

Cote, 17 OCB2d 4 (BCB 2024)

(IP) (Docket No. BCB-4531-23)

Summary of Decision: Petitioner filed an improper practice petition alleging that she did not receive a contractual ratification bonus which she believes she was entitled to receive, and that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by refusing to assist her. Respondents claimed that Petitioner was not eligible for the ratification bonus. Respondent Union also argues that it responded promptly to Petitioner’s inquiries on the subject and properly exercised its discretion not to pursue a grievance on her behalf. The Board found that the Union did not breach 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-

MARILYN COTE,

Petitioner,

-and-

**DISTRICT COUNCIL 37 AFSCME, AFL-CIO, LOCAL 2627, and
NEW YORK CITY HEALTH + HOSPITALS,**

Respondents.

DECISION AND ORDER

On July 31, 2023, Marilyn Cote filed an improper practice petition, *pro se*, against District Council 37, AFSCME, AFL-CIO, Local 2627 (“Union”), and New York City Health + Hospitals (“HHC”). Petitioner alleged that she did not receive a contractual ratification bonus which she believes she was entitled to receive, and that the Union breached § 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 assist her in obtaining such bonus. Respondents claim that Petitioner

was not eligible for the ratification bonus and that the Union responded promptly to Petitioner's inquiries on the subject and exercised its discretion not to pursue a grievance on her behalf. The Board finds that the Union did not breach its duty of fair representation. Therefore, we find no violation of NYCCBL § 12-306(b)(3) and dismiss the petition in its entirety.

BACKGROUND

HHC hired Petitioner in June 2007 as a Systems Analyst, which is a title represented by the Union. Petitioner remained a Systems Analyst until her retirement on February 6, 2023. Upon her retirement, Petitioner was placed on terminal leave.¹ She received her final paycheck around April 27, 2023. Union dues continued to be deducted from Petitioner's paychecks during her time on terminal leave.

On March 31, 2023, the Union membership ratified the 2021-2026 Memorandum of Agreement ("Agreement") between the Union and the City of New York. The Agreement took effect on May 26, 2023. Among other terms, the Agreement provided for a \$3,000 ratification bonus for certain bargaining unit members. The Agreement limits eligibility for the ratification bonus to employees "in active pay status on the date of ratification." (Union Ans., Ex. A) Active pay status is defined in Agreement as "being in active payroll status ("B Status"), military leave with pay ("K status"), or on paid family leave." (HHC Ans., Ex. 1) The Union's Department of Research and Negotiations produced a list of frequently asked questions regarding the Agreement dated March 1, 2023, which defines non-active status as "being terminated for cause from city service; resignation or on terminal leave from city service; or otherwise separated from city service, including being on Unpaid FMLA or Worker's Compensation leave using only accrued

¹ We take administrative notice that employees who have left city service but continue to receive paychecks based on accumulated leave time are described as being on terminal leave.

time.” (Union Ans., Ex. B) Eligible employees received their ratification bonuses in late April 2023.

On May 19, 2023, Petitioner contacted the Union to inquire about her eligibility for the ratification bonus. She spoke to Union Grievance Representative Natasha Isma (“Representative”), who informed her that she was not eligible for the bonus because she was on terminal leave status at the time of ratification. Petitioner contacted the Union again in July 2023 and discussed the situation on a conference call with both the Representative and the President of the Union’s Local 2627 (“Local President”). While on that conference call, Petitioner expressed dissatisfaction with the Union’s explanation that being on terminal leave made her ineligible for the bonus and threatened to proceed with legal action. Petitioner claims that she was “discouraged from taking legal action” to pursue the bonus by the Local President, who “suggest[ed] that it would cost [her] the same \$3,000 dollars to hire a lawyer.” (Pet. ¶ 5)

POSITIONS OF THE PARTIES

Petitioner’s Position

Petitioner argues that the Union breached its duty of fair representation by failing to assist her in seeking to receive the ratification bonus. Petitioner asserts that, as a Union member, she should have received the ratification bonus. She claims that since her Union dues continued to be deducted from her post-retirement paychecks, she should be considered an active member of the Union and thus eligible for the bonus. Petitioner reports that she was “dissatisfied with the... answers” that Union representatives provided to her as well as their suggestion that she should not pursue independent legal action. (Pet. ¶ 5)

Union’s Position

The Union argues that the petition fails to state a claim of any cognizable violation of

NYCCBL § 12-306(b)(3). It asserts that it did not act in an arbitrary, discriminatory, or bad faith manner. The Union notes that it responded promptly to Petitioner's request for assistance and informed her of her rights during multiple discussions on the topic. The Union argues that its determination to not pursue a grievance on Petitioner's behalf was made based on a good faith, reasonable, and non-discriminatory conclusion that there was no meritorious basis on which to file the grievance. Namely, Petitioner was not in active payroll status at the relevant time and thus was not eligible for the bonus. 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.

HHC's Position

HHC argues that Petitioner failed to state a cause of action under NYCCBL § 12-306(b)(3) and that therefore any potential derivative claim against it pursuant to NYCCBL § 12-306(d) must also fail. It notes that a reasoned refusal to take a legal position on the basis that the position is without merit cannot be the basis for a breach of the duty of fair representation. Thus, it argues that because Petitioner's claim to be entitled to a ratification bonus is without merit due to the fact that Petitioner was not in active payroll status at the relevant time, the Union's failure to pursue Petitioner's meritless claim cannot be a breach of the duty of fair representation.

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) (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)) (internal

quotation and editing marks omitted). We note that although Petitioner did not cite to a specific provision of the NYCCBL, it is clear that she alleges a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3), and a derivative claim against HHC under NYCCBL § 12-306(d).²

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.” 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 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 . . . 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 Gertskis*, 77 OCB 11, at 11 (BCB 2006). Indeed, “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).

In this case, Petitioner has failed to establish that the Union engaged in arbitrary, discriminatory, or bad faith conduct. There is no dispute that Petitioner was on terminal leave as of the March 31, 2023, ratification of the Agreement. Nor is it disputed that Petitioner subsequently contacted the Union and spoke with Union representatives multiple times, who informed her she did not qualify for the ratification bonus. 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.”

² Under NYCCBL § 12-306(d), “[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)].”

Ibreus, 15 OCB2d 30, at 10 (BCB 2022) (internal quotation marks omitted) (quoting *Howe*, 79 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 her failure to receive the ratification bonus. Moreover, while Petitioner's complaints clearly demonstrate that she is dissatisfied by the Union's failure to process a grievance on her behalf, "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 (BCB 2012) (quoting *Gertsakis*, 77 OCB 11, at 11) (citations omitted); *see Nealy*, 8 OCB2d 2, at 16.

Further, a Union does not violate the NYCCBL by negotiating benefits that apply to some but not all of its bargaining unit members. *See Oberhauser*, 53 OCB 8, at 12-13 (BCB 1994) ("the fact that [the union] negotiates and agrees upon contract provisions giving different benefits to different groups of workers does not, by itself, constitute a violation of the duty of fair representation. The failure of a contract to satisfy all unit members does not establish a violation of the duty of fair representation.") Therefore, based on the facts alleged, we conclude that the Union made a good faith judgment that Petitioner did not have a meritorious claim regarding the ratification bonus.

Accordingly, we find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and thus did not breach its duty of fair representation. Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Samuels*, 77 OCB 17, at 16 (BCB 2006). We therefore 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 filed by Marilyn Cote, docketed as BCB-4531-23, against District Council 37, AFSCME, AFL-CIO, Local 2627, and New York City Health + Hospitals, hereby is dismissed in its entirety.

Dated: February 21, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

PETER PEPPER
MEMBER

CHARLES MOERDLER
MEMBER