Colon, 12 OCB2d 24 (BCB 2019)

(IP) (Docket No. BCB 4316-19)

Summary of Decision*:** Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to properly represent him after DSNY involuntarily reassigned him to a different shift. The Union and the City separately argued that some of the claims are untimely and that the Union did not breach its duty of fair representation. The Board found that Petitioner's timely allegations did not establish that the Union breached its duty of fair representation. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

GABRIEL COLON,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF SANITATION,

Respondents.

DECISION AND ORDER

On February 21, 2019, Gabriel Colon ("Petitioner") filed a *pro se* verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union"), the City of New

York ("City"), and the New York City Department of Sanitation ("DSNY").[1] Petitioner asserts 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"), by failing to properly represent him after DSNY reassigned him to work at different locations and shifts.[2] The Union and the City separately argue that some of the claims are untimely and that the Union did not breach its duty of fair representation. The Board finds that the timely allegations did not establish that the Union breached its duty of fair representation. Accordingly, the petition is denied.

BACKGROUND

Many of the alleged violations that Petitioner details in his pleadings took place prior to October 21, 2018, four months before the petition was filed, and are therefore time-barred pursuant to NYCCBL § 12-306(e).[3] To the extent the facts surrounding these untimely allegations

[1] Petitioner named Robin Roach and Kenneth Mulligan, the Union's General Counsel and Assistant Director, respectively, and Steven Banks, General Counsel to the City's Office of Labor Relations, as respondents in their individual capacities. As these individuals are not proper respondents under the NYCCBL, we amend the caption *nunc pro tunc* to substitute the Union, the City, and DSNY, for the individuals. *See DC 37,* 6 OCB2d 14 at 2, fn 1 (BCB 2013).

[2] Petitioner also alleged that DSNY harassed him, and retaliated and discriminated against him by, among other things, involuntarily transferring him and refusing to grant his hardship request. In a February 25, 2019 letter, the Executive Secretary of the Office of Collective Bargaining ("OCB") dismissed his claims against the City and/or DSNY ("ES letter") because the petition does not set forth facts that any alleged action taken against Petitioner by DSNY resulted from or was related to his union activity, pursuant to NYCCBL § 12-306(a)(3). Accordingly, the City and DSNY remain respondents in this matter only to the extent required by NYCCBL § 12-306(d). The ES Letter also informed Petitioner that any violations alleged to have taken place prior to October 21, 2018, four months before the petition was filed, are time-barred pursuant to NYCCBL § 12-306(e). Petitioner did not appeal the dismissal of those claims.

[3] NYCCBL § 12-306(e) states:

constitute information relevant to the timely claims, they are described here. Unless otherwise indicated, the facts in this section are those alleged by Petitioner.

The City and the Union are parties to a collective bargaining agreement covering the title Clerical Associate. The Union represents DSNY employees in the Clerical Associate title and Petitioner has held the title Clerical Associate, Level III, at DSNY since May 2006.

Prior to November 2017, Petitioner was regularly assigned to the Manhattan 8 garage. On or about November 4, 2017, Petitioner received a call from his shop steward notifying him that "changes were going to be made" at DSNY. (Pet., p. 1) On November 27, 2017, Petitioner was told to report on the following day to the Manhattan 5 garage. Petitioner subsequently contacted the Union and alleges that Union Representative Ernst Letemps told him that DSNY was supposed to give him written notice of the reassignment and that his seniority played or should have played a factor. On or about November 30, 2017, Petitioner submitted a hardship waiver request to DSNY seeking to remain at his assigned garage, Manhattan 8, to be in closer proximity to his son, who had health issues.[4] According to Petitioner, DSNY denied the request on December 6, 2017.[5] In

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> 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.

[4] Petitioner states that he has a seven-year old child with special needs and medical issues and his child's mother works nights making him the sole caregiver for his son in the evenings.

[5] Petitioner alleges that DSNY granted his colleague, another Clerical Associate at Manhattan 8, a "permanent" hardship waiver despite the fact that Petitioner has more seniority than her. (Pet., p. 4) He further alleges that, in the denial of his own hardship request, DSNY stated that the referenced Clerical Associate had already petitioned for a similar hardship exception. According

early December 2017, Petitioner also complained to the Union about being assigned to a different garage and shift.

The Union contends that its Assistant Director made several inquiries to DSNY regarding Petitioner's change in schedule and work assignment. The Union alleges that in response to its inquiries, DSNY informed the Assistant Director that it had the right to reassign employees in the clerical position within their respective borough as needed. DSNY also informed the Assistant Director that, upon hire, all clerical employees signed a document acknowledging that they may be transferred, reassigned, and/or required to work nights, weekends, holidays, and overtime. The referenced document provides, in pertinent part:

> I . . . understand that, in addition to any other requirements relating to my assignment and duties, I may be required to work nights, weekends, holidays, and overtime. I also understand that I may be assigned anywhere in the [City]; and that I may be transferred; and that I may be reassigned at any time during my employment with [DSNY]. The foregoing requirements and assignments are subject to such laws, rules, regulations and contractual provisions as may be applicable.

(City Ans., Ex. E) Petitioner signed this document on May 16, 2006.

Notwithstanding, the Union was able to assist Petitioner in obtaining a temporary, three-month extension to remain at Manhattan 8, from December 15, 2017 through March 18, 2018. Petitioner alleges that he spoke to his Union Representative about the temporary nature of the hardship waiver that and was told "that was all the union could do" and that Petitioner now had three months to situate himself. (Pet., p. 3)

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to Petitioner, senior Clerical Associates at other Manhattan garages were able to stay at their assigned garages.

Petitioner alleges that despite his 2017 hardship waiver request, he was still "removed, and kept as a floater, and demoted as an RO (roll-over)," even though he was the senior clerk at Manhattan 8.[6] (Pet., p. 4) He subsequently contacted the Deputy Director of DSNY's Personnel Management Division ("PMD") and asked her why he remained a floater, given his seniority and hardship concerns. Petitioner claims that she responded, among other things, that the three-month temporary extension was a "courtesy." (Pet., p. 3) She further explained that Petitioner had signed a document when he was hired indicating that he understood that he could be moved anywhere within his assigned borough.[7]

The Union asserts, and Petitioner denies, that the Assistant Director met with Petitioner in or around December 2017 or January 2018. According to the Union, during this meeting, the Assistant Director advised Petitioner that while the Union had assisted him in gaining the three-month hardship waiver to avoid being assigned to an overnight shift, the waiver was limited and was likely to be granted only once. The Union alleges that the Assistant Director further advised Petitioner that he should use the time to find adequate childcare arrangements because DSNY had the right to reassign him if needed.

Around the time the three-month period ended, Petitioner submitted another hardship waiver request seeking to re-extend his assignment at the Manhattan 8 garage. The request was

[6] Petitioner does not specify when such actions occurred or whether they took place during or after his three-month hardship waiver.

[7] The City contends that DSNY advised Petitioner upon hire that seniority does not play a role in shift assignments or locations, and that childcare issues do not constitute acceptable grounds for the granting of a hardship waiver.

denied. By email dated April 30, 2018, PMD's Deputy Director informed Petitioner, in pertinent part:

> When interviewed in 2006, you were asked to sign a document (copy to HR, you and filed with PMD). Among the many stipulations on said document, it stated you could be moved anywhere within the Department but, as I stated at interview, PMD would limit that to the Borough you are assigned to. The candidates for all field clerical titles are always informed that there were no child care or education hardships.
>
> When PMD approved your DS 380 Hardship Request from December 2017 to March 2018, it was purely a courtesy in order to give you ample time to make other arrangements for child care. It was a privilege, not a right. Moving forward, you applied for Intermittent FMLA which was approved for your son's appointments.
>
> It should be noted that seniority only applies for vacation and layoff purposes. Additionally, all clericals are assigned to the Borough Office within the Borough they are assigned. We do not accept transfer requests indicating a specific district as a choice. They may only request a transfer from Borough to Borough.

(Union Ans., Ex. H)

On or about April 24, 2018, Petitioner completed a Step I grievance form and gave it to the Union's Assistant Director. A Step II meeting was held on April 30, 2018, at which time Petitioner claims that he asked the Assistant Director to take the grievance to Step III. Petitioner alleges, and the Union denies, that the Assistant Director told Petitioner he would take the matter to Step III and arbitration. Petitioner claims that in the subsequent months, despite "countless efforts inquiring that includes calls, and emails" to the Union, the grievance was never progressed to Step III or to arbitration and that he did not hear from the Union. (Pet., p. 4)

The Union contends that Petitioner emailed its Assistant Director on January 16, 2019 after not having heard from Petitioner for many months. The email stated, "I am sending you this email

to inform you that I will be submitting a DS380 form for a new hardship [waiver] to [the DSNY Manhattan Borough Office]. I was not given any notice of shift change from 7 pm to 7 am which is unfeasible in my case due to childcare for my son . . . ."[8] (Union Ans., Ex. G) The following day, the Assistant Director emailed Petitioner that he had received his message and that he would have his Union representative contact him and follow up. According to the Union, Petitioner's Union Representative subsequently called him and left a voicemail message. However, Petitioner contends that he never heard from the Union Representative.

On January 18, 2019, Petitioner filed a new hardship form with DSNY.[9] Petitioner sent the Assistant Director another email on January 21, 2019, informing him that he had submitted a new hardship waiver request, that he had not heard from the Union Representative, and that he was being forced to work an overnight shift, which he was unable to do. DSNY denied Petitioner's hardship waiver request on February 27, 2019 and instructed Petitioner to use his Family and Medical Leave Act ("FMLA") leave for his son's medical appointments and/or therapies. Petitioner alleges that since January 2019, he has made multiple attempts, through emails and phone calls, to obtain the Union's assistance, but that the Assistant Director only responded twice.

[8] On January 17, 2019, a Snow Alert was issued, placing DSNY in "snow mode." (City Ans. ¶ 19) On that date, Petitioner was assigned to work the 7 pm shift at the Manhattan 7 garage. The City asserts that on snow emergency days, DSNY protocol dictates that regular schedules do not apply and instead employees work 12-hour shifts, beginning at either 7 pm or 7 am. The City notes that Petitioner called out sick that day, and for each day for the duration of the storm, and only returned to work on January 20, 2019, when he was scheduled to work the day shift.

[9] Petitioner alleges that weeks later, the hardship waiver request still had not been approved because DSNY needed more information, which he sent on February 6, 2019.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that he was not treated fairly because he was only granted a three-month hardship in 2017 while his fellow Clerical Associate at Manhattan 8, who has less seniority, was granted a permanent hardship waiver.[10] Petitioner questions why he was given only three months to "situate" his life because of a document he signed nearly 13 years ago when every other clerk signed the same document. (Pet., p. 2) He believes that the Union and DSNY have colluded to "keep me demoted belittling my standing and integrity." (Pet., p. 3)

Regarding his January 2019 hardship waiver request, Petitioner contends that he has made multiple attempts to get his Union involved but that the Assistant Director only responded twice and his Union Representative did not respond at all.

Union's Position

The Union argues that any allegations that predate October 21, 2018, are time-barred. It asserts that Petitioner has failed to demonstrate that it has breached its duty of fair representation to him. The Union contends that Petitioner's only timely allegation in this matter is that the Union failed to assist him in the filing of another hardship waiver in January 2019. It also contends that, given the fact that Petitioner was advised over a year prior, in January 2018, that the December 2017 to March 2018 hardship waiver was a limited solution and that he should use the time to make alternate child care arrangements, the Union reasonably believed that Petitioner's January 2019 communication was merely to place the Union on notice of his intention to file another hardship waiver.

[10] Arguments pertaining to the claims dismissed in the ES Letter are not addressed in this Decision.

The Union further argues that the parties' collective bargaining agreement does not provide for a hardship waiver for clerical employees assigned to DSNY. Therefore, Petitioner cannot claim that the Union failed to enforce the contract because what he seeks is not a contractual right to which he is entitled. The Union asserts that Petitioner fails to allege facts demonstrating that the Union discriminatorily or in bad faith interfered with his hardship application. Similarly, it argues, Petitioner does not allege that the Union discriminatorily or in bad faith assisted other members in gaining hardship waivers and not him. It asserts that the opposite is true in that the Union acted diligently to assist him in obtaining a one-time hardship waiver.

City's Position

The City argues that all of Petitioner's claims are time-barred with the exception of the allegations relating to his January 17, 2019 assignment to an overnight shift. On the merits, the City contends that the petition is devoid of any facts that demonstrate that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. It claims that Petitioner fails to explain with any specificity how he believes the Union violated its duty of fair representation and fails to present evidence that the Union's representation of him violated that duty. The City contends that Petitioner signed a document upon hire acknowledging that he may be required to work different shifts and that he may be transferred or reassigned at any time. It maintains that he was reminded on multiple occasions since his hiring that childcare obligations are not a reason for a hardship waiver request to be granted. The City argues that Petitioner's move to the evening shift on January 17, 2019, was due to a snow emergency and therefore was an appropriate action for DSNY to take.

Citing Board precedent, the City asserts that the Board has consistently held that a petitioner's dissatisfaction with the extent and quality of a union's representation does not

constitute a breach of the duty of fair representation. In this instance, it argues, the Union at all times exercised sound discretion and acted in good faith when interacting with Petitioner.

DISCUSSION

"Recognizing that a *pro se* Petitioner may not be familiar with legal procedure, the Board take[s] a liberal view in construing a *pro se* Petitioner's pleadings." *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (quoting *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd*., *Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, 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)) (internal quotation and editing marks omitted). Thus, "as long as the gravamen of the petitioner's complaint may be ascertained by the respondent, the pleading will be deemed acceptable." *Sciarillo*, 53 OCB 15, at 7 (BCB 1994). Here, Petitioner has pled facts asserting that the Union violated its duty of fair representation. We therefore construe the petition as alleging violations of NYCCBL § 12-306(b) and (d).[11] *See Shymanski*, 5 OCB2d 20, at 8 (BCB 2012).

Prior to reaching the merits, we note that the Executive Secretary correctly found that certain allegations were untimely under NYCCBL § 12-306(e). *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) ("timeliness is a threshold question"). Such allegations encompass any claims that the Union failed to assist Petitioner prior to October 21, 2018, including its alleged failure to progress his grievance or obtain a permanent hardship waiver and his claim that the Union colluded

[11] NYCCBL § 12-306(b)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

against him with DSNY. *See* ES Letter; *see also Nardiello*, 2 OCB2d 5, at 28 ("claims antedating the four[-]month period preceding the filing of the Petition are not properly before the Board and will not be considered") (citations omitted). Consequently, the only timely allegation is Petitioner's claim that the Union failed to assist him in obtaining a hardship waiver in January 2019.

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 duty requires that "a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citing *Walker*, 6 OCB2d 1, at 8 (BCB 2013); *Okorie-Ama*, 79 OCB 5 at 14 (BCB 2007)). However, "a union is entitled to broad discretion . . . the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Sicular*, 79 OCB 33, at 13 (BCB 2007). The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be carried simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (quoting *Okorie-Ama*, 79 OCB 5, at 14) (quotation marks omitted); *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005). Further, "to meet this burden, a petitioner must allege more than negligence, mistake or incompetence." *Bonnen*, 9 OCB2d 7, at 17 (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)) (internal quotation marks omitted). "Even 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." *Feder*, 9 OCB2d 33, at 34 (BCB 2016) (citations omitted).

Petitioner alleges that he repeatedly attempted to gain the Union's assistance in obtaining another hardship waiver in January and February 2019, to no avail. We have long held that "where

a petitioner complains that a union failed to take a specific action and in doing so allegedly breaches the duty of fair representation, the petitioner must first demonstrate a source of right to the action sought." *Rondinella*, 5 OCB2d 13, at 17 (BCB 2012) (quoting *Howe*, 79 OCB 23, at 10 (BCB 2007); *see Hinds*, 11 OCB2d 36, at 10 (2018); *Whaley*, 59 OCB 41, at 14 (BCB 1997) (in alleging breach of duty of fair representation, employee failed to articulate a "contractually recognized source of a right to grieve her employment termination").

Petitioner has pointed to no right in the collective bargaining agreement or elsewhere that entitles him to a hardship waiver. To the contrary, the facts as plead by Petitioner suggest no basis upon which the Union could assert a claim. He was on notice from the day he commenced his employment at DSNY that he could be required to work at times other than his regular schedule, including nights, weekends, holidays, and overtime, and that DSNY had the discretion to transfer, assign, or reassign him anywhere in Manhattan. Further, DSNY informed him that it does not have to consider seniority when making assignments. Thus, based on these facts, the Union's conclusion that his temporary hardship waiver "was all [it] could do" and that it could not or would not assist Petitioner in securing another hardship waiver cannot be considered arbitrary, discriminatory, or in bad faith. (Pet., p. 3) *See Rondinella*, 5 OCB2d 13, at 17; *Nealy*, 8 OCB2d 2, at 16. *See also Feder*, 9 OCB2d 33, at 35-36 ("it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance or claim") (citations and internal quotation marks omitted).

We have held that to the extent that the Union's alleged obligations are not contractual or statutory, "the bargaining representative's duty is limited to evenhanded treatment of the members of the unit." *Morris*, 3 OCB2d 19, at 11 (BCB 2010). The Board finds nothing in the record to indicate that the Union has done more for similarly situated members than it did for Petitioner.

Thus, we find that the Union did not violate its duty of fair representation by discriminating against Petitioner.

Even assuming, as Petitioner alleges, that Union Representative failed to respond to him in January and February 2019, under the circumstances we do not find that such a failure amounts to a breach of the duty of fair representation. We have stated that the Board will not find a breach of the duty of fair representation based on a union's alleged failure to communicate where that alleged failure did not prejudice or injure the petitioner. *See Walker*, 6 OCB2d 1 (2013) (finding no violation for alleged failure to sufficiently respond to the petitioner's repeated communications where the petitioner did not demonstrate any basis on which the union could further pursue his grievance); *Lein*, 63 OCB 27 (BCB 1999) (finding no violation where the union failed to notify the petitioner that it canceled the arbitration related to his grievance after a good faith assessment that the grievance likely lacked merit). In this case, given DSNY policy on transfers and hardship requests, there was no basis upon which the Union could assist him in obtaining another hardship waiver. Therefore, we do not find that Petitioner was prejudiced by any lack of response by the Union or that this inaction breached the Union's duty of fair representation. *See Feder*, 9 OCB2d 33, at 37-38.[12]

In conclusion, we do not find that the Union acted in an arbitrary, discriminatory, or bad faith manner. We therefore dismiss the instant improper practice petition in its entirety.

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[12] We also note that it is not clear from the record that Petitioner sought the Union's assistance in filing the hardship waiver request in 2019 or filed a grievance after it was denied. Rather, the evidence indicates that he advised the Union that he had filed the hardship waiver request on January 21, 2019. Therefore, it was not unreasonable for the Union to conclude that Petitioner's intent in contacting it was merely to notify it of the submission of his hardship waiver application. *See Walker*, 6 OCB2d 1.

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, docketed as BCB-4316-19, filed by Gabriel Colon, against District Council 37, AFSCME, AFL-CIO; the New York City Department of Sanitation; and the City of New York, hereby is dismissed in its entirety.

Dated: July 30, 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