

**Ruiz, 15 OCB2d 41 (BCB 2022)**  
(IP) (Docket No. BCB-4469-21)

**Summary of Decision:** Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to help her file grievances asserting that her employer had not provided her with sufficient personal protective equipment. 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 dismissed. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**HELEN RUIZ,**

*Petitioner,*

*- and-*

**SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371,  
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,**

*- and-*

**CITY OF NEW YORK and NEW YORK CITY ADMINISTRATION  
FOR CHILDREN'S SERVICES,**

*Respondents.*

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**DECISION AND ORDER**

On December 1, 2021, Helen Ruiz (“Petitioner”) filed a *pro se* verified improper practice petition against the Social Services Employees Union, Local 371, District Council 37, AFSCME, AFL-CIO (“Union”), the City of New York (“City”), and the New York City Administration for

Children’s Services (“ACS”).<sup>1</sup> Petitioner asserts that the Union violated § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) when it breached its duty of fair representation by failing to properly assist her in filing grievances in order to obtain personal protective equipment (“PPE”) from ACS. The Union and the City separately argue that the Union did not breach its duty of fair representation. The Board finds that the facts do not establish that there has been a breach in the duty of fair representation. Accordingly, the petition is dismissed.

### **BACKGROUND**

The Union represents ACS employees in the civil service title of Child Protective Specialist, including Petitioner. The claim at issue relates to the Union’s response to Petitioner’s grievances that she was not provided sufficient PPE to protect against COVID-19 that were filed after August 1, 2021, four months prior to filing the petition.<sup>2</sup>

Prior to the time period relevant herein, starting in 2017, Petitioner began to voice concerns to her supervisors and Union representatives about the safety of her work environment. Between 2017 and 2019, Petitioner filed at least 16 grievances alleging that her work environment was unsafe, in violation of Article XIV of the Citywide Collective Bargaining Agreement (“Citywide Agreement”), which states that a safe and healthy working environment shall be provided for all

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<sup>1</sup> After the initial petition was deemed deficient by the Board’s Executive Secretary, Petitioner filed an amended petition on January 12, 2022. The Executive Secretary dismissed all of Petitioner’s claims in the amended petition as untimely and/or insufficient, except for the claims that the Union breached its duty of fair representation after August 1, 2021.

<sup>2</sup> Petitioner included facts and allegations in the amended improper practice petition that occurred more than four months prior to the filing of the original petition. We have included facts here that are untimely or were not properly pled only to the extent that they constitute relevant background information. *See Hyppolite*, 12 OCB2d 10, at 2 (BCB 2019).

employees. Petitioner was reassigned to administrative duties at ACS' Queens Borough Office in or around April 2018.

On July 30, 2019, representatives from both the City and the Union met with Petitioner to review each of the grievances that Petitioner had filed. As a result of that meeting, each of Petitioner's grievances were either denied or resolved. Emails produced by the Union show that in February 2020, Jose Santos of the Union's Health and Safety Division was in contact with Petitioner regarding her prior grievances dating back as far as 2017. Specifically, on February 27, 2020, Petitioner emailed Santos and asked for help obtaining a copy of a document regarding her prior grievances. Santos responded the same day and asked Petitioner to clarify what specific document she was seeking. Santos called Petitioner multiple times that day but was unable to reach her. Santos also reviewed Petitioner's email attachments dating back to 2017 and emailed to ask if she had filed an Equal Employment Opportunity complaint outside of ACS. He stated that it would be illegal for any ACS worker to retaliate against her should she file a complaint. Santos further told Petitioner that the Citywide Agreement speaks clearly about the City's responsibility to provide its workers with a safe and healthy environment, directed Petitioner to where she could find a copy of the Citywide Agreement, provided her with his phone number, and invited her to call him if she had any questions. There is no evidence in the record that Petitioner responded to any of these attempts by Santos to contact her and/or provided additional information about her claims.

Following the start of the COVID-19 pandemic in March 2020, Petitioner began contacting a number of ACS officials to request that she be provided PPE and that ACS personnel be directed to more thoroughly and frequently sanitize the area surrounding her workstation.<sup>3</sup> In May 2020,

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<sup>3</sup> During this time, Petitioner also filed complaints alleging similar claims with the Department of

Petitioner complained to her supervisors that a lock box, which Petitioner later learned contained masks, had been placed near her workstation and that a new telephone had been placed on her desk. Petitioner forwarded an email chain regarding these complaints to Santos. In June 2020, Petitioner was provided with cleaning supplies she had requested so that she could clean her workstation. After receiving the cleaning supplies, Petitioner spoke with Union representative Mary Myers, who advised Petitioner that she should only be expected to clean her own immediate work area. Petitioner then spoke with an ACS cleaning crew and asked them to clean the reception area where Petitioner's workstation was located. A member of the cleaning crew stated that cleaning the reception area was not their crew's responsibility. Afterwards, Petitioner refused to clean anywhere outside her immediate workstation in the reception area because it was not a part of her job duties. Petitioner then requested that she be provided with additional cleaning supplies and asked that a cleaning crew be assigned to clean the reception area.

In June 2020, the City began to require that Petitioner sign receipts for any PPE that she was provided to document that she had received the PPE.<sup>4</sup> On July 10, 2020, Petitioner filed an individual grievance at Step I alleging that she had not been provided with a mask that morning. Petitioner alleged that the failure to provide a mask was retaliation and a violation of the Citywide Agreement, the unit agreement covering her title, ACS policies, Occupational Safety and Health Administration policies, and Governor Cuomo's Executive Order 202.16. On July 14, 2020, Petitioner filed a complaint with the New York State Department of Labor's Public Employee

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Health and Mental Hygiene, the Conflicts of Interest Board, the New York State Department of Labor, and the United States Department of Labor, Wage and Hour Division, as well as non-profit agencies outside of New York State.

<sup>4</sup> The City provided sixteen receipts signed by Petitioner between November 2020 and December 2021, which document that she received PPE including masks, gloves, sanitizer, and hand wipes. Emails provided by Petitioner indicate that she also received and signed receipts for PPE as early as June 2020.

Safety and Health Bureau (“PESH”) alleging that Petitioner’s workplace was not being cleaned frequently enough, that Petitioner had not received sufficient PPE, and that ACS was disinfecting her workplace with unknown chemicals. PESH did not substantiate Petitioner’s complaint. On July 15, 2020, Petitioner emailed six ACS officials requesting additional PPE and then forwarded that email to seven union officials, including the Union’s President, Anthony Wells, and the President of District Council 37 (“DC 37”), Henry Garrido.

On November 27, 2020, Petitioner filed a complaint with ACS and a police report with the NYPD claiming that she had been subjected to harassment and retaliation by an ACS employee because the employee had used a disinfectant spray to clean near Petitioner’s workstation. Petitioner emailed her complaint to various union officials and representatives including Union President Wells and DC 37 President Garrido. Petitioner alleged that the ACS employee who cleaned near her work area had used a disinfectant spray in an attempt to “blind or disfigure” her with “corrosive chemicals.” (Pet., Ex. At 29) In response to Petitioner’s allegations that ACS personnel were cleaning with corrosive chemicals, Richard Watson, ACS’s Director of Occupational Safety and Health, provided Petitioner with the Safety Data Sheet for the disinfectant that was used by the cleaning crew. The Safety Data Sheet detailed the chemical composition of the disinfectant and provided that the cleaning agent had been approved by the U.S. Environmental Protection Agency and the Centers for Disease Control and Prevention for disinfecting coronavirus.

In April 2021, Petitioner contacted Union officials to complain that ACS workers were not following City protocols for health screening prior to entering City-owned buildings. At that time, the City had recently implemented a protocol whereby City employees were required to provide an affirmation that they had not been recently exposed to COVID-19 and that they did not feel

symptomatic before they were allowed to enter a City-owned building. The Union provided emails reflecting that these Union officials promptly responded to and investigated Petitioner's complaints and found them to be baseless. On August 2, 2021, Petitioner filed another complaint with PESH alleging that ACS did not provide her with the PPE that she had requested that week.<sup>5</sup>

On September 2, 2021, Petitioner sent several ACS officials an email in which she again complained that her working area had not been properly sanitized and alleged that she was being watched at work. Petitioner complained that there was a lapse in security because the security guards assigned to her office building were spending too much time in the bathroom. Petitioner stated that she would no longer comply with the City's COVID-19 protocols prior to entering her office building because she was being watched by the security guards. Petitioner further complained that her work area had not been properly cleaned or disinfected because she had observed two pens that she alleged were dirty because they had been left on the visitor's desk. Petitioner ended the email by informing the recipients that she would be filing a grievance regarding these concerns. Later that day, Petitioner filed an individual grievance at Step III alleging that she had not been provided any PPE that week in violation of the Citywide Agreement.<sup>6</sup>

On December 15, 2021, Petitioner filed another individual grievance at Step III alleging violations of ACS policy and the ACS Code of Conduct because on December 10, 2021, she was not provided with the PPE she requested. On the grievance form, Petitioner noted that she was omitting Steps I and II and wrote "Safety and Health go to STEP III." (Pet., Ex. at 6-7) The

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<sup>5</sup> The record does not reflect the outcome of Petitioner's second PESH complaint.

<sup>6</sup> Around this same time, Petitioner was suspended from work for reasons unrelated to her workplace safety complaints and then was out on sick leave until she returned to work on December 10, 2021.

grievance asserted that on December 15, 2021, Petitioner had only been provided with three masks rather than the five she requested. The grievance further stated that her supervisor, Nancy Kernisant, had informed Petitioner that she had been reassigned to a different worksite where all ACS employees onsite were provided with three masks and that Petitioner would be treated the same as any other ACS employee assigned to that worksite.

Petitioner contacted Santos regarding the December 15, 2021 grievance, and Santos informed her that she had incorrectly filed the grievance at Step III rather than Step I, because it was not a group grievance. He further advised Petitioner that she needed to revise her submission to state a claim under the Citywide Agreement. Petitioner acknowledges that she communicated with Union President Wells about her grievances and that he advised Petitioner that her “grievances were not in the proper form, etc.”<sup>7</sup> (Pet. at 7) Petitioner states that Santos told Petitioner that the appropriate grievance form could be found on the Union’s website. Petitioner avers that she was unable to find the appropriate form and did not re-submit the grievance. Petitioner alleges that Union representatives were not permitted to sign her grievances but does not state who told her this or when this conversation occurred.

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<sup>7</sup> The record does not reflect when President Wells communicated with Petitioner.

## **POSITIONS OF THE PARTIES**

### **Petitioner's Position**

Petitioner argues that the Union did not provide her with fair or good faith representation during her attempts to file grievances concerning the failure of ACS to provide her “the required” COVID-19 PPE equipment. (Pet. at 5-6) Petitioner believes that ACS violated its own COVID-19 policies and failed to safeguard her as an employee, in violation of Article XIV § 2 of the Citywide Agreement, when it did not timely provide her with the PPE she requested. Specifically, Petitioner alleges that various Union officials lied to her, did not take her grievances seriously, and refused to sign her grievances.<sup>8</sup> Petitioner further alleges that ACS uses Union representatives to make employees comply with the City’s demands.

### **Union's Position**

The Union argues that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege facts to support the conclusion that the Union breached its duty of fair representation. The Union notes that it has communicated with Petitioner and ACS extensively in response to Petitioner’s COVID-related grievances as well as Petitioner’s other grievances and concerns.

With regard to the September 2, 2021 and December 15, 2021 grievances at issue here, the Union argues that they were incorrectly filed under the terms of the Citywide Agreement. The Union contends that only grievances affecting a large group of employees can be filed at Step III and that all other grievances arising under the terms of the Citywide Agreement must be filed at

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<sup>8</sup> Petitioner did not submit a reply to the Union or the City’s answers. Instead, on August 23, 2022, Petitioner sent a series of voluminous email chains asserting new facts and claims that were both untimely and outside the Board’s jurisdiction. Petitioner, the Union, and the City attended a conference on September 19, 2022. Petitioner stated her position but stated she was unable to continue with the conference and left thereafter.



Step I. The Union argues that the form and content of Petitioner's grievances were incorrect because Petitioner filed both grievances at Step III rather than at Step I and as an individual grievance on behalf of herself. The Union avers that Santos advised Petitioner to change the form of her grievance so that it would state a grievance as defined in the Citywide Agreement. Santos explained to Petitioner that she could then re-file her grievance at Step I.

### **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. Concerning Petitioner's requests for PPE, the City asserts that it provided evidence that Petitioner's concerns were taken seriously and that both the City and the Union responded to these concerns. It submitted sixteen receipts signed by Petitioner, which documented that she was provided with the PPE she had requested. The City asserts that the Union did not breach its duty of fair representation and that the amended petition should be dismissed, including any derivative claim against ACS pursuant to NYCCBL § 12-306(d).

### **DISCUSSION**

The Executive Secretary found that Petitioner's only timely claims date from August 1, 2021, forward. *See* NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). Thus, we consider only the claims concerning the Union's alleged breach of the duty of fair representation relating to Petitioner's grievances filed on September 2, 2021, and December 15, 2021.

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 (1<sup>st</sup> 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) (citations omitted).

Here, Petitioner has pled facts alleging that the Union violated its duty of fair representation. "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)). We therefore construe the petition as alleging violations of NYCCBL § 12-306(b) and (d).<sup>9</sup> *See Shymanski*, 5 OCB2d 20, at 8 (BCB 2012). In addition, because Petitioner failed to file a reply to the Union's and the City's answers, to the extent Respondents' factual allegations are not contrary to facts asserted by Petitioner, they are deemed admitted. *See* OCB Rules § 1-07(c)(4) ("Additional facts or new matters alleged in the answer shall be deemed admitted unless denied in the reply.")

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."

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<sup>9</sup> Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

*Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citing *Walker*, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5 (BCB 2007)). However, “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) (citations omitted). 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). 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 (1<sup>st</sup> Dept. 2017) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)).

With regard to a union’s handling of grievances, “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.” *Bonnen*, 9 OCB2d 7 at 17 (internal quotation marks omitted). Rather, a union “enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.” *Id.* (quoting *Nardiello*, 2 OCB2d 5, at 40 (BCB 2009)) (internal quotation marks omitted).

Here, Petitioner claims that the Union violated the duty of fair representation because it “refused to help [her] in acquiring the COVID-19 safety supplies.” (Pet. at 15) Specifically,

Petitioner alleges that Santos refused to help file her grievances and that the Union prohibited onsite Union representatives from signing her grievances. We do not find that the facts support Petitioner's assertions that the Union officials refused to help her file her grievances. Regarding the September 2 and December 15, 2021, grievances at issue here, Santos advised Petitioner that because the grievances raised individual concerns, they needed to be filed at Step I pursuant to the procedures of the Citywide Agreement. Santos directed Petitioner to obtain another grievance form on the Union's website and to file an individual grievance at Step I. The record demonstrates that Petitioner did not heed Santos' advice. When Petitioner drafted the December 15, 2021, grievance, she described her grievance as individual in nature but nevertheless filed it at Step III. (Pet., Ex. at 6-7) In sum, the evidence establishes that the Union assisted Petitioner in her attempts to file her September 2 and December 15, 2021, grievances during the time period relevant to our inquiry. Moreover, the record shows that the Union had been helping Petitioner with her grievances and concerns in the months and years prior to the filing of the petition in this matter<sup>10</sup>

Petitioner has not established that the Union's acts or omissions in representing her were arbitrary, discriminatory, or in bad faith. While Petitioner's complaints, taken as a whole, clearly demonstrate that she is dissatisfied with the representation that the Union provided to her in filing her grievances, "dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation." *Shymanski*, 5 OCB2d 20, at 11 (quoting *Gertskis*, 77 OCB 11, at 11) (citations omitted). To the extent that Petitioner alleges that Santos provided her with inadequate guidance in formulating her September 2 and December 15, 2021, grievances, at most this conduct could be construed as "negligence, mistake, or incompetence," which is insufficient to establish a breach of the duty of fair representation. *West*, 14 OCB2d 12, at 13-14

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<sup>10</sup> The record shows not only that Union representatives responded to Petitioner's inquiries, but also helped Petitioner resolve more than 16 grievances in 2019.

(BCB 2021) (quoting *Bonnen*, 9 OCB2d 7, at 17) (internal quotation marks omitted).

In light of the above, we find that the Union did not act in an arbitrary, discriminatory, bad faith manner. Accordingly, we find that Petitioner has not shown that the Union breached its duty of fair representation, and we dismiss the improper practice 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 improper practice petition, docketed as BCB-4469-21, filed by Helen Ruiz against Social Services Employees Union, Local 371, District Council 37, AFSCME, AFL-CIO, the City of New York, and New York City Administration for Children’s Services, is dismissed in its entirety.

Dated: November 30, 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

PETER PEPPER  
MEMBER