# *Rodriguez,* 16 OCB2d 12 (BCB 2023)

(IP) (Docket No. BCB-4492-22)

***Summary of Decision*:** Petitioner appealed the determination of the Executive Secretary of the Board of Collective Bargaining dismissing his petition for failure to plead facts sufficient to establish a violation of the NYCCBL. Petitioner argued that he pled sufficient facts to establish that the Union breached the duty of fair representation and that the Executive Secretary's determination erroneously relied on the Union's position, overlooked the Union's bad faith, and ignored the FDNY's discriminatory actions. The Board found that the Executive Secretary properly deemed the petition insufficient and denied the appeal. ***(Official decision follows.)***

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

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

***-between-***

**ARNALDO RODRIGUEZ,**

***Petitioner,***

***-and-***

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

***Respondents.***

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## DECISION AND ORDER

On October 25, 2022, Petitioner Arnaldo Rodriguez filed a verified improper practice petition, amended on November 9, 2022, alleging that District Council 37, AFSCME, AFL-CIO, Local 2507 ("Union") breached § 12-306(b)(2) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by refusing to represent him in restoring his position as a Firefighter. Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1)

("OCB Rules"), the Executive Secretary of the Board of Collective Bargaining dismissed the petition on the ground that Petitioner's claims were insufficient to establish a violation under the NYCCBL. *See Rodriguez*, 15 OCB2d 38 (ES 2022) ("ES Determination"). Petitioner appealed the ES Determination on the grounds that it erroneously relied on the Union's position, overlooked the Union's bad faith, and ignored the FDNY's discriminatory actions ("Appeal"). The Board finds that the Executive Secretary properly deemed the petition insufficient and denies the Appeal.[1]

## BACKGROUND

### The Petition[2]

Petitioner was hired by the New York City Fire Department ("FDNY") as an EMT in 2000. The Union is the certified bargaining representative of all EMTs, but not of Firefighters. Petitioner was promoted from an EMT to a probationary Firefighter position on July 29, 2013. On August 2, 2013, the FDNY removed Petitioner from the Fire Academy after four days of training, reassigned him to his permanent EMS-EMT title, and placed him on administrative leave. Approximately one year later, in 2014, the FDNY filed misconduct charges against Petitioner alleging that he falsified medical disclosure forms submitted as part of his Firefighter application. Petitioner remained on administrative leave for the next four years. He was paid as a Firefighter for approximately the first year of the four-year period, after which time he was paid as an EMT. On January 22, 2016, the FDNY sent Petitioner a letter "to serve as confirmation 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

[1] Petitioner requested oral argument before the Board, which was denied.

[2] All facts recounted here are taken from the improper practice petition, the attached exhibits, and Petitioner's request for arbitration.

suspension." (Pet. ¶ 5)

The Union filed a grievance on Petitioner's behalf challenging the disciplinary actions the FDNY had taken against him. A Step I grievance hearing was held in 2014, and a Step II hearing was held in 2017. On August 14, 2017, the Union filed a Step III grievance seeking 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) Petitioner returned to work as an EMT in September 2017 and was assigned to the Bureau of Training to instruct new employees on how to drive ambulances. Petitioner served the 60-day unpaid suspension beginning October 1, 2017. On August 8, 2018, the Union filed a request for arbitration with the Office of Collective Bargaining alleging that Petitioner had been wrongfully disciplined and sought the following remedy on Petitioner's behalf: "Back-pay with interest, expunge disciplinary record, and any other remedy necessary to make the grievant whole."[3]

The Union represented Petitioner at an arbitration hearing held on August 13, 2021, and the arbitrator issued an Opinion and Award dated October 12, 2021 ("Award"). The issue for resolution at arbitration was whether Petitioner "engaged in misconduct by knowingly and deliberately falsifying his medical disclosure forms in 2013." (Pet., Ex. C, at 10) In her Award, 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

[3] We take administrative notice of the request for arbitration, docketed as A-15504-18, which was filed with the OCB but was not included as part of the improper practice petition.

Award, it was 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 requested that the Union seek to enforce the Award in court and obtain an order requiring the FDNY to restore him to a Firefighter position. In response to a discussion with Petitioner and his private counsel on September 27, 2022, the Union's Associate General Counsel emailed Petitioner and his counsel. In that email, dated September 28, 2022, he stated that the Union "could not" challenge Petitioner's demotion from a probationary Firefighter to a permanent EMT position because Firefighters were represented by a different union and covered by a different collective bargaining agreement than EMTs. (Pet., Ex. E) In addition, the Associate General Counsel explained that under State law, probationary civil servants could be demoted for any reason except for an illegal reason, such as unlawful discrimination.[4] Additionally, the Associate General Counsel noted that, for those same reasons, the Union did not seek reinstatement to the Firefighter position in the arbitration request. Finally, the Associate General Counsel stated that the "make whole" remedy in the arbitrator's Award did not indicate that Petitioner was to be reinstated as a Firefighter. (*Id.)* Therefore, he asserted 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." (*Id.)*

In the improper practice petition, Petitioner argued that the FDNY failed to abide by the awarded make whole remedy by refusing to return him to his position as a Firefighter and had also failed to reimburse him for the 60-day suspension at his Firefighter rate of pay. Petitioner claimed

[4] In the email, the Assistant General Counsel cited case law finding that probationary employees could be demoted for "any reason or no reason at all." (*Id.)*

that the Union "inexplicably abandoned" him by refusing to enforce the Award and demand that he be made 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 contended that by failing to pursue these matters on his behalf, the Union violated its duty to fairly represent him under NYCCBL § 12-306(b)(2) and (3). Petitioner claims that by refusing to represent him "despite [that] reinstatement as Firefighter was the remedy sought on the Arbitration application," the Union has left him "trapped in a legal 'Catch 22.'" (Pet. ¶ 14) Petitioner requested that the Board of Collective Bargaining order the Union to represent him in enforcing the Award or authorize his private counsel to represent him as a party.

**The Executive Secretary's Determination**

On November 22, 2022, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the petition for failure to state a cause of action under the NYCCBL. *See Rodriguez*, 15 OCB2d 38 (ES 2022).[5]

Regarding Petitioner's NYCCBL § 12-306(b)(3) claim, the Executive Secretary found that Petitioner failed to allege facts sufficient to state a breach of the duty of fair representation. The Executive Secretary noted that Petitioner complained that the Union refused to represent him in appealing an arbitration award. She observed that, in contrast to the Step III grievance request, "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

[5] The Executive Secretary dismissed Petitioner's claim under NYCCBL § 12-306(b)(2), finding that "an individual lacks standing to raise a failure to bargain claim against a public employee organization under NYCCBL § 12-306(b)(2)." *Rodriguez*, 15 OCB2d 38, at 5 (citing *Feder*, 9 OCB2d 33, at 23 n.23 (BCB 2016) (dismissing individual petitioner's NYCCBL § 12-306(b)(2) claim for lack of standing)); *see County of St. Lawrence,* 48 PERB ¶ 4595, at 4845 (ALJ 2015) (noting that "individuals lack standing to allege a failure to bargain in good faith") (citing *New York City Transit Auth*, 32 PERB ¶ 3061 (1999)).

seek to have Petitioner returned to the Firefighter position." *Rodriguez*, 15 OCB2d 38, at 2-3. The Executive Secretary therefore found that the issue of reinstatement was not before the arbitrator and that nothing in that Award addresses Petitioner's reinstatement as a Firefighter. Accordingly, the ES Determination found that Petitioner had not demonstrated a source of right to the action it requested from the Union.

The Executive Secretary determined that Petitioner's allegations did not amount to a breach of the duty of fair representation because 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." *Rodriguez*, 15 OCB2d 38, at 7. The Executive Secretary noted that the Board has "consistently held that a union has the discretion to determine whether and how it will address a claim" and stated that Petitioner's disagreement with the Union's decision was insufficient to establish a breach of the duty of fair representation. *Id.* (quoting *Richards*, 15 OCB2d 14, at 15 (BCB 2022) (citations and internal quotation marks omitted).

Further, the Executive Secretary found that Petitioner had not proffered facts upon which it could be concluded that the Union treated him arbitrarily, in bad faith, or in any way differently from other bargaining unit members. Consequently, the Executive Secretary determined that no viable claim had been stated under NYCCBL § 12-306(b)(3).

**The Appeal**

On December 2, 2022, Petitioner filed the Appeal. Petitioner first argues that the Executive Secretary erred in relying on Union counsel's alleged misrepresentation of the facts and law in the September 28, 2022, email. Petitioner denies that the Union did not seek to have Petitioner returned to the Firefighter position in the request for arbitration and asserts that the Executive Secretary erroneously relied on this representation. In support, Petitioner cites to the Union's

August 14, 2017, Step III grievance, which stated that the remedy sought was to "[d]rop all charges for Violation of Regulations, bring member back to work as a Firefighter, reimburse member any fines deducted from his paycheck, and any other just and proper remedy." (Appeal, Ex. 1, at 2) Petitioner further claims that the Union "argued explicitly for the reinstatement of Rodriguez to [F]irefighter" at the 2021 arbitration. (Appeal at 2)

Petitioner claims that the State law that allows probationary civil servants to be demoted without a stated reason applies only if the discretion to demote is exercised in good faith. Petitioner argues that the arbitrator's finding that the FDNY's punitive measures against Petitioner were impermissible demonstrates a lack of good faith on the part of the FDNY. Similarly, Petitioner asserts that the Executive Secretary erroneously relied on the Union's claim that a ruling by the arbitrator reinstating him to his Firefighter position would violate civil service law and therefore be unenforceable. He notes that the Executive Secretary did not "reference a specific civil service statute or regulation that reinstatement o[f] Rodriguez would violate" and that the issue of "the arbitrator's lack of jurisdiction or authority to reinstate" Petitioner as a Firefighter was not raised by the Union or FDNY during the grievance procedure or hearing. (Appeal at 3)

Petitioner further argues that the ES Determination overlooks the Union's bad faith in its refusal to seek enforcement of the arbitrator's Award. Petitioner claims that the Union misrepresented its position concerning the remedy sought at arbitration. Petitioner alleges that the issue of his reinstatement as a Firefighter was before the arbitrator and, therefore, argues that the arbitrator's order for the FDNY to "forthwith remove the discipline from [Petitioner's] record, rescind the 60-day suspension, pay him for the missing time with interest, and make him whole" constituted an order to reinstate Petitioner as a Firefighter. (Appeal at 4, citing Ex. 1) Petitioner thus claims that the Union acted in bad faith by abandoning further representation of him concerning the FDNY's refusal to comply with the Award and reinstate him as a Firefighter.

Finally, Petitioner alleges that the Union and the Executive Secretary ignored the fact that the FDNY's removal of Petitioner from his probationary Firefighter position was discriminatory and in bad faith. Petitioner argues that his demotion was part of a "disciplinary package" that the arbitrator held was not justified and was consistent with a long standing FDNY practice of ethnic and racial discrimination. (Appeal at 3) Petitioner asserts that the arbitrator heard testimony that the FDNY brought unjustified allegations against him and falsified records in order to prevent him from becoming a Firefighter. Petitioner notes that he was among the first minority Firefighters to be hired under a court order requiring the FDNY to implement non-discriminatory hiring policies. He claims that no explanation for the FDNY's disciplinary actions against him has been presented other than retaliation for his minority status and resistance to ending their discriminatory policies. Petitioner therefore argues that the Union has compounded the FDNY's discrimination by abandoning his representation and refusing to seek enforcement of the make whole order.

## DISCUSSION

As an initial matter, Petitioner raises allegations that this Board cannot address. First, Petitioner added facts in his Appeal that were not asserted in the improper practice petition before the Executive Secretary, including the claim that Union counsel argued for Petitioner's reinstatement as a Firefighter at the arbitration. The "purpose of an appeal is to determine the correctness of the Executive Secretary's decision based upon the facts that were available … in the record as it existed at the time of [her] ruling." *Buttaro*, 12 OCB2d 23, at 13 (BCB 2019), *affd.*, *Matter of Buttaro v. New York City Off. of Collective Bargaining*, Index No. 152489/2020, 2021 WL 1624394 (Sup. Ct. N.Y. Co. Apr. 23, 2021) (Engoron, J.) (quoting *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008)) (citations omitted)). "A petitioner may not add new facts at a later date to attack the basis of the Executive Secretary's determination." *Babayeva*, 1 OCB2d 15, at 10; *see*

*also Cooper*, 69 OCB 4, at 5 (BCB 2002). Second, to the extent Petitioner makes claims based on incidents prior to July 25, 2022, including any claims regarding the wording or contents of the August 8, 2018, request for arbitration, those claims are untimely. *See* NYCCBL § 12-306(e) (petition alleging an employer or union has engaged "in an improper practice in violation of this section may be filed … 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"). Finally, Petitioner alleged for the first time in the Appeal that the Union acted in bad faith by "abandoning" Petitioner in declining to seek enforcement of the Award, and failing to seek enforcement where racial discrimination motivated the FDNY's demotion of Petitioner's demotion. Petitioner further argues that the Executive Secretary ignored this evidence of bad faith. The claim that the Union acted in bad faith was not pled in the petition and thus cannot be raised on appeal.[6] Therefore, we disregard Petitioner's new allegations and consider only the claim that the Union's September 2022 refusal to seek enforcement of the Award and his reinstatement as a Firefighter was a breach of the duty of fair representation.

In order to demonstrate that a union breached its duty of fair representation, a Petitioner must allege facts that show the union acted in an arbitrary, discriminatory, or bad faith manner. *See Walker*, 6 OCB2d 1, at 7 (BCB 2013). This Board has repeatedly stated that "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." *Fash*, 15 OCB2d 15 at 21 (BCB 2022) (*citing Nardiello*, 2 OCB2d 5, at 40 (BCB 2009); *Del Rio*, 75 OCB 6, at 13 (BCB 2005)). This is because a union "enjoys wide latitude in the handling of grievances

[6] The petition alleges that the Union "inexplicably abandoned [Petitioner] … refusing to represent him in the enforcement of the Arbitrator's Award" although it was "obviously capable of continuing their representation." (Pet. ¶ 12). The petition does not at any point allege that the Union's "refusal" was motivated by bad faith.

as long as it exercises discretion with good faith and honesty." *Fash*, 15 OCB2d 15, at 21 (quoting *Turner*, 3 OCB2d 48, at 15 (BCB 2010)) (additional citations omitted).

After the issuance of the Award, it is undisputed that Petitioner asked the Union to appeal because the FDNY failed to reinstate him as a Firefighter. The Union explained its decision not to seek Petitioner's reinstatement as a Firefighter in the September 28, 2022, email from its Associate General Counsel to Petitioner. In that email, the Associate General Counsel stated that the Firefighter position is represented by a different union and governed by a different collective bargaining agreement than the EMT position and that, under state law, probationary civil servants can be demoted for any reason except for an illegal reason such as race-based discrimination. The Associate General Counsel further noted that the Union did not request reinstatement to the probationary Firefighter position in the arbitration request because of these same factors. Finally, he stated that the "make whole" remedy in the arbitrator's Award does not indicate that Petitioner is to be reinstated as a Firefighter.[7]

We find that the Executive Secretary correctly determined that Petitioner failed to set forth facts to demonstrate that the Union acted in an arbitrary, discriminatory, or bad faith manner with respect to a claimed breach of the duty of fair representation. The Executive Secretary determined that the Union made a reasoned decision not to appeal the Award, expressed its rationale for that decision, and communicated that rationale to Petitioner. Where a union has "set forth a thoughtful and reasonable explanation as to why it believed" a petitioner's claim was without merit and that "rationale was communicated to [p]etitioner," the "petitioner's belief that its union's conclusion was erroneous is insufficient to establish a breach of the duty of fair representation." *Bonnen*, 9

[7] Petitioner offers no authority in support of his position that a "make whole" remedy includes his reinstatement as a Firefighter under these facts or that the Union's interpretation of the scope of the remedy was arbitrary, discriminatory, or made in bad faith.

OCB2d 7, at 17-18 (BCB 2016); *see Sims*, 8 OCB2d 23, at 16, n.12 (BCB 2015); *Evans*, 6 OCB2d 37, at 8 (BCB 2013).

Moreover, "the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Fash*, 15 OCB2d 15, at 21 (quoting *Turner*, 3 OCB2d 48, at 15 (BCB 2010)) (additional citations omitted); *see also Garg*, 6 OCB2d 35 (BCB 2013) (upholding an Executive Secretary determination that dismissed a petition alleging a breach of the duty of fair representation when the union sent the petitioner a letter explaining why it believed that his grievance was untimely and without merit). Therefore, we do not find that the Executive Secretary's reliance on the Union's September 2022 explanation for not appealing the Award or seeking Petitioner's reinstatement to the Firefighter position was improper.

Thus, we find that the ES Determination dismissing the improper practice was correct. Accordingly, we dismiss the Appeal.[8]

[8] We take administrative notice that on March 1, 2023, the New York State Supreme Court issued a decision granting, in part, a CPLR Article 78 petition brought by Petitioner seeking enforcement of the Award and a court order directing the FDNY to restore him to the position of Firefighter. *Rodriguez v. NYC Fire Dept.*, Index No. 652550/2022 (New York County, Mar. 1, 2023) (Moyne, J.). The decision confirmed the Award and ordered the arbitrator to retain jurisdiction regarding the implementation of her Award, but did not direct the FDNY to restore Petitioner to the Firefighter position. The Union was not a party to the proceeding. We have considered the Court's order and do not find it bears upon the Board's decision that Petitioner has not established that the Union's decision not to seek enforcement of the Award was a violation of its duty of fair representation or that the Union otherwise violated the NYCCBL. Even assuming the Court's decision suggests that the Union's determination as to the scope of the Award was incorrect, no violation of the NYCCBL has been established. *See West*, 14 OCB2d 12, at 13 (BCB 2021) (citing *Bonnen*, 9 OCB2d 7, at 17). "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." *Feder*, 9 OCB2d 33, at 34 (BCB 2016) (citations omitted).

**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 Executive Secretary's Determination dismissing the improper practice petition docketed as BCB-4492-22 is affirmed, and the appeal is denied.

Dated: April 4, 2023
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER