that this Board order the Union to provide experienced and knowledgeable representatives in the advocacy of its membership and demote the Representative from his current position. Petitioner also seeks the removal or demotion of

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[2] NYCCBL § 12-306(b)(3) provides, in pertinent part:

> 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.

[3] 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.

Petitioner's superiors who issued the CD and departmental charges, as well as the FDNY Advocate. Furthermore, Petitioner requests that FDNY be ordered to cease and desist from all violations of the NYCCBL and the parties' collective bargaining agreement, especially as they relate to overtime assignments.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that the Union failed to satisfy its duty of fair representation because the Union intentionally overlooked FDNY's rampant abuses of its overtime rules and procedures, as exemplified by Petitioner's incident on December 3, 2003. When presented with an opportunity to correct these abuses at Petitioner's Step One conference, the Union mishandled the disciplinary matter and failed to secure a favorable finding on his behalf. Instead, Petitioner was penalized two days of annual leave, referred for treatment at CSU, and assigned to restricted duty for an indefinite period of time. Petitioner's complaints during the conference concerned exhaustion, stress, poor working conditions, and long hours, all of which he believes are direct results of FDNY mismanagement. Petitioner's statements gave notice to the BITs Adjudicator and the Union that the departmental charges were merely an attempt by FDNY to punish Petitioner for his observations relating to management policies. After BITs referred Petitioner to CSU and placed him on restricted duty, the Union did nothing to contest this additional inequitable punishment, never challenged BITs' authority to make such a referral, and never questioned the appropriateness of such a referral in this instance.

Finally, Petitioner contends that after the Step One conference, the Union's behavior was

evasive, irresponsible, and misleading. The Representative was not able to explain, to Petitioner's satisfaction, any basis for the CSU referral and restricted duty designation, overturn BITs' disciplinary determination, or return Petitioner to active duty. Petitioner's contacts with DC 37's Executive Director, the Union's Professional Division Director, and its Special Counsel proved futile, as no one was able to explain to Petitioner's satisfaction the CSU referral and his restricted duty designation. These facts demonstrate that the Union did not satisfy its duty of fair representation.

Petitioner also argues that FDNY's action in referring him to CSU and placing him on restricted duty are in violation of his rights under the CSL and are in retaliation for his exposing overtime irregularities and abuses committed by his superiors.

Union's Position

The Union argues that it has satisfied its duty of fair representation. Prior to the Step One conference, the Representative discussed these charges at least twice with Petitioner. The Representative negotiated a reduced penalty that Petitioner rejected and that, in hindsight, would have been a favorable disposition. Following the CSU referral, the Representative discussed this matter with FDNY and relayed those conversations to Petitioner. In response to Petitioner's correspondence, the Union addressed Petitioner's concerns in great detail, including his allegations against the Representative, and offered different representation, including the services of the Professional Division Director and the Union's Special Counsel.

Furthermore, after discussions with FDNY and an examination of the particular circumstances, the Union determined that Petitioner's CSU referral was not disciplinary in nature and not retaliatory. Petitioner's own statements at the Step One conference alerted the BITs

Adjudicator that Petitioner could be a risk to himself, his co-workers, or the public. Despite the Union's repeated explanations to Petitioner, he remained unsatisfied. Petitioner's dissatisfaction with the outcome of the disciplinary proceeding does not constitute a violation of the duty of fair representation.

Moreover, Petitioner has been uncooperative with the Union. Initially, Petitioner refused the negotiated settlement offers, and then, against the advice of the Representative, read the statement that led to his CSU referral. Petitioner then failed to communicate effectively with the Union and insisted upon focusing on the imposition of restricted duty. Finally, against the Union's advice, Petitioner continued to refuse to permit CSU to inform FDNY of his treatment plan compliance, thereby prolonging his restricted duty designation.

City's Position

The City alleges that the petition must be dismissed because it fails to allege facts sufficient to amount to a breach of the duty of fair representation. Petitioner has not shown that the Union's conduct was arbitrary, discriminatory, or founded in bad faith. Since Petitioner's allegations are speculative and conclusory, the instant petition must be dismissed.

