Hinds, 11 OCB2d 36 (BCB 2018)

(IP) (Docket No. BCB-4273-18)

Summary of Decision: Petitioner filed a *pro se* verified improper practice petition alleging the Union breached its duty of fair representation in violation of § 12-306(b) (3) of the NYCCBL by failing to adequately represent her in her claim that she was wrongfully terminated. Respondents argued that the petition is untimely. Respondents further argued that the Union did not breach its duty of fair representation as the Petitioner's title does not have statutory due process rights that would allow her to grieve her termination. The Board found that some of the Petitioner's claims as to the Union are timely but the claims against the City are untimely. The Board held that the Union did not breach the duty of fair representation. Accordingly, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

SHARON HINDS,

Petitioner,

-and-

LOCAL 983, DISTRICT COUNCIL 37; and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On May 23, 2018, Sharon Hinds ("Petitioner") filed a *pro se* improper practice petition against Local 983 of District Council 37 ("Union") and the New York City Department of Parks and Recreation ("DPR" or "Parks"). Petitioner claims 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 failed to

adequately represent her in her effort to be reinstated to her position as a City Seasonal Aide ("CSA").[1] Petitioner also alleges that DPR wrongfully terminated her based on false charges. The Union and City argue that the petition is untimely and that the Union did not breach the duty of fair representation because the Petitioner did not have contractual disciplinary due process rights. The Board finds that the Petitioner's claims against the City are untimely but that some of the claims against the Union are timely. The Board further finds that the Union did not breach its duty of fair representation to the Petitioner. Accordingly, the petition is dismissed.

BACKGROUND

The Union is the certified bargaining representative for employees in the title of City Seasonal Aide ("CSA") who are employed at DPR. The City and the Union are parties to a Memorandum of Agreement for the period from March 3, 2008 through March 2, 2010 ("Agreement"), which covers the CSA title, and remains in *status quo*. Pursuant to Article XX § 2(b) of the Agreement,

> [w]hen a City Seasonal Aide who has completed one season and who has worked at least ninety (90) cumulative days in a seasonal capacity, is terminated, the employee or union representative may request a review by the designated representative of the Commissioner within ten (10) calendar days of such notification.

(Union Ans., Ex. H) Both the Union and DPR assert that these are a CSA's only contractual disciplinary due process rights.

[1] Petitioner did not specify which provisions of the NYCCBL the Union allegedly violated. Based on her allegations, we construe the petition to allege a violation of NYCCBL § 12-306(b)(1) and (3). *See Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (Board draws from the pleadings "all permissible inferences in favor of" a *pro se* petitioner).

Petitioner had worked at DPR for at least 30 years and held the title of CSA at the time of her termination. As part of her CSA duties, Petitioner was responsible for cleaning areas around City pools. The City maintains that on July 27, 2017, Petitioner poured a mixture of cleaning agents down a blocked drain near a City pool. It further maintains that she was advised by Supervisor Samuel Diaz to refrain from using chemicals in the drains without discussing it with a supervisor first. The City alleges that the next day, on July 28, 2017, Petitioner again used chemical cleaners to unclog a drain without discussing it with a supervisor. The City alleges that as a consequence, four employees fell ill. Petitioner disputes that she poured a concoction of cleaning fluid down the drain or that any employees were affected by her use of the cleaning agent.

On August 3, 2017, Petitioner was terminated by DPR for "unauthorized use of hazardous chemicals despite warning." (City Ans., Ex. 5) She contacted her union representative, Marlene Giga, and DPR Labor Analyst T. J. Harris, the same day. Petitioner claims that Harris informed her that she was being terminated for being absent without leave and for using a chemical to unclog a drain. According to the Union, Giga informed Petitioner that she would arrange for a review of her termination by DPR, as provided in the Agreement ("CSA review"). On August 31, 2017, Petitioner attended the CSA review, accompanied by Giga as her representative. Harris conducted the CSA review as the Parks' designee. After the review, Giga informed Petitioner that she would schedule another meeting with DPR management in an attempt to have Petitioner's termination rescinded.

The City contends that following the August 31, 2017 meeting, Harris contacted Giga and made an offer to allow Petitioner to resign in lieu of termination. According to the City, Giga spoke to Petitioner and informed Harris that Petitioner declined the offer of resignation. The Union contends that on September 6, 2017, Harris informed Giga via email that Petitioner had failed to

provide certain documents that were requested by DPR, and based on the information in those documents, which DPR eventually acquired through other means, Petitioner's termination would be upheld. (Union, Ex. I) DPR informed Petitioner that her termination was being upheld via a letter dated September 6, 2017. Petitioner contacted Giga upon receipt of the letter on September 10, 2017. Petitioner asserts that during that conversation, Giga informed Petitioner that she had been terminated for failing to provide documents requested by DPR. Petitioner further alleges that she was never notified that she had to provide the documents in question. [4]

The Union claims that in or around mid-September 2017, a labor-management meeting was held with Giga, Local 983 President Joseph Puleo, Local 983 Vice-President Thomas Testa, DPR Assistant Commissioner David Stark and DPR Deputy Director K.C. Reilly. The Union asserts that at this meeting, DPR representatives informed them that Petitioner would not be reinstated due to the injuries caused to other employees by her unauthorized use of chemical cleaners. (Union Ans. ¶ 14) The Union further asserts, and Petitioner denies, that in September 2017, Giga informed Petitioner that nothing further could be done to challenge her termination. Nevertheless, Petitioner continued to pursue reinstatement by reaching out to various representatives of Parks and the Union.

On December 1, 2017, Petitioner spoke to Puleo at a holiday party about her pursuit of reinstatement, and he suggested that submitting a letter from a former supervisor might help in her efforts. Puleo also indicated that obtaining a statement from former co-workers that would confirm her account of the incident could also be helpful. On March 12, 2018, Petitioner called Puleo

[4] The City maintains that the documents were irrelevant to Petitioner's termination and the sole reason she was terminated was for pouring chemicals into a drain after she had been previously warned against such actions.

again and faxed the letters to him. She alleges that during that conversation, she reiterated her interest in being reinstated and that Puleo told her there was "plenty of time before the season starts in June." (Pet. ¶ 3) After March 2018, she had no communication with Puleo but did have a brief conversation with another Union representative who informed her that the fax she sent was received and had been forwarded to Puleo.

On April 19, 2018, the Petitioner communicated with Giga again regarding her case. At that time, Giga informed Petitioner that she had exhausted all remedies to have Petitioner reinstated. Petitioner alleges that she continued to stay in contact with Giga regarding her termination up to the date of the filing of this improper practice petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union breached its duty of fair representation by failing to represent her "fairly and properly" concerning her termination. (Pet. p. 1) Petitioner asserts that she was terminated pursuant to false charges and that no one was injured by her actions. Petitioner further alleges that the day before she was terminated she was injured on the job and requested a transfer because she was being mistreated. Petitioner claims that she was told by her supervisor, William Battista, that if she complained to DPR's EEO Unit that he would fire her. Petitioner alleges she did not provide documents to DPR because no documents were requested and that her failure to receive a request for documents by DPR was a "set up." (Pet. ¶ 2) Petitioner seeks reinstatement to her position as CSA and that those involved in her termination be reprimanded.

Union's Position

The Union argues that Petitioner's claim is untimely and fails to demonstrate that the Union breached its duty of fair representation. Petitioner's termination was upheld by DPR on September 6, 2017. Petitioner did not file the improper practice petition until May 23, 2018, and did not properly serve it until July 10, 2018. Consequently, the Union claims the petition is time-barred.

The Union further contends that in order to reach a finding of a breach of the duty of fair representation, Petitioner must show that the Union engaged in arbitrary, discriminatory, or bad faith conduct. Under the Agreement, Petitioner was only entitled to a CSA review after her termination. CSAs have no other disciplinary due process rights. The Union maintains that it represented Petitioner on August 31, 2017, at her disciplinary review and advocated for her reinstatement and transfer to another borough. The Union further argues that although her termination was upheld on September 6, 2017, it continued to advocate for her reinstatement in mid-September 2017, in a meeting with DPR management. Moreover, based on the Petitioner's own admissions, she has had multiple communications with the Union from August 3, 2017 to the present, during which she was advised of other steps she could take that might help her be reinstated. As such, the Union asserts it did not breach the duty of fair representation and requests that the Board dismiss the petition.

City's Position

The City argues that Petitioner's claim concerning her termination is untimely and she fails to establish that the Union's actions breached its duty of fair representation. It asserts that Petitioner was terminated on August 3, 2017 and had a disciplinary review on August 31, 2017. The City alleges Petitioner did not serve the petition until June 28, 2018, outside the time limits

delineated under the NYCCBL. The City further argues that Petitioner failed to establish that the Union's actions were arbitrary, discriminatory, or in bad faith. It asserts that Petitioner fails to explain with any specificity how she believes the Union violated its duty of fair representation, and simply alleges that she was not represented fairly or properly. The City maintains that Petitioner's dissatisfaction with the Union's quality and extent of representation does not constitute a breach of the duty of fair representation.

The City further argues that Petitioner had limited disciplinary grievance rights and was only entitled to a review of her termination by the designated representative of the Parks Commissioner. The Union requested, and Petitioner received, this review. Furthermore, at the review, Petitioner was represented by her Union representative, who advocated on her behalf throughout the meeting. Accordingly, the claim against the Union, and the derivative claim against the City, should be dismissed.

DISCUSSION

Petitioner claims that the Union failed to represent her "properly and fairly" when she was terminated, in violation of NYCCBL § 12-306(b)(3), and that she was terminated by the City based on false charges. (Pet. ¶ 4) As Petitioner is *pro se*, "in reviewing the sufficiency of the petition, 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 OCB2d 19, at 12 (BCB 2010) (citation omitted).[5]

[5] 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

We first address the timeliness of the claims. NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4) provide that the statute of limitations for filings in these matters is four months.[6] Consequently, an improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd*., *Matter of Mahinda v. City of New York*, Index No. 117487/2009 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd*., 91 A.D.3d 564 (1st Dept. 2012). Claims preceding the four-month period prior to the filing of the petition will not be considered by the Board.

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).

[6] 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. . . .

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

> One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 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 . . . .

Petitioner filed her original petition on May 23, 2018.[7] The Respondents' argument that timeliness should be measured from the date of service is without merit, as our rules expressly provide that the limitations period runs from the date of filing. Therefore, any alleged claims or actions that occurred four months prior to May 23, 2018, are considered untimely and are only considered here as background.

The Petitioner's claim against the City was that she was falsely charged and wrongfully terminated. Petitioner was terminated on August 3, 2017 and had her termination upheld via a letter dated September 26, 2017. Therefore, we find her claims relating to her termination were filed more than four months after she knew about the disputed action and are untimely.[8]

The Petitioner's claims against the Union are, in part, timely. The Union alleges that the first time it informed Petitioner that all remedies to have Petitioner reinstated had been exhausted was in September 2017. However, the record indicates that the Union continued to make efforts to have Petitioner reinstated up until April 19, 2018. According to Petitioner, she spoke to Puleo for a second time in March 2018, when she reiterated her desire to be reinstated and he told her that she had "plenty of time" before the season started in June. (Pet. ¶ 3) She faxed reference letters to the Union office, which she was told by the Union were forwarded to Puleo. Even if the

[7] Petitioner was advised by the Executive Secretary on May 24, 2018 and June 15, 2018 that her petition was deficient because she had not provided proof of service on the Respondents. On June 27, 2018 the Executive Secretary advised Petitioner that her petition remained deficient because she had attempted to serve the designated agent for DPR at an incorrect address. Petitioner rectified this error and the Petition was deemed sufficient on July 20, 2018.

[8] Petitioner filed a reply on August 27, 2018. However, she failed to properly serve Respondents as mandated by OCB Rule § 1-07(4). In her reply, as in her petition, she claims that her termination was related to a prior on-the-job injury, discrimination on the part of her supervisor, and/or her leave request. These claims are untimely. Even if the claims against her employer were timely, they predate and are unrelated to any relevant union activity, and subject to dismissal on those grounds.

Union's assertion that it informed Petitioner in September 2017 that there were no more options available to her with regard to her reinstatement is true, in construing the pleadings in Petitioner's favor, it is not unreasonable for her to believe the Union was continuing to advocate on her behalf based on the Union's representations through March 2018. On April 19, 2018, Giga informed Petitioner that the Union had done all it could to have Petitioner reinstated. Petitioner then filed her improper practice petition a few weeks later. Consequently, the petition is timely as to those actions the Union took that fall within the four months preceding the May 23, 2018 filing of the petition.

Pursuant to NYCCBL § 12-306(b)(3), a union has a duty to fairly represent its members.[9] This duty requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement. *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" to meet his or her initial burden because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Evans,* 6 OCB2d 37, at 8 (BCB 2013); *see also Turner,* 3 OCB 2d 48 (BCB 2010); *Smith*, 3 OCB2d 17 (BCB 2010).

Where an employee claims that a union breached this duty by failing to take specific actions on his or her behalf, the employee must first demonstrate that he or she had the right to the requested procedure or relief. *See Rondinella*, 5 OCBd 13, at 17 (BCB 2012) (finding a union's determination that there was nothing under the contract it could do for petitioner because he was

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

a probationary employee and therefore not entitled to file a grievance was not arbitrary, discriminatory, or in bad faith) (*citing Siculari*, 79 OCB 33 (BCB 2007)*; Howe*, 79 OCB 23 (BCB 2007)). A union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Moreover, "[e]ven errors in judgment do not rise to the level of a breach of this duty, unless it can be shown that the union's actions were arbitrary, discriminatory, or in bad faith." *Morales*, 5 OCB2d 28, at 20 (BCB 2012) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)). A union member's mere dissatisfaction with the outcome of a case is insufficient to ground a claim that a union has breached its duty of fair representation. *Kapetanos*, 73 OCB 18 (2004) (*citing Minervini*, 71 OCB 29 at 15 (BCB 2003); and *McAllan*, 31 OCB 15 at 20 (BCB 1983)).

Here, Petitioner claims that the Union breached its duty of fair representation by failing to represent her "properly and fairly."[10] (Pet., ¶ 2) Based on Petitioner's own representations, she sought and obtained Union representation in August 2017. Giga spoke with her on August 3, 2018, the date she was terminated, and quickly scheduled her CSA review on August 31, 2017. Under Article XX § 2(b) of the Agreement, Petitioner was only entitled to a CSA review after her termination. Giga was then present at the CSA review with Petitioner and advocated on her behalf. Thereafter, the Union continued its efforts to have Petitioner reinstated even after her contractual due process rights were exhausted. Petitioner maintains that shortly after the CSA review, Giga

[10] To the extent Petitioner claims that the Union breached its duty of fair representation by failing to notify her that DPR had requested paperwork pertaining to its review of her termination, Petitioner admits she had knowledge of these facts on September 10, 2017. Therefore, this action on the part of the Union falls well outside the four-month statute of limitations, and any claims related to them are untimely.

told her she would try to set up a meeting with Parks management to have her reinstated. The Union followed through on this commitment. After receiving Parks' decision from the CSA review which upheld Petitioner's termination, Giga and Puleo met with Parks' management in or around mid-September 2017. At that meeting, the Union again requested that Petitioner be reinstated. Although that request was denied, Petitioner continued to seek and receive assistance from the Union. On December 1, 2017, she spoke directly to Puleo who advised her that obtaining letters from a former supervisor and co-workers might assist with her reinstatement. Moreover, it is clear from Petitioner's claims that the Union representative, Giga, regularly communicated with her about appealing her termination from the day she was terminated until April 19, 2018, when she advised Petitioner that the Union could do no more.

The only timely filed aspect of Petitioner's duty of fair representation claims concern the Union's conduct four months prior to the filing of the improper practice petition. Petitioner asserts that she spoke to Puleo in March 2018, when she sent him documents and was told that "there was still time before the start of the season." (Pet. ¶ 3) She also alleges she spoke to another Union representative thereafter who confirmed Puleo had received her documents. Finally, in April 2018, Giga informed Petitioner that the Union had no further means to assist her. We do not find that these allegations, if true, establish a breach of the Union's duty of fair representation. The Union's ultimate advice, that it had no further way to contest Petitioner's termination, was consistent with Petitioner's contractual rights, and was not arbitrary, discriminatory, or in bad faith.

While Petitioner clearly is dissatisfied with the outcome of the review of her termination, and her inability to obtain reinstatement, we do not find that the Union's conduct was arbitrary, discriminatory, or in bad faith. Consequently, we conclude that the Union did not violate the NYCCBL. *See Smith*, 3 OCB2d 17, at 7. The petition is dismissed in its entirety.

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 filed by Sharon Hinds, docketed as BCB-4273-18, be, and the same hereby is dismissed in its entirety.

Dated: October 16, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER