

Johnson, 8 OCB2d 24 (BCB 2015)

(IP) (Docket No. BCB-4100-15)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by not properly representing her regarding a transfer request. The Union asserted that some of Petitioner's claims are untimely, that it acted reasonably and in good faith, and that it did not act in a discriminatory or bad faith manner. Additionally, Respondents argued that Petitioner failed to establish a *prima facie* claim of a violation of the NYCCBL or to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board found that Petitioner's timely allegations do not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the petition was denied. (**Official decision follows.**)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Petition

-between-

TARA JOHNSON,

Petitioner,

-and-

**UNITED PROBATION OFFICERS ASSOCIATION,
THE CITY OF NEW YORK, and THE NEW YORK CITY
DEPARTMENT OF PROBATION,**

Respondents.

DECISION AND ORDER

On March 12, 2015, Tara Johnson, *pro se*, filed a verified improper practice petition against the United Probation Officers Association ("Union"), the City of New York ("City"), and the City's Department of Probation ("DOP"). Petitioner alleges that the Union breached its duty of fair representation 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”) by not properly representing her regarding a transfer request. The Union asserts that some of Petitioner’s claims are untimely, that it acted reasonably and in good faith, and that it did not act in a discriminatory or bad faith manner. Additionally, Respondents argue that Petitioner failed to establish a *prima facie* claim of a violation of the NYCCBL or to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board finds that some of Petitioner’s allegations are untimely, and that the timely allegations do not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the petition is denied.

BACKGROUND

Petitioner became a Probation Officer (“PO”) on or about September 10, 2006.¹ The Union is the certified bargaining representative for employees in the title PO. The Union and the City are parties to a collective bargaining agreement covering POs (“Agreement”). Attached to the Agreement is a letter of understanding, which reserves the right to make transfer decisions to DOP. It states:

This is to confirm our mutual agreement and understanding that requests for transfers within the [DOP] shall be considered in the following manner:

Any employee in the bargaining unit serving in a permanent position may request a transfer within title to another location by making a written application to the Agency’s Director of Personnel.

It is agreed and understood that [DOP] reserves the right to make transfer decisions based on the needs and efficient operation of [DOP].

¹ Petitioner asserts that she worked for DOP as a Probation Officer Trainee from 2001 to 2003.

The terms of this letter of understanding are not subject to the grievance procedure.

(City Ans., Ex. 2)

Petitioner asserts that she worked as a PO for DOP in Brooklyn from September 2006 until her “brief resignation” in February 2013.² (Rep. to Union ¶ 9) Upon Petitioner’s return to DOP, she was assigned to a facility in the Bronx. In or around September 2014, Petitioner was on a medical leave. Also in September 2014, Petitioner expressed to the Union her desire to be transferred from her work location in the Bronx to one in Brooklyn.

Petitioner states that she discussed her transfer request with the DOP Associate Commissioner for Adult Operations “who informed [Petitioner] that he was unable to transfer [her] at that time”³ (Pet., Ex. A) Petitioner states that she then spoke with a Union Vice President (“Union VP”) on September 11, 2014, and informed the Union VP that she wished to be transferred to a work location closer to her home in Brooklyn due to medical and childcare issues. Petitioner further states that during the September 11 conversation, the Union VP “reassured [Petitioner] that she would look into helping [Petitioner] to move closer back to a borough closer to home” (*Id.*) According to Petitioner, the Union VP contacted her later that afternoon to inform her that she had secured Petitioner a place in Brooklyn Family Court and would send details on where Petitioner should report to work. Petitioner asserts that she “did not hear anything” from the Union until September 16, 2014, when she “was finally able to speak” with the Union VP. (*Id.*) According to Petitioner, the Union VP “stated that she was unable to

² On April 13, 2015, Petitioner filed a reply to the Union’s answer in which she made new factual assertions including the statement above which Respondents did not have the opportunity to admit or deny. Some of these relevant facts have been mentioned in the background section, but none are determinative. Petitioner did not file a response to the City’s answer.

³ It is not clear from the pleadings when this conversation occurred.

secure the Brooklyn Family Court location as a result of some moving issues with another [PO] and also since [the Associate Commissioner for Adult Operations] stated that [Petitioner] was unable to leave the Bronx at that time.”⁴ (*Id.*)

The Union acknowledges that Petitioner spoke to the Union VP in September 2014, that the Union VP agreed to attempt to help Petitioner, that the Union VP spoke to the Associate Commissioner for Adult Operations and the Assistant Commissioner for Brooklyn about Petitioner’s wishes, and that the Union VP was unsuccessful in her efforts. However, the Union denies Petitioner’s allegations as to the contents of her conversations with the Union VP.

In a letter dated October 22, 2014, from Petitioner to the Union President (“October Letter”), Petitioner described her dealings in September 2014 with the Union VP and DOP regarding her request for a transfer. Additionally, the October Letter indicates that Petitioner believes that the Union has the power to effectuate transfers:

What my concern is if I am being represented by my Union, then why would an agency personnel have any say in terms of my move especially if my Union is advocating for me. I am asking if it is possible to again look into the possibility of relocating me as promised back to Brooklyn so I can continue to perform my duties as a mother and [PO].

(Pet., Ex. A)

Petitioner asserts that despite the fact that she was not offered a transfer, there was a heavy demand for POs in Brooklyn. In or around November 2014, Petitioner sent a text message to the Union VP stating that she understood there were several spots available in Brooklyn and “wanted to follow up on the status of [her] move.” (Pet., Ex. B) By text message, on or about November 22, the Union VP responded, apologized for not responding sooner, explained that she

⁴ Petitioner asserts that when the Union VP initially told Petitioner about the transfer to Brooklyn Family Court, she did not tell Petitioner that it was conditioned upon a PO deciding to leave. (*See Rep. to Union ¶ 1*)

had been very busy, and stated that she would call Petitioner on Monday. Petitioner responded by thanking the Union VP and wishing her a good weekend.

On or about February 10, 2015, Petitioner again texted the Union VP, stating, in pertinent part:

I am calling because I was following up on the transfer back to Brooklyn. I understand that I was told through AC Salyer and I believe you as well that once this last class graduated I would be moving back to Brooklyn. I just wanted to follow up on that. Also I understand . . . that the Brownsville Neon only has one PO there so if it was a consideration I could perhaps go there otherwise it doesn't matter where I go within the agency as long as it[] is back in Brooklyn. I am currently in the Neon here in the Bronx.

(Pet., Ex. B)⁵

Also on or about February 10, 2015, Petitioner asserts that she had a conversation with a Union delegate who informed her that she had not been moved back to Brooklyn because none of the managers wanted her there, having heard that she is difficult to work with and because they do not like her. Petitioner asserts that this same Union delegate told her to wait before acting on her complaint because a meeting was scheduled to occur on February 14, at which time her situation would be discussed.

On or about February 18, 2015, the Union VP responded to Petitioner's February 10 text stating: "I apologize for the delay[,] been under the weather . . . I [will] look into the status of your transfer and get back to you."⁶ (Pet., Ex. B) Petitioner asserts that, as of April 8, the date of her reply to the Union's answer, she had not heard anything further from the Union regarding

⁵ Petitioner asserts that on a date unspecified, she was told by DOP that her request to be transferred to Brooklyn would be honored when the last PO class graduated in February 2015. Petitioner avers that she tried "to honor [DOP] by waiting for the next step" so she did not file the improper practice petition until that time had passed. (Rep. to Union ¶ 14)

⁶ The Union admits that Petitioner and the Union VP exchanged text messages.

her transfer. Petitioner also asserts that three POs were “moved to the boroughs of their choice” even though their requests to be transferred were made after hers.⁷ (Pet. ¶ 3)

POSITIONS OF THE PARTIES

Petitioner’s Position

Petitioner asserts that her claims are timely because she was informed by the DOP that her transfer request would be honored when the last probation class graduated in February 2015.

Petitioner claims that the Union breached its duty of fair representation by not properly representing her regarding her transfer request.⁸ Petitioner asserts that, in September 2014, after the Union gave her “specific information on where [she] was going to work,” the Union “changed their mind about following through with the appropriate transfer.” (Pet. ¶ 1) Then, in November 2014 and February 2015, the Union VP again informed Petitioner that the Union VP would look into her transfer but again failed to represent her. According to Petitioner, in February 2015, after giving Petitioner a reason for why she had not been transferred, a Union

⁷ Petitioner contends that she understood “that the Union was instrumental in making their move happen rather swiftly.” (Pet. ¶ 3) Petitioner also states that the third PO began working for DOP several years after Petitioner and that:

the 3rd PO in question has since returned back to [DOP] after leaving [DOP] and returning for the 4th time to accept a position in another state, and returning back to [DOP] for a return assignment in Staten Island but shortly thereafter moved back to the Bronx all while [Petitioner] had put in a transfer previously and still had not moved.

(Rep. to Union ¶ 4) Although Petitioner alleges that three POs were transferred to the boroughs of their choice, Petitioner does not allege that any POs were transferred to Brooklyn.

⁸ Under NYCCBL § 12-306(b)(3), “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.”

delegate informed her that she should wait until after February 14 to take any action because her situation would be discussed at a meeting on that date. Despite all of these conversations and Petitioner's many requests for help from the Union, Petitioner asserts that, as of April 8, the Union had not responded concerning a resolution to her situation and that there is "no relevant explanation" as to why she was not transferred back to Brooklyn as "there was a heavy demand for PO's to be placed throughout Brooklyn." (Rep. to Union ¶ 10) Additionally, Petitioner alleges that the Union was instrumental in making the transfers of three other POs to the boroughs of their choice happen rather swiftly, even though those transfer requests were made after Petitioner's request.

As relief, Petitioner asks that this situation "be taken outside of the agency to the next level" since she feels that she is "not being presented fairly by [her] Union" (Pet. ¶ 5)⁹

Union's Position

The Union asserts that to the extent Petitioner's claims allegedly occurred over four months prior to the filing date, they are time-barred. Additionally, the Union argues that the petition fails to state a violation of the NYCCBL.

The Union further asserts that it acted reasonably and in good faith, and "did not act in a discriminatory, invidious, or bad-faith manner." (Union Ans. ¶ 16) Here, the Union VP considered Petitioner's request and agreed to help Petitioner with that request. Next, the Union VP spoke to the DOP Associate Commissioner for Adult Operations as well as the Assistant Commissioner for Brooklyn about Petitioner's wishes; however, the Union VP was unsuccessful in her efforts. Further, the Union avers that transfer requests fall solely within the discretion of

⁹ The paragraph of the petition following the paragraph numbered "4" is not numbered; it has been denominated herein as number "5."

DOP management.¹⁰ Finally, the Union asserts that Petitioner has suffered no legally compensable harm.

City's Position

The City argues that Petitioner has failed to establish a *prima facie* claim of a violation of NYCCBL § 12-306(b)(3). To the extent Petitioner alleges that the Union has breached its duty of fair representation, Petitioner has failed to allege facts sufficient to demonstrate such a breach, and nothing in the petition shows that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Indeed, Petitioner alleges that the Union VP tried to help her secure a transfer and informed Petitioner as to why she was unsuccessful. Thus, the City argues, Petitioner acknowledges that the Union attempted to advocate for Petitioner, and that Petitioner was informed that DOP management had considered her request in light of operational and/or staffing needs. Petitioner's dissatisfaction with the result of the Union's advocacy does not, in and of itself, establish a breach of the duty of fair representation.

Moreover, Petitioner's allegations indicate that she is operating under the mistaken belief that the Union has the authority to determine when and to where POs get transferred. However, the City argues that, pursuant to NYCCBL § 12-307(b), the decision to transfer an employee is reserved for DOP.¹¹ Further, the only mention of transfers in the Agreement, found in a letter of

¹⁰ The Union asserts that, “[t]o the best of [its] knowledge, the [DOP] maintains a transfer list, and offers transfers to those who have requested them on a first-come-first-served basis.” (Union Ans. ¶ 12)

¹¹ NYCCBL § 12-307(b) provides, in pertinent part, that:

It is the right of the city . . . acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which

understanding attached to the Agreement, clearly leaves transfer decisions exclusively to DOP and shows that those decisions are not grievable.

The City argues that, as Petitioner has not established that the Union breached its duty of fair representation, any derivative claim against the City pursuant to NYCCBL § 12-306(d) must also be dismissed.¹²

DISCUSSION

We find that Petitioner has not established that the Union or the City violated the NYCCBL. We therefore dismiss the petition.

The Board recognizes that a “*pro se* Petitioner may not be familiar with legal procedure, and we therefore take a liberal view in construing” a petition filed by an individual without legal counsel. *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*

government operations are to be conducted; . . . [and] exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the [C]ity . . . on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

¹² NYCCBL § 12-306(d) provides, in pertinent part, that:

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.

Abdal-Rahim, 59 OCB 19, at 3 (BCB 1997). The Board’s review is “exercised 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). Additionally, except where Petitioner’s allegations are contradictory or the records before us irrefutably indicate an error, we “assume for the sake of argument that the factual allegations contained in the petition are true.” *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citations omitted). We therefore construe the petition to allege that the Union violated its duty of fair representation under NYCCBL § 12-306(b)(3) by not properly representing Petitioner regarding a transfer request.

Timeliness

We first address the timeliness of the instant petition. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) provides, in relevant part:

A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

See also Section § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”) (stating that a petition must be filed within four months of an alleged violation).¹³ The statute of limitations regarding a claimed

¹³ OCB Rule § 1-07(b)(4) provides, in relevant part:

One or more public employees or any public employee organization acting on their behalf . . . may file a petition alleging that a public employer or its agents . . . has engaged in or is

breach of the duty of fair representation runs from the date the employee knew or should have known that the Union “allegedly acted or failed to act on the petitioner’s behalf.” *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.). As the instant petition was filed on March 12, 2015, only claims arising within four months prior to that date are timely. While claims that antedate November 12, 2014, are not remediable, “factual statements comprising untimely claims may be admissible as background information.” *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *see also Nealy*, 8 OCB2d 2, at 15 (BCB 2015).

To the extent Petitioner claims that the Union did not properly represent her regarding a request to transfer to Brooklyn Family Court in September 2014, we find this claim untimely. Petitioner clearly asserts that the Union informed her in September that it was unable to get her a spot in Brooklyn Family Court because of moving issues with another PO and because the Associate Commissioner for Adult Operations said that Petitioner was unable to leave the Bronx at that time. Petitioner’s October Letter acknowledges that the Union responded to her September request for assistance because she states that she is “asking if it is possible to again look into the possibility of relocating me as promised back to Brooklyn” (Pet., Ex. A) Accordingly, Petitioner knew or should have known that the Union was not pursuing her September transfer request more than four months before this petition was filed. Even if we found Petitioner’s allegations timely based upon her reliance on DOP’s alleged statement that she would be transferred in February 2015, for the reasons set forth further in the discussion, we

engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation . . .

would find that none of Petitioner's claims establish that the Union acted in an arbitrary, discriminatory, or bad faith manner.¹⁴

We find timely Petitioner's allegations that the Union failed to represent her regarding a transfer to Brooklyn between November 12, 2014, and February 2015. During that time frame Petitioner made additional and possibly broader requests for a transfer to anywhere in the borough of Brooklyn and claims that the Union was still "look[ing] into the status of [her] transfer" and discussing her situation in February 2015. (Pet., Ex. B)

Alleged Breach of the Duty of Fair Representation

Pursuant to NYCCBL § 12-306(b)(3), it is an "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 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 Walker*, 6 OCB2d 1 (BCB 2013). The "burden of pleading and proving a breach of this duty lies with the petitioner." *Id.* Indeed, to meet this burden, a petitioner must "allege more than negligence, mistake or incompetence." *Evans*, 6 OCB2d 37, at 8 (BCB 2013). Petitioner cannot meet this burden "simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14; *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005). We have held that "a wide range of reasonableness is granted to a union in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of discretion." *Wooten*, 53 OCB 23, at 15 (BCB 1994).

¹⁴ Petitioner did not give the specific date of DOP's alleged statement.

Here, the record establishes that, in September 2014, the Union considered Petitioner's requests and agreed to try to help her; however, both DOP and the Union informed Petitioner that her transfer request would not be granted at that time. Nonetheless, in October, Petitioner again asked the Union to inquire about a transfer.

After November 12, 2014, Petitioner corresponded with the Union VP by text message regarding a transfer to Brooklyn. The Union VP responded to her text messages in November 2014 and February 2015. Additionally, in February 2015, a Union delegate again explained to Petitioner why she had not been transferred. While Petitioner may have been dissatisfied with the level of communication with the Union, or the content and quality of the communication with the Union, the record is clear that Petitioner expressed her concerns to the Union, the Union responded on multiple occasions, and the Union also provided reasons for why she had not been transferred. *See Turner*, 3 OCB2d 48, at 16 (BCB 2010) (finding that a petitioner's dissatisfaction with the quality of communication did not amount to a breach of the duty of fair representation where the record showed that the union kept the petitioner informed). Petitioner's additional requests for help and dissatisfaction with the Union's efforts are insufficient to establish a breach of the duty of fair representation.

Additionally, Petitioner has not demonstrated any basis upon which the Union could pursue a grievance concerning her transfer request. *See Walker*, 6 OCB2d 1 (finding no violation for alleged failure to sufficiently respond to petitioners' repeated communications where the petitioner failed to demonstrate a basis on which the union could further pursue his grievance). Here, Petitioner appears to incorrectly believe that the Union has the authority to determine when and to where POs get transferred. This is denied by the Union, and the City submitted a letter of understanding attached to the Agreement, from which it is clear that DOP

“reserves the right to make transfer decisions based on the needs and efficient operation of the Department.” (City Ans., Ex. 2) Not only does DOP have the right to determine who gets transferred, its determination cannot be grieved. *See Walker*, 79 OCB 2, at 16 (BCB 2007) (“The fact that the Union refused to pursue a grievance regarding a matter which does not appear to be grievable under the parties’ Agreement is not an arbitrary or perfunctory decision”). To the extent Petitioner argues that the Union failed to meet its duty of fair representation by not succeeding in securing a transfer for her, Petitioner’s dissatisfaction with this outcome is insufficient to demonstrate a violation of the Union’s duty of fair representation.¹⁵ *See Okorie-Ama*, 79 OCB 5, at 14; *Gertsakis*, 77 OCB 11, at 11.

Finally, Petitioner has not raised an independent claim against the City or DOP. Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Nardiello*, 2 OCB2d 5, at 42.

Accordingly, this petition is dismissed in its entirety.

¹⁵ To the extent the petition can be read as raising a claim that the Union treated Petitioner differently than other employees who requested transfers, Petitioner does not allege any specific facts regarding the Union’s representation of these employees that would establish a breach of the duty of fair representation. Additionally, we note that on the record before us, we cannot find that anyone was transferred to Brooklyn with or without Union assistance, during the relevant period of time.

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 Tara Johnson, docketed as BCB-4100-15, against the United Probation Officers Association, the City of New York, and the New York City's Department of Probation 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
MEMBER

PETER PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER