

Thigpen, 17 OCB2d 17 (BCB 2024)

(IP) (Docket No. BCB-4562-24)

Summary of Decision: Petitioner filed an improper practice petition alleging that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to promptly respond to her communications and delaying the filing of grievances on her behalf. Respondents argued that Petitioner did not allege facts demonstrating that the Union acted in an arbitrary, discriminatory, or bad faith manner. 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-

ANGELA THIGPEN,

Petitioner,

-and-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 1549,
THE CITY OF NEW YORK, and
THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,**

Respondents.

DECISION AND ORDER

On May 20, 2024, Angela Thigpen (“Petitioner”) filed an improper practice petition, amended on May 29, against Local 1549, District Council 37 (“Union”), the City of New York (“City”), and the New York City Human Resources Administration (“HRA”). Petitioner alleges that the Union violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(b)(3) by breaching its duty of fair representation. Specifically, Petitioner alleges that her Union representative was slow to respond

to emails and telephone messages and that the Union did not file Step I and III grievances on her behalf.¹ The Board found that the Union did not breach its duty of fair representation. Accordingly, the petition was dismissed.

BACKGROUND

Petitioner served in the title of Eligibility Specialist at HRA from October 15, 2001, to August 4, 2023, when she retired. This title is represented by the Union. Petitioner was approved for leaves of absence from June through September 2021 and from December 2022 through May 2023. Throughout those time periods, Petitioner was on leave with pay when she had available leave to cover the time; however, she was not paid after she exhausted all available leave.

Beginning on June 12, 2023, the Petitioner exchanged a series of emails and calls with a Union representative (“Representative”) regarding her desire to file a grievance to recover backpay for the time she was on unpaid leave. On July 4, 2023, the Union filed a Step I grievance demanding backpay for the period of July 14, 2021, to September 17, 2021. HRA provided no response to the Step I grievance. Also on July 4, the Union filed a Step II grievance demanding backpay for the same time period.² The Representative emailed Petitioner to confirm the filing of the Step II grievance on July 13, 2023. In response to Petitioner’s request, the Union revised the

¹ The initial and amended petitions also included claims against the Union and HRA that were dismissed by the Executive Secretary as untimely. 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 January 19, 2024. Facts and allegations in her petitions that occurred more than four months prior to the date the initial petition was filed 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)).

² The Step I and II grievances are on the same form that appears to have been resubmitted at Step II without changing the date of the initial filing.

Step II grievance on August 8, 2023, to include the period of December 19, 2022, through May 31, 2023.

Petitioner and the Representative attended a Step II hearing on the grievance on November 16, 2023. On December 21, 2023, the Office of Labor Relations issued a Step II decision, stating there was “no violation, misinterpretation, nor misapplication of any contractual provision” of the collective bargaining agreement because HRA’s documentation indicated Petitioner “was on leave with pay when she had available leave credits to cover the time, and off payroll when she exhausted all available leave credits.” (Union Ex. 10)

On January 8, 2024, Petitioner reached out to the Representative’s supervisor, Union Assistant Division Director Jaqueline Pointdujour (“Assistant Director”), to complain that she had not heard from the Representative “at all.” (Union Ex. 13) On January 9, 2024, the Representative sent a letter to the Office of Labor Relations appealing the Step II decision to Step III. On January 17, 2024, the Office of Labor Relations acknowledged receipt of the Step III filing.

On January 18, 2024, the Representative spoke to Petitioner on the phone, and the Assistant Director emailed Petitioner. Both the Representative and the Assistant Director informed Petitioner that her grievance had proceeded to Step III, that the Union was waiting for a hearing date to be scheduled, and that Petitioner would be notified once a hearing date was set.

On January 26, 2024, Petitioner emailed the Assistant Director asking for proof of the filing of the grievance at Step III. The Assistant Director informed her that the Representative was on sick leave and would reach out to discuss the case upon her return. (Union Ex. 15)

On February 6 and again on March 26, 2024, Petitioner emailed the Assistant Director claiming that she had not heard or received anything from the Representative and asking for proof

that a Step III hearing had been requested for her case.³ On March 26, 2024, the Assistant Director emailed the Representative directing her to provide Petitioner with the Step III request letter. The Representative mailed the Step III request letter to Petitioner, who received it on March 27, 2024. According to the Union, as of July 2, 2024, it was still waiting to receive a Step III hearing date from the City.

POSITIONS OF THE PARTIES⁴

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to fairly and properly represent her. Specifically, she claims that the Union did not “process her grievance the right way.” (Pet. at 69) She describes the Representative as unhelpful and slow in responding to emails and telephone messages. As a remedy, Petitioner requests lost wages for the period from December 19, 2022, through May 31, 2023, and to be made whole for a \$3,000 bonus that she did not receive.⁵

Union's Position

The Union argues that the petition fails to state a claim for a violation of NYCCBL § 12-306(b)(3). It asserts that it did not act in an arbitrary, discriminatory, or bad faith manner and that Petitioner has not alleged nor provided facts supporting a claim that it engaged in any such

³ The Union produced emails showing that between January and April 2024 the Representative, Assistant Director, and another Union representative were communicating with each other about Petitioner's requests and confirming that Petitioner had been sent copies of the requested documents.

⁴ The summary of the parties' positions does not include arguments regarding claims dismissed as untimely by the Executive Secretary.

⁵ Petitioner did not provide details regarding the issuance of this bonus and did not allege facts to show that she sought the Union's assistance concerning it.

behavior. The Union maintains that it has pursued Petitioner's claims up to and including filing the Step III grievance for which a hearing date is being scheduled.

The Union denies that it has been slow to respond to Petitioner and notes that slow communication with a bargaining unit member does not breach the duty of fair representation. It points to the repeated communications between Petitioner, the Representative, and the Assistant Director throughout the grievance process and the Union's revision of the dates in the grievance at Petitioner's request as evidence that there was no issue with the Union's representation of Petitioner.

City's Position

The City argues that Petitioner has failed to establish a *prima facie* claim of a violation of NYCCBL § 12-306(b)(3). It notes that the burden is on Petitioner to "present evidence of improper motivation, such as malice, hostility, or discrimination" on the part of the Union and asserts that she has not done so. (HRA Ans. ¶ 22) The City argues that absent such evidence of bad faith, arbitrariness, or discrimination, even a failure by the Union to file a grievance at all would not be considered a breach of the duty of fair representation. Thus, it asserts that this case, in which the Union filed and escalated a pending grievance on Petitioner's behalf with no evidence of improper motive, must be dismissed.

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. sub nom. 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).

Based on the undisputed facts alleged, Petitioner's claims arising after January 19, 2024, do not establish a breach of the Union's 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." 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). We have held that "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).

It is undisputed that the Union responded to Petitioner's request to file a grievance, filed the grievance, and progressed it to Step III of the grievance process. The basis of Petitioner's claim is her dissatisfaction with the Union's general handling of her grievance, including lack of responsiveness to her calls and emails. This Board has long held that, "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) (citations omitted); *see Nealy*, 8 OCB2d 2, at 17. Petitioner's dissatisfaction with the speed at which her grievance has progressed therefore does not constitute a breach of the duty of fair representation. In addition, while Petitioner also complains about slow and inadequate communication by Union representatives regarding her case, we have long held that dissatisfaction with the manner of

communication by a union does not state a claim for a breach of the duty of fair representation absent evidence that the union acted arbitrarily, discriminatorily, or in bad faith. *See Feder*, 9 OCB2d 33, at 37 (BCB 2016) (finding no breach of duty where the petitioner was not prejudiced by the union's lack of communication); *see also Turner*, 3 OCB2d 48, at 16 (BCB 2010) (finding that the petitioner's dissatisfaction with the quality of communication did not amount to a breach of the duty of fair representation where the record failed to show that the union did not keep the petitioner informed). Petitioner has alleged no facts, however, to demonstrate that the Union's acted in bad faith, arbitrarily, or that it treated her any differently than any similarly situated bargaining unit member.

Accordingly, we find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and, therefore, did not breach its duty of fair representation. Since we dismiss the petition against the Union, any derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Samuels*, 77 OCB 17, at 16 (BCB 2006). 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 improper practice petition docketed as BCB-4562-24, be and the same hereby 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'BLINES
MEMBER

CHARLES G. MOERDLER
MEMBER