Moehrle, 12 OCB2d 39 (BCB 2019)

(IP) (Docket No. BCB-4332-19)

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 his behalf. The City argued that the Union did not breach its duty of fair representation as Petitioner was a probationary employee with limited rights. The Board found that Petitioner's claim failed to establish that the Union violated the NYCCBL. Accordingly, the Board dismissed the improper practice petition. (***Official decision follows***).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ROY MOEHRLE,

***Petitioner*,**

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,
and
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

***Respondents*.**

DECISION AND ORDER

On May 31, 2019, Roy Moehrle, *pro se*, filed a verified improper practice petition against the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union") and the New York City Department of Transportation ("DOT" or "City").[1] Petitioner alleges that the Union

[1] On June 10, 2019, the Executive Secretary of the Office of Collective Bargaining issued a deficiency letter in which she dismissed Petitioner's improper termination claim against the City

breached its duty of fair representation pursuant to § 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 file a grievance on his behalf. The City argues that the Union did not breach its duty of fair representation as Petitioner was a probationary employee and did not have disciplinary grievance rights. The Board finds that Petitioner's claim fails to establish that the Union violated the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

On September 9, 2018, Petitioner was arrested, arraigned, and charged with two counts of driving while intoxicated ("DWI"). According to Petitioner, on November 30, 2018, DOT notified him of its intention to hire him as an Apprentice Inspector (Highways and Sewer) (hereinafter, "Apprentice Inspector"). Sometime thereafter and pursuant to DOT requirements, he reported the prior arrest and DWI charges he received on his new-hire investigation form referred to as the Comprehensive Personnel Document ("CPD-B").

Pursuant to DOT's Arrest Notification Policy, applicants are required "to provide information on future developments related to the arrest including . . . future court dates, indictments, adjournments, convictions and final dispositions" in writing to the Office of the Advocate.[2] (Ans., Ex. 4) Additionally, the Policy states that DOT has the discretion to take

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because the petition lacked facts sufficient to support an assertion that the termination resulted from or was related to union activity, in violation of NYCCBL § 12-306(a)(3). This dismissal was not appealed therefore, the Board does not address this claim. However, the City remains a statutory respondent pursuant to NYCCBL § 12-306(d) regarding the claim against the Union.

[2] The Policy further requires that the employee is obligated to notify DOT of an arrest "within two (2) business days of the arrest." (Ans., Ex. 4) However, Disciplinary Counsel at DOT's Office of the Advocate stated in a sworn affidavit that Petitioner was required to report his arrest and conviction within two days of his start date as a new hire. (*See* Ans., Ex. 3 ¶ 10)

disciplinary action when an employee fails to comply. DOT also requires that all Apprentice Inspectors possess a valid State of New York motor vehicle license "for the duration of employment." (Pet., Ex. B) DOT's Loss of License Policy states, in part, that if the "job specification for the title in which the employee was hired requires that a specific license be maintained for the duration of employment and that license is subsequently not maintained, the employee is no longer qualified to hold the position." (Pet., Ex. D)

On January 14, 2019, Petitioner pled guilty to the DWI charges and was sentenced. Petitioner's DMV records reflect that the court imposed a fine, a six (6) month license suspension, and a one (1) year driving restriction in the form of an interlock-ignition device ("IID") on his license.[3]

On March 11, 2019, Petitioner began his employment as a probationary Apprentice Inspector at DOT, a title represented by the Union. According to Petitioner, he informed his DOT supervisor of his conviction and driving restrictions on March 13, 2019, and was told by the supervisor that the conviction would "cause no issues with [his] employment." (Pet. ¶ 2) On March 20, 2019, DOT's Highway Inspection and Quality Assurance Unit notified the Office of the Advocate of Petitioner's prior arrest, conviction, and driving restrictions.[4]

According to Petitioner, a DOT supervisor informed him that he had to report to the Office of the Advocate on March 22, 2019 for an interview regarding his arrest and conviction. On that

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[3] We take administrative notice of the fact that the New York Unified Court System defines an IID as a device – often required as a result of DWI misdemeanor sentencings – that connects to a motor vehicle ignition system and measures the alcohol content in the breath of the person driving.

[4] The Highway Inspection and Quality Assurance Unit received notice of Petitioner's sentence from his attorney.

date, a Union representative accompanied Petitioner to the Office of the Advocate. Petitioner contends that the Union requested that DOT provide a waiver in order for Petitioner to operate a DOT vehicle without the IID restriction.[5] However, DOT informed Petitioner that it would not do so, as it rarely issues such waivers. Instead, DOT gave Petitioner the option to voluntarily resign or be terminated. At the end of the meeting, Petitioner submitted his resignation. According to Petitioner, the Office of the Advocate and the Union informed him that he would be reinstated if the court lifted the license restriction within five business days of the disciplinary interview. The City denies that DOT personnel informed Petitioner he would be reinstated under such circumstances. Additionally, Petitioner asserts that the Union representative advised him to speak to DOT's Director of Personnel "without representation" in order to get reinstated. (Pet. ¶ 9)

According to Petitioner, in reliance on DOT's and the Union's statements, he petitioned the Queens Criminal Court on March 23, 2019 to restore his driving privileges in order to be reinstated. On March 27, 2019, the Court reduced Petitioner's sentence and removed the IID restriction. Shortly thereafter, Petitioner emailed several DOT personnel inquiring about his requested reinstatement to the Apprentice Inspector position. On March 25, 2019, Petitioner emailed the Union representative an unidentified attachment. Petitioner also emailed the Union representative on March 28, 2019, and requested to speak with him in reference to some "updated information" that he planned to submit to DOT.[6] On April 3, 2019, Petitioner sent another email to the Union representative, in which he attached proof of the removal of his IID restriction and

[5] The New York Unified Court System provides a limited exception to the IID restriction that allows an employee to drive without an IID installed when driving a vehicle in the scope of that employee's job so long as the employee notifies his or her employer.

[6] To the extent that the Union replied to either the March 25, 2019 or March 28, 2019 email, this is not reflected in the record.

expressed his gratitude for "everyone's help in this matter." (Pet., Ex. G.) While Petitioner does not allege that he continued to contact the Union after April 3, 2019, he asserts that he forwarded to the Union representative an email communication dated May 6, 2019 between himself and a DOT Department of Personnel representative, in which he requested an update about his reinstatement. *See* Pet., Ex. G. On May 7, 2019, DOT emailed Petitioner and the Union to inform them that Petitioner would not be reinstated and that his voluntary resignation would stand.

POSITION OF THE PARTIES[7]

Petitioner's Position

Petitioner argues that the Union violated its duty of fair representation when it failed to file a grievance on his behalf in order to help him get reinstated to the Apprentice Inspector position. Petitioner concedes that the Union was helpful when a representative accompanied him to his disciplinary interview at the Office of the Advocate. However, he asserts that DOT and the Union informed him that he would be reinstated once he "rectif[ied] the situation." (Pet. ¶ 10) Petitioner argues that he should have been reinstated because he informed DOT of his arrest and conviction and got the restriction lifted within five days of the disciplinary interview. As such, Petitioner argues that DOT did not follow its own Loss of License policy and that the Union should have filed a grievance on his behalf. Additionally, Petitioner argues that the Union should have given him an explanation "to justify the [DOT's] decision" to not reinstate him. (Pet. ¶ 11)

City's Position

The City argues that Petitioner failed to allege facts sufficient to demonstrate a breach of the duty of fair representation. Specifically, it points to the fact that Petitioner did not meet the

[7] The Union did not file an answer or otherwise participate in this matter.

minimum qualifications of the Apprentice Inspector title. The City concedes that Petitioner disclosed his arrest record on the CPB-D form. However, it asserts that Petitioner failed to comply with DOT's "clearly articulated" Arrest Notification policy when he failed to report his January 14, 2019 conviction to the Office of the Advocate within two days of his hire date. (Ans. ¶ 49) According to the City, the notice received from Petitioner's attorney did not meet the requirements for DOT's Arrest Notification Policy because it was sent to a different department, and it was done approximately two months after his conviction date.

Additionally, the City argues that Petitioner was a probationary employee with limited rights. As such, any grievance pursued by the Union would have been meritless. The City further argues that Petitioner has conceded that the Union was helpful in obtaining information about the process for reinstatement during the disciplinary interview. Thus, the City argues that the petition must be dismissed as Petitioner has failed to state a claim for a breach of the duty of fair representation.

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 alleged that the Union breached its duty of fair representation when it advised him that he would be reinstated if his license restriction was lifted and later failed to file a grievance seeking his reinstatement.

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).

This Board has previously stated that "in evaluating the Union's handling of grievances, the Union "enjoys wide latitude . . . as long as it exercises discretion with good faith and honesty." *Porter*, 4 OCB2d 9, at 16 (BCB 2011) (quoting *Sicular*, 79 OCB 33, at 13 (BCB 2007); *Wooten*, 53 OCB 23, at 15 (BCB 1994)). Accordingly, 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). In addition, negligence, mistake, or incompetence does not establish a violation of the Union's duty of fair representation. *See Evans*, 6 OCB2d 37, at 8 (BCB 2013)

The record establishes that the Union assisted Petitioner prior to March 22, 2019. Petitioner was required to have a valid driver's license in order to maintain his position as an Apprentice Inspector. At the start of his employment on March 11, 2019, he did not possess an unrestricted license. The Union accompanied Petitioner to a meeting with the Office of the Advocate on March 22, 2019, where he chose to accept a voluntary resignation because he did not meet this requirement. Therefore, the Union provided Petitioner with the assistance he requested through March 22, 2019.

Petitioner claims that thereafter, the Union breached its duty of fair representation because it advised him that he would be reinstated if his license restriction was lifted within five days of the March 22, 2019 interview and then failed to grieve DOT's failure to reinstate him. Based on the circumstances here, we find these actions do not violate the duty of fair representation. *See State of New York (City University of New York)*, 49 PERB ¶ 4573, at 4737 (ALJ 2015) (finding that the Union had no duty to file a grievance when it determined that it would be meritless due to Petitioner's termination upon failure to meet all job qualifications).

First, there is no evidence that Petitioner requested that the Union file a grievance on his behalf. *See Feder,* 9 OCB2d 33, at 35 (BCB 2016) (finding no arbitrary, discriminatory, or bad-faith conduct where Petitioner failed to present sufficient evidence of his request to the union to file a grievance on his behalf). The record only shows that Petitioner sent the Union an email with updated information regarding his amended sentence and a request to speak with the Union about his plan to submit documents to DOT. He subsequently forwarded the Union representative an email chain between himself and several DOT representatives in which he requested information from DOT related to his reinstatement. Even if Petitioner sent the Union emails with the intent to receive additional information or follow-up from the Union, the record does not support any arbitrary, discriminatory, or bad faith motive in the Union's lack of response. *See Id.* at 36.

Second, while Petitioner believes that DOT's failure to reinstate him was improper, he has not shown that he had a right to reinstatement. It is undisputed that Petitioner was a probationary employee, that he was required to possess a valid drivers' license as a qualification for employment and that he voluntarily resigned his employment on March 22, 2019. Petitioner has not shown a contractual or other basis upon which the Union could have grieved DOT's failure to reinstate him. Therefore, despite any representations that may have been made to Petitioner, we find no basis

upon which the Union could have sought to compel Petitioner's reinstatement after his resignation. *See Gibson*, 29 OCB 13, at 4-5 (BCB 1982) (holding that it is not a breach of the duty of fair representation to not proceed with a fruitless grievance); *see also State of New York (City University of New York)*, 49 PERB ¶ 4573, at 4737.

While the Union may have misinformed Petitioner of his rights, under these circumstances such statements are akin to a mistake, which does not breach the Union's duty of fair representation. *See Feder*, 9 OCB2d 33, at 34 (quoting *Bonnen*, 9 OCB2d 7, at 17 (BCB 2016)) (stating that Petitioner has the burden of proving that the Union's actions amount to more than a mistake). We also note that Petitioner's argument that the Union should have given him an explanation about why the DOT could not reinstate him does not constitute a breach of the Union's duty. *See Feder*, 9 OCB2d 33, at 37 (finding no breach of duty where the Petitioner was not prejudiced by the Union's lack of communication to clear up any misunderstandings); *Porter*, 4 OCB2d 9, at 15; *see also Turner*, 3 OCB2d 48 (2010) (finding that dissatisfaction with the quality of communication does not amount to a breach of the duty of fair representation).

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 by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the verified improper practice petition filed by Roy Moehrle, docketed as BCB-4332-19, against the Law Enforcement Employees Benevolent Association and the New York City Department of Transportation, 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

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