

***Mitchell, 16 OCB2d 30 (BCB 2023)***

(IP) (Docket No. BCB-4523-23)

***Summary of Decision:*** Petitioner filed a verified improper practice petition alleging that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the NYCCBL by failing to adequately represent her regarding her claims of a hostile work environment and wrongful termination. The Union argued that it could not grieve Petitioner’s termination due to her status as a probationary employee and had no obligation to pursue grievances regarding matters it judged to be non-meritorious. HHC argued that Petitioner failed to state factual allegations sufficient to claim a violation of the NYCCBL. The Board found that the Union did not breach its duty of fair representation. Accordingly, the petition was dismissed. (***Official decision follows.***)

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

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

***-between-***

**FATIMA MITCHELL,**

***Petitioner,***

***-and-***

**LOCAL 1549, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and  
NYC HEALTH + HOSPITALS**

***Respondents.***

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**DECISION AND ORDER**

On May 18, 2023, Petitioner Fatima Mitchell filed a verified improper practice petition, *pro se*, against Local 1549, an affiliate of District Council 37, AFSCME, AFL-CIO (collectively “Union”), and NYC Health + Hospitals (“HHC”). Petitioner claims 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 adequately represent her regarding her claims of a hostile work environment and

wrongful termination. The Union argues that it could not grieve Petitioner's termination due to her status as a probationary employee and had no obligation to pursue grievances regarding matters it judged to be non-meritorious. HHC argues that Petitioner failed to state factual allegations sufficient to claim a violation of the NYCCBL. The Board finds that the Union did not breach its duty of fair representation. Accordingly, the petition is dismissed.

### **BACKGROUND**

HHC hired Petitioner on January 9, 2023, in the civil service title of Clerical Associate, which is a title represented by the Union. Until her May 5, 2023, termination, Petitioner served as a probationary employee. The Union and HHC are parties to the 2010-2017 Clerical Agreement ("Agreement"), covering Petitioner's title. The grievance procedure contained in Article VI of the Agreement has no provision for probationary employees to bring grievances claiming wrongful disciplinary actions.

On April 10, 2023, Petitioner contacted Union representative Carol Perrotte ("Representative") to discuss her need to take time off work for medical testing. She informed the Representative that her supervisor Elisa Ramirez ("Supervisor") told her that she would be written up if she took days off and also told her that the Union would not help her. The Representative informed Petitioner of the procedures for requesting medical leave and advised her to follow the Supervisor's instructions regarding time and leave issues.

On April 11, 2023, Petitioner met with her Supervisor and another manager regarding Petitioner's complaint that two of her co-workers were not assisting her in communicating with non-English speaking patients. Petitioner claims that, subsequent to that meeting, the two co-workers in question met with her Supervisor, and from then on, she felt that her work environment became hostile.

On April 12, 2023, Petitioner contacted the Human Resources Department (“HR”) to request an employee rights handbook and code of conduct. She claims HR emailed her Supervisor in response, and that her Supervisor was angry with her for having contacted HR.

On April 26, 2023, Petitioner reached out to the Representative and to HR regarding tension in the workplace. Petitioner alleges that she spoke to the Representative on April 27, 2023, and requested a meeting with her Supervisor and a co-worker to try to find “common ground to work together.” (Pet. ¶ 6) She contends that the Representative yelled at her, saying that there was nothing she could do about tension in the workplace and advised her to “stick it out.” *Id.* Also on April 27, Petitioner claims to have filed a charge with the Equal Employment Opportunity Commission complaining of mistreatment by her Supervisor. HHC avers that it has no record of any such filing.

On May 1, 2023, the Supervisor handed Petitioner a “Notice to Report for Counseling Session” directing her to report to a counseling session regarding excessive absences on May 8, 2023. (Pet. Ex. C) The notice stated that such counseling sessions are not considered disciplinary actions, but that Petitioner was nevertheless welcome to have a Union representative present. Petitioner contacted the Representative to request her presence at that meeting and was informed that the Representative was not scheduled to work that day but would request that the meeting be rescheduled. The meeting was never held.

On May 3, 2023, the Supervisor called Petitioner into a meeting to discuss a performance evaluation. The evaluation covered the period of January 9, 2023, through June 8, 2023, and gave Petitioner an overall rating of “below standard.” (HHC Ans. Ex. 2) Petitioner objected to the timing of the evaluation, noting that it was not yet due until August 7, 2023, and that another employee who had started before her had not yet been evaluated. Petitioner refused to sign the evaluation.

On May 5, 2023, the Supervisor called Petitioner into her office and gave her a letter stating that she had “not satisfactorily completed [her] probationary period” and that her services would no longer be required. (HHC Ans. Ex. 2) Petitioner called the Representative and another Union representative while leaving the premises to inform them that she had been terminated. She claims to have been told there was nothing the Union could do for her.

### **POSITIONS OF THE PARTIES**

#### **Petitioner’s Position**

Petitioner did not expressly state the provisions of the NYCCBL that she claims were breached. She requested assistance from the Union in taking time off for medical leave and dealing with tension and hostility in the workplace and alleges that she was told by the Representative that there was nothing the Union could do. Petitioner requested the Representative’s presence at a meeting with her Supervisor. Instead, Petitioner was terminated before the meeting was rescheduled. Finally, Petitioner contacted the Union shortly after her termination and was again told there was nothing the Union could do for her. Petitioner thus claims that the Union failed to adequately represent her regarding her claims of a hostile work environment and wrongful termination.

#### **Union’s Position**

The Union contends that Petitioner has not shown that it violated its duty of fair representation, which requires that she demonstrate that the Union engaged in arbitrary, discriminatory, or bad faith conduct. The Union argues that it does not have an obligation to advance every grievance and that, with regard to Petitioner’s termination, it could not bring a grievance because Petitioner was a probationary employee. Moreover, it points to the series of communications between Petitioner and various Union representatives regarding her workplace

issues and asserts that it made a reasoned decision that the grievances Petitioner wished to advance were non-meritorious and therefore did not pursue them. The Union argues that even if the Board accepts as true everything alleged by Petitioner, the petition fails to set forth facts upon which any relief can be granted.

### **HHC's Position**

HHC construed Petitioner's claims as allegations brought under NYCCBL § 12-306(a)(3). As a result, it contends that Petitioner has failed to satisfy the elements of an improper practice petition against it. HHC claims that Petitioner's allegations do not meet the test enunciated in *Bowman*, 39 OCB 51 (BCB 1987). It argues that Petitioner fails to state facts to support an allegation that she participated in any union activity, or that union activity was a motivating factor in her termination, and thus cannot be found to have been subjected to anti-union discrimination. HHC notes that Petitioner was a probationary employee and that HHC exercised its managerial right to terminate Petitioner's employment for unsatisfactory performance.<sup>1</sup>

### **DISCUSSION**

In reviewing the sufficiency of the allegations in the pleadings, we draw all permissible inferences in favor of Petitioner and assume, *arguendo*, that the factual allegations are true. *See Feder*, 1 OCB2d 23 at 13 (BCB 2008); *D'Onofrio*, 79 OCB 3, at 20 n. 11 (BCB 2007). Because Petitioner is *pro se* in this proceeding, we are especially aware that such review "should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner." *Feder*, 1

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<sup>1</sup> HHC's pleadings did not address Petitioner's claim against the Union regarding an alleged violation of NYCCBL § 12-306(b)(3). To the extent HHC responded to what it perceives as a claim that it violated NYCCBL §§ 12-306(a), we find no such claim was raised and, therefore, do not address it.

OCB2d 23, at 13; *see also Morris*, 3 OCB2d 19, at 14 (BCB 2010). Based on the evidence submitted, we construe Petitioner's claim to be alleging a failure by the Union to fulfill its duty of fair representation, in violation of NYCCBL § 12-306(b)(3).

Petitioner claims that the Union breached its duty by failing to file a grievance on her behalf. However, "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). *See Sicular*, 79 OCB 33, at 13 (BCB 2007)("[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."); *see also Gibson*, 29 OCB 13, at 4 (BCB 1982) (union's decision that proceeding with a grievance would be fruitless did not constitute a breach of the duty of fair representation). In the instant case, Petitioner was a probationary employee. Pursuant to the grievance procedure contained in Article VI of the Agreement, there is no provision for probationary employees to bring grievances regarding claimed wrongful disciplinary actions. Inasmuch as the Agreement does not provide disciplinary grievance rights to probationary employees, the Union had a reasonable basis for determining that filing a grievance on Petitioner's behalf would be without merit. *See James-Reid*, 1 OCB 2d 26, at 25 (BCB 2008).

Concerning Petitioner's claim that the Union failed to represent her regarding her allegations of a hostile work environment, Petitioner has failed to identify a basis for a contractual grievance. In addition, Petitioner has not alleged that the Union treated other similarly situated members more favorably or that it engaged in bad faith actions or acted arbitrarily. Petitioner acknowledges that the Representative responded to her inquiries, although the Union could not remedy her complaints. While Petitioner may be disappointed with the Union's response, "dissatisfaction with the quality or extent of representation does not constitute a breach of the duty

of fair representation.” *Ruiz*, 15 OCB2d 41, at 12 (BCB 2022) (quoting *Shymanski*, 5 OCB2d 20, at 11 (BCB 2012)); *see also Evans*, 6 OCB2d 37, at 8-9 (BCB 2013); *Sicular*, 79 OCB 33, at 13 (BCB 2007). Therefore, we find no arbitrary, discriminatory, or bad faith conduct in breach of the Union’s 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-4523-23, filed by Fatima Mitchell, against District Council 37, AFSCME, AFL-CIO and its affiliated Local 1549, and NYC Health + Hospitals, is hereby dismissed in its entirety.

Dated: November 2, 2023  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLINES  
MEMBER

CHARLES G. MOERDLER  
MEMBER

PETER PEPPER  
MEMBER