Lake, 8 OCB2d 22 (BCB 2015)

(IP) (Docket No. BCB-4097-15)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b) by failing to adequately address his requests for assistance regarding counseling memos and an unsatisfactory performance evaluation that resulted in his termination. Respondents argued that the Union did not breach its duty of fair representation because Petitioner was terminated during his probationary period and the Union was responsive to Petitioner's requests for assistance, secured a transfer offer for him that he refused, and could not otherwise appeal his termination. The Board found that Petitioner's allegations do not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the improper practice petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

GEOFFREY LAKE,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On March 3, 2015, Geoffrey Lake,[1] who was an employee of the New York City Housing Authority ("NYCHA"), filed an improper practice petition alleging that the City Employees Union, Local 237, International Brotherhood of Teamsters ("Union"), breached its duty of fair

[1] We note that Petitioner, who was *pro se* when he filed the petition, retained counsel prior to the conference in this matter.

representation in violation of § 12-306(b) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by failing to adequately address his requests for assistance regarding counseling memos and an unsatisfactory performance evaluation that resulted in his termination. Respondents argue that the Union did not breach its duty of fair representation because Petitioner was terminated during his probationary period and the Union was responsive to Petitioner's requests for assistance, secured a transfer offer for him that he refused, and could not otherwise appeal his termination. The Board finds that Petitioner's allegations do not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the petition is denied.

BACKGROUND

Petitioner was hired as a provisional Plasterer at NYCHA in October 2011, appointed a probationary Plasterer on October 13, 2014, and terminated on January 30, 2015. The Union and NYCHA are parties to a collective bargaining agreement ("Agreement"). It is undisputed that under the Agreement probationary employees do not have the right to challenge a termination.

On April 4, 2014, Petitioner's supervisor presented a counseling memo to Petitioner stating that his work on a project in March 2014 did not meet NYCHA's standards ("April Counseling Memo"). The April Counseling Memo stated that "[t]his type of workmanship is not acceptable. Be advised that if this type of behavior continues in the future it may result in further disciplinary action." (Pet., Ex. A, April Counseling Memo) After receiving the April Counseling Memo, Petitioner contacted Norberto Luna, the Union Business Agent assigned to represent Plasterers. The Union asserts that Luna explained to Petitioner that, since counseling memos are not considered discipline, they cannot be grieved and all the Union could do is try to

persuade management to retract the memo. Luna discussed the issue on several occasions with NYCHA Director of Technical Services Robert Mallano, who refused to retract the memo. Acting on the advice provided by Luna, Petitioner drafted a written rebuttal to the April Counseling Memo ("Rebuttal to the April Counseling Memo") that Luna reviewed. The parties disagree as to the scope of Luna's review. Petitioner asserts that Luna merely opined that the Rebuttal to the April Counseling Memo was too long but provided no substantive assistance. Luna asserted that he followed his standard practice of limiting his review to ensuring that the rebuttal addressed the counseling memo. Petitioner did not submit the Rebuttal to the April Counseling Memo to NYCHA until June 2014, a delay Petitioner asserts was due to the Union's failure to provide substantive assistance.

On July 17, 2014, Petitioner's supervisor presented a second counseling memo to Petitioner ("July Counseling Memo") that stated that his work on a project in June and July 2014 did not meet NYCHA's standards and took excessive time to complete. The July Counseling Memo also warned that if the behavior continued "it may result in further disciplinary action." (Pet., Ex. B, July Counseling Memo) Petitioner drafted a rebuttal to the July Counseling Memo ("Rebuttal to the July Counseling Memo") which he submitted to his supervisor in December 2014, stating that its filing "was delayed due to my Union." (Pet., Ex. B, Rebuttal to the July Counseling Memo)

Respondents assert that in July 2014, Luna again met with Mallano to discuss the counseling memos that Petitioner had received. Respondents further assert that, as a result of these discussions, the Union secured a transfer offer for Petitioner. Petitioner acknowledged that Mallano offered him a transfer and stated that he refused the transfer offer because it would have

required him to leave his unit. While Petitioner desired to work under a different supervisor, he did not wish to transfer out of his unit.

In October 2014, Petitioner was appointed off of the civil service list to the title of Plasterer and began a one-year probationary period. Petitioner asserts that in the same meeting at which he was informed of his appointment, Mallano presented him with a third counseling memo ("October Counseling Memo") that stated that Petitioner's work on a project in September 2014 took too long to complete. The October Counseling Memo warned that "it can be used in further Disciplinary Action." (Pet., Ex. C, October Counseling Memo) Petitioner did not submit a rebuttal to the October Counseling Memo.

On December 9, 2014, Petitioner's supervisor presented a fourth counseling memo to him ("December Counseling Memo") that stated that, on December 4 and 5, Petitioner was insubordinate by (i) refusing to work in an area he believed to be unsafe despite his supervisor's conclusion that the area was safe to work in and (ii) not having a full set of tools. The December Counseling Memo stated that "this or any other misconduct may result in further disciplinary action." (Pet., Ex. D, December Counseling Memo)

On December 31, 2014, Petitioner submitted a rebuttal to the December Counseling Memo ("Rebuttal to the December Counseling Memo"), which stated that his "helpers informed [him] that they would not work at this location, due to the unsafe and unsanitary work environment." (Pet., Ex. D, Rebuttal to the December Counseling Memo) Petitioner also noted that his tools were destroyed in a fire in November 2014, that he had informed his supervisor of the fire, had provided NYCHA a copy of the Fire Department's official report, and had not been provided with a new full set of tools. On January 5, 2015, Petitioner filed a complaint with

NYCHA's Office of Safety and Security ("Safety Office") regarding the incidents that gave rise to the December Counseling Memo.

On January 6, 2015, Petitioner was presented with a performance evaluation entitled "Probation Report" that rated him as "unsatisfactory" because he took "more than double the amount of time" as other Plasterers to complete his assignments. (Pet., Ex. E, Probation Report)

On January 8, 2015, Petitioner emailed Luna on two occasions stating that he had not been responsive to the requests for assistance that Petitioner had made since June 2014. Petitioner forwarded his emails to Luna to Remilda Ferguson, the Director of the Union's Housing Division, and George Caballero, another Union Business Agent, stating that he is "urgently request[ing]" Union assistance regarding the counseling memos and his performance evaluation. (Pet., Ex E, Emails)

On January 9, 2015, Luna responded to Petitioner's January 8 emails stating that he had informed Petitioner that NYCHA would not retract the July Counseling Memo, had advised him to write a rebuttal, and that now that he has written a rebuttal, Luna would ensure that it is attached to the July Counseling Memo. Luna then emailed Petitioner's Rebuttal to the July Counseling Memo to NYCHA's Human Resources Department and several NYCHA officials; Luna was assured by NYCHA that Petitioner's Rebuttal to the July Counseling Memo would be placed in Petitioner's file. (*See* Pet., Ex. E, Emails)

Petitioner responded with several emails addressed to Luna and copied to Ferguson and Caballero. Petitioner stated in the emails that:

> I left you several voice mail messages and sought your assistance over the past 8 months. You have not been responsive to my requests for assistance until today. I have now received a poor performance evaluation. . . . I request the assistance of someone else within the union. Ms. Ferguson and Mr. Caballero can you please help.

(Pet., Ex E, Emails) Petitioner thanked Luna for forwarding his Rebuttal to the July Counseling Memo to NYCHA but noted that it was "not helpful with my current situation of a poor performance evaluation dated January 6th." (*Id.*) On January 10, 2015, Petitioner once again emailed Luna, Ferguson, and Caballero requesting help with his performance evaluation.

Petitioner was terminated on January 30, 2015. That same day, NYCHA's Safety Office issued a memorandum regarding Petitioner's January 5, 2015, safety complaint, finding that the safety complaint itself was unsubstantiated but nevertheless recommending that the December Counseling Memo be removed from Petitioner's file because his supervisors did not follow NYCHA policy in addressing his safety complaint.

On February 2, 2015, Petitioner emailed Curtis Scott, another Union Business Agent, to thank Scott for investigating his termination.[2] On March 3, 2015, Petitioner filed the instant petition, and a conference was held on May 12, 2015. At the conference, Petitioner asserted that the Union was aware of NYCHA's racial discrimination. Petitioner disclosed that he had filed two complaints with the Equal Employment Opportunity Commission ("EEOC"), one before and one after his termination, and an Article 78 action challenging his termination. The Union asserts that at no point prior to the conference did Petitioner inform the Union that he believed that racial discrimination was a factor in NYCHA's treatment of him. Petitioner acknowledged that he did not mention racial discrimination in any of his written communications with the Union or in his rebuttals to the counseling memos.

[2] No other details regarding Petitioner's dealings with Scott are in the record.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3).[3] Petitioner asserts that the Union failed to adequately assist him in dealing with his counseling memos and drafting written rebuttals which he argues led to more counseling memos, his unsatisfactory performance evaluation, and his termination. Petitioner also asserts that the transfer offer was not a valid option. Petitioner further argues that NYCHA's action stemmed from racial discrimination of which the Union was or should have been aware, and that the Union's awareness created an obligation on the Union to act.

Petitioner acknowledges that, due to his probationary status, his termination cannot be formally grieved but requests that the Board order that the Union assist him with the rescission of his termination. Petitioner also seeks written recognition of what he has gone through, including the acknowledgement of racial discrimination at NYCHA.

Respondents' Position[4]

Respondents argue that Petitioner has failed to allege probative facts in support of his allegation that the Union breached its duty of fair representation. Regarding the counseling memos, Respondents argue that the Union explained to Petitioner that all it could do was meet with management, which it did, and secured a transfer offer for Petitioner that he refused. Regarding his termination, Respondents argue that the Union could not have challenged Petitioner's dismissal as he had not completed his probationary period.

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[3] NYCCBL § 12-306(b)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter."

[4] The Union filed an answer, which NYCHA joined.

Respondents further argue Petitioner's claims of racial discrimination are not properly before the Board. Further, racial discrimination is not mentioned in any of Petitioner's rebuttals or emails and Respondents assert that it was not until the conference in this matter that the Union was made aware of Petitioner's belief that racial discrimination was an issue.

Accordingly, the Union argues its handling of Petitioner's concerns was not arbitrary, capricious, or discriminatory and, thus cannot form the basis of an improper practice petition.

DISCUSSION

Petitioner alleges that the Union breached its duty of fair representation by failing to adequately assist him regarding his counseling memos, an unsatisfactory performance evaluation, and his termination. We find that the record does not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Accordingly, Petitioner has not established that the Union violated the NYCCBL and we dismiss the petition.

NYCCBL § 12-306(b)(3) makes it "an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." The "burden of pleading and proving a breach of this duty lies with the petitioner." *Nealy*, 8 OCB2d 2, at 17 (BCB 2015). The Board recognizes that a "*pro se* Petitioner may not be familiar with legal procedure" and, accordingly, "take[s] a liberal view in construing" pleadings drafted by an unrepresented petitioner. *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd., Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011); *see also Abdal-Rahim*, 59 OCB 19, at 3 (BCB 1997). Thus, we exercise our review "with an eye to establishing whether the facts as pleaded support

any cognizable claim for relief and [we do] not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 13 (BCB 2008).[5]

The duty of fair representation "requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 17; *see also Kassim*, 8 OCB2d 8, at 14-15 (BCB 2015). A union, however, "enjoys wide latitude . . . as long as it exercises discretion with good faith and honesty[, and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21 (BCB 2008); *see also Smith*, 3 OCB2d 17 (BCB 2010). Accordingly, the duty of fair representation is not breached simply because a member "express[es] dissatisfaction with [an] outcome . . . or question[s] the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007); *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005).

It is undisputed that the Union responded to Petitioner's requests for assistance. Nevertheless, Petitioner alleges that the Union's responses were insufficient. We have long held that a disagreement with tactics or "dissatisfaction with the outcome of [his] case is insufficient to ground a claim that a union has breached its duty" of fair representation. *Rivera-Bey*, 73 OCB 20, at 11 (BCB 2004); *see also Shymanski*, 5 OCB2d 20, at 9 (BCB 2012). The record here clearly established that Luna, a Union official, advised Petitioner to write the rebuttals, reviewed his Rebuttal to the April Counseling Memo, ensured that the Rebuttal to the July Counseling Memo would be kept in Petitioner's file, and secured a transfer offer for him. Petitioner also acknowledged that another Union official investigated his termination. There is nothing in the

[5] We note, however, that at the conference Petitioner was represented by counsel, who was permitted to clarify claims raised in the petition, and that the additional facts and arguments raised at the conference are included for consideration in this matter.

record indicating that the Union's conclusions and strategic decisions were not reached in good faith. Moreover, there is no contractual mechanism for the Union to grieve the counseling memos. *See Walker*, 79 OCB 2, at 16 (BCB 2007) (union's failure to pursue a matter not grievable in its contract does not breach the duty of fair representation). Similarly, the Union has no basis under the Agreement to challenge the termination of a probationary employee. *See id.*

Regarding Petitioner's allegations of racial discrimination, which were made at the conference and do not appear in the petition, such claims are not within our jurisdiction. *See* NYCCBL § 12-309; *Holmes*, 4 OCB2d 14, at 14 (BCB 2011) (claims of "discrimination based on race or gender may be actionable under other statutes, but do not constitute improper practices under the NYCCBL, to which our jurisdiction is limited"). Further, there is nothing in the record indicating that Petitioner brought these concerns to the Union's attention. To the contrary, no mention of racial discrimination appears in Petitioner's three rebuttals or the numerous emails. Accordingly, we cannot conclude that the Union breached its duty of fair representation for not responding to concerns Petitioner did not raise. *See Archibald*, 57 OCB 38, at 25 (BCB 1996) (failure to bring matter to union's attention fatal to breach of duty of fair representation claim).

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 verified improper practice petition filed by Geoffrey Lake, docketed as BCB-4097-15, against the City Employees Union, Local 237, International Brotherhood of Teamsters, and the New York City Housing Authority hereby is dismissed in its entirety.

Dated: July 23, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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