Keitt, 12 OCB2d 9 (BCB 2019)

(IP) (Docket No. BCB-4303-18)

Summary of Decision: Petitioner filed an improper practice petition alleging that the Union breached its duty of fair representation by failing to properly assist her in getting an explanation for discrepancies in her paycheck. Respondents argued that Petitioner failed to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board found that Petitioner did not 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 Petition

-between-

TAMMY KEITT,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION LOCAL 371,

-and-

THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On December 21, 2018, Tammy Keitt ("Petitioner") filed a *pro se* improper practice petition against Social Service Employees Union Local 371 ("Union") and the City of New York ("City"). Petitioner claims 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 assist her in getting an explanation

for discrepancies in her paycheck.[1] Respondents argue that Petitioner failed to allege facts sufficient to demonstrate that the Union breached 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 holds the civil service title of Caseworker at the Human Resources Administration ("HRA"), and the Union represents all employees in that title. She claims that for years HRA has repeatedly miscalculated her paychecks causing her to suffer financial hardship.[2]

In October 2018, Caseworkers were scheduled to receive retroactive wage increases. However, Petitioner's October 19, 2018 paycheck ("October 19 paycheck") included deductions that she did not understand. On October 18, 2018, Petitioner sent an email to the HRA Payroll Inquiry, Salary Administration, and HCM Customer Care mailboxes requesting an explanation for the deductions on her October 19 paycheck. The October 18 emails stated, in pertinent part, that: "[t]his email is regarding my pay date of 10/19/2018. In the prior period amount earned there are minuses, which is not on the pay date of 10/5/2018. Can you please advise as to the reason for the

[1] The OCB Executive Secretary determined that to the extent Petitioner is asserting a separate and independent claim against the City, the claim is dismissed because the petition does not set forth facts to support a claim that any alleged action taken against her by her employer was motivated by union activity pursuant to NYCCBL § 12-306(a)(3). Therefore, the Board does not address these claims. The City remains a Respondent only to the extent required by NYCCBL § 12-306(d).

[2] Petitioner submitted exhibits showing a series of issues with her paychecks, including an overpayment and recoupment dating back to 2012, as well as multiple letters to the Union requesting its assistance. While we may consider this evidence as background information, the Executive Secretary, in her sufficiency letter, notified Petitioner that any violations that Petitioner alleges took place prior to August 21, 2018 are time-barred under the NYCCBL. *See* NYCCBL § 12-306(e).

minuses?" (Pet., Ex. B; Ans., Ex. 4) Petitioner sent multiple follow-up emails asking for "the reason for the deductions" on her October 19 paycheck. (*Id*.)

In addition, on October 19, 2018, Petitioner sent a letter by certified mail to the Union's Associate Director of Grievances and Legal Service, Aggrey Dechinea, stating:

> On [s]everal occasions, I have spoken and written letters to you regarding the constant pay adjustment and recoupments. On pay date 10/19/2018, (without notice or explanation) I received a prior period amount earned deduction on my paycheck. Because of the minuses on my check I was unable to receive my retroactive monies.
>
> In 2016, a Step II Grievance was held. The outcome of the Investigation/Determination: "We have been advised by the Agency's Salary Administration that the grievant has been correctly paid at the incumbent salary of Caseworker. We have determined that there has been no violation, misapplication, or misinterpretation of any contractual provision. Accordingly, this grievance is denied."
>
> Based on the outcome of the grievance, I'm questioning why I'm always facing pay adjustments and recoupments. I am ceaselessly facing financial hardship due to payroll constant inaccuracy with calculation, and their repetition of making errors. All my co-workers received their retroactive monies. I am requesting for payroll to put in writing the reasons for the deduction on 10/19/2018 pay date.[3]

(Pet. Ex. C) (emphasis omitted) According to Petitioner's letter, Petitioner attached copies of the October 19 paycheck, the "Determination of Grievance," and the aforementioned emails that she sent to Payroll Inquiry, Salary Administration, and HCM Customer Care. (*Id*.) Petitioner asserts that she sent the letter to the Union "with no results." (Pet., p. 1) The Union asserts that, upon receipt of Petitioner's October 19 letter, the Union utilized its best efforts to obtain an explanation

[3] According to the 2016 Step II Determination, the "grievance states that employees in [certain titles] are entitled to general wage increases. Grievant seeks that her salary accurately be adjusted to the incumbent rate for Caseworker." (Attached to March 8, 2019 email from Petitioner to the Trial Examiner and Respondents)

for the issues raised by Petitioner and, based on the explanation it received, felt that the recoupment was appropriate.

In an email dated January 14, 2019, the Director of Specialized Payroll responded to the emails Petitioner sent to Payroll Inquiry. The Director explained that Petitioner had been overpaid in the amount of $3,007.50 between February 24, 2015, and February 19, 2016, because she incorrectly received an assignment differential and she was incorrectly paid after she exhausted Worker's Compensation and available leave balances at several points. She also explained that since only $416.42 was deducted from Petitioner's October 19 paycheck, she still owed $2,591.08. Additionally, the Director attached a Notice of Overpayment to the email.[4] In its answer to the improper practice petition, the City submitted a lengthy explanation of the overpayments as well as the deduction that was taken from Petitioner's October 19 paycheck in an effort to begin recouping those overpayments.[5] The City also asserts that Petitioner's October 19 paycheck included the retroactive pay increase.

[4] The Notice informed Petitioner that in compliance with Citywide Agreement, Article IX, § 8, there are two methods of recoupment available: (1) salary deduction of $100.00 bi-weekly until the total amount of overpayment is satisfied; or (2) annual leave/compensatory time deduction of 86.5 hours (from current and future accruals). The Notice also informed Petitioner that if she did not respond by January 28, 2019, then Payroll would proceed with the first option, salary deduction. Petitioner did not respond.

[5] The City asserts that the first overpayment was for an assignment differential from the period of February 24, 2015, through May 30, 2015, in the amount of $941.83, which Petitioner was not eligible to receive. It asserts that the second and third overpayments were for periods when worker's compensation was exhausted: for February 5, 2016, in the amount of $187.79; and from February 8, 2016, through February 20, 2016, in the amount of $1,877.88.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union violated its duty of fair representation by failing to properly assist her in getting an explanation for repeated discrepancies in her paychecks.[6] She alleges that HRA has repeatedly failed to pay her properly. Specifically, she claims that in October 2018 multiple deductions were taken out of her paycheck without notice or explanation and she did not receive retroactive payments that she was entitled to. As a result, she sent a certified letter to the Union seeking an explanation for the deductions. She asserts that she received "no results." (Pet. p. 1)

Petitioner repeatedly states that her "argument is not about the overpayment of the money owed, as I understand this monies [sic] has to be paid back. It's about payroll['s] continu[ous] patterns of miscalculations and inaccuracies that is causing constant recoupments in my salary and financial hardship." (March 14, 2019 email from Petitioner to the Trial Examiner and Respondents)

As a remedy for the Union's alleged breach of its duty of fair representation, Petitioner seeks an explanation of all the deductions on her October 19 paycheck and an explanation for why her paychecks constantly have deductions and recoupments. Additionally, Petitioner requests a proper investigation of her salary.

Union's Position

The Union argues that "[a]t no time did [it] act in an arbitrary, discriminatory, or bad faith manner with respect to any of the issues raised by Petitioner in [the timely portion] of the Petition."

[6] While Petitioner cites multiple sections of the NYCCBL have been violated, she has only alleged a violation of NYCCBL § 12-306(b)(3).

(Union Ans. ¶ 5) To the contrary, the Union asserts that it utilized its best efforts to obtain an explanation for the issues raised by Petitioner and determined that the recoupment was appropriate. Additionally, the Union asserts that "[u]pon information and belief, [the Union] took all appropriate action regarding said issues to the extent that any action was necessary or appropriate." (Ans. ¶ 4) Accordingly, the Union asserts that it did not breach its duty of fair representation and that the petition should be dismissed and denied in its entirety.

City's Position

The City argues that Petitioner has failed to establish that the Union breached its duty of fair representation. It asserts that Petitioner received the retroactive monies that she was entitled to and that the deductions were appropriate. Additionally, the City asserts that Petitioner received a response from the City explaining the October 19 deductions and adjustments. Thus, the City argues that any potential derivative claims under NYCCBL § 12-306(d) against it must also be dismissed.[7] Accordingly, the City asserts that the petition should be dismissed in its entirety.

DISCUSSION

While the Petitioner is dissatisfied with the recoupment and with HRA Payroll's repeated errors, we do not find grounds to establish that the Union breached its duty of fair representation.[8]

[7] NYCCBL § 12-306(d) provides, in pertinent part, that:

> The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

[8] "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

See Smith, 3 OCB2d 17, at 9 (BCB 2010) (explaining that mere dissatisfaction with the outcome, or questioning the strategic decisions of the union, is insufficient to establish a breach of the duty of fair representation); *Edwards*, 1 OCB2d 22, at 21 (BCB 2008).

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be carried simply by . . . questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citation and quotation marks omitted). To establish a breach of the duty of fair representation, "Petitioner must establish that the Union's actions or omissions in representing her were arbitrary, discriminatory, or in bad faith." *Porter*, 4 OCB2d 9, at 14 (BCB 2011) (citation and quotation marks omitted). A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Nealy*, 8 OCB2d 2, at 16; *Evans*, 6 OCB2d 37, at 8 (BCB 2013).

At issue here is Petitioner's request for an explanation regarding the deductions or recoupments that the City took from her October 19 paycheck.[9] Shortly after she received the October 19 paycheck, Petitioner sought such an explanation directly from the City as well as assistance from the Union. She received a written response from the City that included an explanation on January 14, 2019. In essence, although the Petitioner asked the Union to get the

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. New York 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).

[9] Petitioner has repeatedly asserted that her claim is not about the overpayment, which she acknowledges must be paid back.

City to "put in writing the reasons for the deduction on 10/19/2018 pay date," she made the same request herself and was able to achieve this result on her own. (Pet. Ex. C) Petitioner has not identified any prejudice resulting from having received this explanation from the City rather than from the Union. *See Barillaro*, 12 OCB2d 4 (BCB 2019) (finding no breach of the union's duty when petitioner received the agency rules regarding transfers from the employer); *cf. Morales*, 5 OCB2d 28, at 23 (BCB 2012) (finding a violation where the union's failure to respond prejudiced petitioner), *affd Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective Bargaining*, 51 Misc3d 817 (Sup Ct, New York County 2016), *affd* 154 AD3d 548 (1st Dept. 2017).

Additionally, Petitioner has not alleged facts to show that the Union discriminated against her. *See Gertskis*, 77 OCB 11, at 11. She alleges that the Union failed to help her get an explanation from Payroll – not that it treated her differently than any other member. Nor has Petitioner claimed that the Union acted in bad faith. Accordingly, while Petitioner may have been frustrated by payroll errors and corrections, in this instance, we cannot find that the Union breached its duty of fair representation.

Since we find that Petitioner did not establish that the Union breached its duty of fair representation, any potential derivative claim against the City pursuant to NYCCBL § 12-306(d) also fails. *See Nardiello*, 2 OCB2d 5, at 42 (BCB 2009).

Accordingly, this petition is dismissed 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 filed by Tammy Keitt, docketed as BCB-4303-18, against the City of New York, hereby is dismissed in its entirety.

Dated: April 8, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER