Ibreus, 15 OCB2d 30 (BCB 2022)

(IP) (Docket No. BCB 4480-22)

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 file grievances on her behalf. The Union argued that the petition is time-barred and that it did not breach its duty of fair representation. The Board found that some claims are time-barred and that the remaining claims do not establish that the Union breached its duty of fair representation. 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-

ERLANDE IBREUS,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and NEW YORK CITY HEALTH + HOSPITALS,

Respondents.

DECISION AND ORDER

On March 3, 2022, Erlande Ibreus ("Petitioner") filed a *pro se* improper practice petition against Social Service Employees Union Local 371 ("Union") and New York City Health + Hospitals ("HHC"). Petitioner asserts 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 refusing to file grievances on her behalf. The Union argues that the petition is time-barred and that it did not breach its duty of fair representation. This Board finds that certain allegations are time-barred and that the timely claims

do not establish that the Union breached its duty of fair representation. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner was hired as a Hospital Care Investigator at Queens Hospital Center, an HHC facility, in July 2018. The Union represents HHC employees in the Hospital Care Investigator title, and at all relevant times Petitioner was a Union member.

On August 26, 2021, the New York State Department of Health approved emergency regulations requiring all healthcare workers in hospitals and nursing homes in the State of New York ("State") to be vaccinated against COVID-19 and to receive their first vaccine dose by September 27, 2021 ("Mandate"). In a September 8, 2021 bulletin, HHC Senior Vice President Yvette Villanueva notified employees that the State has mandated that all health care workers be vaccinated against COVID-19 by September 27 or October 7, depending on the health care facility in which the employee works ("Bulletin"). Among other things, the Bulletin stated that HHC employees who failed to comply with the vaccination requirement would not be cleared to work at any HHC facilities or work locations starting on the applicable date and that they would not be paid until they are cleared to work. The Bulletin also stated that requests for medical and religious accommodations must be submitted by September 14 and that religious accommodations, if granted, would be time limited.[1]

[1] We take administrative notice of these facts and note that Petitioner was subject to the September 27 deadline. The referenced HHC Bulletin can be found at: September 8 2021 - Vaccine Mandate For All Health Care Workers.pdf. We further note that facts asserted by Petitioner at the conference in this matter have been incorporated here.

On September 10, 2021, Petitioner received notice that she would be suspended from work on September 27, 2021, if she did not comply with the Mandate. Petitioner did not receive the vaccine, and she was placed on unpaid leave as of September 27, 2021.

To avoid being discharged for failing to get vaccinated, Petitioner applied for both medical and religious exemptions from the Mandate. During September 2021, she communicated with Union Representative Alexander Elias on multiple occasions to obtain assistance in this regard. Petitioner represents that "[a]though I applied for a religious and medical exemption [from the Mandate], my requests were denied. I also notified H[uman] R[esources] of my religious exemption September 14 and I applied for a reasonable accommodation, but it was denied."[2] (Pet. ¶ 1) In mid-September 2021, Elias informed Petitioner that he could not assist her because she had not been granted an exemption from the Mandate but that, if she did obtain an exemption, he could speak to HHC's Human Resources Department ("HR Department") on her behalf.

For approximately two months after her suspension, Petitioner alleges that she attempted to get permission from the HR Department to work from home as a "reasonable accommodation," but that she never received a response.[3] (Pet. Attachment ("Att.") (11/15/21 email)) On or about October 13, 2021, Elias informed Petitioner that the Union could not file a grievance over HHC's failure or refusal to provide her with a reasonable accommodation. Elias also informed Petitioner that he had done everything he could to assist her and that the matter was now out of his hands.

[2] Petitioner alleges in the petition both that her request for a religious exemption was denied and that it was granted. At the conference in this matter, she represented that she received a religious exemption to the Mandate and was granted a leave of absence as an accommodation, but provided no documentation to support her representation that the religious exemption was granted. As noted later, there is no dispute that the approved leave of absence expired in November 2021.

[3] The petition does not explain whether this request was related to her request for an exemption from the Mandate.

He suggested that Petitioner speak with Union Vice President Darek Robinson and advised her to contact the Union's legal department. Petitioner asserts that she contacted Vice President Robinson on October 14, 2021, who also told her to speak to the legal department.

In a November 3, 2021 email, Petitioner informed Elias that her "religious exemption was approved" but that she had not resumed "work duty" yet. (Pet. Att. (11/3/21 3:59 pm email)) The following day, Elias contacted HHC's HR Department by email to request that Petitioner be provided the opportunity to telework based on the fact that she had recently been "approved" for a temporary religious exemption from the Mandate. (Pet. Att. (11/4/21 email)) In a November 15, 2021 email, Petitioner informed Elias that she had not received a response from HHC on her reasonable accommodation request and that her supervisor "never received any approved notice from HR for my religious exemption and they aren't aware that my religious exemption has been approved." (Pet. Att. (11/15/21 email))

Petitioner asserts that she went to the Union's office multiple times to speak with someone but that "they were never available" and that she was "told to come back another day or go to" another location. (Pet. ¶ 3) Petitioner claims that on November 16, 2021, she went to the Union's headquarters to speak with Vice President Robinson but was told that she could not see him without an appointment.

On or about November 22, 2021, Petitioner received an email from HHC's Office of EEO stating that "your accommodation, an approved leave of absence, will come to an end on Saturday, November 27, 2021." (Pet. Attachment (11/22/21 email)) The email stated that going forward, Petitioner had the option to get vaccinated by November 28, 2021 to return to work or voluntarily resign and retain her health benefits for a period of time as well as a lump sum payout for one

week of pay. It further stated that if she did not choose either option, she would be separated from service on November 29, 2021.

According to Petitioner, on December 6, 2021, she received notification that HHC had terminated her employment on November 29, 2021, because she did not comply with the Mandate. Petitioner alleges that, at an unspecified date, she asked Elias to file a grievance over her termination but that he told her the Union could not do so.[4] In contrast, the Union contends that Petitioner made the request that the Union file a grievance on or about September 27, 2021, and that she was also discharged on that date for failure to take the vaccine. According to the Union, Elias informed her at that time that there was no legal basis on which the Union could file a grievance on her behalf because her discharge was effected in accordance with the official policy of the City of New York and did not violate the collective bargaining agreements under which she was covered.

Petitioner asserts that the last time she went to the Union's office was on December 16, 2021, at which time she met with Cassandra Washington, the Union's "grievance chairperson." (Pet. ¶ 5) She claims that Washington told her that she did not have a grievance because she was terminated for not complying with the Mandate and that she had to speak with Elias, her grievance representative. According to Petitioner, she responded that she had gone to the Union to speak with someone else because Elias had told her to "quit calling him" and that if "I had taken the

[4] Petitioner also asked Elias to assist her in obtaining payment from HHC for two annual leave days for which she had received approval prior to the date she was placed on unpaid leave. Elias contacted HHC by email to request that she receive payment for the two dates at issue. A December 8, 2021 email from HHC's HR Department to Elias reflects that Petitioner was approved for two annual leave days on September 27 and 28 and that she should receive payment in the coming weeks.

vaccine, I would not have this problem."[5] (*Id.*) Petitioner asserts that she did not hear from anyone at the Union after approximately late December 2021. She also asserts that she "never received my W2 to file tax return, and my sick time and my earned hours leave [sic] the union wouldn't file any grievance on my behalf." (Pet. ¶ 6)

POSITIONS OF THE PARTIES[6]

Petitioner's Position

Petitioner argues that the Union did not provide her with proper representation in relation to the events leading up to and including her discharge from HHC. In particular, she claims that the Union failed to assist her in filing grievances regarding HHC's failure or refusal to provide her with a reasonable accommodation following her September 27, 2021 placement on unpaid leave and her improper termination on November 29, 2021. She argues that Elias stopped responding to her and that she did not hear from Elias' supervisor or anyone else at the Union following her

[5] Petitioner further stated that Washington told her that she would have a grievance if she had been denied sick leave or some other type of leave and that she responded that she did not get the vacation and sick time that she was owed. Petitioner asserted that Washington told her that she would call Elias' supervisor but that Washington contacted her two weeks later and stated that the supervisor had not gotten back to her.

[6] HHC did not submit a response to the improper practice petition nor did it request an extension of time to file a response prior to the deadline set forth in the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1).

December 16, 2021 meeting with Washington.[7] Petitioner further contends that the Union refused to file a grievance on her behalf for "my sick time and my earned hours leave."[8] (Pet. ¶ 6)

Union's Position

The Union argues that Petitioner's claims are time-barred by the four-month statute of limitations. It maintains that Petitioner was discharged on September 27, 2021, and that Elias informed her at that time that the Union would not file a grievance regarding her discharge. On the merits, the Union contends that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege facts which, if true, would establish that the Union's determination not to file a grievance regarding Petitioner's discharge was arbitrary, discriminatory, or made in bad faith. It further contends that no such facts exist. The Union argues that its determination was made based on a "good faith, reasonable, and non-discriminatory conclusion" that there was no meritorious basis on which to file the grievance. (Union Ans. ¶ 25) Moreover, it asserts that the Union provided full and complete services to Petitioner including advising her of her rights and informing her that there was no basis for it to file a grievance on her behalf. Accordingly, it argues that the petition should be dismissed.

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[7] Petitioner also claims that the Union "failed to file a grievance on my behalf over [a] workplace discrimination complaint, fail[ed to] file a grievance because the job did not provide a reasonable accommodation, retaliation for making these complaints and wrongful termination." (Pet. ¶ 7) Petitioner does not elaborate on what she meant by "workplace discrimination," or how she was retaliated against for making complaints. (*Id*.)

[8] Petitioner did not file a reply to the Union's answer. However, we note that on the evening before the Board was scheduled to consider her petition, Petitioner provided additional documents that she alleged were relevant to her case. Upon review, the Board determined that the information in these untimely documents does not substantially differ from the facts initially pled and therefore does not affect the outcome of this matter.

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." *Hyppolite*, 12 OCB2d 10, at 7 (2019) (citations omitted). Thus, "as long as the gravamen of the petitioner's complaint may be ascertained by the respondent, the pleading will be deemed acceptable." *Id.* (quoting *Sciarillo*, 53 OCB 15, at 7 (BCB 1994)). Here, Petitioner has pled facts alleging that the Union violated its duty of fair representation by refusing to file grievances over HHC's denial of her reasonable accommodation request and termination of her employment. We therefore construe the petition as alleging violations of NYCCBL § 12-306(b)(3) and (d).[9] *See id.* at 7-8.

As timeliness is a "threshold" question, we first address the Union's argument that Petitioner's claims are untimely. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (citing *OSA*, 1 OCB2d 45, at 13 (BCB 2008). The Union argues that the Board must dismiss the entire petition because the only alleged violation occurred on or about September 27, 2021, when Petitioner requested that the Union file a grievance regarding her discharge and Elias declined to do so. However, Petitioner argues that although she was placed on unpaid leave on September 27, 2021, she was not discharged from her job until November 29, 2021, did not receive notice of the discharge until December 6, 2021, and requested that the Union file a grievance on her behalf at an unspecified date thereafter, which would make the claim timely.

[9] 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)]."

Pursuant to NYCCBL § 12-306(e), the statute of limitations for an improper practice claim is four months.[10] 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). The petition was filed on March 3, 2022; accordingly, Petitioner's claims must have arisen on or after November 2, 2021, to be timely. In this instance, "[s]ince no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleading and assume for the sake of argument that the factual allegations contained in the petition are true." *Noonan*, 15 OCB2d 6, at 6 (BCB 2022) (citations omitted). Accordingly, we accept as true Petitioner's claims that she was not discharged by HHC until November 29, 2021 and that she requested that the Union file a grievance regarding her discharge thereafter. Thus, Petitioner's allegation that the Union failed to file a grievance regarding her termination from HHC is timely.

However, to the extent Petitioner claims that in October 2021, Elias denied her request that the Union file a grievance regarding HHC's denial of her reasonable accommodation request, the claim is time-barred. Petitioner made this request to Elias, at the latest, on October 13, 2021, well before the four-month period preceding the filing of the petition. Therefore, we dismiss this claim. *See Nardiello*, 2 OCB2d 5, at 28.

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[10] 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.

We now turn to the merits of the dispute. 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). 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." *Bonnen*, 9 OCB2d 7, at 16-17 (BCB 2016) (citations and 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 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*, 73 OCB 23, at 10 (BCB 2007); *see also Benjamin*, 4 OCB2d 6, at 14 (BCB 2011) ("Where, as here, the Union does not solely control access to the remedial forum, the bargaining representative's duty is limited to evenhanded treatment of members of the unit."). Here, we find that Petitioner has not shown a legal basis upon

which the Union could grieve her termination. The Mandate was issued pursuant to State regulations, and Petitioner does not dispute that HHC notified her of the Mandate, that she would be placed on unpaid leave if she was not vaccinated by September 27, 2021, and subsequently that she would be separated from service on November 29, 2021, if she did not get vaccinated or voluntarily resign. Petitioner acknowledged that she failed to comply with the Mandate by getting vaccinated by the required deadlines. Moreover, she has not demonstrated that in refusing to file a grievance regarding her termination, the Union acted in bad faith, treated her differently than similarly situated bargaining unit members, or treated her in an arbitrary manner. *See Gonzalez*, 10 OCB2d 20, at 11 (BCB 2017) (finding no violation of the duty of fair representation where the petitioner offered no evidence that union's decision not to pursue arbitration was based on motives other than its good faith evaluation of the merits of the grievance); *Rondinella*, 5 OCB2d 13, at 17-18 (BCB 2012);*see also Bonnen*, 9 OCB2d 7, at 17 ("it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance") (quoting *Cooke*, 57 OCB 46, at 9 (BCB 1996)). Accordingly, we find that the Union's decision not to file a grievance regarding her termination did not violate the duty of fair representation.

To the extent Petitioner claims that the Union did not assist her in obtaining a reasonable accommodation from HHC in November 2021 after she obtained a religious exemption, she concedes that Elias informed her in mid-October that the Union could not file a grievance over HHC's failure or refusal to provide her with a reasonable accommodation. Notwithstanding, the record also reflects that Elias contacted HHC's HR Department on November 4, 2021, to request that Petitioner be provided the opportunity to telework. Accordingly, we find that the Union did assist her. Petitioner's mere dissatisfaction with the Union's inability to obtain the accommodation

for her does not rise to the level of a breach of the duty of fair representation. *See Bonnen*, 9 OCB2d 7, at 19) ("To the extent that Petitioner is dissatisfied with the Union's conclusions, tactics, or outcomes, such claims are 'insufficient to demonstrate a violation of the Union's duty of fair representation.'") (quoting *Shymanski*, 5 OCB2d 20, at 9 (BCB 2012); *see also Richards*, 15 OCB2d 14, at 15 (BCB 2022) ("We have consistently held that a union has the discretion to determine whether and how it will address a claim.") (citations omitted).

Finally, we reject Petitioner's claim that the Union violated its duty of fair representation when it did not respond to her requests that it file a grievance on her behalf after informing her that she did not have a viable claim against HHC. *See Walker*, 6 OCB2d 1 (BCB 2013) (finding no violation for union's alleged failure to sufficiently respond to petitioner's repeated communications where petitioner did not demonstrate any basis upon which the grievance could be further pursued). We also find that Petitioner's claims that the Union failed or refused to file a grievance on her behalf regarding issues pertaining to her W-2 and/or sick leave and "earned hours" leave lack factual support. (Pet. ¶ 6); *see Swakeen*, 5 OCB2d 16, at 11 (BCB 2012) (dismissing claims as conclusory and "not supported by any specific allegation of fact"). There is no evidence in the record regarding Petitioner's sick leave or "earned hours" leave claims, including whether she provided the Union with any specific information about these claims.[11] (Pet. ¶ 6) Accordingly, these claims are dismissed.

Since we dismiss the petition against the Union, any potential derivative claim against HHC pursuant to NYCCBL § 12-306(d) must also fail. *See Celestin*, 14 OCB2d 24, at 8 (BCB 2021). We therefore dismiss the petition in its entirety.

[11] It is also unclear whether Petitioner's assertion regarding "earned hours" leave is a reference to her request for payment for approved leave days on September 27 and 28. (*Id.*)

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 Erlande Ibreus, docketed as BCB-4480-22, against Social Service Employees Union Local 371 and New York City Health + Hospitals, hereby is dismissed in its entirety.

Dated: September 28, 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