Hogans, 16 OCB2d 13 (BCB 2023)

(IP) (Docket No. BCB-4494-22)

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 appeal her suspension and neglecting to communicate its decision not to appeal. Petitioner also alleged that the Union failed to adequately represent her regarding a warning memorandum for being absent without leave. The Union and the City separately argued that the Union did not breach its duty of fair representation. The Board found that Petitioner failed to establish that the Union 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-

KEISHA HOGANS,

Petitioner,

- and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 2627,
THE CITY OF NEW YORK, and
THE OFFICE OF THE NEW YORK CITY COMPTROLLER,

Respondents.

DECISION AND ORDER

On December 12, 2022, Keisha Hogans ("Petitioner") filed a *pro se* verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 2627 (collectively, the "Union"), the City of New York ("City"), and the Office of the New York City Comptroller ("Comptroller"). On January 17, 2022, Petitioner filed an amended petition. 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 appeal her suspension and neglecting to communicate its decision not to appeal. Petitioner also alleges that the Union failed to adequately represent her regarding a warning memorandum for being absent without leave.[1] The Union and the City separately argue that the Union did not breach its duty of fair representation. The Board finds that Petitioner did not establish that the Union violated the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner is employed by the Comptroller as a Computer Associate in the Bureau of Information Systems & Technology's Central Imaging Facility. The Union is the certified bargaining representative for employees in the Computer Associate title.

In March and May 2017, Petitioner filed complaints with the New York State Division of Human Rights ("NYSDHR") alleging that the Comptroller discriminated against her on the basis of age, race, and gender by denying her raises and promotions. In November 2017, Petitioner received a written warning for derogatory comments that she allegedly made towards a colleague in an email. In September 2018, Petitioner filed a complaint with the Comptroller's EEO Officer alleging that the November 2017 warning was issued in retaliation for her previous complaints with NYSDHR. In support of her retaliation allegation, Petitioner alleged that her colleagues in

[1] The initial and amended petitions also included claims against the Union and the Comptroller that were dismissed by the Executive Secretary as untimely and/or insufficient. The Executive Secretary's determinations were not appealed by Petitioner. Accordingly, we only address Petitioner's remaining timely claim that the Union breached its duty of fair representation under NYCCBL § 12-306(b)(3) on or after August 11, 2022. Facts and allegations in her petitions that occurred more than four months prior to filing and/or relate to insufficient claims are referenced here only to the extent that they constitute relevant background information. *See Ruiz*, 15 OCB2d 41, at 2 n.2 (BCB 2022) (citing *Hyppolite*, 12 OCB2d 10, at 2 (BCB 2019)).

the Bureau of Information Systems & Technology frequently engaged in more serious inappropriate conduct, such as sexual harassment, without repercussion. Specifically, Petitioner alleged, *inter alia*, that in February 2018, she witnessed a manager and two of her colleagues watching a pornographic video on one of their cellphones. The Comptroller's EEO Officer forwarded Petitioner's allegations to the Comptroller's Office of General Counsel ("OGC"), and the OGC opened an investigation. Subsequently, in January 2019, Petitioner filed complaints with NYSDHR, the New York City Department of Investigation ("DOI"), and the New York City Commission on Human Rights ("NYCCHR"), repeating the allegations made to the EEO Officer in 2018.

On April 20, 2020, the Comptroller brought six disciplinary charges against Petitioner, alleging, *inter alia*, that she made false statements in her various complaints and related investigations and improperly used the Comptroller's resources to prepare her complaints. The Union retained outside counsel to represent Petitioner regarding these disciplinary charges, and a trial was held pursuant to New York Civil Service Law ("CSL") § 75 ("Section 75"). Petitioner avers that she urged counsel to subpoena her colleague's cellphone records to substantiate her allegation related to the pornographic video, but he declined. Indeed, Petitioner asserts that counsel was "incompetent" throughout the Section 75 trial. (Pet. ¶ 6)

On January 5, 2022 , an Administrative Law Judge ("ALJ") at the Office of Administrative Trials and Hearings ("OATH") issued a Report and Recommendation sustaining one of the charges, finding that Petitioner made false or misleading statements in her DOI complaint regarding the discussion and display of pornography in the workplace related to the alleged incident from February 2018.[2] The ALJ reviewed Petitioner's disciplinary history and relevant

[2] The ALJ recommended the dismissal of all other charges.

