West, 14 OCB2d 12 (BCB 2021)

(IP) (Docket No. BCB-4418-21)

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 accurately advise him whether he had to report for work, failing to properly represent him after he received a counseling memorandum related to his failure to report for work, and failing to challenge his ultimate termination. The Union and NYCHA 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-

COREY WEST,

Petitioner,

- and-

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

Respondents.

DECISION AND ORDER

On February 26, 2021, Corey West ("Petitioner") 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 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 accurately advise him whether he had to report for work, failing to properly represent

him after he received a counseling memorandum related to his failure to report for work, and failing to challenge his ultimate termination. The Union and NYCHA 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 NYCHA as a Caretaker at the Jefferson Houses development ("Jefferson Houses"). The Union is the certified bargaining representative for NYCHA employees in the title of Caretaker. Petitioner was appointed on August 26, 2019 and was terminated on November 2, 2020. As a Caretaker, Petitioner was initially subject to a one-year probationary period.[1] From June 2020 through December 2020, Petitioner was in contact with his Union Business Agent, Ken Roper, regarding various issues related to his employment and ultimate termination.[2]

On June 8, 2020, Petitioner refused to sign his third quarter probationary report, which noted that his overall performance was unsatisfactory and explained that his "work ethic and attitude must improve." (Union Ans., Ex. D; NYCHA Ans., Ex. A) The report expressed negative

[1] NYCHA asserts that it extended Petitioner's probationary period by an additional three months and seventeen days, along with all Union members employed by NYCHA who were on probation during the COVID-19 pandemic in or around mid-March 2020, as mandated by a Department of Citywide Administrative Services ("DCAS") Probation Tolling Policy that was circulated to NYCHA on August 18, 2020. Accordingly, NYCHA asserts that, accounting for Petitioner's record of excused absences and DCAS's mandatory tolling, Petitioner's probationary period was extended through December 17, 2020. The Union did not argue that Petitioner's probationary status was a factor in its representation, and Petitioner did not learn that his probation was extended until after he filed the underlying improper practice petition in this matter.

[2] In an affidavit submitted with the Union's answer, Roper indicated that there was no shop steward at the Jefferson Houses to assist Petitioner in mid-to-late 2020 because the elected steward stepped down in June 2020.

feedback with respect to, *inter alia*, Petitioner's ability to complete daily tasks and his resistant attitude when being instructed by supervisors. On June 30, 2020, Petitioner texted Roper regarding a shortage of staff on his shift, noting that he had not heard from him in two weeks and asking whether he should be worried.[3] (*See* Pet., Ex. A) According to Roper, Petitioner contacted him via phone in June 2020 because he was overwhelmed at work and wanted assistance with his morning shift assignment. Roper asserts that he subsequently contacted Petitioner's Superintendent and the issue was addressed by adding more staff to his shift.

On July 31, 2020, NYCHA management held a meeting with the Caretakers at the Jefferson Houses to discuss the weekend overtime schedule for August 8 and 9, 2020, and to review the new overtime system based on reverse seniority order. Petitioner acknowledges that he was present at the meeting and avers that although the weekend schedule for August 8 and 9, 2020, was discussed at the July 31, 2020 meeting, he was not included on the schedule at that time.[4]

On Friday, August 7, 2020, Petitioner called Roper after completing his shift because the weekend schedule for August 8 and 9, 2020, was officially posted that day, and he learned that he was scheduled to work overtime on Saturday, August 8, 2020. Petitioner wanted to confirm with Roper that he did not have to report for work on August 8, 2020, because he thought that he was

[3] Roper did not reply via text message, but he represented generally that, "[t]he evidence of text messages does not show the complete communication between Petitioner and [Roper]. We had many conversations via phone and in person that were not evidenced in [the] text messages." (Roper Aff. ¶ 34)

[4] The Union and NYCHA each submitted a copy of a sign-in sheet titled "overtime meeting 7/31" that includes Petitioner's signature, and a copy of the Jefferson Houses' "weekend and holiday schedule" for August 8 and 9, 2020, which indicated that Petitioner was scheduled for work on August 8, 2020. (*See* Union Ans., Ex. C; NYCHA Ans., Ex. B) However, Petitioner contends that he did not sign up for overtime on August 8, 2020, that he never worked overtime that was not mandatory, and that the sign-in sheet provided by the Union and NYCHA was blank when he signed it, with NYCHA adding "overtime meeting" after the fact. (Rep. at 7, ¶ 3-7)

only supposed to work overtime every other Saturday, he had worked overtime the prior Saturday, August 1, 2020, and he was not otherwise regularly scheduled to work on August 8, 2020. Petitioner asserts that on August 7, 2020, Roper told him that he did not have to report for work on August 8, 2020, because NYCHA failed to follow the proper procedure for posting the weekend schedule by posting it on Friday, rather than the prior Tuesday.[5] Later that same day, Petitioner texted Roper to confirm what was said on the phone and Petitioner's belief that he did not have to report for work the next day because "even if [NYCHA] need[ed] coverage" he was "off technically." (Pet., Ex. A) Roper did not reply via text message. Thereafter, on August 8, 2020, Petitioner did not report for work, and he did not contact a supervisor to let NYCHA know that he would not be reporting for work.

On August 10, 2020, Petitioner received a counseling memorandum ("Counseling Memo") from the Caretakers' supervisor titled "Absent Without Leave (AWOL)," addressing his failure to report for work on August 8, 2020. (*See* Pet., Ex. B; Union Ans., Ex. B; NYCHA Ans., Ex. B) The Counseling Memo provides, in pertinent part:

> On 8/8/2020 you were expected to report to work at 9am as scheduled in which you never reported to work, therefore you are considered AWOL. On the afternoon of 7/31/2020 a meeting was held by Superintendent Nena Huntley concerning shortage of staff on my weekend and how we will be mandating staff for coverage according to reverse seniority in which all caretakers signed their names in agreement. Staff was informed on 7/31/2020 and on 8/3/2020 concerning coverage. Your absence caused a hardship on your fellow caretakers because they had to cover your assigned areas as well as their own assigned areas.
>
> According to NYCHA General Regulations of Behavior, Amendment B., on page 2, as an employee of the housing authority shall not:

[5] This allegation was raised for the first time at the conference in this matter on April 19, 2021, during which Roper was not present. The Union did not confirm or deny Petitioner's allegation.

> Fail to perform their duties in a satisfactory manner . . . fail [or] neglect or refuse to perform duties or complete assigned tasks, and refuse, fail or neglect to follow a reasonable directive or order of a supervisor or superior or interfere with any person carrying out such directive or order.
>
> The events recorded here and any repeated incidents of the same or similar conduct may be the subject of a future disciplinary action.

(*Id.*)

Also on August 10, 2020, management signed and dated Petitioner's fourth quarter probationary report, noting that Petitioner's overall performance remained unsatisfactory and explaining that he had not "reached the satisfactory requirement needed to become a permanent caretaker."[6] (Pet., Ex. C; Union Ans., Ex. D; NYCHA Ans., Ex. D) The report expressed negative feedback with respect to, *inter alia*, Petitioner's ability to complete daily tasks, his "hostile" attitude when being instructed by supervisors, and his absences from work. (*Id.*)

On August 11, 2020, a NYCHA "Safety and Security Incident Report" was submitted by Petitioner's supervisor describing an August 10, 2020 incident in which Petitioner allegedly threatened him in front of the Superintendent of Jefferson Houses during a meeting regarding Petitioner's fourth quarter probationary report. The summary description in the incident report, as written by Petitioner's supervisor, states:

> At approximately 3:40pm I called Caretaker J ID# 84614 Corey West to the office, to issue him his final probation report in which he failed he said to me in the presence of my Superintendent and my fellow supervisor "Don't worry you are going to get yours!"
>
> I immediately took that as a threat therefore I don't feel safe when he is in my presence.

(NYCHA Ans., Ex. C)

[6] Petitioner signed and dated the fourth quarter probationary report on September 28, 2020.

Attached with the incident report, a notation from NYCHA's Office of Safety and Security ("OSS") indicating that the matter was "closed" on August 14, 2020, provides:[7]

> Inappropriate Behavior
>
> [Property Management Superintendent] stated that he was calling the union. HR is reviewing situation and most likely West will be terminated because he failed his probation (8/14/20). [Petitioner's supervisor] interviewed and he stated he heard West mention about he getting his after the meeting was over.

(*Id.*)

Also on August 11, 2020, Petitioner and Roper exchanged text messages about meeting that day at the Jefferson Houses.[8] On August 14, 2020, Petitioner texted Roper images of the Counseling Memo and his fourth quarter probationary report. According to Roper, after being contacted by Petitioner about his Counseling Memo, he investigated and discovered that Petitioner signed up for overtime on August 8, 2020, but failed to appear for work. Roper determined that the Counseling Memo "was justified and there was nothing that [Roper] could do to pull it." (Roper Aff. ¶ 20) Additionally, when Roper called Petitioner and reported what he learned, "[Petitioner] was very upset, and [Petitioner] defended his actions."[9] (*Id.* at ¶ 22)

Between August 17 and September 15, 2020, Petitioner reached out to Roper via text message with questions related to Roper's schedule and the status of various matters. Specifically,

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[7] According to NYCHA, a matter is "closed" by OSS when it is determined that there is no immediate safety issue that requires further intervention. Once a matter is closed by OSS, it is left to Human Resources ("HR") and/or other relevant departments to address.

[8] Petitioner asserts that Roper texted that he was at the Jefferson Houses on August 11, 2020, but did not meet with Petitioner.

[9] Petitioner acknowledges that Roper called him about the Counseling Memo and advised him that the Union was not going to challenge it, but Petitioner asserts that this call did not occur until after he was terminated in November 2020.

on August 17 and 20, 2020, Petitioner and Roper exchanged texts about when Roper would be returning to the Jefferson Houses.[10] On August 25 and September 15, 2020, Petitioner texted Roper asking for an update on his probationary status.[11]

On November 2, 2020, NYCHA terminated Petitioner. Petitioner's termination letter states, in pertinent part, "I regret to inform you that your employment with [NYCHA] is terminated effective Monday, November 2, 2020, close of business." (Pet., Ex. H)

Between November 2 and December 23, 2020, Petitioner and Roper exchanged multiple text messages related to Petitioner's termination. Notably, on November 4, 2020, Petitioner texted Roper asking how he could go about appealing his termination, and Roper replied that same day informing Petitioner that he would call him later that day after he spoke with HR.[12] On November 23 and 24, 2020, Petitioner and Roper exchanged a series of text messages in an attempt to schedule a call but were unsuccessful in reaching one another. Sometime prior to November 27, 2020, Petitioner texted Roper regarding efforts to overturn his termination, "Is it a long shot or I have a fair chance[?]" to which Roper replied, "It's a fair shot. And like I said before. You have more than one year. So I have several fights on your behalf. Can't guarantee that they'll overturn it which is hard but we definitely will be putting the good fight forward." (Pet., Ex. E) Petitioner followed up, "Ok good to hear appreciate you hopefully everything goes well," to which Roper replied, "Yes. We will fight hard." (*Id.*)

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[10] Petitioner asserts that these text exchanges did not result in a meeting with Roper.

[11] Roper did not reply to Petitioner via text message on August 15, 2020. Although Roper replied to Petitioner's September 15, 2020 text message and indicated that he would have an answer that day, subsequent messages show that Petitioner had not received a response that day via text message.

[12] According to Roper, on or around the second week of November 2020, Petitioner called and informed Roper that he was terminated.

On November 27, 2020, Petitioner texted Roper asking whether he received any updates from HR, and on November 30, 2020, Roper replied that he spoke with HR and that NYCHA was still investigating. On December 1, 2020, Roper texted Petitioner stating that he was still waiting on HR to follow up with him, and on December 7, 2020, Petitioner asked again whether Roper had any further updates. On December 23, 2020, Roper texted Petitioner stating that he just spoke with HR and that he would call Petitioner later that day.

Petitioner asserts that Roper called him on December 24, 2020, and stated that he learned that Petitioner was discharged for an alleged "assault" that occurred on August 6 or 8, 2020.[13] (Pet. ¶¶ 2, 6) However, Petitioner states that management never approached him about an alleged assault, that he told Roper that the allegation "wasn't true and [that he] want[ed] to defend [him]self," and he asked Roper who was making the accusation. (*Id.* at ¶ 6) Roper did not respond directly, but told Petitioner that "nothing can be done and [that the] discharge will stand." (*Id.*)

According to Roper, after learning of Petitioner's termination, he made calls to Petitioner's direct supervisors and HR and was informed that Petitioner allegedly threatened to physically harm a supervisor in front of the Superintendent at the Jefferson Houses. Roper also learned that Petitioner was previously "accused of workplace violence on numerous occasions." (Roper Aff. ¶ 29) According to Roper, he spoke with multiple staff members who all repeated "the same stories of Petitioner's hostility, aggressive behavior, and threats."[14] (*Id.* at ¶ 30) Further, Roper reviewed Petitioner's folder and found that he failed his third and fourth evaluation. According to Roper, he "did everything within [his] power as a business agent to assist and represent Petitioner,

[13] We note that there is no evidence of record that Petitioner was accused of assault, only that he allegedly threatened his supervisor on August 10, 2020.

[14] Petitioner asserts that these additional allegations are "baseless." (Rep. at 9, ¶ 2)

however, due to the circumstances [he] was unable to get [Petitioner] the results [Petitioner] desired." (*Id.* at ¶ 35)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by failing to accurately advise him whether he had to report for work on August 8, 2020, failing to properly represent him after he received a Counseling Memo related to his failure to report to work on August 8, 2020, and failing to challenge his termination. Petitioner asserts that after he spoke with Roper on the phone following his shift on August 7, 2020, and Roper told him that he did not have to report for work on August 8, 2020, Petitioner texted him later in the day to confirm what was said over the phone. However, Petitioner contends that Roper did not respond to his text message, he therefore did not report for work on August 8, 2020, and that two days later he received a Counseling Memo for being AWOL on August 8, 2020. Moreover, Petitioner argues that after receiving the Counseling Memo, he texted a copy of it to Roper, and that subsequently he did not receive proper representation from Roper with respect to investigating and challenging the substance of the Counseling Memo.

Petitioner contends that following his termination, text messages sent by him to Roper in November and December 2020 demonstrate that although Petitioner wanted to challenge his discharge, Roper did not provide him an opportunity to defend himself. Further, Petitioner avers that Roper called him on December 24, 2020, and informed him that the reason for his discharge was an "assault" that allegedly occurred on August 6 or 8, 2020. (Pet. ¶¶ 2, 6) However, Petitioner asserts that he was shocked to hear this allegation because: (1) he received the Counseling Memo

in August and an assault was not mentioned in the memo; (2) assault is a criminal act and he was not arrested; and (3) he was on probation at the time of the alleged assault, yet he was able to work three additional months and take vacation after the alleged assault, and he finds it "unbelievable someone on probation would be allowed to continue working." (*Id.* at ¶ 8) Petitioner asserts that although he informed Roper that he wanted to defend himself against this false accusation, Roper told him that nothing could be done and that the discharge would stand. He contends that the Union did not have an elected shop steward at Jefferson Houses, and therefore Roper was his only line of defense. Moreover, Petitioner avers that given how often Roper was present at the Jefferson Houses between August and November 2020, including August 11, 2020, the day his supervisor filed the incident report, Roper should have known about the allegation prior to Petitioner's termination and he "could have even help[ed] NYCHA write up [the] bogus charges." (Rep. at 8, ¶ 5)

As a remedy, Petitioner requests that the Union be instructed to challenge his termination, fight the false accusations against him, and assist him in getting reinstated with back pay.

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.[15] The Union asserts that although Petitioner only presented "a portion of months of communication" between Roper and Petitioner, the text messages of record show that Roper made a good faith effort to respond to Petitioner's issues after fully investigating each of them. (Union Ans. ¶ 8) It contends that Roper's actions and responses to Petitioner were based on information from HR, the documents in

[15] NYCCBL § 12-306(b)(3) provides, in pertinent part: "[i]t 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."

Petitioner's personnel folder, and statements from other Caretakers and his immediate supervisors, and as such were not arbitrary. Moreover, it avers that the text messages show that Roper communicated with Petitioner in the "acceptable way that a business agent should." (*Id.* at ¶ 18)

The Union argues that although Petitioner is ostensibly dissatisfied with his termination and the answers provided by Roper, a member's dissatisfaction and frustration is insufficient to establish a breach of the duty of fair representation. It asserts that although Petitioner implies that Roper and the Union should have done more to fight his termination, such as filing a grievance, it is well-settled that a union does not breach the duty of fair representation unless its decision not to pursue a grievance was arbitrary, discriminatory, or made in bad faith. Further, the Union contends that even if it made an error in judgment by not challenging Petitioner's termination, such an error does not constitute a breach of the duty of fair representation. Accordingly, the Union avers that it did not breach the duty of fair representation and requests that Petitioner's claim be dismissed.

NYCHA's Position

NYCHA argues that Petitioner fails to establish a breach of the duty of fair representation. It asserts that, as a probationary employee, Petitioner could be terminated without a hearing or a stated reason, and therefore the Union could not have brought a meritorious grievance or otherwise prevented or reversed Petitioner's termination. Moreover, although Petitioner was probationary and it did not need just cause to terminate his employment, NYCHA contends that Petitioner's documented unsatisfactory performance and misconduct, including an instance of alleged workplace violence, provided it with sufficient cause for failing Petitioner's probation.

Accordingly, NYCHA avers that any derivative claim against NYCHA pursuant to NYCCBL § 12-306(d) must also be dismissed.[16]

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 accurately cite all relevant 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).[17]

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 (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

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

[17] Additionally, in the analysis below, we "draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *McNeil*, 10 OCB2d 8, at 8 (BCB 2017) (quoting *Dillon*, 9 OCB2d 28, at 14 (BCB 2016)) (quotation marks omitted).

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).

It is well-established that 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) (citations omitted); *see also Proctor*, 3 OCB2d 30, at 12 (BCB 2010). Thus, a union is not obligated to advance every grievance, and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Indeed, "[a] union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled." *Sicular*, 79 OCB 33, at 13 (BCB 2007) (citation omitted).

In this case, Petitioner has failed to establish that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. Even assuming that Roper told Petitioner that he did not have to report for work on August 8, 2020, there is no evidence that Roper's guidance was arbitrary, motivated by bad faith, or intended to discriminate against Petitioner in any way. To the extent that Petitioner alleges that Roper provided him with erroneous guidance that he relied on in failing to report for work on August 8, 2020, at most such advice was "negligence, mistake, or

incompetence," which is insufficient to establish a breach of the duty of fair representation. *See Bonnen*, 9 OCB2d 7, at 17 (quoting *Sims*, 8 OCB2d 23, at 15) (internal quotation marks omitted).

Similarly, Petitioner has provided no evidence that Roper's failure to respond to his text message following the phone call on August 7, 2020 was arbitrary, motivated by bad faith, or intended to discriminate against him. Moreover, although a union has "a responsibility to communicate with its members," the duty of fair representation does not contemplate specific requirements for communication, and under these circumstances we do not find that the Union's failure to respond to Petitioner the same day breached its duty of fair representation. *See Bonnen*, 9 OCB2d 7, at 18-19 (quoting *Morales*, 5 OCB2d 28, at 26 (BCB 2012), *affd*., *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective Bargaining*, 28 N.Y.S.3d 848 (Sup. Ct. N.Y. Co. 2016), *affd*., *Matter of United Fedn. of Teachers v. City of New York*, 154 A.D.3d 548 (1st Dept. 2017) (internal quotation marks omitted)); *Kassim*, 8 OCB2d 8, at 16 (BCB 2015).

With respect to the Union's representation of Petitioner following the issuance of the Counseling Memo for being AWOL on August 8, 2020, the record reflects that Roper investigated the charges, concluded that Petitioner failed to appear for overtime that he signed up for, determined that the Union could not take action to "pull" or otherwise challenge the Counseling Memo, and communicated his findings to Petitioner. *See Sicular*, 79 OCB 33, at 13 (citations omitted) (explaining that "[a] union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled").[18] There is no evidence in the record that Roper pursued

[18] Further, Petitioner has not established that he was prejudiced by any failure by the Union to communicate about the Counseling Memo in a more timely fashion. *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

this course of conduct arbitrarily, in bad faith, or with the intention to discriminate against Petitioner. *See Evans*, 6 OCB2d 37, at 8 (citations omitted) (explaining that a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty").[19] Moreover, although Petitioner appears to disagree with the Union's ultimate decision not to pursue the matter after its investigation, dissatisfaction with the Union's "conclusions, tactics, or outcomes [is] insufficient to demonstrate a violation of the Union's duty of fair representation." *Molina*, 12 OCB2d 5, at 8 (BCB 2019) (quoting *Bonnen*, 9 OCB2d 7, at 19). Accordingly, we do not find that the Union breached its duty of fair representation with respect to its investigation or decision not to challenge Petitioner's Counseling Memo. *See Evans*, 6 OCB2d 37, at 9; *Sicular*, 79 OCB 33, at 15-16; *Nardiello*, 2 OCB2d 5, at 41-42.

Similarly, with respect to the Union's representation of Petitioner following his termination on November 2, 2020, the record reflects that again Roper conducted an investigation, spoke with HR and Petitioner's direct supervisors about the reasons for Petitioner's termination, and reviewed Petitioner's personnel folder. In doing so, he discovered that Petitioner was accused of workplace violence on numerous occasions, including an allegation that Petitioner threatened his supervisor in front of the Superintendent, and that Petitioner failed his third and fourth quarter probationary evaluations. As a result of these circumstances, the Union determined that it would not assist Petitioner in challenging his termination, and Roper communicated his conclusion to Petitioner.

union's alleged failure to communicate when that alleged failure did not prejudice or injure the petitioner.") (citing *Walker*, 6 OCB2d 1 (BCB 2013); *Lein*, 63 OCB 27 (BCB 1999); *Shenendehowa Central School District*, 29 PERB ¶ 4607 (1996); *Bd. of Ed. of the City School District of the City of N.Y.*, 33 PERB ¶ 3062 (2000)).

[19] We note that even assuming Roper was mistaken in his determination that Petitioner signed up for overtime on August 8, 2020, such a mistake does not violate the Union's duty of fair representation. *See Bonnen*, 9 OCB2d 7, at 17; *Sims*, 8 OCB2d 23, at 15.

There is no evidence in the record that the Union's decision not to appeal Petitioner's termination was arbitrary, made in bad faith, or with the intent to discriminate against Petitioner. Although Petitioner asserts that he was falsely accused of threatening his supervisor and disagrees with the merits of the Union's decision not to challenge his termination, his dissatisfaction with the Union's "conclusions, tactics, or outcomes," is insufficient to establish a breach of the duty of fair representation. *Molina*, 12 OCB2d 5, at 8 (quoting *Bonnen*, 9 OCB2d 7, at 19).[20] Accordingly, we do not find that the Union breached its duty of fair representation with respect to its investigation nor its decision not to challenge Petitioner's termination.

Further, to the extent that Petitioner alleges that the Union breached its duty of fair representation by failing to adequately communicate with him following his termination in November and December 2020, we do not find that the record supports this claim. The record demonstrates that between November 2, 2020 and December 23, 2020, Petitioner and Roper had numerous text message exchanges in which Petitioner inquired about his termination, whether he could challenge his termination, and the status of the matter. The text messages also show that Roper kept Petitioner apprised of his efforts to investigate Petitioner's termination. Moreover, the day after Roper's last text message of record, on December 23, 2020, Petitioner acknowledges that Roper called him to inform him of the reason for his termination and that there was nothing the Union could do it challenge it. Accordingly, we find that the Union's conduct did not amount to

[20] Moreover, Petitioner's claims that Roper should have known about the alleged threat incident earlier or could have assisted NYCHA with writing up the charges are entirely speculative. *See Buttaro*, 13 OCB2d 1, at 11 n.11 (BCB 2020) (explaining that speculatory allegations are insufficient to state a violation of the NYCCBL). However, even assuming that Roper should have known and acted promptly concerning the alleged threat, Petitioner is merely alleging that Roper was not doing his job properly, which is insufficient to establish a breach of the duty of fair representation. *See Shymanski*, 5 OCB2d 20, at 11 (BCB 2012) (citation omitted) ("dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.").

a breach of the duty of fair representation. *See Turner*, 3 OCB2d 48, at 16 (BCB 2010) (finding that the petitioner's dissatisfaction with the quality of communication did not amount to a breach of the duty of fair representation where the record failed to show that the union did not keep the petitioner informed).

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.

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-4418-21, filed by Corey West, against the City Employees Union, Local 237, International Brotherhood of Teamsters, and the New York City Housing Authority, is hereby dismissed in its entirety.

Dated: June 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER