Hyppolite, 12 OCB2d 10 (BCB 2019)

(IP) (Docket No. BCB 4223-17)

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 the NYPD. The Union and the City 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-

PIERRE YVES HYPPOLITE,

Petitioner,

-and-

SERGEANTS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., THE NEW YORK CITY POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On July 3, 2017, Pierre Yves Hyppolite ("Petitioner") filed a *pro se* verified improper practice petition against the Sergeants' Benevolent Association of the City of New York, Inc.[1] ("Union"), the City of New York ("City"), and the New York City Police Department ("NYPD"). Petitioner asserts that the Union breached its duty of fair representation, in violation of § 12-

[1] Petitioner subsequently retained counsel, who requested an abeyance of the matter for over a year pending a related Article 78 proceeding.

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 represent him in relation to his separation of service from the NYPD. 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 represents NYPD employees in the title of Sergeant. Petitioner has held this title with the NYPD since November 2005. The relevant claims that will be considered by the Board relate to the Union's representation of Petitioner concerning his separation of service with the NYPD in the spring of 2017.[2]

In or around January 2013, Petitioner's command referred him to the NYPD Medical Division to undergo a psychological evaluation after he was "observed engaging in abnormal behavior." (City Ans., Ex. 2) Thereafter, Petitioner was placed on restricted duty, his weapon was vouchered, and he was re-assigned to the NYPD's Video Interactive Patrol Enhanced Response ("VIPER") unit, which is responsible for reviewing surveillance cameras. Petitioner was then directed to appear before the NYPD Medical Board, consisting of a panel of three doctors, to assess his fitness for duty. The Union assigned its Executive Board Member and Financial Secretary, Gary DeRosa, to assist Petitioner before the Medical Board. In particular, DeRosa states that he assisted Petitioner in providing the Medical Board with medical records to support Petitioner's

[2] In his replies, Petitioner included new facts and allegations that pre-date the events alleged in the petition to constitute a violation of the NYCCBL. Many of these allegations are untimely. Therefore, new facts asserted in the replies are described here only to the extent they constitute relevant background information.

position that he was fit for duty.[3] The Union also hired and paid for a law firm that handles disability determinations ("Law Firm") to represent Petitioner. Petitioner first appeared before the Medical Board on October 20, 2014; however, his case was deferred pending a review of his hospital records and a written statement. The Medical Board reconvened on December 15, 2014, at which time it found Petitioner psychologically unfit for full-duty police work and recommended that the New York City Police Pension Fund ("Pension Fund") retire Petitioner.

Petitioner's case was then referred to the Pension Fund to determine whether his disability was related to an incident or accident sustained in the performance of duty. The Union assigned DeRosa and the Law Firm to represent Petitioner in these proceedings, and according to a letter from the Pension Fund's General Counsel, they succeeded in having the case remanded to the Medical Board twice for additional evaluations based on new medical evidence.[4] Notwithstanding the additional evaluations, on March 8, 2017, the Pension Fund Board of Trustees adopted the Medical Board's recommendation that Petitioner be retired and determined that he was entitled to receive an "ordinary disability pension."[5] (Union Ans. ¶ F)

According to the Union, the NYPD subsequently gave Petitioner the option of retiring with a service retirement pension, which would allow him to obtain an additional benefit known as the Variable Supplement Fund ("VSF"), rather than an ordinary disability pension. The Union claims

[3] Petitioner asserts that he does not know which medical records were submitted on his behalf.

[4] Petitioner was first examined by the Medical Board on October 20, 2014, and he was examined again on January 21, 2016 and September 29, 2016.

[5] In his replies, Petitioner claims that this determination was made in retaliation for him contacting the Brooklyn District Attorney's Office and for filing a personal injury claim against the City. However, he does not allege that the determination was made in retaliation for union activity, an essential element of a claim under NYCCBL § 12-306(a)(3). Thus, even if these claims were properly raised in the petition, this Board does not consider them. *See Babayeva*, 1 OCB2d 15, at 8 (BCB 2008) (The NYCCBL "explicitly requires that the alleged discrimination be based upon union membership or activity.")

that since Petitioner indicated he would apply for a service retirement, the NYPD took no actions to remove him and instead began to process him as a service retiree. However, Petitioner never took the necessary steps to apply for the service retirement. Petitioner claims this is because he was never ordered to do so.

Despite the Pension Fund's finding that Petitioner must be separated from service, Petitioner continued to report to work from March 8, 2017, through April 29, 2017. Petitioner then took a scheduled vacation from April 30 through May 30, 2017. According to the City, on May 2, 2017, the Executive Officer of the Medical Division, Inspector James Donnelly, became aware that Petitioner had continued to work "in contravention of NYPD orders." (City Ans. ¶ 19) Inspector Donnelly ordered two Sergeants assigned to the Medical Division to transport Petitioner there upon his return from vacation.

On June 1, 2017, the two Sergeants arrived at Petitioner's worksite and attempted to transport him to the Medical Division. According to Petitioner, he asked them why they needed to transport him when he had a car and was capable and willing to follow them there. The Sergeants insisted that Petitioner could not drive himself and that they had to transport him to the Medical Division. Petitioner asked the Sergeants to give him time to contact an attorney, and he remained at the VIPER unit. After a few hours, Petitioner was contacted by DeRosa, who told him that he was waiting for him at the Medical Division. Petitioner informed DeRosa that he was waiting to hear from his attorney and the Chief of Patrol's office. A short time later, DeRosa and Inspector Donnelly arrived at the VIPER unit. Donnelly informed Petitioner that due to the final disposition of the Pension Fund, he should have been separated from the NYPD and was no longer permitted to return to work. According to the City, Donnelly also reminded Petitioner that he needed to speak to the Pension Fund by June 14, 2017, regarding his separation from service.

Petitioner asserts that DeRosa interjected and spoke to him in a "belligerent tone," stating that he had to go to the Pension Fund by the deadline or else he would lose out on the VSF, and DeRosa did not want to see that happen. (Pet., p. 2) Petitioner claims that this is the first and only time that DeRosa spoke to him "face to face." (Rep. to Union ¶ 2)

Petitioner claims he was "stunned" by Donnelly's directive not to return to work. (Pet., p. 2) He informed the Chief of Patrol and the Internal Affairs Bureau about what had happened. However, despite multiple phone calls to a Sergeant who Petitioner believed was investigating the matter, Petitioner did not receive any response.

On June 5, 2017, DeRosa sent Petitioner a letter informing him of his available options to retire with a service retirement pension. In relevant part, the letter stated:

> Dear Sgt. Hyppolite,
>
> This correspondence is to reiterate to you that on March 8, 2017, the New York City Police Pension Fund [("NYCPPF")] Board of Trustees voted in the affirmative and awarded you an Ordinary Disability Retirement (ODR).
>
> It is my understanding that you are currently using your accrued time and are still being carried on the NYPD active payroll. Since your date of appointment to the NYPD was June 30, 1995, you are permitted to retire on a service retirement and be entitled to receive the Defined Benefit, which calculates to $12,000.00 annually. **I am informing you once again**, that if you do not appear at the . . . NYCPPF before June 14, 2017, and file for a Service Retirement that you will retire from the NYPD on an ODR. For your information, members who retire on ODR, **are not entitled** to the annual **$12,000.00 Defined Benefit**.
>
> I cannot stress the importance of the above information and hope that you heed my advice.
>
> For your information the address to the NYCPPF is: 233 Broadway, 18th Floor, NYC and their telephone number is (212) 693-5100.

(Union DeRosa Aff., Ex. A) (emphasis in original)

On July 3, 2017, Petitioner filed the instant improper practice petition claiming that DeRosa's actions breached the Union's duty of fair representation.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union did not provide him with proper representation in relation to the events leading up to his separation of service from the NYPD. In particular, he claims that the Union took a "hands-off approach" during the incident that occurred in January 2013, in which he was first referred for a psychological evaluation. (Pet., p. 2) Petitioner also claims that he never met Union representative DeRosa in person before June 1, 2017, when DeRosa "merely show[ed] up at the scene and threaten[ed] to withhold benefits" from him. (Pet., p. 2) Moreover, he states that DeRosa never met with him to speak about the issues or hear Petitioner's version of events. Petitioner also claims that he does not know what, if anything, the Law Firm did on his behalf. He also contends that the Union and the City "act[] in concert" and are "in cahoots" with one another. (Rep to Union, p. 2) Thus, Petitioner claims that the Union acts more favorably to the City than to its members. Petitioner asserts that the Union's actions do not constitute proper representation.

Union's Position

The Union argues that Petitioner's claims are time-barred, in whole or part, by the statute of limitations. Regarding the merits, the Union contends that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege a breach of contract with the NYPD for which the Union failed to provide representation. Furthermore, the Union argues that it did not act in an arbitrary, discriminatory, or bad faith manner. Rather, the Union obtained and offered Petitioner a "reasonable resolution of his dispute" based on the risks involved in further litigation

to challenge the NYPD's determination that Petitioner was unfit for duty and was entitled to a disability pension. (Union Ans. ¶ 9)

City's Position

The City argues that the petition is devoid of any facts that demonstrate that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. The Union representative's actions in representing Petitioner amount to nothing more than advising Petitioner to take steps to preserve his benefits after the NYPD had already determined that he was medically unfit for duty. Furthermore, the City contends that at all times in its representation of Petitioner, the Union exercised sound discretion and acted in good faith.[6]

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). 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). Here, Petitioner has pled facts alleging that the Union violated its duty of

[6] The City also argues that the Union did not violate NYCCBL §§ 12-306(a)(1), (4), or (5), or §§ 12-306(b)(1), or (2). However, since we do not construe the petition as alleging violations of these sections of the NYCCBL, we need not address these arguments.

fair representation. We therefore construe the petition as alleging violations of NYCCBL § 12-306(b) and (d).[7] *See Shymanski*, 5 OCB2d 20, at 8 (BCB 2012).

As "timeliness is a threshold question," we first address the Union's argument that some of Petitioner's claims are untimely. *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009). Pursuant to NYCCBL § 12-306(e), the statute of limitations for an improper practice claim is four months.[8] Consequently, "claims antedating the four[-] month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 28 (citations omitted). Such claims, however, are admissible as background information. *See Nealy*, 8 OCB2d 2, 15 (BCB 2015).

As the instant petition was filed on July 3, 2017, any claims arising more than four months earlier are time-barred. Consequently, claims in the petition regarding the Union's representation of Petitioner in 2013, when he was first referred for a psychological evaluation, are untimely. Also untimely are any claims relating to the Union's representation of Petitioner before the NYPD Medical Board and Pension Fund from 2014 through March 2, 2017.[9]

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[7] 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)]."

[8] NYCCBL § 12-306(e) states:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

[9] Although any allegations regarding these actions are not timely, we note that the evidence demonstrates that the Union and/or the Law Firm represented Petitioner. They advocated on Petitioner's behalf by successfully requesting on more than one occasion that the case be remanded

Petitioner's claims concerning the Union's breach of its duty of fair representation of him from March 3, 2017, through June 2017, however, are timely. The only facts that fall within this time frame concern Union representative DeRosa's actions on June 1, 2017, when Petitioner was confronted by Inspector Donnelly and ordered to cease reporting to work, and Petitioner's claim that the Union breached its duty of fair representation because it did nothing to assist him and acted "in cahoots" with the City.

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 (citing *Walker*, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5). 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*

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to the Medical Board for additional evaluations based on new medical evidence. While Petitioner is clearly upset that he ultimately retired, his "dissatisfaction with the outcome of his case is insufficient to ground a claim that [the] union has breached its duty of fair representation." *Lake*, 8 OCB2d 22, at 9 (BCB 2015) (internal quotations and brackets omitted) (citing *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007); *see Gertskis*, 77 OCB 11, at 11 (BCB 2005)).

Collective Bargaining, 51 Misc. 3d 817 (Sup. Ct. N.Y. Co. 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)).

Regarding the events that occurred on June 1, 2017, Petitioner alleges that DeRosa's actions consisted of "merely showing up at the scene and threatening to withhold benefits" from him. (Pet., p. 2) Petitioner also claims that DeRosa spoke to him in a "belligerent tone." *Id*. Assuming these allegations are true, such actions speak only to the quality of DeRosa's representation. 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 (quoting *Gertskis*, 77 OCB 11, at 11) (assuming that petitioner's attorney "yelled" at her on the phone, arrived late to a hearing before the Civil Service Commission, and put little effort into arguing her case, such complaints do not rise to the level of a breach of the union's duty of fair representation).

Additionally, we do not find that the facts support Petitioner's assertion that the Union did nothing to assist him.[10] Rather, the record demonstrates that the Union took steps to try to help Petitioner understand how to obtain the maximum possible retirement benefits. In addition to informing Petitioner on June 1, 2017, that he should apply for the VSF, DeRosa followed up this advice with a detailed letter instructing Petitioner as to the deadline and address for doing so. In particular, the letter explained that the benefit was $12,000 yearly, and stated that DeRosa "cannot stress the importance of the above information and hope that you heed my advice." (Union DeRosa

[10] We note that Petitioner's complaint that DeRosa failed to meet with him in person or confer about the issues also relates to the quality and extent of the Union's representation. *See* S*hymanski*, 5 OCB 2d at 11 (quoting *Gertskis*, 77 OCB 11, at 11 (BCB 2005)). Thus, while it is unclear whether this allegation relates to the Union's conduct after March 3, 2017, it likewise does not constitute a violation of the NYCCBL.

Aff., Ex. A) While Petitioner clearly opposed retirement, there is no evidence in the record upon which to conclude that the Union was responsible for this outcome or that its actions were a breach of the Union's duty of fair representation. *See Rivera-Bey*, 73 OCB 20, at 11.

Finally, regarding Petitioner's allegations that the Union and the City acted "in cahoots" with one another, we note that Petitioner has not asserted any facts that would support this bare allegation. By March 2017, the NYPD had already determined that Petitioner must retire. While the Union and the NYPD both urged Petitioner to apply for the VSF prior to the deadline, the evidence demonstrates that they did so because it would increase Petitioner's retirement income and not because they were colluding in a manner that was against his interests.

In conclusion, we do not find that the Union acted in an arbitrary, discriminatory, or bad faith manner. We therefore dismiss the instant improper practice 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 improper practice petition, docketed as BCB-4223-17, filed by Pierre Yves Hyppolite, against the Sergeants Benevolent Association of the City of New York, Inc.; the New York City Police Department; and 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