Barillaro, 12 OCB2d 4 (BCB 2019)

(IP) (Docket No. BCB-4262-18)

Summary of Decision: Petitioner filed an improper practice petition alleging that the Union breached its duty of fair representation by failing to properly assist him concerning a transfer request and refusing to provide him with the employer's written rule regarding transfers. Respondents argued that Petitioner failed to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board found that Petitioner did not establish that the Union violated the NYCCBL. 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-

JOSEPH BARILLARO,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its affiliated LOCAL 376,

-and-

THE NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On January 26, 2018, Joseph Barillaro ("Petitioner") filed a *pro se* improper practice petition against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 376 (collectively, "Union") and the New York City Department of Environmental Protection ("DEP")

and the City of New York (collectively, the "City"). Petitioner claims that the Union breached its duty of fair representation in violation of § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to properly assist him concerning a transfer request and not providing him with DEP's written rule regarding transfers. Respondents argue that Petitioner failed to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board finds that Petitioner did not establish that the Union violated the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner completed two years as an Apprentice Construction Laborer in DEP's Bureau of Water and Sewer Operations ("BWSO"). On November 17, 2016, he became a Construction Laborer and was assigned to the Manhattan Repair Yard.[1] On November 21, 2016, Petitioner submitted a request for transfer form, seeking a transfer from the Manhattan Repair Yard to the Queens Repair Yard ("First Transfer Request").[2] The First Transfer Request was approved, and Petitioner was placed on a transfer list awaiting an opening at the Queens Repair Yard.

Almost 11 months later, on or about October 16, 2017, the DEP Acting Director of Field Operations sent a memo to the DEP Director of Management Services stating that Construction Laborer Payano would be transferred to the Bronx Repair Yard effective October 26, 2017, and

[1] The Union represents all employees in the Construction Laborer title.

[2] A request for transfer form is submitted by an employee seeking a transfer and then it is circulated to the District Supervisor, the Borough Manager, and the Division Chief, who sign and date the form and either approve or disapprove the request. If the transfer request is approved, the applicant is placed on a transfer list to await transfer. Voluntary transfer requests are granted in the order in which they are received and approved, rather than in order of seniority.

that Petitioner would be transferred to the Queens Repair Yard effective November 23, 2017. Subsequently, Petitioner called the President of Local 376 ("Union President") to complain that Payano's transfer was effective before his, which he believed would negatively impact him if they both request a future transfer to the same yard. Petitioner also asked the Union President whether he could submit another transfer request when he is transferred to the new location, the Queens Repair Yard.

Thereafter, the Union President spoke with DEP's Chief of Repairs for Queens and the Bronx regarding Petitioner's concern about the transfer effective dates. In response, DEP amended its records to change the effective date of Petitioner's transfer to preserve his yard seniority. Petitioner did not actually transfer to the Queens Repair Yard until November 23, 2017. Additionally, the Union asserts that the Chief told the Union President that Petitioner could submit another transfer request. That same day, the Union President called Petitioner and relayed this information.

On November 15, 2017, after the First Transfer Request was granted, but before he reported to the Queens Repair Yard, Petitioner submitted a request for transfer form asking for a transfer from the Queens Repair Yard to Queens 4 ("Second Transfer Request"). Later that day, a DEP District Supervisor signed and dated the form but did not check the "approve" or "disapprove" box. The District Supervisor advised Petitioner that his Second Transfer Request could not be processed because he was just coming off the transfer list and would have to wait one year before requesting another transfer. The BWSO has a transfer policy for its Field Operations unit, dated July 1, 1991, that states that "[a]fter a voluntary transfer is made, a transfer request will be accepted one (1) year after the date of the transfer." (City Ex. 3; Union Ex. F) Petitioner asserts, and the

City denies, that he asked the District Supervisor for a copy of the rules regarding transfers and was told to call his Union.

On November 23, 2017, Petitioner began working at the Queens Repair Yard. Around that time, Petitioner called the Union President and told him that his Second Transfer Request had been denied. The Union asserts that the Union President again called the Chief, who told him that Petitioner cannot make a transfer request until one year after the first transfer. When the Union President relayed this information to Petitioner, Petitioner said that, rather than staying at the Queens Repair Yard, he would like to return to his prior work location, the Manhattan Repair Yard.[3] The Union President then called the BWSO's Acting Deputy Commissioner and asked if Petitioner could be transferred back to the Manhattan Repair Yard. DEP informed Petitioner he could return to the Manhattan Repair Yard if he would work nights. Petitioner opted to remain in at the Queens Repair Yard.

Shortly thereafter, Petitioner called the Union President again to inform him that two other Construction Laborers had their transfer requests approved without having to wait one year from the date their last transfer requests were effectuated. The Union President advised Petitioner that he would investigate and get back to him. Soon after, the Union President received the transfer lists confirming Petitioner's assertions. He relayed this information to Petitioner, who asked the Union President for a copy of DEP's rules regarding transfers. The Union President advised Petitioner that he did not have immediate access to DEP's rules regarding transfers, but Petitioner could get the rules from DEP. Petitioner asserts that the Union President said "he can't give [the rules regarding transfers] to me because he doesn't want to throw the other employees under the

[3] Petitioner asserts, and the Union denies, that the Union President apologized and told him that he made a mistake when he told him he could request another transfer.

bus." (Pet. page 1) The Union asserts that Petitioner demanded that the Union President seek to reverse the transfers of the two other Construction Laborers, and in response, the Union President told him that he could not act in a way that would adversely affect other bargaining unit members.

Subsequent to the filing of the improper practice petition on January 26, 2018, DEP learned that the two aforementioned Construction Laborers did not wait one year between transfer requests and were placed on a transfer list in error. Neither Construction Laborer was transferred to another yard despite the erroneously approved transfer requests.

On February 11, 2018, the Union filed a grievance on behalf of Petitioner at Step I of the contractual grievance procedure regarding DEP's failure to accept Petitioner's Second Transfer Request. There was no response at Step I, and on or about February 15, 2018, the grievance progressed to Step II. On March 9, 2018, a Step II grievance review was held at which a copy of the rules regarding transfers was provided to the Petitioner and to the Union. A Step III grievance conference was held in the summer of 2018. As of November 27, 2018, a Step III determination had not been issued.

Petitioner was transferred to the 4 p.m. to 12 a.m. shift at the Manhattan Repair Yard in late Spring or early Summer of 2018. Petitioner asserts that the transfer was involuntary, while the Union and the City assert that it was voluntary.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union violated its duty of fair representation by failing to properly assist him concerning a transfer request and not providing him with a written rule regarding transfers. Specifically, he alleges that the Union provided incorrect advice in connection with the

rules regarding transfers and refused to give him a copy of the rules. He asserts that, if he had known that he would have to wait one year between voluntary transfers, then he would have stayed in the Manhattan Repair Yard. Additionally, Petitioner asserts that the Union did not help him even though DEP approved two other Construction Laborers' transfer requests less than one year after their voluntary transfers.

Union's Position

The Union argues that Petitioner has failed to allege any facts to support his claim that the Union acted arbitrarily, discriminatorily, or in bad faith. To the contrary, it attempted to get Petitioner a transfer back to the Manhattan Repair Yard, as he requested. Additionally, when the Union was unsuccessful in obtaining another transfer for Petitioner, it filed a grievance on his behalf concerning the denial of the Second Transfer Request. The Union also communicated with him consistently regarding his complaints and its efforts on his behalf.

The Union argues its President's failure to produce DEP's rules regarding transfers, which were available to Petitioner and not in the Union President's possession, does not amount to a violation of the duty of fair representation. Further, after the Union President told Petitioner that he did not have the rules regarding transfers, Petitioner did not raise the issue again. It notes that during the grievance meeting, DEP provided Petitioner and the Union with a copy of its rules regarding transfers.

The Union asserts that Petitioner has failed to show that the Union has treated other bargaining unit members in similar circumstances differently than it treated him. Thus, it avers that its actions do not rise to the level of arbitrary, discriminatory, or bad faith. Accordingly, the Union asserts that it did not breach its duty of fair representation and that the petition should be dismissed in its entirety.

City's Position

The City argues that this matter must be deferred to arbitration since Petitioner's improper practice claim arises out of the same transaction as his pending grievance.

The City also argues that Petitioner has failed to establish that the Union breached its duty of fair representation. Indeed, the facts presented in the petition indicate that the Union filed a grievance with DEP on Petitioner's behalf and continues to challenge DEP's refusal to accept Petitioner's Second Transfer Request. Thus, the City argues that any potential derivative claims under NYCCBL § 12-306(d) against the City must also be dismissed.[4] Accordingly, the improper practice petition should be dismissed.

DISCUSSION

While a petitioner bears the burden of pleading facts sufficient to establish a violation of the NYCCBL, where a petitioner appears *pro se* this Board will "take a liberal view in construing [his or her] pleadings" as he or she "may not be familiar with legal procedure." *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd Matter of Rosioreanu v. NYC Office of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. New York County Mar. 30, 2009) (Sherwood, J.), *affd* 78 A.D.3d 401 (1st Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Here, although the petition does not cite specific provisions of the NYCCBL, we construe it to allege that the Union violated the

[4] 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.

duty of fair representation by failing to properly assist Petitioner concerning a transfer request, including not providing him with a written rule regarding transfers, in violation of NYCCBL § 12-306(b)(1) and (3).[5]

Pursuant to NYCCBL § 12-306(b)(3), a union has a duty to fairly represent its members. 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.[6] *See Walker*, 6 OCB2d 1, at 7 (BCB 2013). For the Board to find that a union breached this duty, a petitioner must allege more than mere negligence, mistake or incompetence to meet his or her initial burden. *See Evans*, 6 OCB2d 37, at 8 (BCB 2013); *But see Morales*, 5 OCB2d 28, at 22-23 (BCB 2012), *affd Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective*

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

> 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 their 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.

We note that, pursuant to NYCCBL § 12-305:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities

[6] Contrary to the City's assertion, deferral to arbitration is not appropriate since the question of whether the Union breached its duty of fair representation will not be resolved by arbitration of the transfer grievance. *See, e.g. Cunningham*, 51 OCB 15, at 28-29 (BCB 1993) (noting that the Board could find that a union's conduct breached the duty of fair representation regardless of whether the grievant prevails in arbitration).

Bargaining, 51 Misc.3d 817 (Sup. Ct. New York County 2016), *affd* 154 A.D.3d 548 (1st Dept 2017) (unexplained or egregious mistakes that rise to the level of arbitrary conduct may breach duty of fair representation). A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Id.* (quoting *Smith*, 3 OCB2d 17 (BCB 2010), *affd Matter of Smith v. NYC Bd. of Collective Bargaining*, Index No. 40216/2010 (Sup. Ct. New York County Nov. 30, 2010) (Solomon, J.)). Further, the burden of establishing a breach of the duty of fair representation cannot be met "simply by expressing dissatisfaction with the outcome" of a union's decision. *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007).

Here, the record does not establish that the Union's actions were arbitrary, discriminatory, or made in bad faith. On multiple occasions, the Union President listened to Petitioner's complaints, investigated and discussed them with management, and regularly communicated with him. For instance, the Union President discussed Petitioner's date of transfer to the Queens Repair Yard with a DEP supervisor, after which the effective date of Petitioner's transfer was changed. Additionally, the Union President spoke with Petitioner's supervisors about his transfer requests and attempted to assist him. Ultimately, the Union filed a grievance regarding the Second Transfer Request.

With respect to Petitioner's claim that the Union did not properly advise him of the rules regarding transfers, Petitioner has not alleged that this error was anything more than a mistake. *See Evans*, 6 OCB2d 37, at 8. Even if the Union President made an error and told Petitioner that he could request another transfer when he got to the new yard, this would not rise to the level of a breach of the duty of fair representation. *See D'Onofrio*, 79 OCB 26, at 12 (BCB 2007) (finding that a union's failure to advise a grievant of their rights under § 75 of the Civil Service Law does not violate a union's duty of fair representation where petitioner did not assert any "facts to support

an inference that the failure to apprize him of his § 75 rights was malicious, discriminatory, or anything other than an error"); *see also Schweit*, 61 OCB 36, at 14-15 (BCB 1998) ("[u]nless the petitioner shows that the [u]nion did more for others in the same circumstances than they did for him, or that its actions were discriminatory, arbitrary or taken in bad faith, even errors in judgment such as faulty advice do not breach the duty.").

With respect to Petitioner's claim that the Union did not provide him with DEP's rules regarding transfers, Petitioner did not establish that the Union had a duty under the NYCCBL to do so. In *Jiminez*, the Board found that a union's failure to provide petitioner with a job description does not violate the duty of fair representation where the document providing the description was not within its custody or control. *See Jiminez*, 61 OCB 25, at 9-10 (BCB 1998) (noting that the union's duty extends only so far as to administer and enforce the parties' agreement). Similarly, here, the Union did not have DEP's transfer rules at the time that Petitioner requested them.[7]

Petitioner has not alleged facts showing that the Union discriminated against him by treating him differently than other bargaining unit members who sought transfers. *See Gertskis*, 77 OCB 11, at 11 (BCB 2006). Although Petitioner complains that the Union did not seek to reverse the transfers of two other Construction Laborers as he requested, there is no evidence that the Union played any role in the two other Construction Laborers' transfers. Additionally, the Union's refusal to jeopardize the other bargaining unit members' transfers by notifying DEP of its error does not rise to a violation of its duty of fair representation.[8] *See Finer*, 1 OCB2d 13, at 12

[7] Subsequently, the employer provided Petitioner and the Union with a copy of the requested rules.

[8] Where "the union undertakes a good-faith balancing of the divergent interests of its membership, and chooses to forgo benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation." *Matter of Civil Serv. Bar Assn. v. City of New York*, 64 N.Y.2d 188, 197 (1984) (no breach of the duty of fair representation when a union waived an arbitration award in

(BCB 2008) (finding that the union did not breach its duty of fair representation when it negotiated a pay differential that did not apply to all bargaining unit members); *see also Rooney v. CSEA*, 20 PERB ¶ 3062, at 3-5 (1987) (finding that a union's exclusion of seasonal employees from grievance-arbitration procedures did not breach its duty of fair representation because unions are allowed to reach "agreements in negotiations that are more favorable to some unit employees than to others" and because "[t]he bargaining agent must be given broad discretion in balancing the interests of the unit"). Thus, we find no grounds upon which to conclude that the Union's decisions were arbitrary, discriminatory, or in bad faith.

Since we find that Petitioner did not establish that the Union breached its duty of fair representation, any potential derivative claim against the City pursuant to NYCCBL § 12-306(d) also fails. *See Nardiello*, 2 OCB2d 5, at 42 (BCB 2009).

Accordingly, this petition is dismissed in its entirety.

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return for concessions in collective bargaining agreement to benefit of other classes of employees); *see also Hoerger v. Bd. of Educ. Great Neck Union Free Sch. Dist*., 215 A.D.2d 728, 729 (2d Dept. 1995).

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 docketed as BCB-4262-18, filed by Joseph Barillaro, against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 376, the City of New York, and the New York City Department of Environmental Protection, hereby is dismissed in its entirety.

Dated: February 11, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER