Wright, 12 OCB2d 37 (BCB 2019)

(IP) (Docket No. BCB 4344-19)

Summary of Decision*:** Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to properly represent him in relation to his separation of service from NYCHA. The Union and the City separately argued that the Union did not breach its duty of fair representation. The Board found that the allegations did not state a claim 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-

TYREEN WRIGHT,

Petitioner,

-and-
CITY EMPLOYEES UNION, LOCAL 237, and NEW YORK CITY HOUSING AUTHORITY,

Respondents.

DECISION AND ORDER

On August 5, 2019, Tyreen Wright ("Petitioner") filed a *pro se* verified improper practice petition against City Employees Union, Local 237 ("Union"), and the New York City Housing Authority ("NYCHA").[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

[1] By letter dated August 8, 2019, the Executive Secretary of the Office of Collective Bargaining dismissed the substantive claims against NYCHA because the petition did not allege any actions taken by NYCHA against Petitioner that resulted from or was related to union activity. The Executive Secretary's decision was not appealed. However, NYCHA remains a statutory respondent regarding the claims against the Union pursuant to NYCCBL §12-306(d). .

Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by failing to properly represent him in relation to his separation of service from NYCHA. The Union and the City separately argue that the Union did not breach its duty of fair representation. This Board finds that the allegations do not state a claim that the Union breached its duty of fair representation. Accordingly, the petition is denied.

BACKGROUND

The Union is the bargaining representative for NYCHA employees in the title of Caretaker, among others. Petitioner was hired as a Caretaker with NYCHA in April 2017. The relevant claims that will be considered by the Board relate to the Union's representation of Petitioner concerning his separation of service from NYCHA, effective May 28, 2019.

A year earlier, in or around May 25, 2018, Petitioner began a medical leave of absence as a result of an on-the-job injury. By letter dated April 29, 2019, Petitioner was advised that his employment would be terminated pursuant to Civil Service Law § 71 ("CSL § 71"), unless he returned to work by May 28, 2019.[2] On May 22, 2019, Petitioner reported to NYCHA with medical documentation evincing his fitness to return to duty, and he received clearance from NYCHA's Human Resources department to return to work on May 24, 2019. In connection with this clearance, Petitioner signed a document acknowledging that if he did not return to work, he "may" be considered absent without leave ("AWOL"). (Pet., Ex. 4)

On that day, Petitioner also advised NYCHA that he had previously received a religious accommodation that permitted him to leave work early on Fridays to attend Jum'ah religious

[2] CSL § 71 permits an employer to terminate an employee that has been absent for over a year due to a medical disability. This is a non-disciplinary termination.

services.[3] NYCHA advised Petitioner that the accommodation had expired in August 2018 and informed him that he would need to submit a new request. Petitioner expressed that he wanted the accommodation to continue but did not submit the form to make a new the request at that time.

The Union alleges, and Petitioner does not deny, that after reporting to NYCHA on May 22, the Union advised him to return to work, as scheduled, on May 24, 2019. The Union also asserts that it advised Petitioner to submit a new religious accommodation request, and to include a letter from his Imam to support his accommodation request. Petitioner did not deny or dispute these assertions. Petitioner did not report back to work on May 24.[4] By letter dated June 3, 2019, Petitioner was terminated, effective May 28, 2019.

According to NYCHA and the Union, this was a non-disciplinary termination pursuant to CSL § 71, because Petitioner had been absent for over a year due to a medical disability. According to Petitioner, his termination was disciplinary and without due process, due to an alleged AWOL.[5]

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[3] Prior to Petitioner's leave, he had an accommodation whereby he started work early on Monday through Thursday and left early on Friday to attend religious services.

[4] Petitioner asserts in his petition that he could not report back to work because his request for a religious accommodation on May 22, 2019, was denied. In its answer, NYCHA avers that it advised Petitioner that he was being assigned to a location that could temporarily honor his request. Petitioner did not respond to NYCHA's allegation in his reply, however at the conference held in this proceeding, he asserted that he was not told that the location to which he had been assigned would accommodate his request.

[5] According to Petitioner, the paperwork he and NYCHA signed regarding his return to work stated that he "may" be considered AWOL if he does not report back to work as directed. (Pet., Ex. 4) Specifically, the document provides: "You must report to your assigned work location on the Return to Work date as indicated. Failure to do so will result in not being returned to pay status. In addition, you may be considered AWOL." (*Id.*) Thus, Petitioner alleges that when he did not return to work as directed, he should have been considered AWOL. As termination for an alleged AWOL is a disciplinary matter, he contends that he was entitled to disciplinary due process.

Petitioner reported to NYCHA on June 6, 2019, to submit a formal request for a religious accommodation. At that time, NYCHA informed him that he had been terminated and provided him a copy of the June 3 termination letter. Thereafter, Petitioner contacted various officials within NYCHA to protest his termination without due process. Petitioner also contacted and met with the Union on several occasions seeking assistance. According to Petitioner, he was repeatedly told by Union representatives that his termination without due process was a mistake. The Union, by letter dated June 6, 2019, requested that NYCHA's Director of Human Resources review Petitioner's termination. The record does not reveal any response to the Union's letter.

On or about July 19, 2019, Petitioner submitted a grievance to the Union challenging his termination and claiming a violation of the agreement that provides disciplinary rights to non-probationary employees. The Union did not advance the grievance.

On August 5, 2019, Petitioner filed the instant improper practice petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union did not provide him with proper representation in relation to his termination from NYCHA. In particular, he claims that he was terminated for being AWOL without due process. Petitioner claims that he was repeatedly told by his Union representatives that his termination without due process was in error, but insists that the Union did not effectively resolve the issue. Moreover, he argues that the Union did not advance his grievance alleging that his termination violated the collective bargaining agreement ("Agreement"), which provides that he is entitled to disciplinary due process as a non-probationary employee. Petitioner insists that he returned to work when he went to NYCHA on May 22, 2019, with medical documentation verifying his fitness to return to full duty, and that the documentation signed by Petitioner and

NYCHA confirmed his return to work. The document provides that if he does not return to work as assigned, he "may" be considered AWOL. (Pet. Ex. 4) Accordingly, he argues that when he did not report to work because his request for a religious accommodation had not been granted, he should have been considered AWOL and was entitled to disciplinary due process. Further, he argues that he was not eligible for termination pursuant to CSL § 71 because he was not absent for over a year. In light of the Union's inability or failure to assist him, he asserts that it has violated its duty of fair representation.

Union's Position

The Union argues that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it did not act in an arbitrary, discriminatory, or bad faith manner. Rather, the Union advised Petitioner to return to work as directed and reasonably determined that it would not pursue the grievance because it lacked merit. The Union acknowledges that Petitioner would be entitled to due process under the Agreement if he was subjected to a disciplinary termination. However, the Union maintains that because Petitioner was terminated pursuant to CSL § 71, those disciplinary rights were not applicable. The Union also contends that it not only fairly represented Petitioner, but surpassed its duty by sending a letter requesting that NYCHA review Petitioner's termination, which the Union was under no obligation to do.

NYCHA's Position

NYCHA argues that the petition fails to show that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Moreover, it contends that the Union could not have violated its duty of fair representation by declining to advance Petitioner's grievance because the grievance lacked merit. According to NYCHA, "where the grievance is unmeritorious, no actionable claim will arise against the union for breach of duty of fair representation." (NYCHA

Ans. ¶ 33) NYCHA argues that the grievance lacked merit because it sought to challenge Petitioner's termination as a disciplinary action when, in fact, Petitioner had been "administratively terminated" pursuant to CSL § 71. (NYCHA Ans. ¶¶ 26, 33) As Petitioner's termination was non-disciplinary, the disciplinary rights in the Agreement did not attach. NYCHA further argues that the Union did not violate its duty because it advocated for Petitioner by seeking a review of his termination. Lastly, NYCHA argues that because the Union did not breach its duty of fair representation, any derivative claim against NYCHA must fail.

DISCUSSION

"Recognizing that a *pro se* Petitioner may not be familiar with legal procedure, the Board takes 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). Here, Petitioner has pled facts alleging that the Union violated its duty of fair representation in violation of NYCCBL § 12-306(b) and (d).[6]

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." 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

[6] 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)]."

2015) (citing *Walker*, 6 OCB2d 1 (BCB 2013)); *Okorie-Ama*, 79 OCB 5 (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." *Morales*, 5 OCB2d 28, at 20 (BCB 2012), *affd., Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective Bargaining*, 51 Misc. 3d 817 (Sup. Ct. N.Y. Co. March 31, 2016), *affd., Matter of United Fedn. of Teachers v. City of New York*, 154 AD3d 548 (1st Dept. 2017) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)).

Petitioner alleges that the Union told him that it would assist him in challenging his termination and that it failed to do so. Assuming these allegations are true, they speak only to the quality or extent of Petitioner's representation. Petitioner is dissatisfied with the outcome of the Union's request to NYCHA to review his termination. Nevertheless, the Board has repeatedly stated that "dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation." *Shymanski*, 5 OCB 2d 20 at 11 (BCB 2012) (quoting *Gertskis*, 77 OCB 11, at 11). 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 actions. *Okorie-Ama*, 79 OCB 5, at 14. *See also Shymanski*, 5 OCB 2d 20 at 11. In addition, even if the Union told Petitioner that his termination was in error and should be corrected, under these

circumstances such a statement does not establish a breach of the duty of fair representation. *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).

While, the Petitioner believes that he should have been designated AWOL and received disciplinary due process, he does not provide sufficient facts or evidence to conclude that his failure to return to work required NYCHA to designate him AWOL, nor obligated the Union to grieve a termination it found was pursuant to CSL § 71.

The Union asserts that it did not advance Petitioner's grievance because it determined that his termination was pursuant to CSL § 71 and therefore a grievance challenging the termination for failure to provide disciplinary due process would not be meritorious. A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *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.)). We cannot conclude on the facts alleged that the Union's failure to process the grievance was arbitrary, discriminatory, or in bad faith.[7] Accordingly, we dismiss the instant improper practice petition in its entirety.

[7] We do not find that the facts support Petitioner's assertion that the Union did nothing to assist him. Rather, the record demonstrates that the Union took steps to try to help Petitioner by advising him to get a letter from his Imam to support his request for a religious accommodation, counseled him to report to work, and wrote a letter to NYCHA protesting his termination and requesting that it be reviewed.

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-4344-19, filed by Tyreen Wright, against the City Employees Union, Local 237, and the New York City Housing Authority, hereby is dismissed in its entirety.

Dated: December 3, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER