SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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LACEY, LINDA

Petitioner,

- v -

SOCIAL SERVICES EMPLOYEES UNION LOCAL 371

Respondent

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INDEX NO. 101032/2021

MOTION DATE 12/7/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Linda Lacey (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211, of the co-respondents City of New York and City of New York Department of Social Services (motion sequence number 001) is granted, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Linda Lacey (Lacey) moves by order to show cause for a judgment to overturn a decision of the co-respondent New York City Office of Collective Bargaining, i/s/h/a "Office of Collective Bargaining" (OCB), while the co-respondents City of New York (the City) and City of New York Department of Social Services (DSS; together, the City respondents) cross-move to dismiss the proceeding (together, motion sequence number 001). For the following reasons, the order to show cause is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

Lacey was employed by DSS as a probationary Fraud Investigator, Level I, between September 18, 2019 and December 15, 2020. *See* notice of cross motion (City), exhibit 3. Her termination occurred during the one-year probationary period that followed her hire. *Id*. Lacey subsequently challenged DSS's termination decision by filing two separate *pro se* Article 78 petitions via orders to show cause. *Id*. On November 4, 2021, this court issued a decision that consolidated both petitions, denied them as meritless and dismissed the earlier Article 78 proceeding (Index Number 100374/21; motion sequence numbers 001 & 002). *Id*.

Following her termination, Lacey contacted her union, co-respondent Social Services Employees Union Local 371, District Council 37, AFSCME, AFL-CIO (SSEU), and requested that it file a grievance against DSS on her behalf. *See* notice of cross motion (City), exhibit 2. After conducting an investigation, the SSEU declined to do so. *Id*. On April 28, 2021, Lacey then filed an "improper practice petition" (IPP) against the SSEU that alleged inadequate representation. *See* verified answer (SSEU); ¶ 2; exhibit A. Lacey and the SSEU litigated the IPP before the OCB, which issued a decision on August 3, 2021 dismissing her petition (the OCB decision). *Id*., ¶ 5; exhibit D. The relevant portion of the OCB decision found as follows:

"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, NY County, 2009] [Sherwood, J.], affd., 78 AD3d 401 [1st Dept. 2010], lv. denied, 17 N.Y.3d 702 [2011]) (internal 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). Here, Petitioner has pled facts alleging that the Union violated its duty of fair representation and therefore we construe the petition as alleging violations of NYCCBL § 12- 306 (b) (3) and (d). *See Shymanski*, 5 OCB2d 20, at 8 (BCB 2012).

"NYCCBL § 12-306 (b) (3) provides, in pertinent part, that: 'It 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.' 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, 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.' *Morales*, 5 OCB2d 28, at 20 (BCB 2012), *affd.*, *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v NYC Bd. of Collective Bargaining*, 51 Misc 3d 817 (Sup Ct, NY County, 2016), affd, *Matter of United Fedn. of Teachers v City of New York*, 154 AD3d 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.' *Howe*, 79 OCB 23, at 10 (BCB 2007). Here, we do not find that Petitioner has shown a basis upon which the Union could grieve her termination. According to the City and the Union, Petitioner was a probationary employee at the time of her termination.[1] *Sicular*, 79 OCB 33, at 15 (BCB 2007) (finding that probationary employee was 'unable to establish any entitlement to grievance or other appeal rights from the termination of [her] employment'); *see also Amaker*, 61 OCB 32 (BCB 1998). Therefore, 'the Union's conclusion that there was nothing under the Agreement that it could do to secure [her] reinstatement cannot be

[1] It is undisputed that the Union provided a copy of the parties' June 10 agreement to Petitioner within a few days of her request. To the extent Petitioner claims that the Union failed to provide her with proof that the City and/or DSS provided her with notice of the extension of her probationary period prior to her termination, it is unclear how the Union could have satisfied that request based on Petitioner's assertion that she did not receive said notice from her employer prior to her termination. Further, to the extent the employer did not notify Petitioner of the probationary extension, Petitioner's factual assertions do not provide a basis for a claim against the employer under the NYCCBL.

considered arbitrary, discriminatory, or in bad faith and did not violate the duty of fair representation.' *Rondinella*, 5 OCB2d 13, at 17 (BCB 2012); *see also Rivera-Bey*, 73 OCB 20, at 12 (BCB 2004); *Edwards*, 65 OCB 35, at 9 (BCB 2000). Further, Petitioner did not plead facts which, 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 than Petitioner. *See Rondinella*, 5 OCB2d 13, at 18 (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.

"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 OCB 2d 20 at 11 (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 Union Counsel discussed the matter with Petitioner, corresponded with Petitioner, reviewed the facts and documents that Petitioner presented to her, advised Petitioner in writing that the Union was not going to pursue her claim, and informed Petitioner of alternate legal actions she could pursue on her own.[2] 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 about whether Petitioner had a meritorious claim under the Agreement and declined to process a grievance. *See Sicular*, 79 OCB 33.

"In conclusion, we do not find that the Union acted in an arbitrary, discriminatory, or bad faith manner. Inasmuch as we deny the claim against the Union, any potential derivative claim against DSS also fails, pursuant to NYCCBL § 12-306 (d). *See Nardiello*, 2 OCB2d 5, at 42 (BCB 2009). We therefore dismiss the instant improper practice petition in its entirety."

Id., exhibit D.

Lacey thereafter commenced this Article proceeding to challenge the OCB decision. *See* order to show cause, verified petition. On December 2, 2021, the SSEU filed an answer and the City respondents filed a cross motion to dismiss Lacey's petition. *See* verified answer (SSEU); notice of motion (City). On December 3, 2021, the OCB filed opposition to Lacey's order to

[2] "We do not find that the record supports Petitioner's assertion that Union Counsel used the July 2 email from Petitioner about her alleged misconduct to create a false justification for Petitioner's wrongful termination and to divert from the real issue regarding her termination. Moreover, we note that 'Counsel's determination with respect to the merits of Petitioner's claims need not have been correct, but rather only concluded in good faith.' *Sicular*, 79 OCB 33, at 14."

show cause. *See* Nosek affirmation in opposition (OCB). This matter is now fully submitted (motion sequence number 001).

DISCUSSION

As an initial matter, the OCB asserts that this proceeding should be dismissed as time-barred. *See* Nosek affirmation in opposition, ¶¶ 8-9. Counsel notes that judicial review of OCB decisions is governed by the New York City Collective Bargaining Law (New York City Administrative Code [NYC Admin Code]), § 12-308 of which provides, in part, as follows:

> "a. Any order of the board of collective bargaining or the board of certification shall be (1) reviewable under article seventy-eight of the civil practice law and rules *upon petition filed by an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party*, and (2) enforceable by the supreme court in a special proceeding, upon petition of the board of collective bargaining, board of certification or any aggrieved party."
> NYC Admin Code § 12-308 (emphasis added).

Counsel also notes that the OCB has presented an affidavit of service demonstrating that it served its August 3, 2021 decision on Lacey via certified mail, return receipt requested, on August 5, 2021. *Id*., ¶ 4; exhibit 2. Counsel then asserts that Lacey's failure to commence this proceeding within 30 days thereafter (i.e., by September 6, 2021) renders it untimely and subject to dismissal. *See* respondent's mem of law (OCB) at 5-6.

The court finds counsel's argument to be unsupported. Documentary evidence submitted by the parties shows that Lacey first filed an Article 78 petition and notice of petition with the County Clerk on September 8, 2021, and thereafter served it on the OCB via personal service on October 6, 2021. *See* notice of cross motion (City respondents), Harris affirmation, ¶ 2; exhibit 4; Nosek affirmation in opposition, ¶ 6; exhibit 4. The court's own records show that Lacey thereafter filed an order to show cause with her petition attached on November 9, 2021, and served it on the OCB via personal service on November 17, 2021. *See* order to show cause, aff

of service. November 17, 2021 was the "on or before" date that the court specified for personal service in the order to show cause. *Id*. It is therefore evident that Lacey complied with the court's service instructions for the order to show cause "at [the] time and in [the] manner specified therein," pursuant to CPLR 7804 (c).

The OCB nevertheless argues that this proceeding is untimely as Lacey's service attempts on October 6, 2021 and November 17, 2021 both occurred after the 30-day time limit for commencement specified in NYC Admin Code § 12-308 expired on September 6, 2021. *See* respondent's mem of law (OCB) at 5-6. Although Lacey did indeed exceed the statutory time limit, the OCB's argument is unavailing. CPLR 7804 (f) specifically requires a respondent in an Article 78 proceeding to present any "objections in point of law" either in an answer or a motion to dismiss. Failure to do so results in a waiver of the statute of limitations defense. *See e.g.*, *Matter of Hughes v Doherty*, 9 AD3d 327, 327-328 (1st Dept 2004), citing *Rosenthal v City of New York*, 283 AD2d 156, 157 (1st Dept 2001), *rev on other grounds* 5 NY3d 100 (2005); *Matter of Hans v Burns*, 48 AD2d 947 (3d Dept 1975). Here, the OCB submitted neither an answer nor a motion to dismiss Lacey's Article 78 petition, but merely an attorney's affirmation in opposition. *See* Nosek affirmation opposition. This is an improper procedural vehicle in which to raise the statute of limitations defense since it does not comply with the pleading requirements of CPLR 7804 (f). Therefore, the court deems that the OCB has waived its timeliness argument even though Lacey clearly commenced this action after the 30-day limitations period set forth in NYC Admin Code § 12-308 had expired. Instead, the court finds that the fact that Lacey complied with the service instruction set forth in her order to show cause sufficient to satisfy the requirements of 7804 (c). As a result, it is proper to consider the merits of her petition.

The court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). An agency's determination will only be found arbitrary and capricious where it is "without sound basis in reason, and in disregard of the . . . facts." *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Conversely, if there is a rational basis in the administrative record that supports the agency's determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Here, Lacey alleges that the OCB order "was arbitrary, capricious and in bad faith," and the OCB responds that it "was reasonable and consistent with the record and applicable law." *See* verified petition, ¶ 3; respondent's mem of law (OCB) at 10-13. After reviewing the challenged decision, the court finds for the OCB.

In the first portion of the OCB decision cited above, the OCB determined that Lacey's IPP adequately alleged violations of NYC Admin Code § 12-308 (b) (3)[3] and (d).[4] *See* verified answer (SSEU), exhibit D. The court finds that it was reasonable for the OCB to conclude that a

[3] NYC Admin Code § 12-308 (b) (3) provides that "[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."

[4] NYC Admin Code § 12-308 (d) concerns "[j]oinder of parties in duty of fair representation cases," and provides that "[t]he public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization."

union's decision not to file a grievance with an employer on behalf of a terminated union member might fall afoul of one or both of those regulations. The court also notes that Lacey did not dispute that they were applicable, or that the OCB should have relied on other regulations.

The next portion of the OCB decision found that the SSEU had based its decision not to file a grievance with DSS on Lacey's behalf on the fact that she had been terminated while she was a probationary employee and, as such, had no right to assert a grievance. *See* verified answer (SSEU), exhibit D. It also noted that prior OCB precedent has upheld similar union decisions not to file grievances on behalf of terminated probationary employees. *Id*. The OCB decision finally noted that its rules place the burden of proof on an IPP petitioner to establish that he/she is being treated in an inconsistent manner by the OCB, and found that Lacey had failed to meet that burden of proof. *Id*. Having itself reviewed the administrative rulings cited in the OCB decision, the court determines that the OCB interpreted their holdings reasonably and did not misstate any of them. The court also notes that, in Article 78 proceedings, the Court of Appeals similarly holds that an agency determination will be presumed to be arbitrary and capricious "when it 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 163 (1st Dept 2013), quoting *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). Lacey's petition and order to show cause do not allege that the OCB departed from its own precedent by upholding the SSEU's decision not to file a grievance on her behalf. As a result, she cannot demonstrate that the OCB decision was arbitrary and capricious by reason of inconsistent application of agency rules.

The final cited portion of the OCB decision found that the SSEU had thoroughly investigated all of the evidence that it obtained from Lacey and the DSS before it decided not to

file a grievance on her behalf. *See* verified answer (SSEU), exhibit D. This is the portion of the OCB decision that Lacey chiefly challenges in her petition and order to show cause, although she mainly does so through factual disputes. In the petition which she filed on September 8, 2021, Lacey asserted that the OCB decision was improper as SSEU "failed to investigate a complaint . . . that my employment was wrongfully terminated as a permanent employee," and "entered into a purported agreement with the employer [DSS] that discriminated against union members." *See* verified petition, ¶ 3. Lacey's November 9, 2021 order to show cause further specified that:

> "OCB erred in dismissing petitioner's petition by misrepresenting and omitting some of the facts of petitioner's claim;
> "OCB failed to acknowledge that the union has a duty to investigate the complaints of its members . . . and did not investigate in this case;
> "OCB failed to acknowledge petitioner's permanent status of employment;
> "OCB allowed respondents to compound [sic.] on a purported agreement that was not filed with their office."
> *See* order to show cause at 2.

However, Lacey's arguments are based on two erroneous factual assumptions. First, contrary to Lacey's assertions, the record reflects that Lacey was a probationary DSS employee when she was terminated on December 15, 2020, and *not* a permanent employee. This court upheld DSS's determination of her probationary employment status in its November 4, 2021 decision dismissing the earlier Article 78 proceeding she had filed against DSS under Index Number 100374/21.

Second, the OCB confirmed the evidence in the administrative record that the SSEU had provided her with a copy of the agreement between itself and the City's Office of Labor Relations regarding the extension of the probationary periods of certain employees due to Covid-19 related agency shutdowns on or about June 10, 2020, well before she was terminated. *See* verified answer (SSEU) exhibit D, fn 10 (reproduced as fn 1 in this decision). This court's earlier decision confirmed that finding as well. As a result, the court concludes that both of

Lacey's factual claims are belied by the evidence in the administrative record that the OCB based its decision on. Therefore, the court also concludes that there was a rational basis for the OCB to uphold the SSEU's decision not to file a grievance on her behalf, since terminated probationary employees are not permitted to file grievances.

Accordingly, as the court finds all of Lacey's arguments to be unsupported, it grants the OCB's request that the petition be denied, and also grants the City's cross motion seeking dismissal of this proceeding pursuant to CPLR 3211 (a) (7).

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Linda Lacey (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211, of the co-respondents City of New York and City of New York Department of Social Services (motion sequence number 001) is granted, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

3/14/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE