Molina, 12 OCB2d 5 (BCB 2019)

(IP) (Docket No. BCB-4292-18)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to file a grievance on her behalf following her termination. The Union and NYCHA argued that the Union did not breach its duty of fair representation as Petitioner was a probationary employee with limited disciplinary rights under the collective bargaining agreement. The Board found that Petitioner failed to 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 Proceeding

-between-

ANA MOLINA,

Petitioner,

-and-

CITY EMPLOYEES UNION, LOCAL 237, IBT, and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

DECISION AND ORDER

On October 25, 2018, Ana Molina, *pro se*, filed a verified improper practice petition against City Employees Union, Local 237, International Brotherhood of Teamsters ("Union"), and the New York City Housing Authority ("NYCHA"). Petitioner alleges that the Union breached its duty of fair representation pursuant to § 12-306(b)(3) of the New York City Collective Bargaining

Law ("NYCCBL") by failing to file a grievance on her behalf after NYCHA terminated her.[1] The Union and NYCHA argue that the Union did not breach its duty of fair representation as Petitioner was a probationary employee with limited disciplinary rights. The Board finds that Petitioner's claim fails to establish that the Union breached the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner was employed by NYCHA as a Caretaker (Housing Assistant) at Wise Towers from August 14, 2017 until August 5, 2018. The Union is the certified bargaining representative for Petitioner's title. The Union and NYCHA are parties to a collective bargaining agreement ("Agreement"), which covered the terms and conditions of Caretakers at all times relevant to this matter. Section 40 of the Agreement governs the disciplinary rights of employees.[2]

[1] On November 13, 2018, OCB's Executive Secretary issued a sufficiency letter in which she dismissed Petitioner's improper termination claim against NYCHA because the petition lacked facts to support an assertion that the termination resulted from or was related to union activity pursuant to NYCCBL § 12-306(a)(3). We also note that Petitioner's claim that NYCHA terminated her due to race and/or age discrimination, which she raised for the first time in her reply, falls outside of the Board's jurisdiction. *See Holmes*, 4 OCB2d 14, at 14 (BCB 2011) (stating that "discrimination based on race or gender may be actionable under other statutes, but do not constitute improper practices under the NYCCBL"); *see also Smith*, 3 OCB2d 17, at 10 (BCB 2010). Therefore, the Board does not address these claims.

[2] Section 40(a)(i) of the Agreement provides that: "Employees in the labor class title of Caretaker (HA) who successfully complete their probationary period shall be accorded the same disciplinary rights as permanent competitive class employees." (Union Ans., Ex. B)

During her employment at NYCHA, Petitioner received three Probationary Employee Reports and nine counseling memoranda.[3] Petitioner's work was primarily evaluated by her supervisor, Laura Thomas. Petitioner received her first Probationary Employee Report on November 6, 2017, with an overall rating of Unsatisfactory. She then received three counseling memoranda addressing insubordination and failure to perform her duties. In February 2018, while Thomas was on leave, another supervisor, Terri Dawson, completed Petitioner's second quarter Probationary Employee Report with an overall rating of Satisfactory. When Thomas returned, Petitioner received an additional four counseling memoranda regarding insubordination and failure to perform her duties. Thomas issued Petitioner's third quarter Probationary Employee Report on May 7, 2018, with an overall rating of Unsatisfactory. Petitioner then received an additional two counseling memoranda alleging that she was insubordinate and that she failed to perform her duties.

On July 24, 2018, Thomas sent a letter to NYCHA's Regional Asset Manager requesting that Petitioner be terminated due to "unsatisfactory service" and the two unsatisfactory performance ratings during her twelve-month probationary period. (NYCHA Ans., Ex. C.) According to Petitioner, on approximately three occasions prior to her termination, Petitioner spoke with a Union business agent, requesting assistance due to the poor ratings on her Probationary Employee Reports and the statements made in the counseling memoranda.[4]

[3] NYCHA issues Probationary Employee Reports on a quarterly basis for probationary employees. The Probationary Employee Reports have three categories for an employee's overall performance: Outstanding, Satisfactory, or Unsatisfactory.

[4] Petitioner first raised the fact that she spoke with the Union prior to her termination at the conference before the Trial Examiner. It was neither confirmed nor denied by the Union.

Petitioner subsequently received a termination letter from NYCHA on August 3, 2018. (Union Ans., Ex. C)

On August 7, 2018, Petitioner met with Ken Roper, another Union business agent, and requested that the Union appeal her termination because it was unfair and improper and her supervisor unfairly evaluated her work performance. Petitioner claimed that she did not receive the proper training and that she performed to the best of her abilities in what she thought was a "hectic and chaotic" environment. (Pet. ¶ 11) Roper determined that Petitioner's termination did not violate the Agreement because she was a probationary employee at the time of her dismissal and notified Petitioner of the Union's position. Nonetheless, later that day, Roper sent a letter to NYCHA's Human Resources Department stating that Petitioner's termination was unfair and requesting a review. NYCHA subsequently issued a letter to the Union on August 27, 2018, stating that the case had been reviewed and that Petitioner would not be reinstated. The Union did not file a grievance on Petitioner's behalf.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation when it failed to assist her in appealing her termination. Petitioner concedes that she is a probationary employee and acknowledges that the Union informed her that it would not grieve her termination because it determined that there was no violation of the Agreement. However, she alleges that because her termination was due to Thomas "unfairly evaluating her work performance," the termination was unfair and improper. (Rep. ¶ 9) Petitioner states that there was a clear disparity between her evaluations issued by Thomas and the one issued by Dawson. She was given two Probationary

Employee Report evaluations ratings of unsatisfactory by Thomas. Yet, she received an overall performance rating of satisfactory on the Probationary Employee Report completed by Dawson, which stated that "she shows potential of being an asset to the agency." (Rep. ¶ 6) Petitioner argues that the Union was unwilling to advocate on her behalf and that she had expressed concerns about her work environment to the Union prior to her termination. As such, Petitioner contends that the Union should have filed a grievance on her behalf because it was unlawful for NYCHA to terminate her for "discriminatory reasons," even as a probationary employee. (Rep. ¶ 9)

Union's Position

The Union argues that Petitioner has failed to allege that it acted arbitrarily, discriminatorily, or in bad faith. The Union asserts that its decision not to file a grievance appealing Petitioner's termination was based on Petitioner's status as a probationary employee and is insufficient to establish a breach of the duty of fair representation. The Union further contends that Petitioner has not alleged any facts to show that her termination was not "constitutionally permissible" or in violation of the Agreement. (Union Ans. ¶ 34) The Union points to § 40(a) of the Agreement, which provides that "employees who successfully complete their probationary period shall be accorded the same disciplinary rights as permanent competitive class employees." (Union Ans., Ex. B) Petitioner did not successfully complete her probationary period. Accordingly, it argues that there was no obligation to file a grievance on Petitioner's behalf. The Union further argues that even though Petitioner had no grievance rights as a probationary employee, it sent a letter on her behalf requesting review of her termination. Therefore, the Union asserts that Petitioner has failed to demonstrate that its actions establish a breach of the duty of fair representation.

NYCHA's Position

NYCHA argues that the Union did not breach its duty of fair representation to Petitioner because any grievance filed would have been meritless. Specifically, it points to the fact that the Petitioner was a probationary employee when she was terminated and, as such, could be terminated in good faith for any reason. It concedes that a probationary employee may have grievance rights if he or she is terminated for a "constitutionally impermissible" reason. (NYCHA Ans. ¶ 29) However, NYCHA asserts that the Petitioner was terminated for unsatisfactory performance, which is "constitutionally permissible." *Id*. Thus, NYCHA argues that Petitioner has failed to state a claim for a breach of the duty of fair representation.

DISCUSSION

NYCCBL § 12-306(b)(3) makes it "an improper practice for a public employee organization or its agents … to breach its duty of fair representation to public employees under this chapter." This Board has long held that in order to establish a breach of the duty of fair representation, the petitioner must demonstrate that the union has engaged in "arbitrary, discriminatory, or bad faith conduct in negotiating, administering and enforcing collective bargaining agreements." *See Walker*, 6 OCB2d 1, at 7 (BCB 2013) (citing *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007)); *Edwards*, 1 OCB2d 22, at 20 (BCB 2008); *Carmichael*, 49 OCB 21, at 18 (BCB 1992); *Whaley*, 59 OCB 41, at 13 (BCB 1997).

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 Proctor*, 3 OCB2d 30, at 12 (BCB 2010). Thus, a petitioner must do more than allege that the union refused to advance a grievance. *See Nardiello*, 2 OCB2d 5, at 40 (BCB 2009) (stating that a union is not

obligated to advance every grievance). Moreover, "questioning the strategic or tactical decisions of the Union" is also insufficient to establish a breach. *Okorie-Ama*, 79 OCB 5, at 14; *see Gertskis*, 77 OCB 11, at 11 (BCB 2005). Even if the Union makes a mistake in its exercise of discretion, a petitioner will not have met his or her burden. *See Evans*, 6 OCB2d 37, at 8 (stating that a petitioner must allege more than negligence, mistake, or incompetence to assert a claim for violation of the duty of fair representation).

It is undisputed that the Union considered Petitioner's request to appeal her termination and concluded that filing a claim challenging Petitioner's termination would be meritless. *See Evans*, 6 OCB2d 37, at 8 (finding that making a reasonable inquiry and interpretation of the facts of a petitioner's claim is not arbitrary). Specifically, the Union points to § 40(a) of the Agreement, which provides that "employees who successfully complete their probationary period shall be accorded the same disciplinary rights as permanent competitive class employees." (Union Ans., Ex. B) As Petitioner had not successfully completed her probationary period, the Union reasonably concluded that Petitioner was not entitled to disciplinary due process rights under the Agreement. *See DC 37*, 79 OCB 29, at 10 (BCB 2007) (noting that a probationary employee is generally unable to grieve disciplinary matters); *see Rolle*, 47 OCB 31, at 7 (BCB 1991); *see also Gibson*, 29 OCB 13, at 4-5 (BCB 1982) (holding that a union's decision that proceeding with a grievance would be fruitless was not a breach of the duty of fair representation); *Bonnen*, 9 OCB2d 7, at 17 (BCB 2016) (finding no breach of the duty of fair representation where the Union set forth a thoughtful and reasonable explanation for not processing a disciplinary grievance). Nevertheless, despite its decision not to pursue a grievance, the Union sent a letter on Petitioner's behalf requesting a review of her termination. Although the requested review did not result in

NYCHA changing its decision to terminate Petitioner, the Union took action to the extent it believed was appropriate.

Further, we note that Petitioner's dissatisfaction with the Union's actions because she believed that her termination was improper does not constitute a breach of the Union's duty, since dissatisfaction with the Union's "conclusions, tactics, or outcomes [is] insufficient to demonstrate a violation of the Union's duty of fair representation." *Bonnen*, 9 OCB2d 7, at 19; *see Walker*, 79 OCB 2, at 15 (BCB 2007); *Rivera-Bey*, 73 OCB 20, at 11 (BCB 2004).

In light of the above, we find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and therefore, did not breach its duty of fair representation. Accordingly, we dismiss the petition.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining in New York City Collective Bargaining Law, it is hereby

ORDERED, that the verified improper practice petition filed by Ana Molina, docketed as BCB-4292-18, against City Employees Union, Local 237, IBT and the New York City Housing Authority, 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