Stathes, 14 OCB2d 3 (BCB 2021)

(IP) (Docket No. BCB-4395-20)

Summary of Decision*:** Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by interfering with the submission of grievances, failing to notify her of the status of grievances, and disclosing her personal identifying information in an online post concerning one of the grievances. The Union and the City separately argued that the Union did not breach its duty of fair representation. 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-

DIANE STATHES,

Petitioner,

- and-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On September 21, 2020, Diane Stathes ("Petitioner") filed a verified improper practice petition against City Employees Union, Local 237, International Brotherhood of Teamsters ("Union") and the City of New York ("City").[1] Petitioner alleges that the Union breached its duty

[1] Petitioner failed to name the City of New York as a respondent pursuant to NYCCBL § 12-306(d). We therefore amend the caption *nunc pro tunc* to add the City of New York because the employer is a necessary party to an alleged breach of the duty of fair representation. *See* NYCCBL § 12-306(d); *James-Reid,* 77 OCB 16, at 2 (BCB 2006).

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 interfering with the submission of grievances, failing to notify her of the status of grievances, and disclosing her personal identifying information in an online post concerning one of the grievances. The Union and the City separately argue that the Union did not breach 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 was employed by the New York City Police Department ("NYPD") as a civilian School Safety Agent.[2] The Union is the certified bargaining representative for School Safety Agents. On June 29 and July 23, 2020, the Union filed several group grievances with the City's Office of Labor Relations ("OLR") on behalf of similarly situated School Safety Agents for alleged violations of the 1995-2001 Citywide Agreement ("Citywide Agreement") and the 2010-2018 School Safety Agents Agreement ("SSA Agreement").[3] These group grievances were all related to the global COVID-19 pandemic that began in March 2020 and affected working conditions for City employees. On July 22, 2020, Petitioner, in conjunction with two other School Safety Agents, submitted grievance forms for two of the group grievances via email to their Union Business Agent, Frank Rella. The first grievance concerned alleged out-of-title work and sought hazard pay for work assignments outside of school facilities that involved handing out protective face masks

[2] Unless otherwise stated, facts recited are based on Petitioner's improper practice petition and assertions she made at the conferences held before the Trial Examiner on November 19 and December 14, 2020.

[3] Both the Citywide Agreement and the SSA Agreement remain in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d).

to civilians at parks, playgrounds, subway entrances, and protests ("Out-of-Title Grievance"). Upon initially sending the Out-of-Title Grievance form to the Union Business Agent, Petitioner was told to remove the words "health and safety," or the submission would not be accepted. Although she did not want to, Petitioner followed the instruction. According to the Union, Petitioner was told to amend this language in the Out-of-Title Grievance because another group grievance was already filed concerning health and safety violations. (Union Ans. ¶ 12) The second grievance sought overtime payments for tour changes to cover work assignments outside of school facilities.

Following the submission of the grievance forms and having not received any updates from the Union, Petitioner followed up with the Union Business Agent via telephone.[4] The Business Agent informed Petitioner that he had passed the grievances on to the Union's Director of Grievances and Discipline, Mal Patterson, but did not know anything more about the status of the grievances.[5]

On the evening of September 4, 2020, Petitioner received a message from a colleague informing her that there was a new post on the Union's Facebook page that displayed the Out-of-Title Grievance form. A screenshot of the post was included with the improper practice petition. (*See* Pet., Ex. A) The post of the grievance form shows that Petitioner's name, home address, multiple phone numbers, and signature, were visible. Written with the post, the Union noted that it had "received calls about this attached [Out-of-Title] grievance" and "post[ed] it so members

[4] When submitting the grievance forms, Petitioner requested that the Union "[p]lease respond in writing." (Pet. ¶ 6)

[5] The Union averred at the November 19, 2020 conference in this matter that it is awaiting Step III hearing dates from OLR for the COVID-19 related group grievances.

[would] have their copy." Additionally, the post included a copy of the Union's July 23, 2020 letter to OLR requesting a Step III hearing. The information provided in the Union's post was the first update that Petitioner received about the status of either of the grievances following the telephone call with the Union's Business Agent.

That same evening, Petitioner reached out to a retired Chief School Safety Agent, Dario Negron, about having the post removed from the Union's Facebook page. The post was taken down after being online for approximately three hours. The Union does not dispute that the Facebook post was made or that Petitioner's name, addresses, phone numbers, and signature were visible. In an affidavit submitted with the Union's Answer, Derek Jackson, Director of the Union's Law Enforcement Division, stated that the Union received several inquiries from members with respect to whether the Union had filed the group grievances, and it decided to post a copy of the grievance forms with proof of filing on Facebook in order to "address these inquiries and inform members that the Union affirmatively pursued these grievances on members' behalf."[6] (Jackson Aff. ¶ 7) However, the Union avers that it uses a media relations firm to manage its Facebook page, and it failed to consider that Petitioner's information was on the Out-of-Title Grievance form before sending it to the firm.[7]

[6] According to Petitioner, the only grievance posted on the Union's Facebook page was the Out-of-Title Grievance.

[7] After taking down the Facebook post, the Union asserts that a redacted version of the Out-of-Title Grievance was posted on the Union's website for the same reasons that it was posted on Facebook. In the redacted version, although her signature remains visible, Petitioner's home address and phone numbers are blacked out in a fashion consistent with redactions made on similarly situated COVID-19 related group grievances also posted on the Union's website. *See* https://www.local237.org/uncategorised/1651-local-files-ssa-grievances-summer-2020.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by interfering with the submission of grievances, failing to notify her of the status of grievances, and disclosing her personal identifying information in an online Facebook post concerning the Out-of-Title Grievance. Petitioner argues that the Union Business Agent interfered with the submission of the Out-of-Title Grievance by instructing her that the filing would not be accepted unless she removed the words "health and safety." Moreover, Petitioner avers that although she requested that the Union Business Agent "respond in writing" following the submission of the grievances, she had to contact him by telephone to receive an update. Further, she contends that the update that she received was insufficient, as the Union Business Agent merely informed her that the grievances had been passed along to the Union's Director of Grievances and Discipline.

Petitioner asserts that the Out-of-Title Grievance should not have been posted on Facebook and that her personal information should not have been publicly disclosed without her consent. She argues that the Union's failure to seek permission for the disclosure showed the Union's "lack of care regarding [her] privacy" and left her "vulnerable to possible identify theft . . . and possible retaliation from anyone that may disagree with [her] position [expressed in the Out-of-Title Grievance]." (Pet. ¶ 6) As a result, Petitioner alleges that the Union breached its fiduciary duty and failed to represent her properly.

As a remedy, Petitioner requests a written and public apology on the Union's Facebook page, protection from possible identity theft, and a meeting in which this matter can be discussed amicably.

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. The Union contends that its Business Agent instructed Petitioner to amend the language of the Out-of-Title Grievance because another group grievance was already pending regarding a "health and safety" violation. Moreover, it asserts that Petitioner received confirmation of the submission of the grievances by telephone and email. The Union admits that it posted the Out-of-Title Grievance on Facebook and failed to redact her personal information. However, it contends that it posted the Out-of-Title Grievance to respond to several inquiries from members regarding whether it was filed. The Union avers that Petitioner's general dissatisfaction with the Union's decision to post grievances on Facebook without the consent of the named members is not a basis for a breach of the duty of fair representation without evidence of an improper motivation. Moreover, the Union argues that its failure to redact Petitioner's personal information was a promptly-corrected mistake that was not made in bad faith or with the intent to discriminate against Petitioner or any Union members. Accordingly, the Union asserts that it did not breach the duty of fair representation.[8]

City's Position

The City argues that Petitioner's claims against the Union must be dismissed because she fails to allege facts sufficient to amount to a breach of the duty of fair representation. Indeed, the City contends that Petitioner has failed to show that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. The City notes that the caption accompanying the posting of the Out-of-Title Grievance explained that it was made in response to inquiries from the Union's

[8] Additionally, the Union argues that the Board has no independent jurisdiction over the disclosure of personal information and is not empowered to impose the remedy of identity theft protection, a written public apology on Facebook, or a meeting to discuss the matter.

membership, and it asserts that there is no indication of an improper motivation. Further, without evidence of an improper motivation, the City argues that Petitioner's disagreement with the Union's strategy regarding posting grievance forms does not state a *prima facie* case of a violation of NYCCBL § 12-306(b)(3). Moreover, the City argues that the failure to redact Petitioner's personal information from the Out-of-Title Grievance form was a quickly-remedied mistake that is insufficient to establish a breach of the duty of fair representation.[9] Accordingly, the City avers that any derivative claim against the City pursuant to NYCCBL § 12-306(d) must also be dismissed.[10]

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, although the petition does not cite specific provisions of the NYCCBL, we find that Petitioner has pled facts alleging that the Union violated its duty of fair representation in violation of NYCCBL § 12-306(b)(3) and (d).

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,

[9] Additionally, the City contends that the Board does not have jurisdiction to order a public apology on the Union's Facebook page and protection from possible identity theft.

[10] Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (BCB 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). Indeed, "a union is entitled to broad discretion . . . [and] 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).

In this case, Petitioner has failed to establish that in taking any of the alleged actions, the Union engaged in arbitrary, discriminatory, or bad faith conduct. First, Petitioner has failed to provide evidence that the Union's instruction to remove the words "health and safety" from the Out-of-Title Grievance was made in bad faith or with the intention to discriminate against the Petitioner in any way. Indeed, the Union asserts that Petitioner was instructed to amend the language because another group grievance was already filed alleging health and safety violations. Accordingly, we do not find that the Union's request with respect to the language of the Out-of-Title Grievance violated the duty of fair representation. *See Evans*, 6 OCB2d 37, at 8 (BCB 2013) (a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty"); *see also Nealy*, 8 OCB2d 2, at 16; *Sicular*, 79 OCB 33, at 13.

Second, Petitioner asserts that after submitting the grievance forms to the Union's Business Agent, the Union failed to provide a written update on the status of the grievances despite her request that the Union respond in writing. Further, Petitioner avers that she had to call the Business Agent on the telephone to get an update on the status of the grievances, and all he told her was that they had been passed along to the Union's Director of Grievances and Discipline. However, the

duty of fair representation does not contemplate specific requirements for union communication. *See, e.g., Porter*, 4 OCB2d 9, at 15 (BCB 1996) (finding that the petitioner's dissatisfaction with the union's failure to respond to a letter about a grievance did not breach the duty of fair representation where the record showed that a union representative spoke with him on the phone); *Turner*, 3 OCB2d 48, at 16 (BCB 2010). Further, the obligation to keep Petitioner informed does not require the Union to communicate with her in the manner she requests. *See Turner*, 3 OCB2d 48 (no violation of the duty of fair representation found where a union did not accede to a petitioner's request for a response in writing, but otherwise kept her informed).

Moreover, there is no evidence that the alleged lack of communication regarding the status of the grievances by the Union prejudiced or injured Petitioner in any way. Indeed, it is undisputed that Petitioner learned via the Union's Facebook post that the Out-of-Title Grievance was filed, and the Union explained at the November 19, 2020 conference in this matter that it is awaiting Step III hearing dates for the COVID-19 related group grievances. Accordingly, we do not find that any lack of communication with Petitioner violated the Union's duty of fair representation. *See Cook*, 7 OCB2d 24, at 9 (BCB 2014) ("[T]his 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.") (citing *Walker*, 6 OCB2d 1 (2013); *Lein*, 63 OCB 27 (BCB 1999); *Shenendehowa Central School District*, 29 PERB ¶ 4607 (1996); *Bd. of Ed. of the City School Dist. of the City of N.Y.*, 33 PERB ¶ 3062 (2000)); *Cf. Morales*, 5 OCB2d 28 (BCB 2012) (finding a breach of the duty of fair representation where the union's failure to communicate with the petitioner foreclosed his ability to pursue a potentially meritorious disciplinary grievance).

Third, the Union does not dispute that Petitioner's Out-of-Title Grievance form was posted on its Facebook page and that it failed to redact Petitioner's personal identifying information. As

a result, Petitioner's home address, multiple phone numbers, and signature, were visible for a period of approximately three hours on September 4, 2020. However, there is no evidence that the Union's actions were arbitrary, improperly motivated, or intended to discriminate against Petitioner. *See Morales*, 5 OCB2d 28, at 20 ("Even errors in judgment do not rise to the level of a breach of [the duty of representation], unless it can be shown that the union's actions were arbitrary, discriminatory, or in bad faith") (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)). Instead, the Union avers that it received inquiries from its membership regarding whether the Out-of-Title Grievance was filed, and it decided to post proof of filing on Facebook to show that action was taken. Although Petitioner may disagree with the Union's decision to communicate with its membership about the Out-of-Title Grievance via Facebook, its website, or otherwise, the Board does not find that the Union's decision was arbitrary, discriminatory, or made in bad faith. *See Nealy*, 8 OCB2d 2, at 16; *Sicular*, 79 OCB 33, at 13. Further, the Facebook post was deleted soon after the Union was informed that Petitioner's personal information was exposed, and Petitioner has provided no evidence contesting the Union's assertion that its disclosure was merely an oversight. *See Bonnen*, 9 OCB2d 7, at 17 ("to meet [the] burden [of pleading and proving a breach of the duty of fair representation] a petitioner must allege more than negligence, mistake, or incompetence") (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)). Accordingly, we do not find that the Union's online posting of Petitioner's Out-of-Title Grievance or failure to redact Petitioner's personal identifying information violated the duty of fair representation.[11]

[11] Additionally, we note that to the extent Petitioner takes issue with the choice and/or breadth of redactions made to the Out-of-Title Grievance that was posted on the Union's website following the removal of the unredacted Facebook post, Petitioner has failed to show that the Union's redactions or additional information was displayed/removed from other COVID-19 group grievances that were posted on the Union's website nor does she alleged that any different action taken was done in bad faith. *See D'Onofrio*, 79 OCB 3, at 20 (BCB 2007) (finding no breach of the duty of representation when petitioner did not show that the union did more for others in the

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 in its entirety.[12]

same circumstances than it did for the petitioner); *Schweit*, 61 OCB 36, at 15 (BCB 1998) ("Unless 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 . . . do not breach the duty [of fair representation].").

[12] We note that because we have found no violation of the NYCCBL, we need not address the Respondents' assertions regarding the Board's jurisdiction to award the remedies sought by the Petitioner.

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-4395-20, filed by Diane Stathes, against the City Employees Union, Local 237, International Brotherhood of Teamsters, and the City of New York, is hereby dismissed in its entirety.

Dated: February 2, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
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