Furthermore, the City contends that the Union is allowed a significant amount of discretion in the handling of its memberships' grievances and that the Union's strategic determinations are outside the scope the Board's jurisdiction. Assuming *arguendo* that the Board could examine the Union's tactical decisions, none of these actions indicate improper motivation. Rather, the Union communicated with BITs, performed the requisite investigation, kept Petitioner informed regarding his situation, and provided various forms of assistance.

Finally, while Petitioner does not expressly claim any violation of NYCCBL § 12-

306(a)(1) and (3),[4] the City addresses the conclusory allegations of retaliation and discrimination against Petitioner. First, FDNY acted in accordance with the applicable rules and regulations when it assigned Petitioner mandatory overtime on December 3, 2003. Second, the issuance of the CD and the subsequent disciplinary charges were in response to Petitioner's failure to obey an order to work mandated overtime. Third, FDNY referred Petitioner to CSU and placed him on restricted duty because Petitioner's statements at the Step One conference indicated that he was physically, mentally, and psychologically exhausted as a result of what Petitioner characterized as job stress. Petitioner's continued assignment to restricted duty is self-imposed because FDNY, in accordance with the existing practice, will return him to active service once he authorizes CSU to inform FDNY of his attendance and compliance with the treatment plan.

DISCUSSION

The principal issue before the Board is whether the Union breached its duty of fair representation in handling Petitioner's disciplinary proceedings arising out of the incident on December 3, 2003. We find that Petitioner has not provided sufficient facts to state a *prima facie*

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[4] Section 12-306(a) of the NYCCBL provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> * * *
> (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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> § 12-305 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 and shall have the right to refrain from any or all of such activities.

case that the Union's conduct was arbitrary, discriminatory or founded in bad faith.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), defined the duty of fair representation:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177. A breach of this duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. Although the Court in *Vaca* was interpreting the National Labor Relations Act, the New York State Public Employment Relations Board states a similar standard:

> In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith.

CSEA v. PERB and Diaz, 132 A.D.2d 430, 432, 20 PERB ¶ 7024 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796, 21 PERB ¶ 7017 (1988). Consistent with *Vaca*, *Diaz*, and their respective progeny, this Board, in interpreting NYCCBL § 12-306(b)(3), requires the union to refrain from arbitrary, discriminatory or bad faith conduct in negotiating, administering and enforcing collective bargaining agreements. *Burtner*, Decision No. B-1-2005 at 16; *Minervini*, Decision No. B-29-2003 at 15; *Hug*, Decision No. B-5-91 at 14.

Under the NYCCBL, the union enjoys a wide latitude in the handling of disciplinary proceedings as long as it exercises discretion with good faith and honesty. *Page*, Decision No. B-31-94 at 11; *Hug*, Decision No. B-5-91 at 14; *see also Transport Workers Union, Local 100*,

37 PERB ¶ 3002 (2004). This Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *Grace*, Decision No. B-18-95 at 8; *Miller*, Decision No. B-21-94 at 14. The duty of fair representation is not breached simply because a member disagrees with the union's tactics, *Burtner*, Decision No. B-1-2005 at 16, or quality and extent of representation. *White*, Decision No. B-37-96 at 6. Furthermore, a breach of the duty of fair representation does not occur simply because the outcome of a disciplinary matter does not satisfy the member. *Burtner*, Decision No. B-1-2005 at 16; *White*, Decision No. B-37-96 at 6. Rather, to establish a breach, a petitioner must present evidence of improper motivation, such as malice, hostility or discrimination. *Hug*, Interim Decision No. B-51-90 at 17.

Furthermore, allegations of mere negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of its duty of fair representation. *Schweit*, Decision No. B-36-98 at 15. Even errors in judgment do not breach this duty, unless it can be shown that the union's actions were arbitrary or perfunctory. *Page*, Decision No. B-31-94 at 11. The petitioner has the burden to plead and prove that the union engaged in prohibited conduct. *Minervini*, Decision No. B-29-2003 at 15-16; *Whaley*, Decision No. B-41-97 at 16.

Here, Petitioner's claims against the Union lack merit. The Union exercised its discretion in good faith, avoided arbitrary conduct and responded to Petitioner's concerns in a timely fashion. In preparation for Petitioner's Step One conference, the Representative spoke with Petitioner regarding the disciplinary charges on at least two occasions. Immediately prior to this conference, the Representative negotiated proposed settlements for reduced penalties, which Petitioner rejected. When Petitioner elected to proceed with the conference, the Representative

urged Petitioner not to read his prepared statement to the BITs Adjudicator. Again, Petitioner refused the Representative's advice and the statement, which raised concerns about Petitioner's health and well-being, led to Petitioner's CSU referral and restricted duty designation. The Union investigated the basis for this referral, spoke with officials from FDNY, examined the relevant facts, and determined that this referral was within BITs' discretion and was not intended to be punitive or retaliatory. The Union explained to Petitioner that BITs could lawfully refer him to CSU, place him on restricted duty, and keep him on such designation until treatment compliance is disclosed. When Petitioner complained about the Representative, the Union offered the services of an alternate delegate, its Professional Division Director, and its Special Counsel. The Union also relayed its willingness to pursue both the challenge to the disciplinary charges and Petitioner's complaints about the allegedly improper overtime assignment. Therefore, we find that the Union's conduct was not arbitrary, discriminatory or founded in bad faith.

Moreover, Petitioner has failed to plead and prove that the Union's actions, or lack thereof, were arbitrary, capricious or discriminatory. He offers speculative allegations that the Representative was uninformed and ignorant of FDNY's abusive mismanagement. Rather than proffering relevant allegations of fact, Petitioner focuses on his displeasure with the outcome of the Step One conference, the CSU referral, the restricted duty designation, and the requirement to disclose to FDNY his compliance with CSU's treatment program. However, Petitioner's mere dissatisfaction with the outcome of the disciplinary proceedings and the Union's position on the CSU referral does not indicate a violation of the Union's duty of fair representation.

Accordingly, we dismiss Petitioner's claim against the Union.

Any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail because we dismiss the petition against the Union. *See Raby*, Decision No. B-14-2003 at 13, *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).

While the petition does not expressly allege any claim that FDNY violated the NYCCBL, Petitioner complains that his CSU referral by FDNY violated CSL § 72 and that placing him on restricted duty "is a retaliatory action against me for exposing irregularities and abuses committed by supervisors. . . ." This Board has no jurisdiction over the administration or enforcement of statutes other than the NYCCBL. *Doctors Council*, Decision No. B-31-2002; *Correction Officers Benevolent Ass'n*, Decision No. B-39-88. Therefore, we may not consider the claim under CSL § 72.

As to the complaint of retaliation, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, Decision No. B-51-87. A petitioner must demonstrate that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
2. The employee's union activity was a motivating factor in the employer's decision.

A prerequisite to analysis under this standard is a finding that the purported union activity is the type protected by the NYCCBL and that the employer had knowledge of the protected activity. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 12.

Here, Petitioner concedes that, "my allegations of retaliation are not related to any union activity." (Reply to FDNY's Answer, ¶ 107.) We find nothing in the record that suggests that Petitioner's referral to CSU and his placement on restricted duty were attributable to anything other than his own statement at the Step One conference concerning the effects of stress and overwork on his health and performance. Accordingly, Petitioner's complaint of retaliation does not state a claim of improper practice under the NYCCBL. We express no opinion on Petitioner's complaints about the assignment of mandatory overtime, as that issue is not before us for determination. *Rocke*, Decision No. B-5-2004 at 12-13; *District Council 37, Local 2507, AFSCME*, Decision No. B-47-97.

For the above reasons, the 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-2424-04, filed by German Del Rio, be, and the same hereby is, dismissed.

Dated: New York, New York
March 2, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

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