Clare, 18 OCB2d 13 (BCB 2025)

(IP) (Docket No. BCB-4598-25)

Summary of Decision*:** Petitioner, *pro se*, alleged that the City violated NYCCBL § 12-306(a)(1) and (3) by terminating him in retaliation for scheduling issues related to paid family leave. Petitioner also alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to appeal his termination, neglecting to adequately communicate with him, and not following up with him regarding the reason for his termination. The City argued that Petitioner, a probationary employee, failed to allege a *prima facie* case of retaliation and was terminated legitimately for cause. The Union and the City separately argued that the Union did not breach its duty of fair representation. The Board found that Petitioner failed to establish a *prima facie* case of retaliation for union activity and 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-

ROBERT CLARE,

Petitioner,

- and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 376,
THE CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On April 1, 2025, Robert Clare, a self-represented individual ("Petitioner"), filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO and its affiliated Local 376 (collectively, "Union"), the City of New York ("City"), and the New York City Department of Environmental Protection ("DEP"). Petitioner alleges that DEP violated § 12-306(a)(1) and (3)

of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by terminating him in retaliation for scheduling issues related to paid family leave. Petitioner also alleges that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to challenge his termination, neglecting to adequately communicate with him, and failing to follow up with him regarding the reason for his termination. The City argues that Petitioner, a probationary employee, failed to allege a *prima facie* case of retaliation and was terminated legitimately for cause. The Union and the City separately argue that the Union did not breach its duty of fair representation. The Board finds that Petitioner failed to establish a *prima facie* case of retaliation for union activity and that the Union did not breach its duty of fair representation. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner was employed by DEP as an Apprentice Construction Laborer ("Apprentice"). The Union is the certified bargaining representative for employees in the Blue Collar bargaining unit, which includes the Apprentice title.

DEP hired Petitioner on February 13, 2023. Apprentice is a non-competitive title with a "two year training and probationary period."[1] (Union Ex. 2) Under the Blue Collar Agreement ("Agreement"), the grievance procedure outlined in Article VI does not apply to probationary employees.[2]

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[1] We take administrative notice that "an employee holding a position in the non-competitive or labor class" does not attain disciplinary rights under § 75 of the Civil Service Law until they have "completed at least five years of continuous service in the non-competitive or labor class." Civil Service Law § 75(1)(c).

[2] Article VI, § VI(1) of the Agreement defines a "grievance," in pertinent part, as:

Petitioner was involved in a multi-vehicle car accident during work hours on January 24, 2025. DEP terminated Petitioner on January 31, 2025, prior to the conclusion of his two-year probationary period.

The City alleges that Petitioner was terminated for neglecting to report an arrest, poor work performance, failing to follow safety procedures, and multiple car accidents, moving violations, and time and leave issues.[3] Petitioner acknowledges that "[DEP] agency/supervision was getting mad at [him] for switching up [his] schedule, due to [him] having a newborn . . . [and that he] would take days off without telling [his direct supervisors] . . . [which] began to mess up crew layouts on papers." (Pet. ¶ 7) Petitioner knew that DEP was "mad" because they made him "sig[n] papers about [his] time." (*Id.* at ¶ 8) However, Petitioner maintains that he always advised Human Resources of his days off in advance, which was consistent with DEP paid family leave protocols.

Soon after January 31, 2025, Petitioner called Union Local 376 President Patrick McFarland ("Union President") to ask why he was terminated. Petitioner claims he was initially unable to reach him, but the Union President eventually answered the phone and informed him that he was unaware of the reason for his termination. Following this initial conversation, the Union alleges that the Union President inquired with DEP and that he was told that Petitioner was terminated during his probationary period due to a car accident.

> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by [§] 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct . . . .

(Union Ex. 1)

[3] According to Petitioner, he had no disciplinary write-ups, and other Apprentices were not terminated for accidents, even for one that resulted in someone's death. Further, Petitioner alleges that there is no DEP policy that mandates discipline for car accidents.

Thereafter, the Union President contacted Petitioner again. However, Petitioner alleges that the Union President failed to provide him with a specific reason for his termination. He avers that the Union President merely speculated that it could have been related to a car accident or his time issues. According to the Union, the Union President relayed to Petitioner that he failed his probation due to a car accident. Moreover, the Union avers, and Petitioner does not deny, that the Union President informed Petitioner that the Union would not be able to grieve his termination because he was a probationary employee. Petitioner maintains that the Union President "assured" him that he would contact him again to provide more information regarding the reason for his termination, but that he never did. (Rep. at 2)

Petitioner contends that he learned the official reason for his termination through a response to his unemployment benefits application from the New York State Department of Labor ("DOL"). Specifically, Petitioner states that DOL informed him that DEP told DOL that his discharge related to the January 24, 2025 car accident and an allegation that he told his supervisor that the accident was a mere "fender bender," which Petitioner denies. (Rep. at 2)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that DEP terminated him in retaliation for scheduling issues related to paid family leave. Petitioner asserts that DEP was bothered by his scheduling changes following the birth of his child. As a result, he contends that he has been subject to disparate treatment, as other Apprentices have received lesser discipline for car accidents, even where such accidents resulted in fatalities. Petitioner notes that he has no disciplinary write-ups, yet he was terminated while other similarly situated Apprentices were not. He also avers that DEP's claim,

communicated to him by DOL, that he lied to his supervisor about the nature of the January 24, 2025 car accident is hearsay and that terminating him for it would be arbitrary and pretextual.

Petitioner also argues that the Union breached its duty of fair representation by failing to challenge his arbitrary and retaliatory termination. Petitioner asserts that DEP's disparate treatment in disciplining him for his involvement in the January 24, 2025 car accident warranted Union action, yet the Union did nothing to help him. Moreover, he contends that the Union neglected to adequately communicate with him regarding the reason for his termination. Specifically, Petitioner claims that the Union President promised that he would follow up with him again concerning the reason for his termination, but he failed to do so. He argues that the Union's pattern of behavior regarding his termination is consistent with the Union's purported reputation for poorly representing employees.

As a remedy, Petitioner requests that DEP reinstate him to his position as Apprentice.

Union's Position

The Union argues that Petitioner failed to state a claim under NYCCBL § 12-306(b)(3) for a violation of the duty of fair representation because his termination was not a matter under the Union's exclusive control and the Union did not act in an arbitrary, discriminatory, or bad faith manner.[4] Citing Article VI of the Agreement, it further asserts that Petitioner was not covered by the grievance procedure as a probationary employee and thus had no rights under the Agreement. The Union maintains that the Union President notified Petitioner of this and that there was "no further action the Union could undertake." (Union Ans. ¶ 21) Accordingly, the Union argues that it did not breach the duty of fair representation and that Petitioner's claim must be dismissed.

[4] NYCCBL § 12-306(b)(3) provides, in pertinent part, 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."

City's Position

The City argues that Petitioner has failed to state a *prima facie* case of retaliation that would violate NYCCBL §12-306(a)(1) and (3).[5] The City asserts that Petitioner's pleadings fail to specify any precise allegations and thus do not satisfy the pleading requirements under § 1-07(c)(1)(C) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). Specifically, it notes that Petitioner pled no protected activity prior to his termination and that he similarly failed to allege that anti-union animus motivated his termination. To the contrary, the City contends that Petitioner failed his probation as a result of legitimate performance issues and that, accordingly, his claim must be dismissed.

The City also argues that the Union did not violate its duty of fair representation under NYCCBL § 12-306(b)(3). It asserts that Petitioner was a probationary employee who was not entitled to appeal his termination under the Agreement's grievance procedure. Therefore, the City contends that there was "little" the Union could have done to assist Petitioner following his termination, even if Petitioner takes issue with the Union's degree of responsiveness. (City Ans. ¶ 42) Moreover, it avers that there is no evidence that the Union acted with bad faith or in a discriminatory fashion. As such, the City claims that Petitioner has failed to allege facts sufficient to support a finding that the Union acted arbitrarily, discriminatorily, or in bad faith in this matter.

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[5] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> ***
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

It maintains that Petitioner's claim amounts to nothing more than dissatisfaction with his termination and the Union's inability to reverse DEP's legitimate action. Therefore, the City argues that any derivative claim against DEP pursuant to NYCCBL § 12-306(d) must also be dismissed.

DISCUSSION

"Recognizing that a [self-represented] Petitioner may not be familiar with legal procedure, the Board takes a liberal view in construing a [self-represented] Petitioner's pleadings." *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (internal quotation and editing marks omitted) (quoting *Rosioreanu*, 1 OCB2d 39, at 2 n.2 (BCB 2008), *affd. sub nom.*, *Matter of Rosioreanu v. New York City 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)). Here, although the petition does not cite specific provisions of the NYCCBL, we find that Petitioner has pled facts alleging that DEP retaliated against him in violation of NYCCBL § 12-306(a)(1) and (3) and that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3).

Claim against DEP

NYCCBL § 12-306(a)(3) provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1). *See, e.g.*, *Kalman*, 11 OCB2d 32, at 11 (BCB 2018) (citation omitted).

To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the

Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. The test states that, to establish a *prima facie* case of retaliation, the petitioner must demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Kalman*, 11 OCB2d 32, at 11. The first prong of the *prima facie* case is satisfied where "the employer is shown to have knowledge of the protected union activity." *CSTG, L. 375*, 7 OCB2d 16, at 20 (BCB 2014) (citing *Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)), *affd.*, *Matter of Donas v. City of New York & New York City Off. of Collective Bargaining*, Index No. 101265/14 (Sup. Ct. N.Y. Co. Oct. 23, 2015) (Wooten, J.). In this case, Petitioner has not alleged that he was engaged in any protected union activity prior to his termination, and therefore he has failed to establish the first prong of the *prima facie* case.[6] Accordingly, we dismiss Petitioner's NYCCBL § 12-306(a)(1) and (3) claims.

Claim against the Union

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

[6] To the extent Petitioner alleges that he was retaliated against for scheduling issues related to his paid family leave, we note that "OCB does not have jurisdiction to remedy acts of discrimination other than those based on union activity." *Payne*, 17 OCB2d 11, at 11 (BCB 2024) (citations omitted); *see also* NYCCBL § 12-309.

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 (internal quotation marks omitted) (quoting *Okorie-Ama*, 79 OCB 5, at 14); *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 (internal quotation marks omitted) (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)). "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." *Feder*, 9 OCB2d 33, at 34 (BCB 2016) (internal quotation marks and citations omitted).

Moreover, "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." *Mitchell*, 16 OCB2d 30, at 6 (BCB 2023) (internal quotation marks omitted) (quoting *Fash*, 15 OCB2d 15, at 21 (BCB 2022)); *see also 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."); *Gibson*, 29 OCB 13, at 4-5 (BCB 1982) (holding that union's decision that proceeding with a grievance would be fruitless did not constitute a breach of the duty of fair representation).

In this case, Petitioner has failed to establish that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. Specifically, Petitioner argues that the Union breached its duty of fair representation by failing to challenge his termination. We find that this claim is unsupported by the record. It is undisputed that Petitioner was a probationary employee at the

time of his termination. Probationary employees do not have statutory disciplinary rights under § 75 of the Civil Service Law. *See, e.g.*, *Rodriguez*, 17 OCB2d 16, at 3 (BCB 2024). As a result, Petitioner did not have disciplinary rights pursuant to the grievance procedure in Article VI of the Agreement. As Petitioner did not have a contractual right to grieve his termination, we find that the Union had a reasonable basis to conclude that filing a grievance on Petitioner's behalf would be without merit and that the Union's decision not to file a grievance or otherwise challenge Petitioner's termination was not a breach of its duty of fair representation. *See Mitchell*, 16 OCB2d 30, at 6 (finding no breach of the duty of fair representation for the union's failure to grieve a probationary employee's termination where the collective bargaining agreement did not provide grievance rights for probationary employees); *Rondinella*, 5 OCB2d 13, at 17-18 (BCB 2012) (finding that because the petitioner was a probationary employee and had no grievance rights, "the [u]nion's conclusion that there was nothing under the Agreement that it could do to secure his reinstatement [could not] be considered arbitrary, discriminatory, or in bad faith and did not violate the duty of fair representation").

Petitioner also alleges that the Union breached its duty of fair representation by neglecting to adequately communicate with him regarding the reason for his termination. We similarly find that the record does not support this claim. The record shows that the Union President communicated with Petitioner on multiple occasions regarding his termination. To the extent Petitioner may have been dissatisfied with the Union President's response time or the depth of the Union President's explanations for his termination, it is well-established that "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) (internal quotation marks omitted) (quoting *Shymanski*, 5 OCB2d 20, at 11 (BCB 2012)); *see also Simon*, 16 OCB2d 27, at 10-11

(BCB 2023) (finding that the petitioner's dissatisfaction with the union director's reluctance to answer questions generally and failure to provide a "concrete answer" to her specific question regarding the timeline for a grievance hearing did not state a violation of the duty of fair representation); *Thigpen*, 17 OCB2d 17, at 6-7 (BCB 2024) (finding that the petitioner's complaints about slow and inadequate communication by the union did not rise to the level of a breach of the duty of fair representation).

Specifically, Petitioner alleges that the Union President failed to contact him again concerning the reason for his termination following their second conversation about it, despite his assurance that he would do so. However, the Board has consistently held that a union does not breach its duty by failing to communicate unless that alleged failure "prejudice[d] or injure[d] the petitioner." *Fash*, 15 OCB2d 15, at 22 (internal quotation marks omitted) (quoting *Cook*, 7 OCB2d 24, at 9 (BCB 2014)). Under the factual circumstances of this case, we do not find that Petitioner was injured or prejudiced by the Union President's alleged failure to follow up concerning the reason for his termination. *See, e.g.*, *Hogans*, 16 OCB2d 13, at 11 (BCB 2023) (finding no breach of the duty of fair representation where the petitioner alleged that the union failed to communicate that it was not going to take additional action on her case following a final decision of the Civil Service Commission where the right to further action was not established); *Harason*, 13 OCB2d 8, at 11 (BCB 2020) (finding that the union's failure to respond to the petitioner's emails about the status of his grievance did not violate the duty of fair representation in the absence of a meritorious grievance).

In reaching the above determinations, we note that there is no evidence to establish that any action or position taken by the Union, or lack thereof, regarding Petitioner's termination was discriminatory, arbitrary, or motivated by bad faith. Indeed, Petitioner has not shown that the

Union handled his termination as a probationary employee differently than that of other similarly situated bargaining unit members. *See, e.g.*, *Lacey*, 14 OCB2d 18, at 11 (BCB 2021) (finding no breach of the duty of fair representation where the petitioner failed to establish that the union filed grievances or otherwise appealed terminations of other probationary employees in similar circumstances), *affd. sub nom.*, *Lacey v. Social Serv. Employees Union Local 371*, Index No. 101032/21 (Sup. Ct. N.Y. Co. Mar. 14, 2022) (Edmead, J.); *D'Onofrio*, 79 OCB 3, at 20 (BCB 2007) (finding no breach of the duty of representation where the petitioner did not show that the union did more for others in the same circumstances than it did for the petitioner); *Schweit*, 61 OCB 36, at 15 (BCB 1998) (same).

Therefore, we find that the Union did not breach its 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-4598-25, filed by Robert Clare, against District Council 37, AFSCME, AFL-CIO, its affiliated Local 376, the City of New York, and the New York City Department of Environmental Protection, is dismissed in its entirety.

Dated: August 14, 2025
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

ALAN M. KLINGER
MEMBER

JEFFREY L. KREISBERG
MEMBER