OATH precedent and recommended a twenty-day suspension without pay. On January 24, 2022, the Comptroller adopted the ALJ's Report and Recommendation in full.

Thereafter, on June 17, 2022, the Union appealed the Comptroller's decision to the New York City Civil Service Commission ("CSC") pursuant to CSL § 76. Petitioner was represented in the appeal by a DC 37 Assistant General Counsel. The Assistant General Counsel argued on appeal, *inter alia*, that Petitioner's due process rights were violated because the sustained charge concerned her statements related to the alleged February 2018 pornographic video that was never entered into evidence at trial. On August 12, 2022, the CSC affirmed the Comptroller's determination. On August 14, 2022, Petitioner asserts that she reached out to the Assistant General Counsel to inquire about the next steps for her case, because she was "sure [the Union] could have taken [her case] to other courts."[3] (Pet. ¶ 6) According to Petitioner, she did not hear back from the Assistant General Counsel or the Union otherwise about her case after August 12, 2022.

On the morning of August 29, 2022, Petitioner was working from home, and she avers that she experienced technical issues with her electronic network login that precluded her from signing into her work laptop. She used her personal cellphone to email the information technology helpdesk to troubleshoot the issues, but they were unsuccessful in resolving them. The helpdesk noted that she would need to bring the laptop into the office the next day, on August 30, 2022, for updates. Later that day, on August 29, Petitioner contends that she was locked out of the network entirely and was no longer able to access her work email account from her personal cellphone.

On October 25, 2022, Petitioner received a warning memorandum ("Warning Memo") from Executive Director for Technology Support Ronald Katz, alleging that she was

[3] We take administrative notice that pursuant to CSL § 76(3), decisions of the CSC "shall be final and conclusive, and not subject to further review in any court."

uncommunicative and otherwise unavailable to work on August 29 following her initial inquiry to the helpdesk. Additionally, the Warning Memo alleges that Petitioner marked her timesheet as "at work" for those hours, despite her inability to communicate or otherwise work her standard hours.[4] (City Ans., Ex. 4)

On October 28, 2022, Petitioner texted screenshots of the Warning Memo, along with evidence of her laptop issue and request for helpdesk assistance, to Local 2627 President Laura Morand, explaining that management was threatening to "make [her] AWOL" despite her technological issues. (Amended Pet., Ex. C) Morand replied to her text that same day, noting that she forwarded Petitioner's documents to Union Representative Natasha Isma. Morand also provided Petitioner with Isma's phone number and stated that Petitioner would hear from Isma soon. On February 21, 2023, Petitioner emailed Morand and Isma to follow-up regarding the Warning Memo and inquire as to whether the Union planned to act. Isma replied that same day, noting that the Union could not "stop management from writing anything concerning [Petitioner's] work performance, even if [Petitioner] [is] not in agreement[,]" but that Petitioner had the option to write a written rebuttal for the record.[5] (Union Ans., Ex. E) Moreover, Isma advised that the Union would schedule a meeting with management to address the issue. According to the Union,

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[4] The Warning Memo alleges that Petitioner's conduct violated various rules set forth in the Comptroller's employee handbook. However, the Warning Memo states that it is "not a formal disciplinary action and [does] not constitute commencement of a formal disciplinary procedure." (City Ans., Ex. 4)

[5] Article X of the Citywide Agreement, "Evaluations and Personnel Folders," § 1, provides that, "[a]n employee shall be required to accept a copy of any evaluatory statement of the employee's work performance or conduct . . . if such statement is to be placed in the employee's permanent folder . . . ." Article X, § 2, provides that, "[i]f an employee finds in the employee's personnel folder any material relating to the employee's work performance or conduct in addition to evaluatory statements . . . the employee shall have the right to answer any such material filed and the answer shall be attached to the file copy." (Union Ans., Ex. F)

as of February 24, 2023, Isma was still trying to arrange the meeting with management, and its "investigation" of the Warning Memo is still pending. (Union Memo of Law, at 9)

POSITIONS OF THE PARTIES[6]

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by failing to appeal her suspension following the CSC's August 12, 2022 decision and neglecting to communicate its decision not to appeal. Petitioner asserts that her counsel at the Section 75 trial was "incompetent" and that he failed to subpoena cellphone records that would have corroborated her account of the pornography incident from February 2018. (Pet. ¶ 6) As a result, she contends that the Union should have taken her case to "other courts" following the CSC's decision to affirm the Comptroller's determination. (*Id.*) Moreover, Petitioner avers she contacted the DC 37 Assistant General Counsel on August 14, 2022, to find out "what the next steps [were][,]" but she never heard back from the Union.[7] (*Id.*) Petitioner also argues that the Union violated the duty of fair representation by failing to adequately represent her regarding the Warning Memo from October 25, 2022.

As a remedy, Petitioner requests that the suspension be expunged from her employment record and that she be made whole for the resulting lost pay and benefits.

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[6] To the extent the Union or the City answered Petitioner's untimely and/or insufficient claims dismissed by the Executive Secretary, such responses are not described here.

[7] Petitioner concedes that the Assistant General Counsel was the "only honest attorney that [she] dealt with who defended [her]." (Pet. ¶ 6)

Union's Position

The Union argues that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it did not act in an arbitrary, discriminatory, or bad faith manner.[8] The Union asserts that its decision to take no further action on Petitioner's case following the CSC's August 12, 2022 decision was not arbitrary because its regular policy is not to provide representation in judicial forums beyond the CSC in the event of a sustained penalty. The Union contends that it represented Petitioner "no differently than any other dues-paying member." (Union Memo of Law, at 9) Moreover, with respect to the Warning Memo from October 25, 2022, the Union avers that Representative Isma informed Petitioner that her "contractual remedy" is to submit a rebuttal letter for her personnel file and to schedule a meeting with management, which it is currently working to arrange.[9] (*Id.*) It contends that to the extent any of its actions were construed to be negligent, mistaken, or incompetent, this would be insufficient to establish a breach of the duty of fair representation.

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). The City asserts that Petitioner has not shown that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Indeed, it notes that mere dissatisfaction with a union's tactical or strategic determinations is not sufficient to establish a breach of the duty of fair representation. Moreover, the City avers that to the extent

[8] 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."

[9] The Union asserts that unlike a grievance, Petitioner and the Union are not bound to any particular time frame to submit the rebuttal letter.

Petitioner asserts a claim against the Union related to its handling of her Warning Memo from October 25, 2022, no "proper grievance has been filed by Petitioner prompting the [Union's] representation on [this] matter." (City Ans. ¶ 30) Accordingly, the City argues that any derivative claim against the Comptroller pursuant to NYCCBL § 12-306(d) must also be dismissed.[10]

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." *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (internal quotation and editing marks omitted) (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 (1st Dept. 2010), *lv. denied*, 17 N.Y.3d 702 (2011)). Here, although the petition does not cite specific provisions of the NYCCBL, we find that Petitioner has pled facts alleging that the Union violated its duty of fair representation in violation of NYCCBL § 12-306(b)(3) and (d).[11]

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); *Okorie-Ama*, 79

[10] Pursuant to NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

[11] Additionally, 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) (internal quotation marks omitted) (quoting *Dillon*, 9 OCB2d 28, at 12 (BCB 2016)).

OCB 5 (BCB 2007)). 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 of [a] disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (internal quotation marks omitted) (quoting *Okorie-Ama*, 79 OCB 5, at 14); *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 (internal quotation marks omitted) (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)). "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).

Moreover, it is well-established that a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Evans*, 6 OCB2d 37, at 8 (BCB 2013) (citations omitted); *see also Dillon*, 9 OCB2d 28, at 14-16 (BCB 2016) (applying same principle in the context of a union's handling of a member's disciplinary litigation before OATH and the CSC); *Shymanski*, 5 OCB2d 20, at 9-12 (BCB 2012) (same). The Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Walker*, 79 OCB 2, at 14 (BCB 2007) (citing *Grace*, 55 OCB 18, at 8 (BCB 1995)). 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).

In this case, Petitioner has failed to establish that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. With respect to Petitioner's assertion that the Union should have taken her case to other courts following the CSC's decision affirming her suspension, there

is no evidence that any lack of further action by the Union was motivated by bad faith or intent to discriminate against Petitioner. Moreover, 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." *Ibreus*, 15 OCB2d 30, at 10 (BCB 2022) (internal quotation marks omitted) (quoting *Howe*, 73 OCB 23, at 10 (BCB 2007)); *see also Benjamin*, 4 OCB2d 6, at 14 (BCB 2011). Here, Petitioner has failed to demonstrate a legal basis upon which the Union could have challenged the CSC's final decision. Indeed, CSL § 76(3) explicitly states that decisions of the CSC "shall be final and conclusive, and not subject to further review in any court." Further, the Union asserts that its policy is not to provide representation in forums beyond the CSC in the event of a sustained penalty.[12] Accordingly, we do not find that the Union acted arbitrarily or otherwise violated the duty of fair representation in declining to pursue subsequent action. *See Walker*, 79 OCB 2, at 15-16; *Dillon*, 9 OCB2d 28, at 14; *Ibreus*, 15 OCB2d 30, at 10-11.

Additionally, Petitioner asserts that the Union breached its duty of fair representation by failing to communicate that it was not going to take additional actions on her case following the CSC's final decision on August 12, 2022. However, the Board has consistently held that a union does not breach its duty for the failure to communicate unless that alleged failure "prejudice[d] or injure[d] the petitioner." *Fash*, 15 OCB2d 15, at 22 (BCB 2022) (internal quotation marks omitted)

[12] We note that Petitioner has not shown a disparate application of the Union's described policy or otherwise established that the Union handled her case following the CSC's final decision any differently than that of other bargaining unit members. *See D'Onofrio*, 79 OCB 3, at 20 (BCB 2007) (finding no breach of the duty of representation when petitioner did not show that the union did more for others in the same circumstances than it did for the petitioner); *Schweit*, 61 OCB 36, at 15 (BCB 1998) ("Unless the petitioner shows that the [u]nion did more for others in the same circumstances than they did for him, or that its actions were discriminatory, arbitrary or taken in bad faith, even errors in judgment . . . do not breach the duty [of fair representation]"); *Fash*, 15 OCB2d 15, at 23 n.26 (BCB 2022); *Stathes*, 14 OCB2d 3, at 10 n.11 (BCB 2021).

(quoting *Cook*, 7 OCB2d 24, at 9 (BCB 2014)). In this case, because we have determined that Petitioner failed to establish a legal basis upon which the Union could have challenged the CSC's final decision, we find that Petitioner has not shown that she was prejudiced or injured by the Union's failure to communicate regarding her case following the CSC's final decision on August 12, 2022. *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 the duty of fair representation when the union reasonably concluded that the grievance was not meritorious) (citing *Cook*, 7 OCB2d 24, at 9); *Fash*, 15 OCB2d 15, at 22-23.

Finally, to the extent Petitioner contends that the Union breached its duty of fair representation by failing to adequately represent her regarding the Warning Memo from October 25, 2022, we find that the record does not support this claim. The record evidence shows that although Representative Isma explained that the Union could not "stop management from writing anything concerning [Petitioner's] work performance," she advised Petitioner to write a rebuttal. (Union Ans., Ex. E) Moreover, Isma offered to schedule a meeting with management to address the issue, which the Union has represented it is in the process of arranging. Further, to the extent Petitioner disagrees with the actions taken by the Union or its position on its ability to appeal the Warning Memo, such disagreement does not establish a violation of the NYCCBL.[13] *See Shymanski*, 5 OCB2d 20, at 11 (citation omitted) ("[D]issatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."); *see also Evans*, 6 OCB2d 37, at 8-9; *Sicular*, 79 OCB 33, at 13. Accordingly, we do not find that the Union breached its duty of fair representation concerning Petitioner's October 2022 Warning Memo.

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[13] We also note that there is no evidence in the record to establish that any of the actions or positions taken by the Union regarding the Warning Memo were discriminatory or motivated by bad faith.

Therefore, we find that the Union did not breach its duty of fair representation. Accordingly, we dismiss the 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 verified improper practice petition, docketed as BCB-4494-22, filed by Keisha Hogans, against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2627, and the City of New York and the Office of the New York City Comptroller, is hereby dismissed in its entirety.

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