Daniel, et al., 8 OCB2d 4 (BCB 2015)

(IP) (Docket Nos. BCB-4063-14; BCB-4064-14; BCB-4068-14; BCB-4070-14; BCB-4071-14; & BCB-4073-14)

Summary of Decision: Petitioners asserted that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b) by failing to enforce an alleged agreement with ACS concerning Petitioners' effective date of promotion. The Union argued that it responded to Petitioners' concerns, achieved partial resolution of the issue, and continues to pursue Petitioners' claims. The City argued that the petitions were untimely and did not establish a breach of the duty of fair representation. The Board found that the petitions were timely but did not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Accordingly, the improper practice petitions were denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

AMECHI DANIEL, OLALEKAN PEDRO, BETTY MITCHELL, ANTHONY KARUNWI, BEVERLY THOMAS, and LORETTA GARVIN-LIPFORD,

Petitioners,

-and-

SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

In August 2014, Amechi Daniel, Olalekan Pedro, Betty Mitchell, Anthony Karunwi, Beverly Thomas, and Loretta Garvin-Lipford, filed petitions against the Social Services Employees Union, Local 371 ("Union") asserting that it breached its duty of fair 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").[1] Petitioners assert that the Union arbitrarily failed to enforce an alleged agreement between the Union and the Administration for Child Services ("ACS") concerning the effective date of Petitioners' promotion from Supervisor I (Social Services) to Supervisor II (Social Services) and that ACS is derivatively liable for the Union's violation of NYCCBL § 12-306(b). The Union argues that it responded to Petitioners' concerns, achieved partial resolution of the issue, and continues to pursue Petitioners' claims through the grievance process. The City argues that the petitions are untimely and that Petitioners failed to establish that the Union breached its duty of fair representation. The Board finds that the petitions were timely but do not establish that the Union acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the improper practice petitions are denied.

BACKGROUND

Petitioners are employed by ACS in the title Supervisor II (Social Services). Prior to April 17, 2014, Petitioners were in the title Supervisor I (Social Services). The Union is the certified collective bargaining agent for all levels of the title Supervisor (Social Services). Respondents are parties to the Social Services Agreement ("Agreement"), covering March 2008 to March 2010, which remains in *status quo*.

On December 17, 2013, ACS conducted a promotional hiring pool for the Supervisor (Social Services) Level II and III positions. Although Petitioners were on the certified exam list of 34 applicants, they were not among the 20 initially promoted on January 6, 2014, to

[1] BCB-4063-14 and BCB-4064-14 were filed on August 4, 2014. BCB-4068-14 was filed on August 7, 2014. BCB-4070-14 and BCB-4071-14 were filed on August 8, 2014. BCB-4073-14 was filed on August 13, 2014. Upon notice to the parties, the Trial Examiner consolidated the petitions for the Board's consideration because it was determined that each petition stated the same claim based in the same facts.

Supervisor II (Social Services). Petitioners sought the Union's assistance in disputing the results of the hiring pool. It is undisputed that ACS promoted Petitioners, along with other employees, to Supervisor II (Social Services), effective April 17, 2014, and Petitioners began performing the duties of the title on that date.

Petitioners allege that the April 2014 promotions were the result of an agreement between the Union and ACS that also provided for Petitioners to receive the same effective date of promotion as the employees promoted from the December 2013 hiring pool. Petitioners assert that, although they were promoted, the Union failed to enforce the portion of the agreement concerning the effective date of their promotion. As a result, other employees promoted from the December 2013 hiring pool have greater seniority in the title.[2]

The parties provide differing accounts concerning whether or not ACS and the Union reached an enforceable agreement regarding Petitioners' promotion. It is undisputed that, on or about December 18, 2013, Petitioners notified the Union that they believed there were irregularities and possible violations of the Civil Service Law associated with the hiring pool that occurred the previous day. Petitioners assert that by early April 2014, they had determined that the Union had failed to address their concerns about the December 2013 promotional pool and were prepared to file an improper practice petition. Though denied by the Union, Petitioners assert that Union President Anthony Wells reached out to them and asked them to not to file an improper practice petition because the Union had reached an agreement with ACS to promote

[2] Petitioners also assert that ACS has arbitrarily violated their rights and abused civil service rules with regard to their seniority and the seniority of others in the past. Petitioners assert that the Union is aware of these previous problems.

Petitioners effective January 6, 2014.[3] Petitioners assert this agreement is documented by an article titled "Sup II and Sup III List Updates" that was published on the Union's website on April 9, 2014. The article stated, in pertinent part:

> As a settlement between [the Union] and [ACS] to resolve a dispute over a SUP II promotion list, and after discussions with DCAS, the agency will promote the remaining candidates on the list. The new promotions will have the same effective date as the original call in.
>
> Last year, the Union objected to the procedures used with the list, calling them violations of the Civil Service Law.
>
> SSEU Local 371 President Anthony Wells was pleased with the settlement, and stated that the Union is dedicated to preserving the Civil Service system . . . .

(Pet., Ex. A) Petitioners further assert that the Union reached out to members through phone calls and e-mails to notify them of the alleged agreement with ACS.

Respondents deny that ACS reached an agreement with the Union concerning the Petitioners' promotional date. According to the City, after the December 2013 promotional pool, ACS Director of Labor Relations Eric Ambrose received a phone call from the Union Representative who expressed concern at the manner in which the promotions were conducted. Subsequently, following internal discussions concerning the feasibility of additional promotions, ACS decided to promote the remaining eligible employees from the certified exam list.

According to the Union, the April 2014 promotions occurred "[u]pon the demand, urging and insistence of [the Union]." (Union Ans. ¶ 13) The Union asserts that it attempted unsuccessfully to obtain an agreement from ACS to provide petitioners with an appointment date

[3] Petitioners assert that a Union representative, Ms. Lovaglio-Miller ("Union Representative") told Petitioners that the Union had filed a notice of intent to bring a lawsuit against ACS and that the Union acted in bad faith by not going forward with that lawsuit.

of December 17, 2013. According to the Union, ACS initially indicated a willingness to provide Petitioners with the same effective date of promotion as the other promoted employees but later informed the Union that the Department of Citywide Administrative Services ("DCAS"), which administers the civil service appointment process, determined that Petitioners could not receive a retroactive appointment date and that Petitioners' date of appointment must be the date they began working in the title.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners assert that their claims are timely. The petitions were filed within four months of when they knew or should have known that the Union failed to enforce the agreement with ACS. Additionally, if the statute of limitations on any of their claims began to run on December 17, 2013, as the City contends, Petitioners argue that the time limit should be tolled because the Union misled them in April 2014 into thinking that it would adequately represent their interests. According to Petitioners, in April 2014 they began completing the improper practice petition forms when the Union President asked them not to file the improper practice petitions because the Union was resolving their problem. On April 9, 2014, the Union informed Petitioners that they would be given the same effective date of promotion as those employees promoted in the December 2013 pool. Also, the Union indicated an intention to bring a lawsuit to ensure Petitioners received the appropriate date of promotion. The Union did not follow through on either promise. Based on these promises, Petitioners did not file an improper practice petition in April 2014.

Furthermore, Petitioners assert that the Union violated NYCCBL § 12-306(b) by arbitrarily and capriciously failing to enforce an agreement reached with ACS concerning Petitioners' date of promotion. Petitioners also allege that the Union misled them, in bad faith, with regard to this agreement in the April 9, 2014 web posting. The Union failed to ensure that ACS complied with the agreements reached concerning Petitioners' promotional date and failed to take the necessary steps to fully implement the agreement. The Union also failed to represent Petitioners in a fair and honest manner. As a result of the Union's failure to ensure Petitioners received the promotion date they deserved, a number of other employees promoted from the December 2013 hiring pool have greater seniority in the Supervisor II (Social Services) title. Therefore, the petitions must be granted.

Union's Position

The Union claims that it did not breach its duty of fair representation toward Petitioners. It argues that a union must refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements.

Here, Petitioners complain of the alleged failure by the Union to enforce an alleged agreement made by ACS to provide Petitioners with the same date of promotion as those employees promoted from the December 17, 2013 hiring pool. The Union argues that no such agreement existed. While ACS initially indicated to the Union that such an agreement may be possible, it was rejected by DCAS. Therefore, the Union cannot be held to have violated its duty of fair representation for failing to enforce an agreement that did not exist. Moreover, the Union argues that the duty of fair representation would not extend to the alleged agreement, even if it did exist, because it would not constitute a collective bargaining agreement.

The Union argues that it has utilized its best efforts to provide representation to Petitioners. It successfully obtained their appointment to Supervisor II (Social Services) and then attempted to obtain the December 2013 appointment date they desire.[4] At all times in this matter, the Union has acted in good faith. Therefore, the Union argues that the petitions must be dismissed.

City's Position

The City argues that the improper practice petitions are untimely as the underlying claims against the City and the Union arose from the December 2013 hiring pool and the subsequent promotional appointments, which occurred in early January 2014. Thus, any petition concerning that hiring pool must have been filed by April 17, 2014, and a petition concerning the January appointments must have been filed in May 2014. As the petitions were not filed in this matter until August 2014, they are untimely.

Furthermore, even if the Board were to reach the merits of these claims, they must be dismissed. First, the Board does not have jurisdiction regarding any claim that the City or ACS violated the Civil Service Law in conducting the December 2013 hiring pool or subsequently promoting employees to Supervisor II (Social Service) and can only find a violation of the

[4] On or about July 28, 2014, the Union filed a group grievance against ACS, seeking additional payment for employees promoted to Supervisor II (Social Services). It states, in pertinent part:

> There has been a violation, misapplication or misapplication [sic] of the DC 37 Citywide agreement . . . and the SSEU Local 371 contract . . . . The grievants, who were reclassified to Supervisor II from Supervisor I on 1/06/14, only received difference in salary between Supervisor I and Supervisor II on 4/17/14. As a remedy, the grievants are seeking the difference in Supervisor I and Supervisor II from 1/06/14 to 04/17/14 and all other remedies deemed to be just and proper.

(Union Ans., Ex. A) Although, on its face, the grievance appears to only apply to employees promoted as a result of the December 2013 hiring pool, the Union alleges that this grievance applies to Petitioners and that it continues to represent Petitioners interests.

NYCCBL with regard to issues concerning compliance with the Civil Service Law where the petitioner established an intent to discriminate based on union activity. Here, Petitioners have not provided any evidence that ACS's motives in executing the December 2013 promotions violated the NYCCBL, and thus the claim must be dismissed.

The City also asserts that Petitioners failed to establish a claim under NYCCBL § 12-306(b), and therefore any derivative claim against the City or ACS must be dismissed. Here, there is no evidence that the Union acted in an arbitrary, discriminatory, or bad faith manner in negotiating, administering, or enforcing a collective bargaining agreement. Petitioners' statements make clear that, after they were not promoted in December 2013, the Union discussed the situation with ACS. Following these communications, ACS chose to promote Petitioners. At most, Petitioners' claims amount to dissatisfaction with the manner in which they were promoted. Nothing in the petitions established that the Union acted with malice, hostility, or discrimination in handling this matter. Instead, the record shows that the Union exercised sound discretion and acted in good faith in representing the Petitioners.

DISCUSSION

We first consider whether the petitions were filed in a timely manner. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) requires that a petition "alleging that a . . . public employee organization or its agents has engaged in or is engaging in an improper practice" be filed with the Board 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* § 1-07(b)(4) of the Rules of the Office of Collective

Bargaining (Rules of the City of New York, Tile 61, Chapter 1) (an improper practice petition must be filed within four months of an alleged violation).

Here, Petitioners filed six petitions with the Board between August 4, 2014, and August 13, 2014. Therefore, even measuring the statute of limitations from the date of the last petition filed, any alleged violation that the Petitioners knew or should have known after April 13, 2014 is timely. Petitioners did not become aware of the alleged agreement at the center of this controversy until on or around April 9, 2014, and nothing in the record indicates that they knew or should have known that the Union would fail to enforce a portion of that alleged agreement before April 13, 2014. We therefore find the petitions timely with regard to Petitioners' claim that the Union violated its duty of fair representation.[5]

In considering the merits of Petitioners' claims, we find that the record does not establish that the Union violated the duty of fair representation, and we therefore dismiss the petitions. Pursuant to NYCCBL § 12-306(b)(1) and (3), a union has a duty to represent its members fairly.[6] This duty requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct.

---

[5] We also find that, to the extent Petitioners assert that ACS and/or the City violated the Civil Service Law in conducting the December 2013 hiring pool, these claims do not state a violation of the NYCCBL, and thus this Board does not have jurisdiction over such claims. We therefore do not consider whether such claims would be timely.

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

> It shall be an improper practice for a public employee organization or its agents:
>
> > (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
> >
> > * * *
> >
> > (3) to breach its duty of fair representation to public employees under this chapter.

See Walker, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5 (BCB 2007). For the Board to find that a union breached this duty, a petitioner must "allege more than negligence, mistake or incompetence." *Evans*, 6 OCB2d 37, at 8 (BCB 2013).[7] Additionally, the Board will not find a violation of the duty of fair representation where a union member merely disagrees with the union's tactics or is dissatisfied with the outcome of a grievance or other dispute. *See Burtner*, 75 OCB 1 (BCB 2005); *Hug*, 47 OCB 5 (BCB 1991).

Here, we find that the Union did not breach its duty of fair representation. Nothing in the record indicates that the Union acted in an arbitrary, discriminatory, or bad faith manner in representing Petitioners' interests regarding the December 2013 hiring pool and their subsequent promotion in April 2014. Rather, it is clear that the Union acted in good faith by taking steps to contact ACS and advocate on Petitioners' behalf. This communication resulted in ACS promoting Petitioners to Supervisor II (Social Services) in April 2014. Furthermore, Petitioners do not assert that the Union treated any similarly situated employees differently than it treated Petitioners.

Concerning Petitioners' claim that the Union failed to enforce an alleged agreement between ACS and the Union that provided Petitioners and others with an earlier date of promotion than they inevitably received, we find that no such agreement was reached and that the Union was not arbitrary in its actions regarding Petitioners' date of promotion. While the

[7] We note that while a petitioner bears the burden of pleading facts sufficient to establish a violation of the NYCCBL, this Board will "take a liberal view in construing [his or her] pleadings" as the petitioner "may not be familiar with legal procedure" where a petitioner appears *pro se*. *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd*., *Matter of Rosioreanu v. NYC Office of Coll. Barg.*, 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). Furthermore, in reviewing the sufficiency of the pleadings in cases where a hearing was not held, "we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Morris*, 3 OCB 19, at 12 (BCB 2010).

post on the Union's website on April 9, 2014 incorrectly represented that the Union had reached an agreement with ACS, nothing indicates that this representation was deliberately misleading, malicious, or discriminatory. *Cario-Durham Teachers Association*, 47 PERB ¶ 3008 (2014) (finding that a union official's misstatement was not a violation because it was not deliberately misleading as "[a]n honest mistake resulting from misunderstanding . . . does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union") (*quoting Civ. Serv. Empl. Assn. Local 1000 v. N.Y.S. Pub. Empl. Relations Bd. and Diaz,* 132 AD 2d 430, 432 (3d Dept 1987), *aff'd on other grounds* 73 NY2d 796 (1988)). On these facts, we do not find that the Union's representation of Petitioners following the December 2013 hiring pool has been arbitrary, discriminatory, or without good faith, and 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 improper practice petitions filed by the Petitioners Amechi Daniel, Olalekan Pedro, Betty Mitchell, Anthony Karunwi, Beverly Thomas, and Loretta Garvin-Lipford, docketed as BCB-4063-14, BCB-4064-14, BCB-4068-14, BCB-4070-14, BCB-4071-14, BCB-4073-14, respectively, be, and the same hereby are, denied.

Dated: February 2, 2015
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER B. PEPPER
MEMBER