Lacey, 14 OCB2d 18 (BCB 2021)

(IP) (Docket No. BCB-4427-21)

Summary of Decision*:** Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it refused to represent her in relation to her termination from DSS. 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-

LINDA LACEY,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION LOCAL 371, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
THE CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

DECISION AND ORDER

On April 22, 2021, Linda Lacey ("Petitioner") filed a *pro se* verified improper practice petition against the Social Service Employees Union Local 371, District Council 37, AFSCME, AFL-CIO ("Union"), the City of New York ("City"), and the New York City Department of Social Services ("DSS").[1] Petitioner asserts that the Union breached its duty of fair representation, in

[1] We amend the caption *nunc pro tunc* to add the City and DSS because the employer is a necessary party to an alleged breach of the duty of fair representation. *See* NYCCBL § 12-306(b)(3); *James-*

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 represent her in relation to her termination from DSS. 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 and the City are parties to the Social Services and Related Titles Collective Bargaining Agreement ("Agreement").[2] The Union represents DSS employees in the competitive class title of Fraud Investigator. Petitioner began her probationary employment with DSS in the title of Fraud Investigator at Level I on November 18, 2019 and was terminated on December 15, 2020.

Reid, 77 OCB 16, at 2 (BCB 2006). However, as Petitioner did not specify any claims against her employer, we construe the petition as only asserting a claim against the City and DSS under NYCCBL § 12-306(d), which provides that "[t]he public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section."

[2] Article VI, § 1(b) of the Agreement defines a "grievance" as:

> A claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration[.]

(City Ans., Ex. D)

Fraud Investigators are subject to a one-year probationary period.[3] In a letter dated June 10, 2020, the City and District Council 37 agreed that due to the COVID-19 pandemic:

> The probationary period for all employees who were in their probationary period (including competitive, non-competitive, and Labor class employees) shall be tolled [for the period beginning March 13, 2020 and ending June 30, 2020]. Therefore, any employee who was in their probationary period as of March 13, 2020, will have their probationary period automatically extended by 3 months and 17 days.

(Pet., Ex. 1; City Ans., Ex. B) Petitioner was still on probation during the March 13 to June 30, 2020 tolling period, so the City asserts that her probationary period was automatically extended by 110 days and scheduled to end on March 8, 2021.[4]

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[3] New York City Personnel Rule 5.2.1(a) provides, in relevant part:

> Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period.

[4] A NYCAPS User Bulletin distributed to agency HR and personnel officers, dated August 18, 2020, states in pertinent part:

> As per the City's agreement with DC 37, any employee who was serving a probationary period (including competitive, noncompetitive and Labor class employees) as of March 13, 2020, will have the probationary period automatically extended by 3 months and 17 days. The terms of this agreement also apply to Local 237 members.
>
> Please note that DCAS has implemented probation tolling for affected employees as follows:
>
> - Employees who were scheduled to serve probation during the 3/13 and 6/30 period, their probationary period was extended by 110 days.

(City Ans., Ex. C)

On December 15, 2020, Petitioner reported to the DSS Office of Human Capital Management for a meeting. During that meeting, Petitioner was given a letter signed by the Executive Director of the DSS Office of Disciplinary Affairs ("ODA") stating that her employment "as a Probationary Fraud Investigator I" was "being discontinued effective at the close of business today" and "[i]f you have any questions concerning this matter, please contact your Union Representative" ("December 15 Letter"). (City Ans., Ex. F) Petitioner asserts that when she asked why she did not receive notice of disciplinary charges or a hearing, she was told that her Union had negotiated an extension of probationary periods so she should contact her Union. The City asserts that Petitioner was terminated due to various issues relating to her conduct in the workplace and her work performance during her probationary period.[5]

Following her termination, Petitioner called the Union. Petitioner asserts that the Union informed her that the probationary period for all probationary employees had been extended.

[5] In support of this assertion, the City attached a memo from an IDNYC Supervisor requesting that her recommendation for Petitioner's "Probationary Termination" be forwarded to the ODA. (City Ans., Ex. E) The Supervisor noted that the recommendation to terminate was consistent with the HCM/City Time Operations recommendation and followed a meeting with the Office of Conflict Resolution. The memo states that:

> Whether the directives, instructions, or tasks to be completed are given by me, IDNYC Deputy Directors, Executive Directors, FIA Supervisors and Directors, HCM/City Time Operations, HRBP External Affairs Personnel, or any other program area, [Petitioner] fails to comply accordingly.

(City Ans., Ex. E) The Memo then describes approximately 20 incidents with colleagues and issues with time and leave dating from January 2020 through September 2020. It also asserts that multiple conferences were held with Petitioner between January 2020 and August 2020. For example, a conference was held on July 30, 2020 to address Petitioner's allegedly unprofessional behavior, untimely responses to emails, the use of her personal email, her failure to follow work directives and instructions, and her reluctance to take direction and assistance. The Memo also states that "[a]s of late, staff member has been LWOP'd, as recourse for failure to meet work expectations, properly account for time, and insubordinate behavior." (City Ans., Ex. E)

Petitioner asserts that she told the Union that such an agreement by the Union would be a conflict and that agreements to extend probationary periods are "between [the] Agency and Commissioner." (Pet. ¶ 16) Additionally, Petitioner asserts that she asked the Union to file a grievance on her behalf and insisted on speaking with a Union attorney.

On December 17, 2020, Petitioner spoke with counsel for the Union, Jill Mendelberg ("Union Counsel"). According to Petitioner, Union Counsel was focused on what happened at the conference in July between Petitioner and Petitioner's supervisors regarding her work performance.[6] At Union Counsel's request, Petitioner forwarded a July 2, 2020 email from her supervisors that stated that the purpose of the July conference was to "discuss Ms. Lacey's disruptive work performance and misconduct" and listed alleged examples. (Union Ans., Ex. A) Petitioner also sent Union Counsel a copy of the December 15 Letter.

On December 18, 2020, Union Counsel sent Petitioner an email stating that she had reached out to the Union's Associate Director of Grievances and was waiting for a response. She also attached a copy of the June 10, 2020 agreement between the City and DC 37 to extend probationary periods and stated that she would be in touch with Petitioner the following week.[7] Petitioner sent Union Counsel follow-up emails that afternoon. Union Counsel responded indicating that she had received all of Petitioner's emails and reiterated that she would be in touch early the following week.

[6] The Associate Director of Grievances for the Union attended the conference on July 30, 2020.

[7] Petitioner acknowledges that Union Counsel sent her a copy of the June 10, 2020 letter agreement, but she asserts that Union Counsel failed to send proof that Petitioner had been notified by her employer about any extensions to her probationary period prior to her termination.

On December 21, 2020, Union Counsel sent Petitioner a detailed email stating that she had reviewed all the relevant facts. She noted that in July 2020 Petitioner had attended a conference to discuss certain work performance and misconduct issues and that at some point Petitioner had refused to complete an I-9 form. She relayed that she had "been advised that the agency ha[d] discharged [Petitioner] for repeated acts of insubordination and problems with [her] work performance that did not improve during [her] tenure with the Agency." (Union Ans., Ex. E) Union Counsel explained that as a probationary employee, Petitioner may not challenge her discharge under the contractual grievance procedure because it is available only to permanent employees. Finally, Counsel advised Petitioner that there were several alternative legal actions that Petitioner could pursue on her own if she wished.

On December 22, 2020, Petitioner responded by complaining that Union Counsel misunderstood information she supplied and relied upon incorrect information including the length of Petitioner's probationary period at the time of her termination.[8] Petitioner also criticized Union Counsel for requesting that Petitioner provide "personal documents," failing to contact Petitioner by phone before writing the email, providing "suspicious" proof of the agreement to extend the probationary periods, and not providing "documented proof" of DSS's reason for terminating Petitioner. (Union Ans., Ex. F) Further, Petitioner criticized Union Counsel for her lack of knowledge of I-9 forms.

Petitioner asserts that she contacted the Union's Vice President of Grievances and Legal Services and again requested that a grievance be filed.

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[8] We note that Union Counsel stated that the COVID-19 extension of probationary periods had no impact on Petitioner's probationary status because her termination occurred "within the original one-year probationary period." (Union Ans., Ex. E) However, since Petitioner began her employment on November 18, 2019, and was terminated on December 15, 2020, her termination occurred 27 days after her one year anniversary.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union refused to represent her in relation to her termination from DSS. Petitioner asserts that she completed her one-year probationary period. She neither received notice of an extension of her probationary period from her employer nor consented to an extension of her probationary period, both of which she asserts were required. Petitioner also asserts that she did not receive notice of any disciplinary charges against her, nor did she receive a hearing before she was terminated on December 15, 2020. Thus, Petitioner asserts that her probationary period was not properly extended and that she was terminated in violation of the Agreement and the New York Civil Service Law § 75 ("CSL § 75"). Moreover, Petitioner asserts that an agreement between the City and the Union to extend probationary periods "would be a conflict" and invalid because the Union and City are not authorized parties to such an agreement. (Pet. ¶ 15) She also asserts that agreements of probationary extensions are between the "Agency and Commissioner." (Pet. ¶ 16)

Petitioner argues that rather than investigating and evaluating her claims, the Union sided with the agency and dismissed her in a perfunctory manner in order to swiftly dismiss her claims. She asserts that Union Counsel requested the July 2 email from Petitioner about her alleged misconduct and then used that document to create a false justification for Petitioner's wrongful termination and to divert from the real issue of her termination without due process. She also asserts that "[n]o proof or copy of a notice of extension of probation from Petitioner's employer sent to Petitioner or stating that Petitioner had received such a notice was produce[d] by [the] Union." (Rep. to Union Ans. ¶ 15) She argues that this demonstrates that the Union was motivated by deceit and dishonesty and failed to properly represent her in violation of NYCCBL § 12-306(b).

Petitioner asserts that the Union's refusal to represent her has caused emotional stress, pain, suffering, and a loss of wages.[9] Petitioner seeks reinstatement, backpay, and to be made whole.

Union's Position

The Union argues that the petition must be dismissed because it does not allege facts which if true would establish that the Union's determination to not appeal Petitioner's discharge grievances to arbitration was arbitrary, discriminatory, or in bad faith, and no such facts exist. It asserts that it reviewed her claim, responded to her request to file a grievance, and advised her that the Agency discharged her for repeated acts of insubordination and problems with her work performance. Further, it told her that it would not file a grievance because she was a probationary employee and did not have contractual rights to appeal her termination. The Union also informed her that she could pursue other legal actions on her own. As such, it asserts that the petition should be dismissed in its entirety.

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. Additionally, the City asserts that there is no factual support for a claim that the Union declined to present a meritorious grievance for improper or discriminatory reasons. It asserts that the majority of Petitioner's claims concern the communications she had with the Union and her displeasure with the fact that she did not have the contractual right to challenge her termination since she never completed her probationary period. It asserts that Petitioner, a probationary employee at the time of her discharge, was not entitled under the Agreement to challenge DSS's decision to terminate her employment.

[9] In her reply to the City's answer, Petitioner alleges that she was "unable to reply to City Respondent further." (Rep. to City Ans., at 3) However, Petitioner was granted an extension of time to file her reply to the City's answer and did not request a further extension.

Thus, the City asserts that the Union addressed Petitioner's termination to the extent permissible and in a manner that was consistent with Petitioner's contractual rights. Moreover, it asserts that any derivative claim against the City pursuant to NYCCBL § 12-306(d) must also be dismissed. Therefore, the City requests that the petition be dismissed in its entirety.

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 fair representation and therefore we construe the petition as alleging violations of NYCCBL § 12-306(b)(3) and (d). *See Shymanski*, 5 OCB2d 20, at 8 (BCB 2012).

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." 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)). However, 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 2006). 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 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)).

We have held that "where a petitioner complains that a union failed to take a specific action and in doing so allegedly breaches the duty of fair representation, the petitioner must first demonstrate a source of right to the action sought." *Howe*, 79 OCB 23, at 10 (BCB 2007). Here, we do not find that Petitioner has shown a basis upon which the Union could grieve her termination. According to the City and the Union, Petitioner was a probationary employee at the time of her termination.[10] *Sicular*, 79 OCB 33, at 15 (BCB 2007) (finding that probationary employee was "unable to establish any entitlement to grievance or other appeal rights from the termination of [her] employment"); *see also Amaker*, 61 OCB 32 (BCB 1998). Therefore, "the

[10] It is undisputed that the Union provided a copy of the parties' June 10 agreement to Petitioner within a few days of her request. To the extent Petitioner claims that the Union failed to provide her with proof that the City and/or DSS provided her with notice of the extension of her probationary period prior to her termination, it is unclear how the Union could have satisfied that request based on Petitioner's assertion that she did not receive said notice from her employer prior to her termination. Further, to the extent the employer did not notify Petitioner of the probationary extension, Petitioner's factual assertions do not provide a basis for a claim against the employer under the NYCCBL.

Union's conclusion that there was nothing under the Agreement that it could do to secure [her] reinstatement cannot be considered arbitrary, discriminatory, or in bad faith and did not violate the duty of fair representation." *Rondinella*, 5 OCB2d 13, at 17 (BCB 2012); *see also Rivera-Bey*, 73 OCB 20, at 12 (BCB 2004); *Edwards*, 65 OCB 35, at 9 (BCB 2000). Further, Petitioner did not plead facts which, if credited, would establish that the Union had filed grievances or otherwise appealed terminations of other probationary employees in similar circumstances. Thus, Petitioner has not established that the Union has treated similarly situated members differently than Petitioner. *See Rondinella*, 5 OCB2d 13, at 18 (union did not violate its duty of fair representation where there was no indication that it did more for similarly situated members than it did for petitioner). Therefore, we find that the Union did not violate its duty of fair representation by not seeking Petitioner's reinstatement.

The Board has repeatedly stated that 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). Moreover, "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). While it is clear that Petitioner disagrees with the Union's conclusions and wanted the Union to do more for her, it is undisputed that Union Counsel discussed the matter with Petitioner, corresponded with Petitioner, reviewed the facts and documents that Petitioner presented to her, advised Petitioner in writing that the Union was not going to pursue her claim, and informed

Petitioner of alternate legal actions she could pursue on her own.[11] Based upon these facts, we find that the Union's actions were not arbitrary, discriminatory, or in bad faith. Instead, the Union made a determination about whether Petitioner had a meritorious claim under the Agreement and declined to process a grievance. *See Sicular*, 79 OCB 33.

In conclusion, we do not find that the Union acted in an arbitrary, discriminatory, or bad faith manner. Inasmuch as we deny the claim against the Union, any potential derivative claim against DSS also fails, pursuant to NYCCBL § 12-306(d). *See Nardiello*, 2 OCB2d 5, at 42 (BCB 2009). We therefore dismiss the instant improper practice petition in its entirety.

[11] We do not find that the record supports Petitioner's assertion that Union Counsel used the July 2 email from Petitioner about her alleged misconduct to create a false justification for Petitioner's wrongful termination and to divert from the real issue regarding her termination. Moreover, we note that "Counsel's determination with respect to the merits of Petitioner's claims need not have been correct, but rather only concluded in good faith." *Sicular*, 79 OCB 33, at 14.

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-4427-21, filed by Linda Lacey, against Social Service Employees Union Local 371, District Council 37, AFSCME, AFL-CIO; the City of New York; and the New York City Department of Social Services, hereby is dismissed in its entirety.

Dated: August 3, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER