Noonan, 15 OCB2d 6 (BCB 2022)

(IP) (Docket No. BCB-4445-21)

Summary of Decision*:** Petitioner claimed that the City retaliated against him in violation of NYCCBL § 12-306(a)(3) after he and Union representatives inquired about a late paycheck. Petitioner further claimed the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to properly represent him in response to that retaliation. Respondents argued that Petitioner has not stated a cause of action nor provided any evidence that the Union engaged in arbitrary, discriminatory, or bad faith conduct. The City further argued that Petitioner did not engage in protected union activity, did not experience any adverse employment action and did not establish a *prima facie* case for retaliation. The Board found that Petitioner failed to state a cause of action against the Union and failed to establish that the City retaliated against him. 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-

MICHAEL NOONAN,

Petitioner,

-and-

LOCAL 983, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On August 31, 2021, Petitioner filed a petition alleging that the City of New York ("City") and the New York City Department of Parks and Recreation ("DPR") violated NYCCBL § 12-306(a)(3) by retaliating against him when he and Union representatives inquired about a late

paycheck.[1] Petitioner further claims that Local 983, District Council 37, AFSCME, AFL-CIO ("Union") breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to properly represent him in response to that retaliation. Respondents argue that Petitioner has not stated a cause of action alleging that the Union breached its duty of fair representation, nor has he provided evidence that the Union engaged in arbitrary, discriminatory, or bad faith conduct. The City further argues that Petitioner did not engage in protected union activity, did not experience any adverse employment action, and did not establish a *prima facie* case for retaliation. The Board finds that Petitioner failed to state a cause of action against the Union and failed to establish retaliation against him by the City. Accordingly, the petition is denied.

BACKGROUND

Petitioner began work as a City Seasonal Aide at DPR on May 3, 2021. DPR employs City Seasonal Aides on a seasonal basis to perform light repair and general maintenance work in buildings and on the grounds of various public structures such as port terminals, markets, public housing projects, public offices, parks, and park buildings. The Union represents DPR employees including City Seasonal Aides.

As of May 29, 2021, Petitioner had not received his first paycheck and contacted both DPR Deputy Administrator Stephanie Thayer and his Union Representative, Ralph Baselice, about the issue. His Union Representative contacted DPR HR Payroll official Jose Diaz on Petitioner's behalf on June 1, 2021, and was informed that a supplemental check would be issued that week. On June 4, 2021, DPR issued a check to Petitioner for the pay he had not received in the previous

[1] Petitioner was advised that his September 14, 2021 appeal of the dismissal of the § 12-306(a)(3) claim was being deemed an amendment to his original petition.

month. According to Petitioner, after the paycheck inquiry, he began to experience a hostile work environment, and his supervisors began changing his assignments, workload, and schedule with no notice.

On July 13, 2021, Petitioner participated in a supervisory conference to discuss claims against him alleging dereliction of duty and insubordination. His supervisor described the incident as follows: "On Tuesday, July 13, you were given a directive by Crew Chief Asia Thorpe to clean 7, 8 and 9. You left the perimeter dirty. You were found in the park house doing nothing. This type of behavior is unacceptable and [will] not be tolerated." (Pet., Ex. 6) Petitioner texted his Union Representative after the conference to inform him that it had taken place. His Union Representative then provided him with a guide on how to write a rebuttal to a supervisory conference ("rebuttal package") to assist with formulating a response to allegations against him.

On August 1, 2021, Petitioner received a supervisory conference memo memorializing what occurred during the July 13 conference, along with a Seasonal Evaluation of his work performance in which his supervisor recommended that he not be rehired for another season. Petitioner wrote a response using the rebuttal package he received from his Union Representative. He did not inform any Union representatives of the conference memo he received on August 1, or the recommendation to not rehire. In his rebuttal, Petitioner claimed that in the July 13 meeting his supervisor told him that his "work was complete" and that he did not "need to worry about a write up," referring to the supervisory conference memo. (Pet., at 6) Petitioner did not file a grievance or request that the Union file one on his behalf.

On September 5, 2021, Petitioner emailed DPR Deputy Chief of Administrative Services Thomas Mathai to inform him that he was uncomfortable at his current work location because his supervisor was making "incredibly inappropriate comments" about his "legs and genital area" and

requested reassignment to a new location. (City Ans., Ex. D) On the Deputy Chief's recommendation, Petitioner contacted DPR's EEO Office with his request. Petitioner was reassigned starting September 9, 2021, and continued to work at the new location through at least the end of October 2021.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the City retaliated against him for an inquiry into a late paycheck and that the Union breached its duty of fair representation by failing to properly represent him in response to that retaliation. Petitioner asserts that after he inquired about the late paycheck, his supervisors retaliated against him by creating a hostile work environment and changing his assignments, workload, and schedule with no notice. Petitioner further asserts that he received an "improper write up," referring to the supervisory conference memo, on August 1, 2021, along with a Seasonal Evaluation of his work performance in which his supervisor recommended that he not be rehired. (Pet., at 1) Petitioner claims that he never received a verbal or written warning prior to the supervisory conference memo and was assured by his supervisor that he would not be issued a "write up." (Pet., at 6)

City's Position

The City claims that it did not retaliate against Petitioner in violation of NYCCBL § 12-306(a)(3). It contends that the payroll inquiry that caused DPR's alleged retaliation was not protected union activity because it was an action related to an individual personnel issue, and was not taken in furtherance of the collective welfare of employees generally. The City further argues that regardless of whether Petitioner's inquiry was protected union activity, there is no causal

connection between that activity and any alleged employment action taken against him. The City asserts that the petition contains no facts to support the claim that Petitioner's payroll inquiry caused any adverse employment action to be taken against him, or indeed that any adverse employment actions were taken against him at all, and instead relies on conclusory statements of retaliation.

The City further claims that Petitioner failed to plead facts sufficient to establish a claim under NYCCBL §12-306(b)(3). Specifically, it asserts that Petitioner has not pled any facts to suggest that the Union's actions were motivated by bad faith or were "arbitrary, discriminatory, or underhanded in any way." (City Ans. ¶ 80) Since the Union is not liable, the City argues that it is also not liable.

Union's Position

The Union argues that even when drawing all permissible inferences in his favor, Petitioner has not stated a cause of action alleging that the Union breached its duty of fair representation under NYCCBL 12-306(b)(3). The Union asserts that there is nothing in the petition that alleges arbitrary, discriminatory, or bad faith conduct, or any other wrongdoing by the Union.

Additionally, the Union argues that Petitioner had the right under the applicable collective bargaining agreement to either file a grievance for any alleged contractual violation himself or notify the Union that he wished to file a grievance but did neither. The Union claims that it was never notified by Petitioner that he received the supervisory conference memo, nor that he wished to file a grievance based on it. Therefore, the Union argues that Petitioner has failed to prove that the Union breached the duty of fair representation.

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, Petitioner claims that his supervisor retaliated against him, in violation of NYCCBL § 12-306(a)(3), by issuing the conference memo and recommending that he not be rehired. "Since no hearing was held, in reviewing the sufficiency of the petition, 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." *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citing *Seale*, 79 OCB 30 (BCB 2007); *D'Onofrio*, 79 OCB 3, at 20, n.11 (BCB 2007)).

To determine whether an action violates NYCCBL § 12-306(a)(3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987). This test states that, in order to establish a *prima facie* claim of retaliation, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Feder*, 4 OCB2d 46, at 42 (BCB 2011).

The first prong of the *prima facie* case is satisfied where "the employer is shown to have knowledge of the protected union activity." *CSTG, L. 375*, 7 OCB2d 16, at 20 (citing *Local 376*,

DC 37, 4 OCB2d 58, at 11 (BCB 2011); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)). Here, petitioner engaged in union activity by seeking his Union Representative's assistance regarding a late paycheck. While Petitioner sought to obtain only his own paycheck, pay is a term covered by the collective bargaining agreement, and therefore Petitioner's inquiry was seeking enforcement of a contractual benefit and protected. *See Local 375, DC 37*, 5 OCB2d 27, at 14 (BCB 2012) (email to Labor Relations and colleagues regarding employer's alleged misapplication of the collective bargaining agreement protected). Further, it is undisputed that Petitioner sought assistance from his Union Representative who contacted DPR's HR department about the delayed payment.

Petitioner has not alleged that his supervisor, who conducted the July 13 conference, was aware of his union activity. However, even assuming *arguendo* that "the employer's agent responsible for the alleged discriminatory action," was aware of his union activity, we find that Petitioner's claim fails because he has not satisfied the second prong of a *prima facie* case. *Bowman*, 39 OCB 51, at 18-19. Proof of the second prong, "absent an 'outright admission of any wrongful motive, . . . must necessarily be circumstantial.'" *CSTG, L. 375*, 7 OCB2d 16, at 20 (quoting *CWA, L. 1180*, 77 OCB 20, at 15 (BCB 2006)) (other citations omitted). However, a "petitioner must offer more than speculative or conclusory allegations." *Local 1180, CWA*, 8 OCB2d 36, at 18 (BCB 2015) (quoting *SBA*, 75 OCB 22, at 22 (BCB 2005)). Here, Petitioner offers no probative evidence but rather makes only conclusory allegations that issuance of the counseling memo and the recommendation that he not be rehired was motivated by anti-union animus.[2] Without more, the temporal proximity between Petitioner's paycheck inquiry in early

[2] We do not consider Petitioner's claims concerning other retaliatory actions by the City, such as hostile work environment, assignment, workload, or schedule changes, because he did not plead

June 2021 and DPR's alleged retaliation in August 2021 is insufficient to support an inference of improper motivation. *See SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005) (noting that "proximity in time, without more, is insufficient to support an inference of improper motivation"), *affd. sub nom., In the Matter of Soc. Serv. Empl. Union, Local 371 v. NYC Bd. of Collective Bargaining*, Index No. 116054/05 (Sup. Ct. N.Y. Co. May 30, 2006) (Stallman, J.), *affd*., 47 A.D.3d 417 (1st Dept. 2008); *see also CSTG, L. 375*, 7 OCB2d 16, at 20. Therefore, we find that Petitioner has not established a *prima facie* case of retaliation in connection with his supervisory conference memo or the recommendation that he not be rehired, and we dismiss this claim.

Petitioner also alleges that the Union violated its duty of fair representation by failing to properly represent him after the City retaliated against him for inquiring about a late paycheck in May 2021. To establish a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3), a petitioner must demonstrate that the union has engaged in "arbitrary, discriminatory, or bad faith conduct in negotiating, administering and enforcing collective bargaining agreements." *Walker*, 6 OCB2d 1, at 7 (BCB 2013) (quoting *Okorie-Ama*, 79 OCB 5, at 14). A petitioner must allege more than negligence, mistake, or incompetence to meet its burden. *See Del Rio*, 75 OCB 6 at 13 (BCB 2005). 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. *See Morales*, 5 OCB2d 28, at 20 (BCB 2012) (citing *Del Rio*, 75 OCB 6, at 13 (BCB 2005)). Further, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21 (BCB 2008) (citations and editing marks omitted).

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facts to support those claims. *Jones*, 11 OCB2d 3 at 10 (BCB 2018) (claim dismissed where Petitioner did not plead facts sufficient to make out a *prima facie* case of retaliation).

Instead, a petitioner must present evidence of improper motivation. *See Del Rio*, 75 OCB 6, at 13 citing *Hug*, 45 OCB 51 (BCB 1990).

There is no evidence that the Union failed to fairly represent Petitioner in this case. Petitioner complained to the Union about his missing paycheck, the Union made inquiries to the agency on his behalf, and Petitioner received the check shortly thereafter. Further, Petitioner notified the Union about his supervisory conference, and the Union provided him with a package of materials to submit a rebuttal to the allegations against him. Thereafter, Petitioner received a conference memo memorializing the meeting with his supervisor, as well as an evaluation recommending that he not be rehired. Petitioner, however, did not inform the Union of these developments nor make any further requests for assistance. Petitioner has alleged no error or refusal of aid on the part of the Union, much less that the Union's actions were arbitrary, discriminatory, or in bad faith, as required to find a breach of the duty of fair representation.

Accordingly, after a thorough review of the record, we find that the allegations do not make out a *prima facie* case of retaliation against the City and do not state facts which would, if proven, establish that the Union breached its duty of fair representation. Therefore, the 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 Michael Noonan against District Council 37, Local 983, and the New York City Department of Parks and Recreation, docketed as BCB-4445-21, is hereby dismissed in its entirety.

Dated: February 9, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER