

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ARLENE P. BLUTH
J.S.C.
Justice

PART 32

The City of New York et al.,

INDEX NO. 401937/12

-v-

MOTION DATE _____

Jose E. Morales et al.

MOTION SEQ. NO. _____


The following papers, numbered 1 to _____, were read on this motion to/for Article 78 proceeding

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>+ memo</u>	No(s). <u>1</u>
Answering Affidavits — Exhibits	<u>+ memo</u>	No(s). <u>2, 3, 4</u>
Replying Affidavits	<u>+ memo and sur-reply</u>	No(s). <u>5, 6</u>

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding
 is denied and dismissed in accordance with the
 attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/31/16


ARLENE P. BLUTH, J.S.C.
 J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFEREN

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

----- X

**In the Matter of the Application of
THE CITY OF NEW YORK, et al.,**

Index No. 401937/2012

Petitioners,

- against-

JOSE E. MORALES, et al.

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

Respondents.

**For a Judgment and Order Pursuant to Articles 75 and
78 of the Civil Practice Law and Rules.**

----- X

The petition from petitioners, the City of New York, Michael R. Bloomberg as Mayor of the City, the City Office of Labor Relations (OLR), James F. Hanley as OLR Commissioner, the Police Department of the City of New York (NYPD), and Raymond W. Kelly as Police Commissioner (collectively, City Petitioners), seeking to vacate and annul a decision of the New York City Board of Collective Bargaining (BCB) is denied, and this proceeding is dismissed.

This proceeding arises out of a BCB decision that found that respondent United Federation of Teachers (UFT) breached the duty of fair representation to one of its union members, respondent Jose E. Morales (Morales). The City Petitioners bring this petition seeking to overturn BCB's decision.

Why Morales was fired

Morales was a member of UFT and employed as a Supervisor of School Security with the

School Safety Division (SSD) of the NYPD for 21 years until he was terminated on July 15, 2009. Morales was fired due to disciplinary charges related to alleged financial mismanagement of a close friend's assets. Morales considered this close friend, Vincent DeGioia, to be his "adoptive parent" and DeGioia had helped raise Morales.

DeGioia granted Morales a durable power of attorney on July 15, 2007, which was subsequently revoked on July 27, 2007. After the power of attorney was revoked, Morales was alleged to have removed the contents of DeGioia's safe deposit boxes, withdrawn \$15,000 from DeGioia's bank accounts and deposited DeGioia's pension check into Morales' account. Morales did not deny performing these acts. Instead, he claimed that he was unaware that his power of attorney was revoked. Morales claims that he was acting at DeGioia's request. Morales also insists that all monies were returned to DeGioia. In February 2009, Degioia's niece wrote a letter to SSD stating that DeGioia viewed Morales as a son and that DeGioia had a penchant for making up stories involving his family members. DeGioia's niece also described DeGioia as "an angry man with sadistic tendencies" and that Morales and his family were the only people DeGioia considered family.

The New York County District Attorney's Office investigated these allegations and declined to pursue criminal charges against Morales.

The NYPD brought disciplinary charges against Morales, accusing him of four counts of prohibited conduct.

The grievance procedure and "Morales I"

The City of New York (City) and UFT are parties to a collective bargaining agreement

that provides a four-step process for employees to assert grievances against disciplinary actions that concludes with binding arbitration. A Step I conference was held on February 3, 2009 and Morales was represented by a UFT representative. After the conference, the NYPD told Morales that it was seeking his resignation or termination. Morales refused to resign. After the Step II hearing on June 18, 2009, the NYPD notified UFT that Morales was terminated.

In order to appeal a Step II finding, the appeal must be filed in writing within 10 days of the determination. Neither UFT nor Morales filed a written appeal within this time period. Morales contends that he reached out to UFT on numerous occasions regarding his appeal throughout the summer of 2009 but UFT did not explain its inaction until December 2009. UFT contends that they told Morales that they were considering whether or not to file the appeal.

Morales then filed an improper practice petition (Morales I) with BCB on October 29, 2009 and amended this petition on December 22, 2009. Morales claimed that UFT had ignored him since his termination despite Morales' numerous attempts to contact UFT.

On December 11, 2009, UFT filed a Step III appeal of the July 15, 2009 Step II termination of Morales, obviously well past the deadline. UFT then filed an answer to the Morales I petition on January 11, 2010 and its answer to the amended Morales I petition on January 19, 2010.

On January 28, 2010, the City denied UFT's December 11, 2009 Step III hearing request as untimely. On or about April 30, 2010, the City agreed to let Morales proceed to Step III. The City made this agreement on the condition that it reserved its right to raise a timeliness defense.

BCB issued a decision on the Morales I petition on May 25, 2010 in which it found that it could not yet determine if Morales had been denied a forum to challenge his termination. BCB

dismissed Morales' petition without prejudice to re-file following the conclusion of the grievance process.

On May 27, 2010, a Step III conference was held. Morales' Step III appeal was denied as untimely on June 3, 2010. On June 14, 2010, UFT requested an arbitration (Step IV) claiming that Morales was improperly terminated. On August 8, 2011, the arbitrator denied Morales' grievance after concluding that the filing of the Step III appeal was untimely. The parties disagree as to when Morales actually received notice of the arbitrator's decision. Eventually, in an Article 78 proceeding, a Supreme Court Justice upheld the arbitrator's decision because of the untimeliness issue.

Morales II - Morales re-files his petition

On December 14, 2011, Morales re-filed his improper practice petition (Morales II). UFT filed its response on December 29, 2011. The City filed its response on January 18, 2012.

On June 28, 2012, BCB let UFT and the City Petitioners know that it was going to decide the Morales II petition. BCB issued a decision on the Morales II decision on July 10, 2012. BCB found that UFT had breached its duty of fair representation in handling Morales' disciplinary proceedings. BCB claimed that UFT had a duty to inform Morales whether it would pursue his grievance beyond the Step II hearing and that UFT's failure to communicate with him breached its duty of fair representation. BCB also found that UFT never provided a reason for its failure process the Step III appeal. BCB claimed that these facts indicated that UFT's actions were arbitrary.

BCB rejected the City's argument that Morales had to show that UFT intended to

undermine his grievance claim. BCB concluded that UFT and the NYPD should process Morales' grievance to Step IV and permit an arbitrator to make a decision on the merits rather than on the timeliness issue. BCB also directed that UFT hire outside counsel for Morales to avoid a conflict of interest. BCB retained jurisdiction to consider any apportionment of damages or other issues arising from the arbitration.

On July 31, 2012, UFT requested that BCB reconsider the Morales II decision, but BCB denied this request on September 4, 2012. The City brought this current proceeding seeking to overturn BCB's Morales II decision.¹

Discussion

When reviewing an Article 78 petition, "[t]he courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary or capricious" (*Pell v Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]). A determination of the Board of Collective Bargaining "may not be upset unless it is arbitrary and capricious or an abuse of discretion, as the Board is the neutral adjudicative agency statutorily authorized to make specified determinations" (*New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650, 656, 642 NYS2d 156 [1996]). "An administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight" (*Herzog*

¹UFT brought a related proceeding seeking to overturn the same BCB decision in *United Federation of Teachers, Local 2, AFT, AFL-CIO v New York City Board of Collective Bargaining et al.*, Index No. 103612/12. That case was never consolidated with the instant proceeding and a separate decision is issued today.

v Joy, 74 AD2d 372, 375, 428 NYS2d 1 [1st Dept 1980]). “When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will generally defer to the agency’s expertise and judgment regarding that statute” (*Dist. Council 37 American Fedn. of State, County & Mun. Empls., AFL-CIO v City of New York*, 22 AD3d 279, 283, 804 NYS2d 10, [1st Dept 2005]). “A court cannot simply substitute its judgment for that of an administrative agency when the agency’s determination is reasonable” (*id.* at 284).

The New York City Collective Bargaining Law (NYCCBL) holds that it is an improper practice for a public employee organization “to breach its duty of fair representation to public employees” (NYCCBL § 12-306[b][3]). It is well established that the duty of fair representation is breached “only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith” (*Vaca v Sipes*, 386 US 171, 190 [1967]).

“[I]rresponsible or grossly negligent conduct may not form the basis of a union’s breach of the duty of fair representation” (*Civil Serv. Empls. Assn. v Pub. Empl. Relations Bd.*, 132 AD2d 430, 432, 522 NYS2d 709 [3d Dept 1987] *affd* 73 NY2d 796 [1988]). Instead, “there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith” (*Sapadin v Bd. of Educ. of City of New York*, 246 AD2d 359, 360, 666 NYS2d 421, [1st Dept 1998] [internal quotations and citation omitted]). “[A] union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a wide range of reasonableness as to be irrational” (*Air Line Pilots Assn. Intl. v O’Neill*, 499 US 65, 67 [1991] [internal citation omitted]).

UFT never gave BCB any reason for UFT's failure to file a timely appeal

The City Petitioners first argue that BCB's decision in Morales II should be vacated because it was arbitrary and capricious. The City Petitioners claim that BCB ignored relevant case law in its analysis of the duty of fair representation. The City Petitioners believe that UFT's failure to timely process Morales' grievance to Step III shows that UFT was negligent, which cannot evidence a breach of the duty of fair representation. The City Petitioners insist that BCB improperly shifted the burden of proof onto UFT rather than require Morales to show a breach of the duty of fair representation. The City Petitioners also point out that Morales could have appealed the Step II decision on his own and, therefore, BCB was prevented, as a matter of law, from finding that UFT breached the duty of fair representation.

BCB claims that the City Petitioners cite cases which involve allegations of negligence rather than arbitrariness. BCB also argues that because UFT represented Morales during the first two stages of his grievance process, UFT had to continue representing Morales or let him know that they would not be pursuing an appeal. BCB insists that it would have been inappropriate for Morales to have contacted the NYPD or the OLR while he was represented by UFT. BCB contends that Morales properly pled UFT's unexplained inaction and that UFT failed to provide a detailed response to Morales' petitions. BCB further argues that UFT had a duty to communicate with Morales about the status of his appeal from the Step II hearing. Absent an explanation for UFT's inaction and UFT's failure to communicate with Morales, BCB concluded that UFT's actions were outside the range of reasonableness standard required for a union's acts (*see O'Neill, 499 US at 67*).

As an initial matter, both the City Petitioners and BCB agree that in order for a union's

actions to breach the duty of fair representation, a union's actions must be arbitrary, discriminatory, or in bad faith. This Court must assess whether it was reasonable for BCB to conclude that UFT's actions were arbitrary. The City Petitioners' claim that it was unreasonable for BCB to conclude that UFT's actions were arbitrary is unconvincing. The cases cited by the City Petitioners evidence union conduct characterized as an "honest mistake" or "gross negligence" (see e.g., *Mamorella v Derkasch*, 276 AD2d 152, 716 NYS2d 211 [4th Dept 2000]; *Braatz v Mathison*, 180 AD2d 1007, 581 NYS2d 112 [3d Dept 1992]). However, *UFT failed to present facts before BCB to demonstrate an "honest mistake", negligence or even gross negligence* and so there was no basis for such a finding; certainly it would have been improper for BCB to assume negligence. The City Petitioners do not cite controlling case law holding that a breach of the duty of fair representation cannot be found where a union presents no explanation for its actions.

There appears to be few cases with similar facts to the instant proceeding. The cases cited by the City Petitioners do not address *unexplained* union actions. The most analogous case cited by BCB held that "a union may breach its duty when it fails to process a meritorious grievance in a timely fashion with the consequence that arbitration on the merits is precluded" (*Young v U.S. Postal Serv.*, 907 F2d 305, 308 [2d Cir 1990] [holding that plaintiff established a breach of the duty of fair representation and ruling that plaintiff was terminated for just cause]). The Second Circuit ruled that the plaintiff "showed that the Union thought her grievance was valid but was late in filing" and that defendant "Postal Service had to produce evidence that the Union's tardy filing was based on a justifiable reason" (*id.* at 308-09).²

²In *Young*, the plaintiff's union was not a party to the proceedings.

Although the plaintiff in *Young* lost on the merits, the facts relating to the breach of the duty of fair representation are analogous to the instant proceeding. UFT's failure to timely process Morales' grievance prevented Morales from receiving an arbitration on the merits. Morales demonstrated that UFT processed his grievance through arbitration (Step IV), thereby suggesting that UFT believed the grievance was meritorious. UFT failed to produce evidence that it had a reason for its late appeal of the Step II termination.

This Court is unable to hold that BCB was irrational in its finding that Morales was not required to pursue his own appeal. UFT represented Morales through the first two stages of the grievance process before ceasing substantive contact with Morales. Morales reached out to his UFT representative for assistance but UFT failed to act until it filed an appeal on December 11, 2009 even though Morales was terminated on July 15, 2009. Morales also alleged that his UFT representative expressed on multiple occasions that UFT would represent Morales throughout the grievance process and, if necessary, to arbitration. UFT does not dispute this assertion. BCB reasonably concluded that to require Morales to pursue his own appeal would permit a union to represent a member during the initial stages of a grievance and then suddenly become silent with impunity. The fact that Morales could have filed the appeal by himself does not negate UFT's failure to file a timely appeal, UFT's previous statements that it would pursue the grievance to arbitration, or UFT's failure to communicate with Morales.

BCB's Morales II decision is also rational because UFT failed to provide BCB with any explanation for its actions. The City Petitioners claim that an affidavit from Morales' union representative (*Huart Affidavit*) demonstrates that UFT's actions were negligent. However, the *Huart Affidavit was never submitted to BCB*. "Judicial review of administrative determinations

is confined to the facts and record adduced before the agency” (*Featherstone v Franco*, 95 NY2d 550, 554, 720 NYS2d 93 [2000] [internal quotations and citations omitted]). Neither UFT nor the City Petitioners provided BCB with the Huart Affidavit. Therefore, this Court cannot consider the Huart Affidavit when evaluating whether BCB had a rational basis for its decision.

Although it is clear that negligence cannot form the basis for a breach of the duty of fair representation, UFT never presented BCB with any evidence that UFT was negligent, despite many opportunities to do so. The OCB Rules required UFT to provide “a statement of facts with numbered paragraphs setting forth the nature of the controversy” (Rules of the Office of Collective Bargaining (OCB Rules) §§ 1-07[c][3][i][B]-[D]). UFT did not provide this statement in its response to the Morales’ improper practice petitions. UFT also failed to submit the Huart Affidavit to BCB, even though it was signed on August 8, 2012, while UFT’s request to reconsider the Morales II decision was pending before BCB. This Court cannot penalize BCB or Morales for failing to supply an explanation for UFT’s conduct. BCB thoroughly reviewed the facts and the relevant case law before drafting a rational decision. Accordingly, this Court is unable to find that BCB’s decision was arbitrary or capricious.³

Consideration of Morales I and Morales II

The City Petitioners further argue that BCB improperly considered facts from both the

³To the extent that the City Petitioners claim that BCB’s decision is not supported by substantial evidence, this Court is unable to conduct such a review. First, only the Appellate Division can address the substantial evidence issue (*see* CPLR 7804[g]; 7803[4]). Second, BCB did not hold a hearing or quasi-judicial hearing that would require this Court to transfer the matter to the Appellate Division. “Under CPLR 7803[4] the substantial evidence test applies only where a hearing has been held and evidence taken pursuant to direction by law” (*Colton v Berman*, 21 NY2d 322, 329, 287 NYS2d 647 [1967]). Therefore, this Court can only establish whether BCB’s determination was arbitrary or capricious (*id.*).

Morales I and Morales II petitions without formally consolidating these proceedings or giving the City Petitioners or UFT notice that BCB intended to consider arguments from both petitions. BCB counters that its Morales I decision clearly authorized Morales to re-file his improper practice petition after the grievance process was completed. BCB maintains that this re-filing merely supplemented Morales' initial filing and did not replace the Morales I petition. BCB also argues that it could consider both the Morales I and Morales II petitions because the cases were related. BCB claims that the City Petitioners had notice when they participated in a conference held after the Morales II petition was filed.

BCB's consideration of both the Morales I petition and Morales II petition was not irrational. BCB's decision in Morales I clearly contemplated that Morales could re-file his improper practice petition after the grievance process was completed. Once the arbitrator ruled that Morales' appeal from the Step II decision was untimely, Morales re-filed his petition. The City Petitioners were on notice of Morales' improper practice claims.

BCB's Remedy

The City Petitioners also claim that BCB's Morales II decision was in excess of BCB's jurisdiction. BCB ordered that the parties re-arbitrate Morales' grievance solely on the merits and without consideration of the timeliness issue. The City Petitioners claim that this remedy prohibits the City Petitioners from asserting the timeliness defense entitled to it under the contract between UFT and the City. The City Petitioners further claim that BCB is effectively overturning an arbitration award that was upheld by the Supreme Court, an action that BCB cannot review. The City Petitioners also claim that BCB's decision places a heavy burden on the City, while UFT, who is accused of wrongdoing, faces no consequences from BCB's decision.

BCB claims that the remedy it imposed is supported by Civil Service Law § 205(5)(d) and that since the City Petitioners did not make this argument before BCB, this Court cannot consider it.

BCB is not requiring the City Petitioners to rehire Mr. Morales; BCB is only requiring that the decision to fire him be reviewed on the merits. Mr. Morales, who by all accounts was a wonderful City employee for many years, was fired due to alleged off-the-job unauthorized conduct. Because of his union, that decision to terminate him was never reviewed on the merits. Setting aside whether this argument is properly before the Court, BCB's remedy is appropriate and consistent with public policy. "To permit the employer wrongfully to discharge an employee and then be shielded from the natural consequences of such breach by the collective bargaining agreement or by wrongful or perfunctory union conduct in the enforcement of such agreements is contrary to public policy" (*Jackson v Regional Tr. Serv.*, 54 AD2d 305, 309, 388 NYS2d 441 [4th Dept 1976]).

Mr. Morales' claim that he was wrongfully discharged has never been decided on the merits. If his claim is meritorious, the City Petitioners will have been effectively shielded from any review of their actions due to UFT's breach of the duty of fair representation. Without consideration of Morales' claims, Morales will be left without any remedy for UFT's failure to timely process his appeal. Therefore, the Court is unable to conclude that BCB's remedy was irrational.

Accordingly, it is

ORDERED and ADJUDGED that the petition of the City of New York, Michael R. Bloomberg as Mayor of the City, the City Office of Labor Relations, James F. Hanley as OLR

Commissioner, the Police Department of the City of New York, and Raymond W. Kelly as
Police Commissioner, is denied and the proceeding is dismissed.

This constitutes the Decision and Order of the Court.

Dated: March 31, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC