

Celestin, 14 OCB2d 24 (BCB 2021)

(IP) (Docket No. BCB-4430-21)

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 provide adequate communication or assistance regarding his complaint about being required to work double and triple tours. The Union and the City separately argued that the Union did not breach its duty of fair representation. The Board found that Petitioner failed to establish that the Union violated the NYCCBL. Accordingly, the petition was dismissed. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

GEORGE CELESTIN,

Petitioner,

-and-

**CORRECTION OFFICERS BENEVOLENT ASSOCIATION,
THE CITY OF NEW YORK and the NEW YORK CITY
DEPARTMENT OF CORRECTION,**

Respondents.

DECISION AND ORDER

On May 14, 2021, George Celestin (“Petitioner”) filed a verified improper practice petition, *pro se*, against the Correction Officers Benevolent Association (“Union”), the City of New York (“City”) and the New York City Department of Correction (“DOC”).¹ Petitioner alleges that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City

¹ The original petition was found deficient, and Petitioner cured the deficiency by filing an amended improper practice petition on May 25, 2021.

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by failing to provide adequate communication or assistance regarding his complaint about being required to work double and triple tours, which resulted in serious health issues. The Union and the City separately argue that the Union did not breach its duty of fair representation. The Board finds that Petitioner did not establish that the Union violated the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner is employed by the DOC as a Correction Officer (“CO”). The Union is the certified bargaining representative for employees in the CO title. Petitioner alleges that on April 19, 2021, he complained to Control Room Captain Susanka about the number of double and triple tours that he was required to work and was told that other COs were required to do the same and that there was nothing she could do.² Petitioner alleges that on April 20, 2021, he worked a 24-hour tour with no meal breaks or opportunity to take his medication. By the end of his 24-hour tour, Petitioner experienced lethargy, dizziness, dehydration, lack of feeling in his extremities, and blurred vision. Rather than risk driving himself, he called a friend to drive him home.

On April 21, 2021, Petitioner submitted a letter to Union President Benny Boscio complaining about being required to work frequent double and triple tours with no meal breaks. The complaint asserted that the combination of overwork, lack of food, water, and sleep, and the

² COs work eight-hour shifts, also referred to as tours. When a CO works two tours in a row it is referred to as a “double,” and three tours in a row is referred to as a “triple.” There is an ongoing dispute between the Union and the DOC related to staffing and excessive tours. The Union filed a lawsuit seeking to enjoin the DOC from requiring COs to work triple tours. The Union has advocated for the cessation of triple tours in meetings with the City and to the press and has campaigned for hiring additional officers to improve staffing levels.

inability to take needed medication during shifts, was causing him serious health issues, including headaches, dizziness, blurred vision, tender swollen feet, and difficulty breathing.³ In the letter, Petitioner requested to be assigned a maximum of three double-tours (16-hour shifts) per week. Petitioner alleges, and the Union denies that after not receiving a response to that letter, Petitioner followed up with President Boscio's secretary on April 28, 2021, and again received no reply.

On April 26, 2021, Petitioner submitted a request for a reasonable accommodation to the DOC. In that request Petitioner reiterated the complaints he made to the Union regarding working too many double and triple tours without breaks to eat, drink, take medication, or attend scheduled doctor's appointments. The request included a signed doctor's note stating that Petitioner "is unable to perform more than two overtime shifts per week." (Amended Pet. at 6) The request was reviewed and denied by Deputy Warden Terrence Graham.

At 7:00 a.m. on May 9, 2021, Petitioner began working a 24-hour tour. Petitioner reports that at 6:30 a.m. on May 10, he collapsed at his post, injuring himself, and was taken to the emergency room. Petitioner alleges that the Union did not contact him in the immediate aftermath of the incident. Rather, Petitioner alleges he coincidentally encountered Union Corresponding Secretary and Executive Board Member Antoinette Anderson in the hospital while she was visiting another Union member and later received a follow-up phone call from her asking what happened. After that incident, Petitioner returned to work, after which time he alleges, and the City denies, that he continued to be assigned double and triple tours with no meal breaks.

On May 13, 2021, Petitioner resubmitted his request for a reasonable accommodation to the Union, which forwarded it to DOC Chief of Administration Sherrie Ann Rembert. Union First Vice-President and Executive Board Member Joseph Bracco spoke to Rembert about the request on

³ Petitioner claimed excessive overtime requirements were exacerbating his recovery from a recent surgery, coronavirus infection, and other medical conditions.

Celestin's behalf. In his second request for a reasonable accommodation, Petitioner asked to be limited to two double tours per week and requested a transfer to an alternate location with less demand for overtime. Anderson communicated with Petitioner regarding his complaints once more on June 21, 2021 but did not file a grievance or otherwise take further action.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by not responding to a written complaint he submitted to the President of the Union on April 21, 2021, and by not following up with the complaint. In the complaint, Petitioner described being forced to work double or triple tours without meal breaks, which exacerbated his recovery from a recent surgery, coronavirus infection, and other medical conditions. Petitioner claims that the Union's failure to adequately respond to that complaint resulted in a May 10, 2021 incident in which he collapsed at his post during a 24-hour shift, injuring himself seriously enough to require hospitalization. Petitioner submitted reasonable accommodation requests asking for reduced overtime assignments to protect his health before and after that incident, with the second request suggesting that he be transferred to a different post where less overtime would be required. Petitioner asserts that the Union's inability or failure to assist him was a violation of its duty of fair representation.

Union's Position

The Union argues that Petitioner did not allege facts sufficient to make out a *prima facie* case and that the Union adequately represented Petitioner in this matter. It claims that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege the Union acted in an arbitrary, discriminatory, or bad faith manner. Allegations of negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case for a breach of the duty of fair representation. The Union

notes that it does not have the authority to change Petitioner's hours or assignment and claims that it did all it could for Petitioner by taking his complaints to the appropriate personnel at the DOC to be processed and by raising his issues directly with management. The Union also asserts that it made a good faith assessment that Petitioner's claims did not establish a viable grievance and that it has no obligation to bring a meritless grievance on Petitioner's behalf. Further, the Union notes that either the Union or a unit member may initiate Step I of the grievance process. If a unit member believes the DOC violated the CBA, a DOC rule, regulation, or procedure, that member may file a grievance with the Head of the Facility. (*See* Union Ex. C at 20) Accordingly, the Union asserts that it did not breach the duty of fair representation.

City's Position

The City argues that Petitioner's claims against the Union must be dismissed because he fails to allege facts sufficient to establish a breach of the duty of fair representation. The City contends that Petitioner has failed to show that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. The City notes that Petitioner's allegations against the Union relate to a purported failure to respond to his complaints regarding his schedule. It argues that even if it is true that the Union failed to respond to his complaints, such failure is insufficient to support a violation of the NYCCBL as Petitioner has not alleged that the Union's actions were improperly motivated. The City further argues that the Union has exercised good faith and sound discretion in its dealings with Petitioner, pointing to the Union's recent lawsuit and press campaign aimed at reducing overtime requirements for COs. Moreover, the City avers that any derivative claim against the City pursuant to NYCCBL § 12-306(d) must also be dismissed.

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). We note that although Petitioner did not cite to a specific provision of the NYCCBL it is clear that he alleges a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3) and a derivative claim against the City under NYCCBL § 12-306(d).⁴

NYCCBL § 12-306(b)(3) makes it "an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation." This duty requires that "a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citing *Walker*, 6 OCB2d 1 (BCB 2013)); *Okorie-Ama*, 79 OCB 5 (BCB 2007). The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be carried simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (quoting *Okorie-Ama*, 79 OCB 5, at 14) (quotation marks omitted); *see also Gertsakis*, 77 OCB 11, at 11 (BCB 2005). Indeed, "a union is entitled to broad discretion . . . [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Sicular*, 79 OCB 33, at 13 (BCB 2007).

In this case, Petitioner has failed to establish that the Union engaged in arbitrary, discriminatory, or bad faith conduct. Petitioner does not allege a contractual basis for his grievance or facts that suggest the Union's failure to file a grievance was arbitrary, discriminatory or in bad faith.

⁴ Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

Petitioner does not allege that the Union declined to present a meritorious claim for any improper reasons. Indeed, there is no allegation in the instant petition that the Union's handling of Petitioner's complaints was undertaken arbitrarily or in bad faith.

The Union asserts that it did all it could to remedy Petitioner's situation and made a good faith judgment that it could not bring a meritorious grievance on his behalf. Union First Vice-President Bracco raised Petitioner's complaints with Chief Rembert and requested a remedy for his situation. Moreover, the Union is currently pursuing litigation in federal court on behalf of all COs to remedy the same burdensome tours and excessive overtime issues raised by Petitioner.

Further, the Board has held that a grievant's dissatisfaction with the amount or quality of communication with the union does not amount to a breach of the duty of fair representation. *See Feder*, 9 OCB2d 33, at 37 (finding no breach of duty where the Petitioner was not prejudiced by the Union's lack of communication to clear up any misunderstandings); *Porter*, 4 OCB2d 9, at 15; *see also Turner*, 3 OCB2d 48 (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 the instant case, it is undisputed that Executive Board Member Anderson communicated with Petitioner regarding his complaints on May 10, May 12, and June 21, 2021. Moreover, there is no evidence that any delay in the Union's response to Petitioner's April and May 2021 complaints about the effects of excessive overtime on his health prejudiced Petitioner. *See Cook*, 7 OCB2d 24, at 9 (BCB 2014) ("[T]his Board will not find a breach of the duty of fair representation based on a union's alleged failure to communicate where that alleged failure did not prejudice or injure the petitioner.") (citing *Walker*, 6 OCB2d 1 (2013); *Lein*, 63 OCB 27 (BCB 1999); *Shenendehowa Central School District*, 29 PERB ¶ 4607 (1996); *Bd. of Ed. of the City School Dist. of the City of N.Y.*, 33 PERB ¶ 3062 (2000)). *Cf. Morales*, 5 OCB2d 28 (BCB 2012) (finding a breach of the duty of fair representation where the union's failure to communicate with the

petitioner foreclosed his ability to pursue a potentially meritorious disciplinary grievance). Accordingly, Petitioner's dissatisfaction with the Union's communication is insufficient to support a claim of a breach of the duty of fair representation. Further, Petitioner provides no evidence to support his claim that any lack of communication was improperly motivated. Accordingly, we do not find that any lack of communication with Petitioner violated the Union's duty of fair representation.

Accordingly, we find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and thus did not breach its duty of fair representation. Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Samuels*, 77 OCB 17, at 16 (BCB 2006). We therefore 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-4430-21, filed by George Celestin, against the Correction Officers Benevolent Association, the City of New York, and the New York City Department of Correction is hereby dismissed in its entirety.

Dated: October 5, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

CHARLES MOERDLER
MEMBER

PETER PEPPER
MEMBER