Ozcan, 15 OCB2d 16 (BCB 2022)

(IP) (Docket No. BCB-4438-21)

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 bring his grievance to arbitration and failing to communicate that it was not bringing his grievance to arbitration. Petitioner also alleged that DPR violated NYCCBL § 12-306(a)(1) and (3) by creating a hostile work environment in retaliation for his union activity. The Union and the City separately argued that the Union did not breach its duty of fair representation and that none of their actions violated the NYCCBL. The Board found that Petitioner failed to establish that the Union or DPR 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-

OMER OZCAN,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 461, THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On July 12, 2021, Omer Ozcan filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 461 (collectively, the "Union"), and the City of New York ("City") and New York City Department of Parks and Recreation ("DPR"). Petitioner alleges 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 bring his grievance to arbitration and failing to communicate that it was not bringing his grievance to arbitration. He also alleges that the City violated NYCCBL § 12-306(a)(1) and (3) by creating a hostile work environment in retaliation for his union activity.[1] The City and the Union separately argue that the Union did not breach its duty of fair representation and that none of their actions violated the NYCCBL. The Board finds that Petitioner did not establish that the Union or DPR violated the NYCCBL. Accordingly, the petition is dismissed in its entirety.

BACKGROUND

DPR maintains the City's lifeguard program. It is largely a seasonal operation, with between 900 and 1,400 seasonal lifeguards who are assigned to the City's pools and beaches. There is also a smaller number of year-round lifeguards employed at the City's pools, as instructors at the municipal lifeguard school, and as supervisors of the lifeguard program.

DC 37 represents employees employed by the City in the Lifeguard and Chief Lifeguard titles in the Seasonals bargaining unit. DC 37 and the City are parties to a collective bargaining agreement covering the Seasonals bargaining unit ("Agreement") for the period of March 3, 2008,

[1] The petition also included claims that were dismissed by the Executive Secretary as untimely regarding, *inter alia*, DPR's failure to promote Petitioner and the Union's delay in processing his grievance. In her sufficiency letter, the Executive Secretary notified the parties that "[n]otwithstanding this determination, the Board of Collective Bargaining ("Board") is unable to consider alleged violations that occurred more than four months before the filing date of the petition." (ES Determination at 1) We note that pursuant to NYCCBL § 12-306(e) and the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-12(f), the four-month statute of limitations period begins to accrue on the day after the alleged violation(s) occurred. Accordingly, any claims related to the Union and DPR's actions that occurred prior to March 11, 2021, are not addressed here.

to March 2, 2010.[2] The Agreement's economic terms were modified by the 2017-2021 memorandum of agreement covering all employees represented by DC 37, and it remains in effect pursuant to the *status quo* provision of the NYCCBL. Local 461 represents employees in the Lifeguard title. Local 508 represents employees in the Lifeguard Supervisor titles, including those assigned as Chief Lifeguard and details within that title, including Lifeguard Lieutenant, Assistant Coordinator, and Borough Coordinator.

Petitioner has been employed as a seasonal Lifeguard at DPR since 2004 and is a member of Local 461. On or around June 28, 2019, Petitioner submitted a request for promotion to Lifeguard Lieutenant to DPR Chief of Personnel David Terhune. According to Petitioner, his promotion request was denied by former Local 508 Treasurer and DPR Assistant Coordinator, Richard Sher.[3]

On July 16, 2019, Petitioner filed a grievance at Step I alleging that DPR violated Article XIX, § 4 and Article XXIII, §§ 1, 2, and 6 of the Agreement by failing to promote him to Lifeguard Lieutenant.[4] DPR denied the grievance at Step II on September 9, 2019, finding no violation of the Agreement because "Article XIX, Section 4 does not apply to promotions and . . . [Petitioner]

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[2] As noted above, some lifeguards are employed year-round but are nonetheless covered by the Agreement.

[3] Sher resigned from DPR on August 25, 2021.

[4] Article XIX, § 4 of the Agreement, "Transfers," provides that, "[a] request to transfer to a vacancy resulting from resignation, dismissal, promotion, or death, may be made by written request to DPR. Such request shall be acted upon in order of seniority. Transfers shall be made at the discretion of the DPR, after notice to and discussion with the Union except in cases of emergency. Transfers because of lack of personnel shall be made on the basis of inverse seniority, except in cases of emergency." (City Ans., Ex. 1) Article XXIII, § 1 of the Agreement provides that, "[a] Lifeguard must have three seasons of satisfactory service to be eligible for detail as Lifeguard Lieutenant." (*Id.*) Article XXIII, § 2 provides that, "[t]he DPR will take immediate steps to fill job quotas." (*Id.*) Article XXIII, § 6 provides that, "[t]here shall be no discrimination against any employee because the employee has exercised the right of collective bargaining or because the employee has presented a grievance in any hearing or conference related to such matter . . . ." (*Id.*)

did not submit a transfer request," and "transfers to and from different locations are only considered for employees within the same title and detail." (Union Ans., Ex. C) Moreover, the denial explained that Article XXIII, § 1, "only speaks to how Lifeguards become eligible for details to the title of Lifeguard Lieutenant, with no mention of seniority."[5] (*Id.*) Petitioner appealed to Step III, asserting that because DPR "has no policy, written or otherwise, addressing the procedure for being promoted or [d]etailed, the only language outlining the process is the [t]ransfers section of the contractual agreement [Article XIX, § 4] . . . Article XIX, § 4 outlines the sole procedure available to an employee who requests to fill a vacancy in a position that he or she is qualified to fill, regardless of whether it is considered to be a promotion or [d]etail, and 'such a request shall be acted upon in order of seniority.'" (Pet., Ex. 5)[6]

On January 10, 2020, Petitioner also filed internal union charges with AFSCME against the former President of Local 461, Franklyn Paige, alleging, *inter alia*, that Paige violated the AFSCME constitution by depriving seasonal lifeguards of the opportunity to participate in union meetings and elections.[7] Petitioner testified against Paige at an AFSCME trial in August 2020.[8]

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[5] There is no evidence that Petitioner's grievance was heard or that a determination was made at Step I.

[6] The petition refers to attached exhibits that are not clearly numbered or referenced. As a result, the trial examiner renumbered the exhibits and provided the renumbered list to the parties. References to Petitioner's exhibits herein are based on the renumbered list.

[7] According to Petitioner, Local 461 is controlled by Local 508 and holds "secretive elections" during which seasonal lifeguards are ineligible to vote. (Pet. ¶ 5)

[8] On October 19, 2020, Paige was found guilty of failing to hold constitutionally mandated membership meetings and depriving seasonal lifeguards of the full rights of union membership. As a result, Paige was removed from office as President and was suspended from seeking union office for a period of four years.

With respect to Petitioner's grievance, a Step III hearing was held in September 2020, and an OLR review officer denied his grievance on March 1, 2021. The Step III denial found that no authority was produced to support the claim that Article XIX, § 4 of the Agreement applies to employees seeking to move "into a new title." (Union Ans., Ex. D) Moreover, the denial explained that although Article XXIII, § 1 sets forth minimum eligibility requirements for the Lifeguard Lieutenant position, it "creates no duty on [DPR] to detail a particular employee to a position." (*Id.*) The Step III denial also noted that no evidence was provided to show that DPR failed to immediately fill any position in violation of Article XXIII, § 2, or that Petitioner had been discriminated against in violation of Article XXIII, § 6.

Following the denial at Step III, Petitioner requested that the Union advance his grievance to arbitration. On March 29, 2021, DC 37 Field Supervisor Barbara Terrelonge responded that "legal" was looking into it. (Pet. ¶ 3) Petitioner followed up with Director of DC 37 Parks, Cultural, and Higher Education Division David Boyd on April 20, 2021.[9] On April 22, 2021, Director Boyd responded to Petitioner, noting that the General Counsel's office was continuing its internal review process. Petitioner inquired again on June 1, 2021. When he filed his improper practice petition on July 12, 2021, Petitioner represented that he had still not received any acknowledgment from the Union that it would not be filing for arbitration. In an affirmation submitted with the Union's answer, former DC 37 Blue Collar Division Director David Catala asserts, and Petitioner denies, that he informed Petitioner at least three times during the grievance process that he did not believe his grievance was viable: first, at the Step II hearing; second, after

[9] DC 37's Blue Collar and White Collar Divisions merged into the Parks, Cultural and Higher Education Division on March 1, 2021.

Petitioner asked him to advance the grievance to Step III; and third, at the Step III hearing, at which time he alleges that he told Petitioner that the Union would not proceed to arbitration.

According to Petitioner, harassment on the job is "continual." (Pet. ¶ 5) He asserts that in addition to the denial of the promotion, DPR's retaliation against him also includes isolating him from other workers. As an example, he notes that the locker room goes quiet when he walks in. In addition, he asserts that in Summer 2021, DPR Borough Coordinator Howard Wolzster looked at him in a "threatening" manner when he walked by his lifeguard chair. (*Id*.)

POSITIONS OF THE PARTIES[10]

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to bring his grievance to arbitration and failing to communicate that it was not bringing his grievance to arbitration.[11] He asserts that the Union failed to notify him that it would not pursue arbitration despite his repeated requests for information regarding the status of his grievance over a three-month period. According to Petitioner, as a result of the Union misleading him into believing that his grievance was still being

[10] The summary of the parties' positions does not include arguments in support of claims deemed untimely by the Executive Secretary.

[11] NYCCBL § 12-306(b)(3) provides, in pertinent part: "[i]t 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."

considered and declining to pursue arbitration, he "could not advance in the Department" or "learn the final result of the grievance process."[12] (Pet. Rep. Memo at 5)

Petitioner contends that his petition is timely because the Union deliberately misled him regarding whether it would advance his grievance to arbitration. He avers that the Union is estopped from arguing that his petition is untimely because it intentionally obfuscated its intentions regarding whether it would arbitrate the denial of his grievance. Petitioner alleges that he filed his petition as soon as he knew that the Union would not pursue his grievance.

Petitioner also argues that DPR violated NYCCBL § 12-306(a)(1) and (3) by exposing him to harassment and a hostile work environment.[13] Specifically, he avers that he has been isolated from other workers, that the locker room goes quiet when he walks in, and that DPR Borough Coordinator Wolzster looked at him in a "threatening" manner when he walked by his lifeguard chair in Summer 2021. (Pet. ¶ 5)

As a remedy, Petitioner requests that the City be ordered to "reclassify Lifeguard Coordinator positions as managerial and preclude their eligibility to participate in [Local 508];"

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[12] Petitioner asserts that the Board has jurisdiction over his duty of fair representation claims because the Union's actions in failing to proceed to arbitration and communicate with him about the decision interfered with his terms and conditions of employment.

[13] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

"develop job descriptions for each title within the [C]itywide lifeguard program;" "post job vacancy announcements for both permanent and seasonal supervisory lifeguard positions and post them online;" align lifeguard testing standards with those established by the United States Lifesaving Association for Open Water Lifeguards and the American Red Cross for Pool Lifeguards; "administer a civil service test for the full time lifeguard positions and promotions;" and make Petitioner whole and free from future retaliation.[14] (Pet. ¶ 9) In addition, Petitioner requests that DC 37 be ordered to "allow seasonal dues paying members to participate and vote in the elections of Local 461 and 508." (*Id.*) Petitioner also requests a make-whole remedy and an order prohibiting future retaliation.

Union's Position

The Union argues that Petitioner fails to state a claim under NYCCBL § 12-306(b)(3) because it did not act in an arbitrary, discriminatory, or bad faith manner. The Union avers that Director Catala informed Petitioner at every step of the grievance proceedings in 2019 and 2020 that the Union did not believe he had a viable grievance. Accordingly, the Union contends that the petition is untimely because it was filed well after the expiration of the four-month statute of limitations when Petitioner knew or should have known that the Union didn't believe his grievance was viable. To the extent Petitioner alleges that the Union failed to communicate about the status of his grievance, the Union asserts that it is "significant" that on or around March 1, 2021, the DC 37 White Collar and Blue Collar Divisions merged into the Parks, Cultural, and Higher Education Division. (Union Ans. ¶ 51) The Union avers that this merging "created a delay in [the] transmitting of critical information regarding the Union's discussions with [Petitioner] about his

[14] Despite the remedy sought, the petition does not allege specific facts relating to DPR's job descriptions, job vacancy announcements, lifeguard tests, or the administration of civil service tests.

grievance not being viable." (*Id.* at ¶ 52). Moreover, the Union contends that even if Petitioner satisfied the minimum experience criteria under Article XXIII, § 1 of the Agreement, that does not mean he was "automatically" entitled to be promoted to Lifeguard Lieutenant. (*Id.* at ¶ 24) Therefore, the Union argues that it did not believe Petitioner's grievance was meritorious and, given the wide latitude unions have in the handling of grievances, it was not obligated to pursue arbitration.

To the extent Petitioner alleges that the Union holds secretive meetings and elections, the Union avers that the Board has no jurisdiction over internal union operations unless it can be shown that they affect the nature of representation accorded to employees with respect to negotiating and maintaining terms and conditions of employment. To the extent Petitioner raises similar allegations regarding Local 508, the Union argues that Petitioner has no standing to challenge internal union procedures of a local union of which he is not a member.

The Union also asserts that that "all or some" of the remedies requested by Petitioner are not properly before the Board. (Union Ans. ¶ 9) Accordingly, the Union requests that the Board dismiss the petition.

City's Position

The City argues that Petitioner has failed to establish a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3). It asserts that although Petitioner takes issue with the fact that the Union had a differing interpretation of the Agreement and the merits of his grievance in deciding not to proceed to arbitration, such judgments do not constitute a breach of the duty of fair representation where, as here, Petitioner has failed to demonstrate that the Union acted arbitrarily, discriminatorily, or in bad faith. Specifically, the City contends that although

Petitioner cited Article XIX, § 4 in support of his grievance, he applied for a promotion, not a transfer, and the Agreement provides no way for the Union to prevail at an arbitration.

The City also argues that it has not engaged in any retaliatory action against Petitioner. It asserts that the "rightful" denial of a grievance and "threatening stares" cannot serve as adverse employment actions. (City Ans. ¶ 52, 54) Therefore, the City contends that Petitioner has failed to establish a violation of NYCCBL § 12-306(a)(1) and (3).

In addition, the City avers that Petitioner's requested remedies are not "susceptible to remediation" by the Board because they concern either managerial rights or internal union affairs. (City Ans. ¶ 78-79) Thus, it argues that the petition, including any derivative claims against the City pursuant to NYCCBL § 12-306(d), must be dismissed.

DISCUSSION

As noted in the ES Determination, the statute of limitations for filing an improper practice petition is set forth in NYCCBL § 12-306(e), which provides, in relevant part, as follows:

> 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 . . . .

See also OCB Rule § 1-07(b)(4).

Consequently, "[a]ny claims antedating the four-month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)) (internal quotation marks

omitted). Pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-12(f), the four-month period begins to accrue on the day after the alleged violations occurred.

The initial petition in this matter was filed on July 12, 2021. Based on this filing date, Petitioner's claims must have arisen on or after March 11, 2021, in order to be timely. The Union argues that Petitioner knew or should have known that it was not going to arbitrate his grievance prior to March 11, 2021, because Director Catala asserted that he told Petitioner multiple times earlier in the grievance process that it was not meritorious. However, Petitioner denies Director Catala's factual assertions and there are no other facts upon which to conclude that Petitioner knew or should have known that the Union would not arbitrate his grievance earlier than March 11, 2021.[15] Therefore, we proceed to consider the merits of Petitioner's claims regarding the Union's failure to arbitrate and all other timely claims arising on or after March 11, 2021.[16]

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to bring his grievance to arbitration. 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,

[15] In the analysis below, 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." *McNeil*, 10 OCB2d 8, at 8 (BCB 2017) (quoting *Dillon*, 9 OCB2d 28, at 14 (BCB 2016)) (quotation marks omitted).

[16] As an additional preliminary matter, we note that to the extent Petitioner asserts that Local 461 is controlled by Local 508 and holds secretive elections, the Board has no jurisdiction over such claims. *See Lawtone-Bowles*, 15 OCB2d 4, at 10 (BCB 2022); *Velez*, 23 OCB 1, at 9 (BCB 1979) (dismissing for lack of jurisdiction petitioner's claim that the conduct of an internal union election violated the NYCCBL); *McAllen*, 31 OCB 15, at 24-25 (BCB 1983) (dismissing for lack of jurisdiction petitioner's claim that the union's failure to hold monthly membership meetings violated the union's constitution and the NYCCBL).

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). 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).

Arbitrarily ignoring a meritorious grievance constitutes a breach of the duty of fair representation. *See Morales*, 5 OCB2d 28, at 23 (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. Mar. 31, 2016), *affd., Matter of United Fedn. of Teachers v. City of New York*, 154 A.D.3d 548 (1st Dept. 2017) (citing *Mora-McLaughlin*, 3 OCB2d 24, at 14 (BCB 2010); *Whaley*, 59 OCB 41, at 14 (BCB 1997); *Krumholz*, 51 OCB 21, at 12 (BCB 1993); *Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 23 PERB ¶ 3042 (1990); *Letter Carriers Branch 529 (Postal Serv.)*, 319 NLRB 879, 881 (1995)). However, a union "'enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations.'" *Turner*, 3 OCB2d 48, at 15 (BCB 2010) (quoting *Edwards*, 1 OCB2d 22, at 21 (2008) (additional citations and editing marks omitted)). Thus, a union is not obligated to advance every grievance, and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Indeed, "[a] union has the implied authority, as representative, to make

a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled." *Sicular*, 79 OCB 33, at 13 (BCB 2007) (citation omitted).

Like in *Fash*, 15 OCB2d 15 (BCB 2022), we conclude that the Union's decision not to pursue arbitration did not violate the duty of fair representation. Here, the Union asserts that Petitioner's grievance did not have merit because even if Petitioner satisfied the minimum experience criteria under Article XXIII, § 1 of the Agreement, that does not mean he was "automatically" entitled to be promoted to Lifeguard Lieutenant. (Union Ans. ¶ 24) Indeed, although the record suggests that Petitioner met the minimum eligibility requirements for the Lifeguard Lieutenant position, Article XXIII, § 1 does not guarantee appointments to eligible applicants. Moreover, Petitioner asserts that in the absence of an express contract provision governing promotions, he was entitled to the Lifeguard Lieutenant promotion pursuant to Article XIX, § 4 of the Agreement, the transfer provision, because it "outlines the sole procedure available to an employee who requests to fill a vacancy in a position that he or she is qualified to fill, regardless of whether it is considered to be a promotion or [d]etail." (Pet., Ex. 5) Neither the Union nor the City agrees with Petitioner's interpretation of the scope of Article XIX, § 4. However, assuming *arguendo* that Article XIX, § 4's transfer language could be construed to encompass promotions as Petitioner contends, it is clear that "[t]ransfers shall be made at the discretion of the DPR," and seniority only determines the order in which transfer requests are "acted upon." (City Ans., Ex. 1) Petitioner has identified no other contractual provision or policy that would entitle him to the Lifeguard Lieutenant promotion.[17] Therefore, we find that the

[17] The Board has long held that the right to promote, like the right to hire, falls within the powers reserved to management under NYCCBL 12-307(b). *See DC 37*, 25 OCB 37, at 4 (BCB 1980).

Union's decision not to pursue arbitration did not violate the duty of fair representation.[18] *See Turner*, 3 OCB2d 48, at 15; *Sicular*, 79 OCB 33, at 13.

Further, Petitioner argues that the Union breached its duty of fair representation by failing to communicate that it was not bringing his grievance to arbitration. He asserts that after his grievance was denied at Step III on March 2, 2021, he requested that the Union advance it to arbitration. However, he asserts that as of July 12, 2021, when he filed the improper practice in this matter, he had not yet received any acknowledgment from the Union that it would not be filing for arbitration. Moreover, he asserts that the only responses he received from the Union after the Step III denial were in March and April 2021 stating that it was still conducting its internal review process.

The Board has held that a union's unexplained failure to update a grievant with the status of a meritorious grievance may violate its duty of fair representation. *See Morales*, 5 OCB2d 28, at 25-26. However, such conduct does not rise to a breach of the duty of fair representation unless the failure to communicate "prejudice[d] or injure[d] the petitioner." *Cook*, 7 OCB2d 24, at 9 (BCB 2014) (citing *Walker*, 6 OCB2d 1; *Lein*, 63 OCB 27 (BCB 1999)). In this case, because we have determined that the Union reasonably concluded that Petitioner's grievance was not meritorious, we cannot find that Petitioner was prejudiced or injured by its failure to communicate regarding the decision not to arbitrate. *See Harason*, 13 OCB2d 8, at 11 (BCB 2020) (finding that the union's failure to respond to petitioner's emails about the status of his grievance did not violate

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Therefore, failures or refusals to promote are grievable only to the extent the parties have expressly limited this right in their collective bargaining agreement. *See id.*; *PBA*, 43 OCB 74, at 9 (BCB 1989).

[18] Like in *Fash*, we note that although Petitioner is a vocal critic of Union leadership, there is no evidence in the record to establish that the Union's decision not to pursue arbitration was discriminatory or made in bad faith.

the duty of fair representation when the union reasonably concluded that the grievance was not meritorious) (citing *Cook*, 7 OCB2d 24, at 9).

Petitioner also argues that DPR violated NYCCBL § 12-306(a)(1) and (3) by subjecting him to a hostile work environment. Specifically, Petitioner alleges that the locker room goes quiet when he walks in and that Borough Coordinator Wolzster walked past his lifeguard chair in Summer 2021 and gave him threatening looks. However, while it may be true that Petitioner considered Borough Coordinator Wolzster's stares or other employees' silence to be harassment, we find these claims to be speculative and insufficient to conclude that the conduct rose to the level of an adverse employment action remediable under the NYCCBL. Accordingly, we dismiss these claims. *See DC 37, L. 983*, 6 OCB2d 10, at 31 (BCB 2013); *Andreani*, 2 OCB2d 40, at 28 (2009) ("crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer"); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *affd., Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (failure to allege adverse employment action fatal to NYCCBL § 12-306(a)(3) claim); *compare*, *DC 37, L. 2507*, 11 OCB2d 18, at 22 (BCB 2018) (finding that the removal of a desirable assignment is an adverse employment action); *OSA*, 7 OCB2d 20, at 27 (BCB 2014) (finding that an undesirable transfer is an adverse employment action).

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-4438-21, filed by Omer Ozcan, against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 461, and the City of New York and New York City Department of Parks and Recreation, is hereby dismissed in its entirety.

Dated: June 1, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER