D'Onofrio, 79 OCB 26 (BCB 2007)

[Decision No B-26-2007] (IP) (Docket No. BCB-2579-06).

Summary of Decision**:* Petitioner alleged that the Union breached its duty of fair representation when it failed to answer a petition challenging arbitrability on his behalf and failed to pursue or advise him of his rights under CSL § 75 in relation to proceedings which led to the termination of his employment. Petitioner also alleged that the City colluded with the Union to deny him his rights under CSL § 75 and that the City, in furtherance of that collusive intent, sought to deny him due process by filing a petition challenging the arbitrability of a grievance regarding the termination of his employment. The Board found that Petitioner had not alleged facts sufficient to state a *prima facie* case that the Union breached the duty of fair representation by acting in a manner that was arbitrary, discriminatory, or founded in bad faith. The remaining claims were dismissed on the basis that the allegations were speculative and conclusory. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ROBERT D'ONOFRIO,

Petitioner,

-and-

ENTERPRISE ASSOCIATION OF STEAMFITTERS, LOCAL 638 and the NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

The petition in this matter, filed by Robert J. D'Onofrio on November 9, 2006, alleges that the Enterprise Association of Steamfitters, Local 638 ("Local 638" or "Union") failed to answer a petition challenging arbitrability on his behalf and failed to pursue or advise him of his rights under

New York Civil Service Law § 75 ("CSL 75") in proceedings which led to the termination of his employment, in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner also alleges that the City of New York ("City") and the New York City Police Department ("NYPD") colluded with the Union to deny him his rights under CSL § 75 and that the City, in furtherance of that collusive intent, sought to deny him due process by filing a petition challenging the arbitrability of a grievance regarding the termination of his employment. This Board finds that Petitioner has not alleged facts sufficient to state a *prima facie* case that the Union breached its duty of fair representation by acting in a manner that was arbitrary, discriminatory, or founded in bad faith, and the remaining claims are dismissed on the basis that the allegations were speculative and conclusory.

BACKGROUND

We have issued two prior decisions involving the same parties and many of the same facts: *D'Onofrio*, Decision No. B-3-2007, an improper practice petition in which Petitioner alleged that the Union had breached its duty of fair representation, and *D'Onofrio*, Decision No. B-4-2007, a petition challenging arbitrability. For purposes of this decision, we take administrative notice of the facts as elicited from the pleadings from both of these matters. We also note that this petition was filed prior to the issuance of these two decisions.

NYPD's First Set of Disciplinary Charges Against Petitioner

Petitioner, first hired in 1997 by NYPD as a General Supervisor of Buildings, has held the civil service title of Steamfitter in the Building Maintenance Section at NYPD since June 30, 1999. In 2002 and 2003, NYPD filed several sets of charges and specifications against Petitioner. On

November 13, 2003, Petitioner, several Union representatives, and NYPD's Personnel Officer, Deputy Commissioner, Management and Budget attended a Step I Informal Conference regarding all of the charges and specifications pending against Petitioner. The Union appeared at the Informal Conference to represent Petitioner. After the parties attempted to settle the matter, Petitioner rejected the proposed settlement.

On December 5, 2003, a second Informal Conference was held, at which time Petitioner claimed that he was not guilty of the charges, declined a proposed penalty, and informed the City and the Union of his election to pursue grievance proceedings pursuant to Administrative Guide 319-19.[1] On December 8, 2003, the Personnel Officer, Deputy Commissioner, Management and Budget sent NYPD's Deputy Commissioner, Management and Budget a memorandum memorializing the conferences in which she stated that "[Petitioner] declined to accept the penalty of 30 days Time on Suspension, and wanted to exercise his right to Grievance Proceedings as per Administrative Guide 319.19." (BCB-2570-06, Resp. Ex. 6.)

A Step II disciplinary hearing was held on the charges and specifications against Petitioner and, in a Step II decision on November 1, 2004, the Deputy Commissioner of NYPD Office of Labor Relations ("NYPD OLR") found that one of the charges and specifications should be dismissed and two others should be sustained. As a penalty, Petitioner was suspended from work for 30 days

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[1] Administrative Guide 319-19 ("AG 319-19") is titled "Civilian Employee Discipline," and its stated purpose is "to correct violations of department regulations by a civilian employee." (Resp. Ex. 1.) AG 319-19 sets forth a procedure for processing violations of department regulations by civilian employees. The pertinent part of AG 319-19 states that if a respondent declines a penalty, NYPD should advise respondent that he may contact his union representative and choose between formal charges and specifications or allow the union, with respondent's consent, "to pursue matter in accordance with the Grievance Procedure set forth in Supplementary Agreement." (*Id.*)

without pay. On November 23, 2004, Petitioner requested a Step III review of the charges against him, and, on January 31, 2005, a Step III hearing was held. On March 7, 2005, a New York City Office of Labor Relations ("OLR") Hearing Officer issued a Step III determination, which found that the charges against Petitioner had been substantiated and that the penalty implemented at Step II was appropriate.

After the Union refused to proceed with his grievance, Petitioner submitted a request for arbitration on his own, with the consent of the Union, on April 22, 2005. An arbitrator was selected by the City and Petitioner on August 12, 2005.

In a separate matter, on April 10, 2003, NYPD served Petitioner with an additional charge and specification. Although this charge and specification was initially considered with the other charges and specifications during the previous Informal Conferences, it was considered separately at Step II. The charge was substantiated and NYPD imposed a 30-day annual leave penalty upon Petitioner. Petitioner appealed the Step II decision for this particular charge on February 15, 2005. In a Step III reply, issued on June 15, 2005, an OLR Review Officer found that NYPD substantiated the charge, that the penalty imposed was appropriate, and denied the grievance.

Petitioner again sought arbitration on his own behalf, with the Union's approval, on July 8, 2005. With the consent of the City and Petitioner, two of Petitioner's arbitration cases, A-11162-05 and A-11294-05, were consolidated on August 2, 2006. On August 12, 2006, the Office of Collective Bargaining designated a single arbitrator to hear and decide both matters, and an arbitration was scheduled for June 8, 2007.

Events Leading Up To Petitioner's Termination

During 2004 and 2005, 24 new charges and specifications were filed against Petitioner, and

on July 22, 2005, a Step I Informal Conference was held regarding those charges. At the Informal Conference, a NYPD representative offered Petitioner the option of resigning in lieu of termination as a penalty, but Petitioner declined to resign and signed a document, provided to him by NYPD, titled "Grievance Hearing," which stated, "I decline the decision and penalty set forth at the conclusion of my Informal Conference and elect to exercise my right to Grievance Proceedings as per Administrative Guide 319-19." (Emphasis in original.) (BCB-2570-06, Resp. Ex. 3.) A NYPD representative and a Union representative also signed the document.

A Step II hearing regarding the charges was held on September 26, 2005, and, on November 2, 2005, the Deputy Commissioner of NYPD OLR found that all of the charges and specifications against Petitioner were substantiated and terminated Petitioner's employment. On November 7, 2005, the Director of NYPD's Employee Management Division sent Petitioner a letter making the termination effective.

On November 9, 2005, Petitioner requested a Step III hearing to challenge his termination and the charges filed against him and on December 5, 2005, a Step III hearing was held. In a Step III decision on January 4, 2006, an OLR Review Officer found that NYPD had substantiated the charges against Petitioner and that termination was appropriate.

The Union refused to take the claim to arbitration, and, on January 18, 2006, Petitioner again submitted a request for arbitration on his own behalf, with the Union's consent. The request contained the language, "Grievant . . . asked Local 638 to file this request for arbitration, and he agreed to represent himself (or provide his own attorney) and Local 638 has no responsibility for this arbitration." (Union Ex. F.) Similar language appears on the page that contains a waiver of his right to file the action in another forum. The request claimed that Respondent was wrongfully terminated

in violation of CSL § 75. As a remedy, he seeks to be restored to full duty.

On August 29, 2006, the City and NYPD filed a petition challenging the arbitrability of the grievance, Docket No. BCB-2570-06 (A-11999-06). The City argued that Petitioner could not form a nexus between the subject matter of the grievance and a specific provision that granted Petitioner the right to grieve the termination because he was employed pursuant to New York State Labor Law § 220 and, therefore, there is no collective bargaining agreement between the Union and the City which provides Petitioner the right to challenge discipline. The City further argued that in the absence of a contractual provision, employees holding titles covered by New York State Labor Law § 220 are provided grievance rights through Executive Order 83, but that Executive Order 83 does not provide Petitioners with the right to challenge disciplinary action through the grievance procedure. Therefore, the City contended, Petitioner was only entitled to disciplinary procedures established by CSL § 75 and since he could not form a nexus between his termination and a valid collective bargaining agreement, the petition should be dismissed in its entirety.

Petitioner answered the petition *pro se*. Petitioner argued that he had been actively misled into believing that he had grievance rights by both OLR and NYPD throughout three separate grievance proceedings over 3-1/2 years, and, because of their actions, he is unable to exercise his rights under CSL § 75 in a timely manner.

The Board, in *D'Onofrio*, Decision No. B-4-2007, found that Petitioner had properly asserted facts supporting the equitable defense of laches. Petitioner established that the City was guilty of a significant delay when it did not act to dispute Petitioner's rights to the grievance procedure until long after he had submitted his grievance to the process, that the City's delay was unexplained and unexcusable, and that the delay severely prejudiced Petitioner's ability to present a defense against

the claim. Accordingly, this Board found that the uncontroverted facts were sufficient to establish the equitable defense of laches and dismissed the petition. *D'Onofrio*, Decision No. B-4-2007 at 10. In *D'Onofrio*, Decision No. B-3-2007, the Board dismissed Petitioner's improper practice petition in which Petitioner alleged that the Union had breached its duty of fair representation.

On November 9, 2006, Petitioner filed the instant petition. He has not specified what remedy he seeks.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges the Union did nothing to answer the City's petition challenging arbitrability on his behalf. Regarding the failure to pursue or advise him of his CSL § 75 rights, he argues that the arbitration process was approved and authorized from the top down in the Union's hierarchy and that one would have to conclude that their actions were wilfully misleading so as to cause him harm and injury. He also claims that the Union's actions regarding this matter show what he had claimed in his prior improper practice petition – that the Union is incompetent.

In response to the Union's contention that Petitioner had his own attorney to advise him on arbitration during this time, Petitioner asserts that the claim is false. He asserts that he had, at the relevant time, retained a civil rights attorney to represent him in other matters, but it was not until the Union refused to seek arbitration on his behalf that he sought outside advice or counsel relating to his termination. Until that point, Petitioner relied solely on the Union's advice on those issues.

Petitioner alleges that the City sought to deny him due process by filing a petition challenging the arbitrability of the grievance regarding his termination. He contends that the parties engaged in

a conspiracy to have the Petitioner choose arbitration, where he could easily be terminated after a Step II hearing, and then deny him the benefit of that procedure by challenging his request for arbitration. He also claims that the City and NYPD engaged in "fraudulent" acts against him. He argues that his work was above standards and that the City and NYPD sought to falsify this fact by submitting modified transcripts to the New York State Worker's Compensation Board.

Petitioner argues that if the petition challenging arbitrability had been granted, the Union and the City would have been at fault for him being without legal recourse for losing his employment. Because those parties selected or acquiesced to the grievance process to which he is now being told that he is not entitled, they should be held accountable for the loss of his rights.

Union's Position

The Union asserts that it acted in a proper manner regarding Petitioner and that its conduct was not arbitrary, discriminatory, or in bad faith. It contends that it acted within its discretion and in the best interest of the unit as a whole in deciding not to contest Petitioner's termination at arbitration. The Union asserts that even if the City is correct and arbitration is not applicable here, it would not change the outcome because the Union would have declined to challenge Petitioner's termination in any other forum.

The Union further contends that it had done nothing to answer the City's petition challenging arbitrability because, by that point in the proceedings, the Union had already informed Petitioner that it would not pursue arbitration on his behalf and Petitioner had decided to pursue arbitration on his own, with his own attorney. Petitioner had expressly absolved the Union from any further obligations to him regarding the arbitration.

City's Position

The City argues that Petitioner has not pled facts sufficient to establish that it interfered with, restrained, or coerced Petitioner in the exercise of his rights under NYCCBL § 12-305. Petitioner has not identified any alleged discriminatory act or protected activity sufficient, other than the request for arbitration, to allow the City to respond to Petitioner's allegations. As such, Petitioner fails to meet the pleading requirements set forth in the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-07(c)(1)(D). The City contends that, to the extent that Petitioner alleges that his request for arbitration constitutes protected activity, the City's challenge does not constitute an improper practice because he cannot show that the employee's protected activity was the motivating factor in its decision to challenge. The City was justified in filing its petition challenging arbitrability because Petitioner's grievance was not arbitrable.

DISCUSSION

The principal issue before this Board is whether the Union breached its duty of fair representation when it failed to answer a petition challenging the arbitrability of Petitioner's grievance and failed to pursue or advise him of his rights under CSL § 75 after his employment with the City had been terminated. We find that Petitioner has not alleged facts sufficient to state a *prima facie* case that the Union's conduct was arbitrary, discriminatory, or founded in bad faith.

For purposes of clarification, *D'Onofrio*, Decision No. B-3-2007, involved many of the same facts which culminated in the instant matter. In *D'Onofrio*, Decision No. B-3-2007, this Board found that the Union had not breached its duty of fair representation in the manner that it had handled his grievances, including the one which challenged his termination, through the grievance procedure and

to the point of the request for arbitration. *Id.* at 24. The primary new issues for purposes of this decision are whether the Union breached its duty by not proffering an answer to the City's petition challenging the arbitrability of the grievance regarding his termination and by not pursuing or advising him of his rights under CSL § 75 during the time that he would be able to exercise them.

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 courts have adopted a similar standard in reviewing claims brought before the New York State Public Employment Relations Board:

> 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 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988); *see New York City Transit Authority*, 37 PERB ¶ 3002 (2004). Consistent with *Vaca*, *Diaz*, and their respective progeny, this Board has interpreted the duty of fair representation under NYCCBL § 12-306(b)(3) to require a 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 14.

Under the NYCCBL, this Board has held that 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. *Gertskis*, Decision No. B-11-2006 at 10; *Watkins*, Decision No. B-23-2005 at 11; *Hug*, Decision No. B-51-90 at 14. A grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation alone does not constitute a breach of the duty of fair representation, *Hodge*, Decision No. B-3-2006 at 18; *Whaley*, Decision No. B-41-97, and this Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *Walker*, Decision No. B-2-2007 at 14; see *Grac*e, Decision No. B-18-95 at 8.

Petitioner has the burden to plead and prove that the union engaged in prohibited conduct. *Minervin*i, Decision No. B-29-2003 at 15-16. For a petitioner to make a *prima facie* showing of a union's breach before this Board, he or she must allege more than negligence, mistake, or incompetence. *D'Onofrio*, Decision No. B-3-2007; *Schweit*, Decision No. B-36-98 at 15. Unless a petitioner shows that the union did more for others in the same circumstances than it did for the petitioner, or that its actions were arbitrary or perfunctory, errors in judgment do not breach the duty. *Schweit*, Decision No. B-36-98 at 15; *see Page*, Decision No. B-31-94 at 11. Even gross negligence does not breach the duty of fair representation. *Okorie-Ama*, Decision No. B-5-2007 at 15; *CSEA*, 132 A.D.2d at 432; *New York City Transit Authority*, 37 PERB ¶ 3002 (2004).

In light of this standard, we find that the facts as alleged by Petitioner, even if true, are insufficient to establish a breach of the duty of fair representation.[2] Regarding the Union's failure

[2] Because Petitioner is *pro se* for purposes of this proceeding, and a hearing was not held, we draw all permissible inferences in favor of Petitioner from the pleadings, and assume, *arguendo*, that the factual allegations from the pleadings are true. *James-Reid*, Decision No. B-

to file an answer to the City's petition challenging arbitrability, we note that Petitioner released the Union of responsibility for the arbitration concerning his termination when he submitted his January 18, 2006 request for arbitration on his own behalf, containing express language releasing the Union of any responsibility. In *D'Onofrio*, Decision No. B-3-2007, the Board determined that Petitioner's agreement to release the Union, in return for the Union authorizing Petitioner to pursue arbitration on his own, was both legally enforceable and did not constitute a breach of the duty of fair representation considering the totality of the circumstances. *Id.* at 22-23. Consequently, it follows that in the instant matter, the Union did not bear a responsibility to respond to a petition challenging the arbitrability of that very same grievance, based upon Petitioner's specific release from such responsibility. Therefore, we dismiss this claim.

Petitioner attributes the Union's failure to apprize him of his rights under CSL § 75 to an independent, deliberate attempt on the part of the Union to mislead him, the Union's general incompetence, and/or collusion with the City to deprive him of those rights. In *D'Onofrio*, Decision No. B-3-2007, this Board dismissed Petitioner's claim that the Union had failed to properly represent him regarding the same grievances, because he did not allege facts which would show that the Union's representation of him and his dissatisfaction with the outcome of his disciplinary matters was a result of deliberately invidious, arbitrary, or bad faith actions on behalf of the Union. *Id.* at 20. Petitioner has not asserted any new facts to support an inference that the failure to apprize him of his § 75 rights was malicious, discriminatory, or anything other than an error.[3] As we stated

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29-2006 at 11.

[3] In so holding, we note that in the past, we have held that the duty of fair representation does not extend to the enforcement of rights which an individual employee may vindicate without the assistance of his or her bargaining representative, because the duty concerns only the

earlier, mere errors in judgment do not breach the duty of fair representation unless Petitioner can show that the Union did more for others in the same circumstances than it did for Petitioner or that its actions were arbitrary or perfunctory. *D'Onofrio*, Decision No. B-3-2007 at 20; *Schweit*, Decision No. B-36-98 at 15. Additionally, Petitioner's claim of collusion between the City and the Union are likewise speculative and conclusory, and we dismiss that claim.[4]

Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. See *Samuels*, Decision No. B-17-2006 at 16. We have already dismissed the claims of collusion between the City and the Union, and the remaining independent claims against the City are dismissed.[5]

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negotiation, administration and enforcement of a collective bargaining agreement. *Williams*, Decision No. B-48-97. In *Williams*, we found that the Union owed no duty to a § 220 employee involved in a § 75 proceeding because the Petitioner's claimed rights were not derived from the NYCCBL or a collective bargaining agreement, but from CSL § 75. *Id.* at 8.

[4] In regard to Petitioner's claim that the City tried to deny him due process by filing a petition challenging arbitrability, we note that a public employer which is party to a disagreement as to whether a matter is a proper subject for the grievance and arbitration procedure may petition the Board for a final determination thereof. OCB Rules § 1-07(b)(3). Since we find that Petitioner's allegations regarding collusion with the Union are speculative and conclusory, and he has not alleged facts which would show that the City's actions in filing the petition were improperly motivated or otherwise violative of the NYCCBL, the City was within its right to file its petition.

[5] In dismissing this petition in its entirety, we note that Petitioner is still able to seek review of his alleged wrongful termination through arbitration because the Board dismissed the City's petition challenging the arbitrability of Petitioner's grievance regarding his termination in *D'Onofrio*, Decision No. B-4-2007.

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-2579-07, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
June 18, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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CHARLES G. MOERDLER
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