Rodriguez, 17 OCB2d 16 (BCB 2024)

(IP) (Docket No. BCB-4552-24)

Summary of Decision: Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to adequately investigate her discrimination claim and failing to represent her in her wrongful termination claim. The Union argued that it did not breach its duty of fair representation because it promptly responded to Petitioner's inquiries and represented her. The City also argued that the Union did not breach its duty of fair representation. The Board found that the allegations did not state a claim that the Union breached 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-

IRENE RODRIGUEZ,

Petitioner,

-and-

LOCAL 154, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, CITY OF NEW YORK and NEW YORK CITY COMMISSION ON HUMAN RIGHTS,

Respondents.

DECISION AND ORDER

On March 3, 2024, Irene Rodriguez ("Petitioner") filed a *pro se* improper practice petition against Local 154, District Council 37, AFSCME, AFL-CIO ("Union"), the City of New York

("City"), and the New York City Commission on Human Rights ("CCHR").[1] Petitioner asserts 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"). Specifically, Petitioner alleges that the Union failed to adequately respond to her discrimination claim and subsequently failed to properly investigate and challenge her termination for failing her probationary period. The Union contends that there was no contractual basis on which to grieve Petitioner's claim of discrimination, that Petitioner was not permitted to challenge her termination due to her status as a probationary employee, and that the Union assisted Petitioner continuously throughout her employment as it would any other bargaining unit member. The City argues that the Union did not breach its duty of fair representation. The Board finds that the facts do not establish that there has been a breach in the duty of fair representation. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner was employed as a probationary employee by CCHR in the non-competitive title of Human Rights Specialist. CCHR is the agency charged with enforcing the New York City Human Rights Law, Title 8 of the Administrative Code of the City of New York, and educating the public and encouraging positive community relations. The City and the Union are parties to a collective bargaining agreement for the period May 6, 2021, through November 6, 2026 ("Agreement"), which covers the Human Rights Specialist title, among others.

Petitioner was hired as a probationary employee on August 7, 2023. Petitioner was subject

[1] After the initial petition was deemed deficient by the Board's Executive Secretary, Petitioner filed an amended petition on March 14, 2024.

to a six-month probationary period pursuant to the City's Personnel Rules and Regulations and a Personnel Services Bulletin ("PSB"). Probationary periods can be extended past six months based on an agency's recommendation and the written consent of the probationer. *See* PSB § 200-6 (C). Probationary periods are extended automatically by the number of days a probationer is absent or does not perform the duties of the position. (*Id.*) At the time of her termination, Petitioner was still probationary and did not have any contractual or statutory right to challenge her termination. *See* Agreement Article VI, § 1(f); Civil Service Law § 75.

In December 2023, Petitioner contacted her Union Representative, Raul Rodriguez, to complain that she had been subjected to discrimination and harassment by her supervisor and seeking to file a grievance pursuant to the Agreement.[2] Article VI, § 1(b) of the Agreement defines a "grievance" as:

> A claimed violation, misinterpretation, or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration[.]

(Union Ans., Ex. 1) Article VI, § 1(f) of the Agreement further defines a "grievance," in pertinent part, as:

> A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation….

[2] During a case conference, Petitioner claimed that she first contacted the Union about the alleged harassment and discrimination in September 2023, an assertion that was not included in Petitioner's pleadings. Since facts occurring prior to November 3, 2023, fall outside the statute of limitations we do not consider this new fact as a viable claim but include it merely as background information to the timely claims.

(*Id.*)

The Union Representative explained to Petitioner that the Union could not represent her with respect to her complaints because claims of discrimination and harassment are not grievable under the terms of the Agreement. Accordingly, the Union asserts that the Union Representative advised Petitioner to contact CCHR's Equal Employment Opportunity ("EEO") Officer and file a claim alleging discrimination and harassment. Petitioner then filed a complaint and request for a reasonable accommodation with the CCHR EEO Officer. On December 20, 2023, the CCHR EEO Officer told Petitioner that the agency was unable to grant her request for a reasonable accommodation.

On December 27, 2023, Petitioner received her first performance evaluation at CCHR, a copy of which she was provided with on January 5, 2024. Her overall rating for that period was "Conditional"; however, she received a rating of "Unsatisfactory" in several categories. (City Ans., Ex. 1) The recommendation in her evaluation was that Petitioner's probation would be extended by a period of eight weeks. On January 8, 2024, Petitioner met with her supervisors to discuss her evaluation. She refused to sign her evaluation because she disagreed with it.

In the weeks following her evaluation, Petitioner was cited for violating CCHR policy in two instances. First, on January 5, 2024, Petitioner admitted that she violated CCHR remote work policy when she worked on agency business after hours. Second, during the week of January 8, 2024, Petitioner was told that she violated CCHR policy when she failed to come in to work during her scheduled work hours.

On January 10, 2024, Petitioner's supervisors told her that she would be terminated if she did not sign her evaluation and if she refused to consent to the proposed extension of her probation. Later that day, Petitioner sent an email that explained why she had declined to sign her evaluation.

Ultimately, Petitioner stated that she consented to the proposed extension of her probation. On January 11, 2024, Petitioner forwarded an edited version of this email containing additional concerns to her Union Representative.

On January 12, 2024, Petitioner met with CCHR Director Oscarina Martinez about her actions during the prior weeks. Petitioner defended her actions in person and in several emails sent to her supervisors at or around this time. Regarding the remote work policy, Petitioner avers that she had worked on agency business after hours because she feared that inclement weather would prevent her from travelling to the office the next morning. Regarding her failure to come to work during her scheduled hours, Petitioner claimed she told Martinez that she believed that the CCHR EEO Officer had granted her a temporary reasonable accommodation that permitted her to come into the office on a modified schedule. (Union Ans., Ex. 5) Petitioner alleges that Director Martinez informed her on January 12 that she had not been granted any reasonable accommodation. (*Id.*)

On January 16, 2024, Petitioner met with her supervisor and CCHR Executive Director of Human Resources Taiwo Onabanjo to discuss her evaluation for a second time, her pending complaint to the CCHR EEO Officer, and the proposed extension of her probationary period. On January 17, 2024, the Executive Director emailed Petitioner a memorialization of the results of that meeting. The email stated, in relevant part:

> 1. You are reminded that an agency cannot extend an employee's probationary period without the employee's consent. You agreed to sign your probationary evaluation, which includes the probation extension, after attaching your supporting documentation.
>
> 2. You declined the offer to have a meeting with your supervisor(s) regarding how to resolve the issues raised in your evaluation.
>
> 3. You will wait for the Commissioner's decision regarding your accommodation appeal.

4. You will follow up with the EEO regarding your grievance.

(City Ans., Ex. 2) Petitioner responded to the Executive Director's email and stated, in pertinent part, "I agreed to sign the performance evaluation after being informed that if I did not sign, I would be terminated." (*Id.*)

On January 17, 2024, Petitioner contacted her Union Representative and asked to schedule a meeting with him to discuss her potential grievances. During a phone call on January 18, 2024, Petitioner and the Union Representative discussed the negative feedback that she received on her evaluation. The Union Representative told Petitioner that if she did not agree with the evaluation, she could sign it under protest and submit a rebuttal explaining her objections to the evaluation. The Union maintains that Petitioner and her Union Representative subsequently remained in contact regarding Petitioner's concerns until her termination from CCHR. Petitioner also spoke with her Union Representative's supervisor, Marialena Santana. According to the Union, after speaking with Petitioner regarding her claims, her Union Representative and Santana determined that the Union could not help her with her claims of discrimination and directed her to contact the CCHR EEO Officer.

On February 1, 2024, the Executive Director wrote to Petitioner to confirm that that she had signed her evaluation and asked her to clarify whether her signature also represented her consent to the proposed extension of her probationary period from February 7, 2024, to April 16, 2024. He noted that Petitioner had submitted two signed copies of her evaluation. One copy was signed, and the other was signed "under duress." (City Ans., Ex. 2) He explained that it was evident that Petitioner disagreed with her evaluation but that Petitioner could not agree to the extension of her probation "under duress." (*Id.*) Later that day, Petitioner responded by reiterating her complaints and stating that she had signed the evaluation "under distress" and that she had

decided to sign her evaluation because she understood that failing to sign and agree to the extension of her probation would result in her termination. (*Id.*) The Executive Director replied to Petitioner's email on February 7, 2024, to confirm that her response constituted consent to the extension of her probation from February 7, 2024, to April 16, 2024. Petitioner confirmed that her probation had been extended but argued that it had only been extended to April 4, 2024, rather than April 16.[3] CCHR terminated Petitioner's probationary employment on March 5, 2024.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by failing to properly investigate and represent her in both her claims of discrimination and her subsequent termination. Petitioner admits in her reply that the Agreement does not permit grievances claiming discrimination but argues the Union nevertheless breached its duty of fair representation by failing to act in her best interests and represent her despite this limitation. Petitioner concedes that she was a probationary employee at the time of her termination but argues that the Union breached its duty of fair representation by failing to challenge her termination.

Union's Position

The Union argues that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege facts to support the conclusion that the Union breached its duty of fair representation. It asserts that it did not act in an arbitrary, discriminatory, or bad faith manner. The Union avers that it maintained consistent communication with Petitioner throughout her

[3] The Executive Director responded that Petitioner's probation had been extended by eight weeks plus the eight days of annual leave that Petitioner had utilized since she began her employment at CCHR.

employment and that it directed her to the proper forum for her claims of discrimination, CCHR's EEO Office. Moreover, the Union notes that it is undisputed that Petitioner could not challenge her termination because she was a probationary employee. The Union maintains that it acted in accordance with the Agreement during all its interactions with Petitioner and that it treated her no differently than any other member of her bargaining unit. Since Petitioner has alleged no facts that would establish that its representation of Petitioner was arbitrary, discriminatory, or in bad faith, the Union requests that this petition be dismissed.

City's Position

The City argues that the petition fails to state a claim under NYCCBL § 12-306(b)(3) and that therefore any potential derivative claim against it pursuant to NYCCBL § 12-306(d) must also fail.[4] Specifically, Petitioner has not alleged any facts that demonstrate that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. It asserts that it is undisputed that Petitioner was a probationary employee at the time of her termination and that the Union was not entitled under the Agreement to challenge CCHR's decision to terminate Petitioner's employment. Accordingly, the City asserts that the petition must be dismissed in its entirety.

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

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

quotation and editing marks omitted). Thus, "as long as the gravamen of the Petitioner's complaint may be ascertained by the Respondent, the pleading will be deemed acceptable." *Sciarillo*, 53 OCB 15, at 7 (BCB 1994) (citations omitted).

Here, Petitioner has alleged that the Union violated its duty of fair representation. 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)). However, "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) (citations omitted).

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). Further, "to meet this burden, a Petitioner must allege more than negligence, mistake or incompetence." *Bonnen*, 9 OCB2d 7, at 17 (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)) (internal quotation marks omitted). "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." *Matter of City of New York, et al. v. Morales, et al.,* Index No. 103612/12 (Sup. Ct. N.Y. Co. Mar. 31, 2016) (Bluth, J.), and *Matter of United Fedn. of Teachers, Local 2, AFT, AFLCIO v. NYC Bd. of Collective Bargaining,* 51 Misc3d 817 (Sup. Ct. N.Y. Co. 2016), *affd., Matter of United Fedn. of*

Teachers v. City of New York, 154 A.D.3d 548 (1st Dept. 2017) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)).

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 establish that the Union had a right to grieve discrimination claims or that it had a basis upon which to grieve her termination during her probationary period. It is undisputed that Petitioner was a probationary employee and that she was terminated by the City prior to the completion of her probationary period. *See Sicular*, 79 OCB 33, at 15 (finding that probationary employee was "unable to establish any entitlement to grievance or other appeal rights from the termination of [her] employment"); *Amaker*, 61 OCB 32 (BCB 1998), *affd., Matter of Amaker v. Office of Collective Bargaining*, Index No. 400217/1999 (Sup. Ct. N.Y. Co. May 6, 1999) (Bransten, J.). Therefore, "the Union's conclusion that there was nothing under the Agreement that it could do to secure [her] reinstatement cannot be considered arbitrary, discriminatory, or in bad faith and did not violate the duty of fair representation." *Lacey,* 14 OCB2d 18, at 11 (BCB 2021), *affd., Lacey v. Social Services Employees Union Local 371, et al.,* Index No. 101032/2021 (Sup. Ct. N.Y. Co. Mar. 14, 2022) (Edmead, J.), *motion denied* (1st Dept. Jan 16, 2024); *see also Rivera-Bey*, 73 OCB 20, at 12 (BCB 2004); *Edwards*, 65 OCB 35, at 9 (BCB 2000).

We reach the same result concerning Petitioner's attempt to grieve her complaints of discrimination. The Union Representative communicated to Petitioner that claims of discrimination or harassment are not grievable under the Agreement. Notwithstanding, the record

reflects that the Union Representative continued to respond to Petitioner even after the Union determined that it could not grieve her claim of discrimination. The Union also communicated regularly with Petitioner and provided counsel regarding her other complaints.

Further, Petitioner did not plead facts that, if credited, would establish that the Union had filed grievances or otherwise appealed terminations of other probationary employees in similar circumstances. Thus, Petitioner has not established that the Union has treated similarly situated members differently. *See Rondinella*, 5 OCB2d 13, at 18 (BCB 2012) (finding that a union did not violate its duty of fair representation where there was no indication that it did more for similarly situated members than it did for petitioner). Therefore, we find that the Union did not violate its duty of fair representation by not seeking Petitioner's reinstatement or grieving her allegations of discrimination.

The Board has repeatedly stated that 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). Moreover, "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 *Gertskis*, 77 OCB 11, at 11). While it is clear that Petitioner disagrees with the Union's conclusions and wanted the Union to do more for her, it is undisputed that her Union Representative discussed her concerns with Petitioner, corresponded with her, reviewed the facts and documents that she presented to him, advised her that the Union was not going to pursue her claim, and informed her of alternative legal remedies that she could pursue on her own. Based upon these facts, we find that the Union's actions were not arbitrary, discriminatory, or in bad faith. Instead, the Union made a determination

within its broad discretion that Petitioner did not have a meritorious claim under the Agreement and declined to process her grievances. *See Sicular*, 79 OCB 33.

In light of the above, we find that the Union did not act in an arbitrary, discriminatory, bad faith manner. Inasmuch as we deny the claim against the Union, any potential derivative claim against CCHR also fails, pursuant to NYCCBL § 12-306(d). *See Lacey*, 14 OCB2d 18. We therefore dismiss the improper practice 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 improper practice petition, docketed as BCB-4552-24, filed by Irene Rodriguez against Local 154, District Council 37, AFSCME, AFL-CIO, the City of New York, and New York City Commission on Human Rights, is dismissed in its entirety.

Dated: August 12, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER