Garces, 9 OCB2d 8 (BCB 2016)

(IP) (Docket No. BCB-4151-16)

Summary of Decision*:** Petitioner appealed the Determination of the Executive Secretary that dismissed his improper practice petition because it did not plead facts sufficient to establish a violation of the NYCCBL. Petitioner argued that the petition alleged facts sufficient to raise an inference that the Union breached its duty of fair representation. The Board found that the Executive Secretary properly deemed the charges in the petition insufficient, and denied the appeal. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JUAN PABLO GARCES,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 375, and
THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

DECISION AND ORDER

On February 10, 2016, Juan Pablo Garces ("Petitioner") filed a *pro se* improper practice petition against District Council 37, Local 375 ("Union") and the New York Housing Authority ("NYCHA"). Petitioner claimed 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"), when it declined to advance his out-of-title grievance to arbitration. Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), on March 1,

2016, the Executive Secretary dismissed the Petition on the grounds that Petitioner's claims were insufficient. *See Garces,* 9 OCB2d 5 (ES 2016) ("ES Determination"). On March 8, 2016, Petitioner appealed the ES Determination. The Board finds that the Executive Secretary properly deemed the charges in the petition insufficient, and denies the appeal.

BACKGROUND

Improper Practice Petition

All of the allegations that follow are as recited by Petitioner in his verified improper practice petition. Petitioner began working as a Construction Inspector for NYCHA on February 13, 1990 and was promoted to Construction Project Manager in 1996. Petitioner alleges that, in 2014, he was promoted to the position of Program Specialist. On March 19, 2015, the Union filed a grievance alleging that Petitioner was performing out-of-title work for which he was not properly compensated. Petitioner asserts that, on March 27, 2015, his supervisor removed him from the Program Specialist position.

The grievance was denied at Steps I and II. By letter dated June 10, 2015, Union counsel notified Petitioner that the Union had filed a request for arbitration on his behalf. Petitioner asserts that Union counsel subsequently "insisted" that he attend a Step III meeting on July 31, 2015 as NYCHA had "something to offer" to resolve the grievance. (Pet. ¶ 7) A Union representative appeared with Petitioner at the Step III meeting, but the matter was not resolved.

On or about August 13, 2015, Petitioner contacted Union counsel regarding the scheduling of the arbitration. Union counsel responded on August 19, 2015, informing Petitioner that the Union was awaiting a Step III decision but that, once a hearing date was set, the Union would schedule a mutually convenient date to prepare for the arbitration. Petitioner asserts that he met with Union counsel on September 28, 2015 to prepare for the arbitration hearing.

By letter dated October 29, 2015, Union counsel informed Petitioner that it had conducted a "full review" of the matter and determined that it would not proceed to arbitration because the grievance did not appear to be viable. (Pet., Ex. D) Specifically, the letter states, in pertinent part:

> A grievance was filed on your behalf on March 19, 2015 and on March 26, 2015, the New York City Housing Authority ("NYCHA") cease and desisted assigning you to out-of-title work. Therefore, the only time period for which you can recoup the difference in pay between your title (CPM Level II) and the out-of-title you are claiming (CPM Level III) is from the date the Step I grievance was filed (March 19, 2015) until the day on which NYCHA cease and desisted assigning the out-of title work which occurred on or about March 26, 2015 (approximately, seven days of pay).
>
> After reviewing the facts of this case, it does not appear that the Union would be successful in meeting its burden of proving that you were working above the CPM Level II title, specifically in the CPM Level III title. In addition, your current salary is approximately $ 70,071.00 and the minimum incumbent rate for a CPM Level III is $ 74,898.00. Even if the Union were successful, which we do not believe that the Union would be, the only monies you would be able to recoup is in the amount of approximately $139.00, which represents the difference in the CPM II and CPM III salaries for the approximately seven days you performed out-of-title work.
>
> Therefore, based upon a full review of this matter, it does not appear that the Union would be successful in proving that you were doing the work of a CMP III, and even if it were successful, there is no remedy available to you. As such, this matter does not appear to be a viable grievance and the Union will no longer proceed with this matter to arbitration.

(*Id*.) The letter concluded by stating that, if the Union did not hear from Petitioner by November 12, 2015, it would assume that he has no objection to the matter being withdrawn. Petitioner did not object to the withdrawal within the time frame set by the Union. On December 15, 2015, the

Union withdrew the request to arbitrate the grievance.[1]

In a December 18, 2015 letter to the Union, Petitioner's private attorney questioned the Union's rationale for not pursuing the grievance and asserted that the Union had miscalculated the potential recovery amount in Petitioner's case. The attorney threatened to bring an improper practice petition against the Union for "changing its position on the matter and refusing to proceed" with the grievance.[2] (Pet., Ex. E)

In the improper practice petition at issue in this appeal, Petitioner claimed that the Union breached its duty of fair representation in an "arbitrary, capricious, and discriminatory manner," by reneging on multiple prior promises to proceed to arbitration. (Pet. ¶ 15) He further asserted that he believes that the Union is discriminating against him "at least in part based on age knowing that I have retired" from NYCHA.[3] (*Id.*)

Executive Secretary's Determination

On March 1, 2016, the Executive Secretary issued the ES Determination pursuant to OCB Rule §1-07(c)(2)(i), dismissing the petition for failure to state a cause of action under the NYCCBL.[4] *See Garces*, 9 OCB2d 5.

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[1] We take administrative notice of the Union's withdrawal letter.

[2] The petition does not indicate any communication by either party between the December 18 letter and the filing of the improper practice petition.

[3] The petition does not indicate when Petitioner retired from NYCHA.

[4] OCB Rule §1-07(c)(2)(i) states, in pertinent part:

> Within 10 business days after a petition alleging improper practice is filed, the Executive Secretary shall review the petition to determine whether the facts as alleged may constitute an improper practice as set forth in § 12-306 of the statute. If, upon such review, . . . it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four months prior

The Executive Secretary determined that Petitioner failed to allege facts sufficient to state a breach of the duty of fair representation. The Executive Secretary noted that while Petitioner's claim was based on a disagreement with the Union's decision not to advance his grievance to arbitration, despite originally stating that it would, such a claim did not amount to a breach of the duty of fair representation. This is because "the Union has considerable discretion in determining whether to pursue a grievance on behalf of a member." *Garces*, 9 OCB2d 5, at 5 (ES 2016) (citing *Nealy*, 8 OCB2d 2, at 16 (BCB 2015)). The Executive Secretary found that based on facts alleged by Petitioner, the Union "performed a careful review of the facts in the matter" before exercising its discretion in determining that Petitioner did not have a viable claim. *Id*. Furthermore, the Union "explained its reasoning for not advancing the arbitration in a detailed letter to Petitioner." *Id*.

Additionally, the Executive Secretary found that Petitioner's claims of discrimination based on his age and/or retirement status were speculative and conclusory because the petition was devoid of any facts to support Petitioner's belief that he was discriminated against. Consequently, the Executive Secretary determined that the allegations concerning the representation provided to Petitioner by the Union were insufficient, on their face, to establish a breach of the duty of fair representation under NYCCBL § 12-306(b)(3).

The Appeal

On March 8, 2016, Petitioner filed the present appeal of the ES Determination. Petitioner objected to the dismissal of his claims prior to receiving an answer from the Union or NYCHA and argued that he was not given an opportunity "to address any perceived deficiencies in the

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> to the filing of the charge, the Executive Secretary may issue a decision dismissing the petition or send a deficiency letter. Copies of such decision . . . shall be served upon the parties by certified mail.

improper practice charge." (Appeal at 1)

As to the merits of his petition, Petitioner argues that the Executive Secretary addressed his allegations of bad faith in a conclusory fashion. He asserts that "[t]he decision to suddenly change course on pursuing a grievance on behalf of a new retiree at minimum raises an inference of bad faith." (*Id*.) Petitioner cites to *Baker v. Bd. of Educ., Hoosick Falls Cent. Sch. Dist.*, 3 A.D.3d 678 (3d Dept. 2004), in support of this argument. He also notes that the reason for his retirement was that he felt he was "facing retaliation in the workplace through transfer and assignment to uncompensated out-of-title work that the union could not adequately protect him from."[5] (Appeal at 1-2) Petitioner argues that because his petition was dismissed he was deprived of an opportunity to "cross-examine union decision-makers to understand what factors went into" the decision not to proceed to arbitration. (Appeal at 2)

Petitioner requests that the Board reverse the ES Determination and schedule this matter for a conference or hearing. Alternatively, Petitioner requested that he be given the opportunity to file an amended petition.

DISCUSSION

In the instant appeal, Petitioner argues that he has raised an inference of bad faith with respect to the Union's decision not to pursue his claim at arbitration and objects to the dismissal of his petition without the opportunity to submit more evidence or cross-examine witnesses. Upon consideration of these arguments, the Board finds that the Executive Secretary properly dismissed the petition because it fails to state a claim under the NYCCBL.

[5] Although Petitioner did not provide the exact date on which he retired, the appeal states that it was sometime after the Union sent the August 19, 2015 letter.

In order to demonstrate that a union breached its duty of fair representation, a Petitioner must allege, and substantiate, facts which show that the union acted in an arbitrary, discriminatory, or bad faith manner. *See Walker*, 6 OCB2d 1, at 7 (BCB 2013) (citations omitted). In the ES Determination, the Executive Secretary accurately cited case law that establishes the relevant legal standards with respect to a claim of a breach of the duty of fair representation. In particular, this Board has repeatedly stated that "[a] union is not obligated to advance every grievance [nor does it] breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions." *Donnelly*, 7 OCB2d 23, at 17 (BCB 2014) (citing *Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005)). This is because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Garg*, 6 OCB2d 35, at 11 (BCB 2013) (quoting *Nardiello*, 2 OCB2d 5, at 40) (internal quotation marks omitted). However, a union does have "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Id*. (quoting *Nardiello*, 2 OCB2d 5, at 40) (emphasis in original) (internal quotation marks omitted).

In this case, according to Petitioner, the Union processed his grievance through Step III of the grievance procedure, filed for arbitration on his behalf, and met with him to discuss his arbitration. Thereafter, the Union sent him a letter explaining that it had fully reviewed the facts of the case and did not believe that it would be successful in proving that Petitioner performed out-of-title duties. The letter further stated that even if the Union were successful, it believed the potential recovery would be minimal. Thus, we find that this letter sets forth a reasonable explanation for the Union's decision not to proceed to arbitration, and we "will not substitute [our] judgment for that of [the] union or evaluate its strategic determinations." *Lake*, 8 OCB2d 22, at 9 (BCB 2015) (quoting *Edwards*, 1 OCB2d 22, at 21 (BCB 2008)) (internal quotation marks

omitted); *see also Garg*, 6 OCB2d 35 (upholding an ES Determination that dismissed petition alleging a breach of the duty of fair representation when the union sent the petitioner a letter explaining why it believed that his grievance was untimely and without merit).

To the extent that Petitioner alleges the actual reason for the Union's change of course regarding the arbitration was his age and/or retirement status, the ES Determination correctly noted that the petition was "devoid of any facts" to support Petitioner's belief in this regard. *See Garces*, 9 OCB2d 5 at 5. Further, the case cited to by Petitioner in his appeal does not persuade us that sufficient facts have been alleged to raise an inference that the Union acted in bad faith.

In *Baker v. Bd. of Educ., Hoosick Falls Cent. Sch. Dist.*, 3 A.D.3d 678, a class of retirees claimed that the union breached its duty of fair representation when it obtained retroactive salary increases for current employees during negotiations but rejected the employer's offer to apply the retroactive salary schedule to retirees. The court found that the petitioners stated a cause of action because the facts demonstrated that the union distinguished between current employees and retirees, and afforded a "total lack of representation" to the retirees due to their status as such. *Id*. at 681. In contrast, there are no facts alleged here to demonstrate that the Union treated Petitioner differently because he was a retiree. Instead, the facts alleged demonstrate that the Union represented Petitioner. As noted earlier, the Union filed a grievance on Petitioner's behalf, represented him through Step III of the grievance process, and only ceased pursuing arbitration after Union counsel met with him to assess the facts and determined the likelihood of success at arbitration.[6] Further, based on the petition, it is not clear whether the Union's decision

[6] We note that, because Petitioner has not asserted any facts to support his claim that the Union's decision not to pursue arbitration was made based on his status as a retiree, we need not evaluate whether it would constitute an improper practice for the Union to make such a decision.

not to proceed to arbitration was made before or after Petitioner retired.[7]

Petitioner argues that the Union's decision to change course, and withdraw its arbitration demand after taking earlier actions to pursue arbitration, gives rise to an inference of bad faith. We disagree. The inference Petitioner asks the Board to adopt would strip the union of the ability to exercise its discretion to pursue, or not pursue, grievances throughout the grievance process, and instead, would bind it to whatever course of conduct it elected at the outset. The petition itself reveals that the Union's decision was made after Petitioner met with Union counsel and that the Union provided Petitioner with a rational basis for deciding to withdraw the arbitration. Petitioner alleges no facts beyond the decision not to take the grievance to arbitration to suggest the Union acted in bad faith. As we have repeatedly held, a union enjoys wide latitude in its administration of the grievance process, and we decline to infer bad faith merely because a union changes an earlier decision to arbitrate a grievance. *See Garg*, 6 OCB2d 35, at 11.

Finally we note that, although Petitioner protests the fact that his petition was dismissed before the Union was required to file an answer, OCB Rule §1-07(c)(2) specifically provides that the Executive Secretary may determine the sufficiency of improper practice petitions and dismiss them in cases where "the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation" of the NYCCBL. Thus, a petitioner is not entitled to require the respondent to answer a petition where, as here, the petition is devoid of any specific, probative facts to support Petitioner's belief that the Union's actions were taken in bad faith based on his age and/or retirement status. *See Finer*, 1 OCB 2d 13, at 15 (BCB 2008) ("[C]onclusory, vague pleading is insufficient to state a cause of action under the NYCCBL.") (citing *DEA*, 79 OCB 40,

[7] While the appeal noted that Petitioner retired sometime after the Union sent him the August 19, 2015 letter, even presuming this information was in the petition, it would be insufficient to warrant a conclusion that the Union was aware of his retirement, or that it became aware at a relevant stage of its decision making process.

at 23 (BCB 2007); *see also Collella*, 79 OCB 27, at 54 (BCB 2007) ("allegations of improper motivation must be based on specific, probative facts"). Nor do the OCB Rules provide that a petitioner is entitled to re-plead or amend a petition that is plainly insufficient as a matter of law.

Accordingly, Petitioner's appeal of the dismissal of the verified improper practice is denied.

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 Executive Secretary's Determination, *Garces*, 9 OCB2d 5 (ES 2016), is affirmed, and the appeal therefrom is denied.

Dated: April 7, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER