OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

ARNALDO RODRIGUEZ,

Petitioner,

15 OCB2d 38 (ES 2022)
Docket No. BCB-4492-22

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 2507, THE CITY OF NEW YORK, and NEW YORK CITY FIRE DEPARTMENT,[1]

Respondents.
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DETERMINATION OF EXECUTIVE SECRETARY

On October 25, 2022, Petitioner Arnaldo Rodriguez filed a verified improper practice petition. On November 9, 2022, Petitioner filed an amended verified improper petition alleging that District Council 37, AFSCME, AFL-CIO, Local 2507 ("Union") violated NYCCBL § 12-306(b)(2) and (3) by refusing to represent him in regaining his position as a Firefighter.[2] For the reasons set forth below, the petition is dismissed.

[1] The caption is amended *nunc pro tunc* to add the City of New York ("City") and the New York City Fire Department ("FDNY") as respondents because the employer is a necessary party to an alleged breach of the duty of fair representation, pursuant to § 12-306(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

[2] Petitioner cited provisions of the NYCCBL in his e-filed submission that were not clearly subjects of improper practices under the statute; however, he specified in his attached factual statement that the claims are being brought under NYCCBL § 12-306(b)(2) and (3). Therefore, only those claims are considered here.

BACKGROUND

All facts recited here are based entirely on Petitioner's pleadings unless otherwise specified. In June 2000, Petitioner was hired by the FDNY as an Emergency Medical Technician ("EMT"). In 2013, pursuant to a federal court mandate requiring the FDNY to use nondiscriminatory examination and hiring practices to select applicants for the Firefighter position, Petitioner applied for a Firefighter position. On July 29, 2013, he was promoted from an EMT position to a Firefighter position.

The following month, the FDNY removed Petitioner from the Firefighters Academy after four days of training and placed him on administrative leave status. Approximately one year later, in 2014, the FDNY filed misconduct charges against Petitioner alleging that he falsified his medical documents. The FDNY kept Petitioner on administrative leave for the next four years, paying him as a Firefighter for approximately the first year of the four-year period. By letter dated January 22, 2016, the FDNY notified Petitioner that "you were reassigned to your permanent title of EMS-EMT effective date of August 2, 2013." (Pet., Ex. A) The FDNY subsequently fined Petitioner 60 days' pay pursuant to an "imposed unpaid suspension." (Pet. ¶ 5)

On August 14, 2017, the Union filed a grievance on Petitioner's behalf challenging the basis for the FDNYs disciplinary actions taken against him. The Union's Step 3 grievance form states that the Union sought the following remedy on Petitioner's behalf: "Drop all charges for Violation of Regulations, bring member back to work as firefighter, reimburse member any fines deducted from his paycheck and any other just and proper remedy." (Pet., Ex. B) The Union subsequently filed a request for arbitration with the Office of Collective Bargaining. The undersigned takes administrative notice that the Union, in its request for arbitration, sought as a remedy back pay with interest, expungement of the disciplinary record, and any other remedy

necessary to make the grievant whole, but did not seek to have Petitioner returned to the Firefighter position.

Petitioner was represented by the Union at an arbitration hearing held on August 13, 2021, and the arbitrator issued an Opinion and Award dated October 12, 2021 ("Decision"). In the Decision, the arbitrator stated that the question for resolution is whether Petitioner "engaged in misconduct by knowingly and deliberately falsifying his medical disclosure forms in 2013." (Pet., Ex. C, at 10) The arbitrator determined that the FDNY had violated the parties' collective bargaining agreement by wrongfully disciplining Petitioner and ordered that it "remove the discipline from his record, rescind the 60-day suspension, pay him for the missed time with interest, and make him whole." (*Id.* at 13)

By letter dated December 22, 2021, the FDNY notified Petitioner that, pursuant to the Decision, it is rescinding his suspension without pay and "will remunerate you for the equivalent pay that was withheld, at your pay rate at the time of the suspension." (Pet., Ex. D) It further stated that it would restore any annual leave and sick leave balances that were lost as a result of the suspension.

Petitioner contacted the Union seeking assistance in appealing the FDNY's refusal to reinstate him to the Firefighter position. In a September 28, 2022 email to Petitioner and his private counsel, DC 37 Associate General Counsel Steven Sykes explained that the Union cannot challenge Petitioner's demotion from probationary Firefighter. He stated that when Petitioner was initially demoted to his permanent EMT position and requested that the Union challenge his demotion, Sykes informed him that the Union was unable to do so because the Firefighter title is represented by a different union than the one representing EMTs and is covered by a different collective bargaining agreement, and because State law provides that probationary civil servants

can be demoted for any reason except for an illegal reason such as discrimination. Sykes further stated in the email that although the Union sought restoration to the provisional Firefighter position in the original grievance, it did not seek this remedy in the arbitration request for the reasons referenced above.[3] Finally, Sykes stated that the "make whole" remedy in the Decision cannot be read to require reinstatement to the Firefighter position because Petitioner's demotion was not subject to the grievance procedure and therefore not encompassed in the issue at arbitration.

Petitioner maintains that the FDNY has refused to return him to his Firefighter position and has also refused to reimburse him for the 60-day suspension at his Firefighter pay. Petitioner claims that the Union "inexplicably abandoned" him, refusing to represent him in the enforcement of the Decision to "make him whole" by returning him to his Firefighter position "from which he was wrongfully demoted as part of the discipline package FDNY levied against him." (Pet. ¶ 12) He contends that the Union has violated its obligation under NYCCBL § 12-306(b)(2) and (3) and left him "trapped in a legal 'Catch 22'" by refusing to represent him in regaining his Firefighter position "despite [that] reinstatement as Firefighter was the remedy sought on the Arbitration application." (Pet. ¶ 14) Petitioner requests that the Board of Collective Bargaining ("Board") order the Union to represent him in enforcing the Decision or authorize his private counsel to represent him as a party "ex rel DC 37." (*Id.*)

[3] Citing case law, Sykes noted that, "even if the arbitrator had ordered the FDNY to reinstate [Petitioner] to his prior position, the order would be contrary to civil service law and therefore unenforceable." (Pet., Ex. E)

DISCUSSION

Pursuant to OCB Rule § 1-07(c)(2), the undersigned has reviewed the petition and determined that it must be dismissed for failure to plead facts which, if credited, could serve to establish a cause of action under NYCCBL § 12-306 (b)(2) or (3).[4]

Initially, Petitioner lacks standing to bring a claim under NYCCBL § 12-306 (b)(2). It is well settled that the duty to bargain in good faith runs between the public employer and the employee organization. *See Baith*, 57 OCB 30, at 2 (BCB 1996). Accordingly, the Board has long held that an individual lacks standing to raise a claim under NYCCBL § 12-306(a)(4) because this section addresses a duty to bargain in good faith between the employer and the union. *See, e.g.*, *Robinson*, 69 OCB 43, at 6 (BCB 2002); *Lopez*, 59 OCB 31, at 10 (BCB 1997); *see also Baith*, 57 OCB 30, at 2-3 (nothing in NYCCBL § 12-306(a)(4) "was intended to create any independent rights or causes of action for the benefit of third parties, whether they be constituent members of the bargaining group or whether they are merely seeking to represent them[selves] in an unofficial capacity") For these reasons, it has also held that an individual lacks standing to raise a failure to bargain claim against a public employee organization under NYCCBL § 12-306(b)(2). *See Feder*, 9 OCB2d 33, at 23 n. 23 (BCB 2016) (dismissing individual petitioner's § 12-306(b)(2) claim for lack of standing); *see also McAllan*, 31 OCB 15, at 15 (BCB 1983) ("the duty of a certified public

[4] NYCCBL § 12-306(b) provides, in pertinent part:

> It shall be an improper practice for a public employee organization or its agents:
>
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer;
> (3) to breach its duty of fair representation to public employees under this chapter. . . .

employee organization to bargain in good faith is a duty owed to the public employer and not the union's members"). Accordingly, the claim alleging a violation of NYCCBL § 12-306 (b)(2) is dismissed.

Petitioner's claim against the Union for breach of the duty of fair representation is also dismissed. 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 (BCB 2015) (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)).

The Board has 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." *Lacey*, 14 OCB 18, at 10 (BCB 2021) (quoting

Howe, 73 OCB 23, at 10 (BCB 2007)), *affd*., *Lacey v. Social Service Employees Union Local 371*, Index No. 101032/2021 (Sup. Ct. N.Y. Co. 2022) (internal quotation marks omitted); *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, Petitioner alleges that the Union has refused to represent him in appealing an arbitration award. He contends that the FDNY is obligated to reinstate him to the Firefighter position, which he maintains the arbitrator ordered pursuant to her Decision. The undersigned finds that Petitioner has not demonstrated a legal basis upon which the Board could find that the Union's failure or refusal to appeal the Decision was a breach of its duty of fair representation. Initially, and notwithstanding Petitioner's assertion to the contrary, it should be noted that the issue of reinstatement to the Firefighter position was not before the arbitrator. In the Decision, the arbitrator stated that the issue before her was whether Petitioner "engaged in misconduct by knowingly and deliberately falsifying his medical disclosure forms in 2013." (Pet., Ex. C, at 10) Nothing in the Decision, including the resulting award, addresses Petitioner's reinstatement as a Firefighter.

"We have consistently held that a union has the discretion to determine whether and how it will address a claim." *Richards*, 15 OCB2d 14, at 15 (BCB 2022) (citations and internal quotation marks omitted). It is undisputed that the Union considered Petitioner's request for assistance, made a reasoned decision that it would not take the portion of the grievance seeking Petitioner's reinstatement to the Firefighter position to arbitration, and clearly communicated that position to Petitioner. Sykes informed Petitioner that the Union was unable seek his restoration to the Firefighter position because that title is represented by a different union than the one

representing EMTs and is also covered by a different collective bargaining agreement. Sykes further informed him that the Union could not seek to have him placed in the Firefighter position because State law provides that probationary civil servants can be demoted for any reason except for an illegal reason such as discrimination. Petitioner does not dispute that he was a probationary Firefighter prior to being removed from that position. *See Bonnen*, 9 OCB2d 7, at 19 (quoting *Shymanski*, 5 OCB2d 20, at 9 (BCB 2012) ("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.'").[5]

In sum, Petitioner has also not proffered facts upon which it can be concluded that the Union treated him in an arbitrary fashion or differently than other bargaining unit members, or engaged in bad faith conduct in representing him. *See Nealy*, 8 OCB2d 2, at 16. Thus, Petitioner has not carried his burden of establishing a cause of action for breach of the duty of fair representation under NYCCBL 12-306(b)(3).[6]

For all the reasons set forth above, the improper practice petition is hereby dismissed. Petitioner is entitled to appeal this Determination pursuant to OCB Rule § 1-07(c)(2)(ii), which provides:

> Within 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board a written statement setting forth an appeal from the decision with proof of

[5] In response to Petitioner's contention that the "make whole" language in the award portion of the Decision reflects a directive that he be placed in the Firefighter position, Sykes stated that the "make whole" remedy in the arbitrator's award cannot be read to require reinstatement to the Firefighter position because Petitioner's demotion was not subject to the grievance procedure and therefore not encompassed in the issue at arbitration. To the extent Petitioner believed that the meaning of the "make whole" portion of the Decision was unclear, he could have requested that the Union seek clarification from the arbitrator upon receipt of the Decision.

[6] Consequently, the NYCCBL 12-306(d) claim against the FDNY is also dismissed.

service thereof upon all parties. The statement shall set forth the reasons for the appeal.

This dismissal is without prejudice to any rights that Petitioner may have in any other administrative or judicial forum.

Dated: November 22, 2022
New York, New York

Abigail R. Levy
Executive Secretary
Board of Collective Bargaining