

Leiva, 16 OCB2d 29 (BCB 2023)

(IP) (Docket No. BCB-4520-23)

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 assist her or file grievances on her behalf regarding a change to her work assignment. 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-

MAXI-MILLIE LEIVA,

Petitioner,

- and-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 2627,
THE CITY OF NEW YORK, and
THE NEW YORK CITY OFFICE OF TECHNOLOGY AND INNOVATION,**

Respondents.

DECISION AND ORDER

On May 3, 2023, Maxi-Millie Leiva (“Petitioner”) filed, *pro se*, a verified improper practice petition against District Council 37, AFSCME, AFL-CIO (“DC 37”) and its affiliated Local 2627 (collectively, “Union”), the City of New York (“City”), and the Office of Technology and Innovation (“OTI”). 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 assist her or file grievances

on her behalf concerning a change in her work assignment. The Union and the City separately argue that the Union did not breach its duty of fair representation. The Board finds that many of the incidents cited by Petitioner fall outside of the four-month statute of limitations and that the Union did not violate the NYCCBL as to the timely claim. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner has been employed as a Computer Aide at OTI since November 2019. The Union is the certified bargaining representative for employees in the Computer Aide title. Petitioner was originally assigned to the Mainframe Operations unit in the functional position of Tape Librarian. According to the City and the Union, this function became obsolete in April 2021. As a result, OTI reassigned Petitioner in August 2021. OTI briefly assigned her back to Mainframe Operations in October 2021 but reassigned her again at the end of that month to its Enterprise Mobile Technology unit.

Petitioner contacted her Union representative in December 2021 to complain about her involuntary reassignment to the Enterprise Mobile Technology unit. The Union claims that the representative advised Petitioner in late 2021 or early 2022 that the employer could reassign her to perform the duties in question and that the Union could not challenge the reassignment. Petitioner claims the representative promised to get back to her but never did. Regardless, thereafter Petitioner discussed her concerns with the Union President, who engaged in informal discussions with OTI to see if Petitioner's concerns could be resolved. No satisfactory solution was found, and in October 2022, the Union President advised Petitioner that the Union would not be able to offer any further assistance with respect to the reassignment.

Petitioner also complained to the Union in October 2022 that her civil service title had been changed without her consent from Computer Aide to Telecommunications Associate. According to Petitioner, the Union told her it could not help her with the change of title. Both the City and the Union deny that Petitioner's civil service title changed.¹

On April 17, 2023, OTI notified Petitioner that in May she would be reassigned, this time to OTI's Citywide Service Desk. Petitioner again alleged that this reassignment included a change of her civil service title to Telecommunications Associate and that she was not being paid the correct salary for the Telecommunications Associate title. Petitioner was reassigned to OTI's Citywide Service Desk with a new functional position, Junior Service Desk Agent, effective May 8, 2023. The Union reviewed Petitioner's duties as a Junior Service Desk Agent and determined that they were appropriate for her civil service title of Computer Aide. The City submitted a screenshot of Petitioner's record from its Personnel Management System confirming that Petitioner's civil service title was not changed and that she was in the Computer Aide title throughout the relevant period.

In March 2023, Petitioner also sought assistance from the Union regarding delayed paychecks. The City and Union clarified that due to a delay in the submission of her time sheets, Petitioner had been issued paper checks, which she had to pick up at a designated time and location. The City provided documentation showing Petitioner did receive her checks in March 2023, and Petitioner subsequently confirmed that she is not owed any outstanding pay.²

¹ In November 2022, Petitioner was temporarily returned to her original position in the Mainframe Operations unit.

² While not alleged in the petition, at the case conference Petitioner also asserted that she had received notices that she had been terminated in January 2023, and subsequently submitted copies of the notices. The notices were issued by the DC37 Benefits Trust Fund and the City and advised Petitioner that her benefits had been terminated in January. The City and the Union confirmed at

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation, in violation of NYCCBL 12-306(b)(3), by refusing to assist her or file grievances on her behalf.³ As a remedy, Petitioner requests a transfer to a different agency.

Union's Position

The Union argues that most of Petitioner's complaints fall outside of the four-month statute of limitations. With regard to any remaining potential claims, the Union argues that Petitioner failed to establish a violation of NYCCBL §12-306(b)(3) because she did not plead facts to suggest it acted in an arbitrary, discriminatory, or bad faith manner. The Union states it evaluated Petitioner's complaints and found that there was no violation of the collective bargaining agreement and therefore no viable grievance it could pursue on her behalf. With respect to the delayed paychecks, the Union acknowledges that Petitioner sought its assistance but complained that she had been issued a paper check instead of her direct deposit due to a delay in the submission of her timesheets. The Union notes that since Petitioner received her check, there was no further action for it to take. With respect to the reassignments, the Union explained that it investigated the issue and learned that Petitioner's original functional position at OTI was being eliminated by

the conference that Petitioner's employment was not terminated and that she remains in active pay status. Petitioner did not allege that she requested any assistance from the Union with respect to the notices concerning her benefit termination.

³ 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."

the agency. It determined that the agency had authority to reassign her to a new functional position. The Union states that it communicated to Petitioner in late 2021 or early 2022 and again on October 25, 2022, that it could not file a grievance regarding the reassignment. Further, the Union evaluated the duties performed by Petitioner in her current role of Junior Service Desk Agent and determined that they were appropriate for her civil service title of Computer Aide. The Union states that it also represents other Computer Aides who perform this same function. The Union denies that there was ever a change to Petitioner's civil service title.

City's Position

The City avers that most of Petitioner's complaints must be dismissed because they are based on facts that occurred outside the four month statute of limitations. Further, 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). With respect to the alleged missing paychecks, the City states that Petitioner received a paper check instead of direct deposit in March 2023 as a result of timesheets not being submitted in a timely fashion and provided documentation to show that Petitioner received all monies owed for the period in question. With respect to the reason for Petitioner's reassignment to the Junior Service Desk Agent position at OTI's Citywide Service Desk, the City asserts that Petitioner's original position in the Mainframe Operations unit became obsolete. The City denies that there was ever a change to Petitioner's civil service title and provided documentation to show that Petitioner has continuously remained in the Computer Aide title. According to the City, Petitioner has not shown that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith.

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)).

As a threshold matter, pursuant to 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), an improper practice charge “must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.” *Sweeny*, 73 OCB 9 at 4 (BCB 2004); *see also Ibreis*, 15 OCB2d 30, at 9 (BCB 2022). In this case, the petition was filed on May 3, 2023. Thus, to be considered timely, any claims must have arisen on or after January 2, 2023. To the extent that any events Petitioner described occurred prior to January 2, 2023, they cannot serve as the basis for a claim. This includes Petitioner’s claim that the Union breached its duty of fair representation by not assisting her or filing grievances in connection with her reassignment in October 2021. The Union advised her in October 2022 that it could not assist her with the reassignment, and thus this claim is time-barred.⁴

⁴ According to the Union, Petitioner knew or should have known before October 2022 that the Union would not file a grievance with respect to the reassignment. In this instance, the Board need not make a precise determination of the earliest point at which Petitioner knew or should have known because the Union’s notice to her in October 2022 was more than four months prior to the filing of the petition.

Petitioner’s remaining timely claim relates to her complaint about her reassignment in May 2023 to the functional role of Junior Service Desk Agent.⁵ 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 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 2006). 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).

⁵ We find no claim with respect to Petitioner’s assertion that she received notices that she had been terminated in January 2023. The record confirms that Petitioner was not terminated and remains in active status. Moreover, this issue was not raised in the petition and there is no evidence that she contacted the Union to request assistance with the notices. Similarly, we find no claim with respect to Petitioner’s allegation that her civil service title was changed; the record reflects that she has been in the Computer Aide title throughout the relevant period. We likewise find that Petitioner has not stated a claim with respect to the delays to her paychecks in March 2023, as the record shows that she received paper checks due to a delay in submission of her timesheets, no outstanding money is owed to her, and she has not established that there was any further action the Union could take.

In this case, Petitioner has not established that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. With respect to OTI's reassignment of Petitioner in May 2023, when Petitioner sought assistance with a comparable reassignment in the past, the Union determined there was no contract violation and advised Petitioner that it could not assist her. Similarly, the Union evaluated the new role Petitioner assumed in May 2023 and concluded that it was appropriate for her civil service title. "[T]he Board will not second-guess the Union's judgment even if the Union's legal assessment was erroneous[,] in the absence of the allegations showing arbitrary or bad faith conduct." *Fernandes*, 8 OCB2d 21, at 17-18 (BCB 2015) (internal citations omitted). Here, there is no indication that by concluding it did not have basis to grieve Petitioner's reassignment, the Union treated Petitioner in an arbitrary, discriminatory, or bad faith manner. Therefore, we find that the Union did not breach its duty of fair representation and dismiss the petition.

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-4520-23, filed by Maxi-Millie Leiva, against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2627, and the City of New York and the Office of Technology and Innovation, is hereby dismissed.

Dated: November 2, 2023
New York, New York

SUSAN J. PANAPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROL O'BLENES
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER