James-Reid, 1 OCB2d 26 (BCB 2008)

(IP) (Docket No. BCB-2539-06).

Summary of Decision: The union and the City, at close of Petitioner's case, moved to dismiss claimed breach of the duty of fair representation on the basis that credible evidence adduced in two days of hearings established that representation provided through the union comported with the duty of fair representation. The Board rejected Petitioner's claim that her receipt of funds through a settlement in which the City specifically denied liability for illegal discrimination in discipline precluded the City from imposing discipline. The Board also found that the credible unrebutted testimony of Petitioner's counsel that he determined not to invoke Petitioner's right to an investigation of the charges for discriminatory animus based on his analysis of the results in disciplinary cases of similarly situated members established that the tactical decision was not arbitrary or perfunctory, and that no breach of the duty of fair representation had been established. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

AMRYL JAMES-REID,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On May 14, 2006, Amryl James-Reid ("Petitioner") filed the instant improper practice proceeding alleging that the Patrolmen's Benevolent Association ("PBA" or "Union") breached its duty of fair representation in violation of § 12-306(b)(1) and (3) of the New York City Collective

Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") when the counsel afforded Petitioner by the Union in her disciplinary hearing for alleged misconduct: (1) induced Petitioner to waive her rights to a hearing and plead guilty to charges and specifications of which Petitioner had maintained her factual innocence; (2) failed to raise the allegedly preclusive effect of the finding of a special master in a federal civil rights action that Petitioner had been the subject of, and was eligible for an award of compensation for "discriminatory discipline" arising from the facts and circumstances comprising certain of the disciplinary charges against her; and (3) failed again to raise these issues to the Commissioner in opposing the recommended penalty of termination.[1]

At the conclusion of the Petitioner's case, the Union and the City each moved for judgment based on the evidence presented by the Petitioner, asserting that she had not carried her burden of proof, and that no defense case need be interposed. This Board finds that such judgment is in warranted here, and dismisses the petition in its entirety.

BACKGROUND

On March 14, 2006, Amryl James-Reid filed a *pro se* verified improper practice petition against the PBA. The petition was dismissed in part by the Executive Secretary pursuant to Section 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York Title

[1] Although the petition initially asserted a number of claims outside the purview of the NYCCBL, and which were dismissed by the Executive Secretary as beyond the jurisdiction of this Board, these three claims were not dismissed and were deemed sufficient by this Board to proceed to a hearing. *James-Reid*, 77 OCB 29, at 2 (BCB 2006); discussing *James-Reid*, 77 OCB 16, at 8-9 (ES 2006).

61, Chapter 1)("OCB Rules") in a determination dated May 2, 2006. Pursuant to that determination, the petition was amended *nunc pro tunc* to join as a respondent the City of New York and the New York City Police Department ("City" or "NYPD," respectively), which had been served with the petition at the time of its filing, although not named as a party, as required by § 12-306(d) of the NYCCBL.[2]

The PBA subsequently filed a motion to dismiss, which was granted as to Petitioner's claim that counsel had provided inadequate representation by not seeking dismissal of the most serious of the charges and specifications against her on the ground that the disciplinary charge was untimely, a claim that this Board found to be lacking in merit, and therefore not an appropriate basis for a claim sounding in breach of the duty of fair representation. *James-Reid*, 77 OCB 29, at 17-18 (BCB 2006). The balance of the motion to dismiss was denied. *Id.* at 18-19. The PBA then filed a motion to disqualify Petitioner's counsel, which was denied by the Trial Examiner, whose decision was appealed to this Board and which was affirmed. *James-Reid*, 79 OCB 9 (BCB 2007).

After two days of hearing, the Trial Examiner found that the credible evidence established the facts to be as follows.

Petitioner, an African-American, was a police officer employed by the City in the NYPD for approximately sixteen years. Petitioner alleges both that she received many accolades and awards from the NYPD and that, throughout her career, she "has been discriminated against because of her

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[2] NYCCBL § 12-306(d) provides:
The 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.

race by being unfairly disciplined when compared to other Caucasian police officers." (Pet. at ¶1). Petitioner was a class member in a federal civil rights class action, *Latino Officers' Assn. v. City of New York,* 99 Civ. 9568 (LAK) ("LOA Action") asserting discrimination in disciplinary matters based on race and national origin, as well as a pattern and practice of retaliatory discipline predicated upon the class's complaints of discrimination.

Petitioner asserts that she was the subject of inappropriate disciplinary charges, which resulted in her termination, and which were based on three specific incidents. The first occurred in July 2001, when, upon being apprised of her estranged husband's arrest, she endeavored to contact his date for that evening, who was a witness to the arrest. The second took place in December 2001, when Petitioner was off duty, and a stray bullet pierced her windshield. Petitioner drove her son home and reported the incident by telephone, rather than reporting directly to the nearest precinct. Petitioner asserts that when she spoke to her commanding officer about this incident, he informed her that she had taken the appropriate action under the circumstances. Finally, in or about September through December 2001, while the Municipal Credit Union's ("MCU") computer system was shut down in the wake of the terrorist attack of September 11, 2001, Petitioner overextended her credit line by approximately $6,000.

Petitioner testified at length about the factual predicates for each of these charges. With respect to the charges stemming from her husband's arrest, two specifications had been lodged. Specification 1 alleged that Petitioner improperly interfered with an investigation by making calls to the home of a potential witness and presented herself at the witness' home, stating "in effect, 'I'm the

police. I can get any information I want.'" (City Ex. 1, Charge 1, Spec. 1).[3] The second specification accused Petitioner of improperly causing an inquiry to be made on the SPRINT System, a linked information system through which police officers access information, that was not related to official business, "to wit: [Petitioner] requested another member of the service to conduct a computer check relating to the arrest of said Officer's husband." (City Ex. 1, Charge 1, Spec. 2). Petitioner admitted the essence of these charges in her testimony before the Trial Examiner, although she claimed that she took these actions with good intentions.

For example, with respect to the claims arising out of her reaction to her husband's arrest, Petitioner acknowledged that, when her mother-in-law informed her of the arrest she "went to the precinct to find out what happened [a]nd I then contacted the young woman, he was out on a date with . . . that day to find out what had happened." (Tr. 9; 228). Similarly, on cross-examination, Petitioner admitted that she "contacted an officer from the 75th Precinct to locate the address where he was arrested," but was unable to get the information from the SPRINT report; she obtained the address from 411. (Tr. 130). While admitting she had committed the actions she was charged with, Petitioner denied that they constituted violations of the Patrol Guide, stating that "I did what any officer would do if their family member was involved in anything." (Tr. 131).

As to the second incident, Petitioner likewise admitted at the hearing that she had in fact left the scene of the shooting and gone directly home with her son, calling the precinct upon her arrival

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[3] Petitioner endeavored to deny that the woman she sought to confront, her husband's date for the evening on which he was arrested, was a witness, only to be confronted with her sworn admission at the pre-trial interviews pursuant to Patrol Guide § 206-13 regarding the disciplinary charges against Petitioner, which are still referred to by the pre-Patrol Guide nomenclature, as a "GO-15" that she *was* a witness. (Tr. 129, 132, 138; PBA Ex. 2 at 75).

home instead of following procedure and driving to the nearest precinct. She offered a twofold account for her behavior: first, she testified, she could not call until she arrived home because her cell phone was brand-new and had not yet been charged. Second, in view of her young son's alarm after the bullets entered the car, Petitioner felt it was imperative to take him directly home. She estimated the entire period of delay was approximately ten minutes. Petitioner testified that the commanding officer of the 69th Precinct told her that she had done the right thing.

With respect to the MCU incident, Petitioner's testimony regarding her reasons for believing that she had not been in any way culpable for this course of actions led to testimony that was repeatedly self-contradictory, and contradicted her statements at the GO-15. For example, Petitioner readily admitted that after September 11, 2001, she had overdrawn her account by approximately $6,000. The account had previously had $6,000 in it, which Petitioner stated she deposited earlier in September 2001. (Tr. 146). Petitioner admitted that, after September 28, 2001, she stopped making deposits into her MCU account, because the MCU "had problems" with its computers in the wake of the September 11 attack. (Tr. 154, 151). Petitioner admitted that she had continued to make purchases from that account after she ceased making deposits into the account, until the MCU contacted her in November 2001.

Petitioner first denied, then subsequently admitted, that she was aware that she had exceeded the funds in her account in approximately mid-October. (Tr. 166, 183).[4] The bank sent her a statement reflecting a negative balance in late November 2001; in December, the MCU and Petitioner executed an agreement pursuant to which she was to repay the MCU the funds she expended in excess

[4] On redirect examination, Petitioner again denied this statement. (Tr. 266).

of what she had on account.

Petitioner testified that her MCU debit card "functions as a credit card," only to subsequently admit that such was not the case after being confronted with her contrary characterization of a debit card in the GO-15 interviews. (Tr. 157, 158; 166). She then changed her testimony again, asserting that "it could be used either way, a debit card or a credit card." (Tr. 180-181). Petitioner then stated that a debit card cannot be used to withdraw more funds than are in the linked account "unless the bank allows it," which she claimed legitimated her overdrawing the account, since the MCU subsequently agreed to a repayment plan with her. (*Id.*).

Similarly, petitioner first testified that she did not make any withdrawals from the MCU account (Tr. 161, 162), only to be confronted with her prior sworn statement at the GO-15 that she in fact had made both purchases and withdrawals. Petitioner did not explain the discrepancy.

Each of these incidents became the subject of charges and specifications. The first two incidents were included in charges and specifications served upon Petitioner on December 10, 2002, charging her with violations of, respectively, Patrol Guide §§ 203-10 (regulating Public Contact–Prohibited Conduct), and 212-32 (regulating Off Duty Incidents Involving Uniformed Members of the Service).[5] The MCU incident was the subject of a second set of charges, served on Petitioner on or about December 10, 2004, asserting that she was guilty of conduct in violation of

[5] The Patrol Guide "is an internal manual – nearly 1,500 closely printed pages – containing thousands of rules, procedures and policies adopted by the Police Commissioner for the governance, discipline, administration and guidance of the Police Department." *James-Reid*, 77 OCB 29, at 4, n. 3, quoting *Galapo v. City of New York*, 95 N.Y.2d 568, 574-575 (2000); *see Forster v. City of New York*, 309 A.D.2d 578 (2d Dep't 2003). Violations of the Patrol Guide's provisions are proper matters for discipline of employees. *Id.; see also, Williams v. Police Department of New York*, 50 N.Y.2d 956 (1980); *People v. Feerick*, 93 N.Y.2d 433, 442-443 (1999).

Penal Law § 155.35, Grand Larceny.

In or about February 2004, the LOA Action was settled, creating a fund in the amount of $20,000,000, to be administered among the members of the class based upon the valuation of their claims by Special Masters Kenneth Feinberg and Peter Woodin. As part of the terms of the settlement, class members who were NYPD officers and who had been charged with disciplinary infractions, were permitted to:

> raise[] discrimination or retaliation as an affirmative defense to disciplinary charges [and to] make a written motion to the Deputy Commissioner for Trials at or before the first conference for (1) discovery of data or information that is material and necessary to establishing such an affirmative defense and/or (2) for a stay of a disciplinary proceedings while the OEEO [the NYPD's Office of Equal Employment Opportunity] investigates his/her claim of discrimination . . . . Whenever a member of the NYPD raises discrimination or retaliation as an affirmative defense to disciplinary charges, the Deputy Commissioner for Trials shall specifically address and make a finding in his/her Report and Recommendation to the Police Commissioner with respect to the affirmative defense.

(City Ex. 2, Stipulation of Settlement in LOA Action ("Stipulation") at ¶¶ 16-17; *see also* Pet. Ex. C.)

The Stipulation provided that the parties, "without admitting any fault or liability, agree to the entry of this Stipulation and Order to resolve all issues that were or could have been raised by the plaintiffs in their complaints." (Stipulation at 2). The Stipulation further provided that:

> Nothing contained herein shall be deemed to be an admission by any of the Defendants that they have in any manner or way violated plaintiffs' rights, or the rights of any other person or entity, as defined in the constitutions, statutes, ordinances, rules or regulations of the United States, the State of New York, or the City of New York, or any other rules, regulations or bylaws of any department or subdivision of

> the City of New York.

(Stipulation ¶ 38).

On September 15, 2004, the District Court entered a final Judgment and Order Approving the Class Action Settlement, pursuant to the terms and conditions of the Stipulation. (City Ex. 2, "Final Order"). As part of the Final Order, the District Court ordered that "all changes to the disciplinary and equal employment practices and procedures of the NYPD agreed upon in the Stipulation. . . shall be implemented by the defendants within the time frames set forth in the Stipulation." (Final Order at 5, ¶ 1). The District Court likewise certified the class as amended by the Stipulation, approved the settlement embodied in the Stipulation as fair and reasonable, and approved the attorneys fees charged. The Final Order also "ordered, adjudged and decreed" that:

> subject to the Court's continuing jurisdiction to ensure compliance with the Stipulation, the individual and class claims raised in the Second Amended Complaint (except the individual claims of the five named plaintiffs who have timely opted out of the settlement are dismissed without prejudice and without costs, except as specified in the Stipulation.

(Final Order at 5).

In June 2005, Petitioner met with Special Masters Feinberg and Woodin, and informed them of her claims that she had been subjected to discipline in a discriminatory manner, citing, among other incidents, the disciplinary charges against her that were then pending, and are at issue herein. In July, she filed a further submission with the Special Masters. In her submission, Petitioner omitted to inform the Special Masters that she had in fact attempted to locate a potential witness through the Sprint System. (Pet. Ex. 6 at 6). When asked at the hearing why she omitted this fact, Petitioner testified that she omitted it because she "didn't receive any information;" that "it wasn't misconduct"

for her to attempt to contact the potential witness, or to use the SPRINT System; and that she "didn't intentionally leave anything out." (Tr. 132, 133, 136-137).

Similarly, Petitioner did not state in her submission to the Special Masters that she had made purchases and withdrawals from the MCU in an amount nearly double the contents of her account; rather, she stated simply that "Still modified [duty] in 2003, MCU extends my credit line, later they realize it was an error, they give me a loan for the amount that was used. The job charges me with Prohibited Conduct for taking the loan." (Pet. Ex. 6 at 7). Moreover, Petitioner's account situates the MCU incident well after the computer crash affecting the MCU in the wake of the September 11, 2001 terrorist attack.

On November 10, 2005, Special Masters Feinberg and Woodin sent a letter to Petitioner in which they informed her that she had been deemed "eligible to receive compensation" and that her award was "$75,000 for a Discriminatory Discipline claim." (Petition, Exhibit B.)

At the GO-15s, she was represented by Stuart London, of Worth, Longworth & London ("W L & L"), a law firm through which representation is provided to members of the PBA in criminal, administrative, and civil matters, at the expense of the PBA. The firm, according to Mr. London, provides representation pursuant to an arrangement with the PBA that originated in a two year contract, but which has continued beyond its expiration, and is now embodied in an annually recalculated retainer agreement between the PBA and the firm. The representation provided is available as of right and with no payment by the individual member to all PBA members charged with on-duty disciplinary infractions, and is generally provided, in "99 out of a hundred" cases, without additional charge to members charged with infractions arising out of off-duty incidents. (Tr. 330).

London testified that in a disciplinary proceeding, the PBA member, not the PBA, is his client, that he enters into an attorney-client relationship with the member, and that the PBA cannot and does not direct his representation. According to London, the representation provided by him and his firm giving rise to this case was in his capacity "as a PBA attorney" and not as her "personal" counsel. (Tr. 358). Consistently, at each of the three GO-15 interviews at which he represented Petitioner, London identified himself as "PBA counsel." (Pet. Ex. 2 at 2; Pet Ex. 3 at 2; Pet. Ex. 4 at 2). Petitioner testified that she had no retainer agreement with W L & L itself.

Petitioner testified that she did not know why, with respect to the MCU charge, there were three separate GO-15 interviews. As she viewed it, such repeated inquiry was not warranted "[b]ecause the bank never filed any charges, the DA never filed any charges. There was a loan between me and my bank." (Tr. 121). When the transcript of the third GO-15 was shown to her, Petitioner acknowledged that at that interview she addressed statements made at the prior GO-15 interview that were erroneous or reflected confusion on her part about the financial transactions at issue. (Tr. 122-124). According to London, the second and third GO-15 interviews were convened at his request in order to afford Petitioner a chance to clarify her statements at the previous GO-15, including her statement that she had not made any cash withdrawals but only purchases from the MCU account, and thereby hopefully avoid a charge of making false statements in violation of the Patrol Guide, a disciplinary offense for which termination is often the penalty. The transcript of the second GO-15 reflects London's request that Petitioner be afforded an opportunity to review the financial documents at issue "so that the next time we're GO15'ed it can go smoother." (Petitioner's Ex. 3 at 45).

At each of the GO-15 interviews, Petitioner was asked if she was satisfied with her representation, and replied that she was. (Pet. Ex. 2 at 2; Pet Ex. 3 at 2; Pet. Ex. 4 at 2). At the hearing in this matter, she reiterated that she was satisfied with the representation provided her at this stage, stating unequivocally that, as to London's representation of her, "I had no problem at the GO-15." (Tr. 126).[6]

Petitioner and London agreed that the next stage in the disciplinary process was negotiation, in which the NYPD would offer her a proposed resolution. On July 14, 2005, Petitioner met London at One Police Plaza for negotiation, where the NYPD offered a penalty of 60 days suspension, one year probation and a "vesting out," that is, early retirement. Petitioner testified that she would not accept this offer because she "was not guilty of anything" and also complained that the NYPD's offer was not in writing, and she "kn[e]w the procedure is for them to have it in writing." (Tr. 66).[7] Petitioner stated that London told her that it was "more than likely" that the offer was so "harsh" because of the LOA Action. (Tr. 68).

According to London, Petitioner declined to accept the NYPD's offer because she objected to retiring from the NYPD with 16 years of pensionable service and lose her variable supplement payment. London testified that he advised Petitioner to accept the offer, because she "would at least get a *pro rata* pension when her twentieth year hit." (Tr. 367; 378). London further explained his

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[6] Petitioner at first described counsel as having "just sat there" at the GO-15 interviews; upon having her memory refreshed with the transcript, she acknowledged that he had offered a defense to a possible claim of her having made a false statement in the GO-15, and protested against the interviewer's "badgering" her. (Tr. 123-124). Petitioner then acknowledged she had been satisfied with his representation, and had previously stated so on the record. (Tr. 126).

[7] However, Petitioner admitted London telling her that the offer was only reduced to writing upon the officer's agreement. (Tr. 68).

concern was centered on the MCU charge, which he believed could lead to termination, "based on the data base that we had, that it was an offense that Police Commissioner Kelly thought you were profiting off a tragedy and he took a very hard line on those cases." (Tr. 367). London disagreed that offers were reduced to writing as a matter of procedure, stating that offers were always made verbally and only reduced to writing "when the officer accepts the disposition." (Tr. 377-378).

On November 14, 2005, Petitioner's disciplinary trial was held in what is casually referred to as the "Trial Room," an administrative hearing held before, in this case, Deputy Commissioner for Trials Robert Vinal. Commissioner Vinal would make a recommendation to the Police Commissioner as to the disposition of the disciplinary charges for his action. According to the transcript of the hearing, Petitioner admitted the facts supporting the charge that she did not report to the nearest precinct after a gunshot pierced her windshield but instead drove her son directly home and then called in. (PBA Ex. 2 at 3, 10-12). As to the other charges, those involving contacting a witness and seeking to access police information for personal reasons, Petitioner entered a guilty plea, but sought to mitigate. (PBA Ex. 2 at 3, 4-11). Petitioner was then questioned by Commissioner Vinal with respect to these allegations.

Petitioner asserts that she did not intend to plead guilty, that she had told London that she had no intention of pleading guilty, but that he advised her to "admit the actions" because "that's what I was told to do to keep my job." (Tr. 192). Despite the fact that Petitioner heard London tell Commissioner Vinal that she "was pleading guilty," Petitioner testified that "I understood I was pleading not guilty to the whole trial." (Tr. 191-192). Petitioner further stated that "there's some deal that they had come up with" that would result in a penalty short of termination. (Tr. 192). Petitioner

described her "admission to the actions and not pleading guilty" and dismissed the talk of a guilty plea as "some lawyer talk." (Tr. 192). Somewhat contrary to this, Petitioner testified that she had expected London to introduce testimony controverting the factual allegations she had admitted to on the record.

It is uncontested that London did not move for a stay of the disciplinary trial or for discovery pursuant to the Stipulation. London further admitted that he was aware of the Stipulation and that Petitioner was a claimant thereunder its terms; he explained why he did not invoke its procedures as follows:

> I couldn't. I considered whether there was any discrimination involved in the three sets of charges, and I went through them each individually. The first one, where she went to visit the complaining witness, clearly is not discriminatory. The second one, where her car is filled with bullets, is not discriminatory. And the third one, where she stops putting money in her account, overdrafts by six thousand dollars, also was not a discriminatory accusation. The four corners of each allegation was misconduct that, quite frankly, she admitted to in all three cases. So I wasn't going to have her perjure herself to submit any affidavit or talk about discrimination. Furthermore, we have a data base, and we studied this when we took over the law firm from our predecessor. So I know what cases are worth in our system, whether it's failure to safeguard a weapon or grand larceny or bullets in a vehicle. We have had 93,000 cases in the last ten years, and we have a data base that is very thorough. In reviewing the data base, it was obvious to me the MCU transgression was a termination offense. So there was no discrimination claim that I thought viable; therefore, I felt the best way to proceed was to have her separate from the department, take her pension with her. There was no way to really bring up a discrimination claim, so I did not pursue that.

(Tr. 389-390).

Similarly, with respect to the decision not to bring Petitioner's award from the Special Master to the to the attention of Commissioner Vinal, London explained that:

> It had no bearing on the three sets of charges I was defending her on, based on what I previously stated about the misconduct that she admitted to, and the fact that when we checked over data, bills, the penalties were consistent with what the police commissioner had observed [sic] in similar cases in the past.[8]

(Tr. 403-404).

Petitioner was found guilty, and Commissioner Vinal recommended she be terminated.

On February 2, 2006, counsel submitted a so-called "Fogel Letter," that is, a letter to the Police Commissioner challenging the hearing officer's decision and urging reasons why the recommendation of termination should not be adopted, pursuant to *Matter of Fogel v. Board of Education*, 48 A.D.2d 925 (1st Dep't 1975).[9] In that letter, counsel likewise did not raise the Special Masters' award to Petitioner. Commissioner Raymond Kelly signed a final order terminating Petitioner on February 23, 2006, effective that day. London offered to challenge her termination pursuant to Article 78 without any charge to her, although it fell outside the scope of his representation under the PBA retainer.

The instant improper practice proceeding was filed on March 14, 2006. Subsequent to the Executive Secretary's partial dismissal of patently meritless claims, and this Board's ruling on the PBA's motion to dismiss, several claims remained to be tried: (1) counsel's failure to seek a stay of the disciplinary trial and to bring the Special Masters' award in Petitioner's favor to the attention of

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[8] In the Trial Room, the Department Advocate similarly argued that at least three similar cases existed, in which the officers were terminated. (PBA Ex. 2 at 129).

[9] The right afforded employees in *Fogel* to challenge the findings and recommendations of a hearing officer to the final decision-maker applies specifically to police officers challenging discipline recommendations. *See James-Reid*, 77 OCB 29, at 6, n.4, citing *Scully v. Safir*, 282 A.D.2d 305, 308 (1st Dep't 2001).

the Commissioner, which constituted a fundamental failure of representation; (2) counsel's alleged representation to Petitioner that the NYPD and her counsel had reached a settlement agreement in principle, whereby she would plead guilty at the hearing, in exchange for which she would receive a penalty other than termination; and (3) counsel's failure to defend her at the hearing, as instructed by her. Petitioner asserts that respondents' "conduct towards Petitioner, who is an African-American female, was discriminatory and done in bad faith." (Petition at ¶4(e)).

POSITIONS OF THE PARTIES

Union's Position

In its motion for judgment at the close of Petitioner's case, the PBA raises three principal arguments. First, the PBA asserts that the petition alleges no act on the part of the PBA or its agents but rather acts of "petitioner's independent counsel." While Petitioner's counsel was admittedly appointed and paid by the PBA to represent Petitioner in her disciplinary hearing, the relationship of attorney and client implicates an obligation separate from any duty owed by the Union. The PBA denies that counsel is an agent of the Union.

Next, the PBA asserts that even if the strategic and tactical decisions made by the attorney are attributable to the Union, the alleged decisions complained of do not, as a matter of law, rise to the level of a breach of the duty of fair representation. The Union defends the strategic decisions made by counsel, claiming that each contested decision was reasonable under the circumstances. The PBA asserts that the alleged advice offered to Petitioner to admit her conduct in the Trial Room was rational, since it was "an attempt to mitigate any penalty by demonstrating an acceptance of

responsibility for her wrongful acts" as well as serving to "insulate Petitioner from any charge that might have resulted from making a false statement under oath.

Finally, as to the failure to invoke the stay of disciplinary trials, the PBA asserts that if Petitioner deemed such a stay warranted, she should have so instructed her counsel, but that in any event, Petitioner had not provided any facts to support a contention that the charges for which the Petitioner was terminated, especially that of theft from the MCU account, resulted from discrimination. This failure, the PBA contends, renders the decision not to seek a stay rational, and thus it cannot support a claim for breach of the duty of fair representation. Moreover, counsel credibly explained each of his tactical and strategic decisions, and Petitioner did not rebut these explanations.

City's Position

The City argues that the credible testimony adduced at the hearing does not establish a breach of the duty of fair representation. Asserting that neither disagreement with the conduct of a disciplinary proceeding nor with its outcome constitutes a breach of the duty of fair representation, the City argues that evidence of improper motivation, such as hostility or discrimination, is required.

The City further argues that the City cannot be held liable even were the PBA deemed to have breached the duty of fair representation, where, as here, there is no plausible claim that the "the public employer has breached its agreement" with an employee organization, as required for derivative liability pursuant to NYCCBL § 12-306(b)(3). Because discipline and disciplinary procedures are not subject to collective bargaining, the City and the NYPD are not proper parties to this litigation.

Petitioner's Position

In her opposition to the PBA's motion for judgment at the conclusion of her case, Petitioner asserts that the PBA and City are precluded by the Stipulation and Final Order from challenging that the charges against Petitioner for which she was terminated constituted discriminatory discipline, and that, as a result, London's failure to raise the defense constituted perfunctory representation. Additionally, he should have, at a minimum, invoked the procedures created in the Stipulation allowing for a stay of the disciplinary trial and an investigation into the motivation of the disciplinary charges.

Likewise, Petitioner asserts that the counsel provided by the PBA was not independent but was rather "house counsel" to the PBA. Petitioner asserts that counsel is financed and retained by the PBA for the defense of the PBA and its members. Counsel is provided by the PBA for various matters including but not limited to disciplinary proceedings. Petitioner maintains that she at no time chose, or was given an opportunity to choose, her counsel.

DISCUSSION

As in our previous decision in this matter, we need not decide whether the Union, as exclusive certified bargaining agent, has any obligation under any contractual provision or the NYCCBL to provide representation to its members in the statutorily mandated police disciplinary process which has been held by the Court of Appeals in *Matter of Patrolmens Benev. Assn. v. Pub. Empl. Rel. Bd.*, 6 N.Y.3d 563 (2006), to constitute a prohibited subject of bargaining. *James-Reid*, 77 OCB 29, at 13, citing, *Thomas*, 59 OCB 37, at 9-10 (BCB 1997) (absent contractual or statutory obligation, no

duty to provide representation in disciplinary proceedings). In this case, where the evidence establishes that the PBA in fact provides representation in disciplinary proceedings to its members by selecting and paying counsel, whose continued retainer is subject to renewal on an annual basis, the provision of such representation, whether voluntary or mandated, acts to trigger an obligation to do so in a fair and non-discriminatory manner.

This Board has repeatedly held that "a union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do, but where it assumes such an obligation, that union violates the duty of fair representation" if it renders its services in a manner that is "arbitrary, discriminatory, or in bad faith." *James-Reid*, 77 OCB 29, at 13, quoting *Thomas*, 59 OCB 37 at 10; citing *Edwards*, 65 OCB 35, at 9 (BCB 2000) (same); *Castro*, 65 OCB17, at 3-4 (BCB 2000); *Lopez*, 59 OCB 31, at 9-10 (BCB 1997); *Krumholz*, 51 OCB 21, at 14-15 (BCB 1993). That assumed duty can be carried out by the union through counsel, union delegates or other union representatives. *James-Reid*, 77 OCB 29, at 15-18, (considering such claims regarding representation provided by counsel, union delegates and trustees at disciplinary trial).

In the instant case, while the attorney in question testified unequivocally that he did not take direction from the PBA in representing Petitioner, he was equally unequivocal in his testimony before the Trial Examiner that his representation was in his capacity "as a PBA attorney" and not as her "personal" attorney. Moreover, counsel testified, he did so as part of a plan paid for directly by the PBA, which required his firm, a firm entirely dedicated to representation of the PBA and its individual members based on their status as members of the PBA, to provide representation directly to members of the PBA by virtue of such membership in any disciplinary case relating to on-duty

conduct, and which provided such representation as a matter of course in charges arising from off-duty conduct. Indeed, at each of the GO-15 interviews and the mitigation hearing, the attorney identified himself as "PBA counsel." Under these circumstances, we find that the Petitioner established that the PBA took upon itself the burden of representing her at her disciplinary trial, and sought to carry that burden through appointing the WL & L to discharge that limited duty. *James-Reid*, 77 OCB 29, at 13-15.

As we have previously held, "representation provided to a member by a designee of a union may be the predicate of a claim that the duty of fair representation has been breached, on the theory that the union, having appointed an agent to fulfill its duty, is properly held responsible for any resultant breach of that duty." *Sicular*, 77 OCB 33, at 13-14 (BCB 2007) (disciplinary representation provided by self-standing law firm under retainer evaluated under duty of fair representation standard), quoting *James-Reid*, 77 OCB 29, at 15; *see also Del Rio*, 75 OCB6, at 13-14 (BCB 2005); *Hassay*, 71 OCB 2 (BCB 2003) (union delegate as agent); *Grace*, 55 OCB 18 at 7-8 (BCB 1995). As we explained in *Sicular*, "[s]uch a claim properly evaluates the attorney's behavior under the same standard as would apply to any other claimed breach of the duty of fair representation. " 79 OCB 33, at 14, citing *James-Reid*, 77 OCB 29 at 15-17; *Green*, 65 OCB 34, at 9 (BCB 2000) (no evidence that attorney at discipline hearing "acted in a manner that could be classified as arbitrary, discriminatory or in bad faith"); *Reid*, 67 OCB 21, at 9-9 (BCB 2000); *Gertskis*, 77 OCB 11, at 10-12 (BCB 2006). Indeed, in *Green*, the forum in which the alleged breach of the union's duty of fair representation through an attorney took place was the same Police Department Disciplinary Unit involved here. *Id.*; *see also James-Reid*, 77 OCB 29, at 16.

The fact that counsel is not a direct employee of the PBA does not change the analysis. *See, e.g., Sicular,* 79 OCB 33, at 12-13 (applying standard duty of fair representation analysis to claimed inadequate representation where union referred matter to its legal counsel); *James-Reid*, 77 OCB 29, at 16. Nor does the existence of a separate congeries of fiduciary duty between Petitioner and the counsel provided her by the Union alter the outcome as to the Union. *James-Reid*, 77 OCB 29, at 15-16 (considering duty of fair representation claim and dismissing without prejudice claim against attorney as outside of NYCCBL). We have recently had occasion to reaffirm, "it is well settled that, in the context of a labor union's acting in its representative capacity, the scope of its 'fiduciary duty' is defined by the contours of the duty of fair representation." *Finer*, 1 OCB2d 13, at 10 (BCB 2008), quoting *Arizaga v. NYC Health & Hosp. Corp.* 96 A.D.2d 457, 457-458 (1st Dept. 1983); *see generally Gorga v. Amityville Teachers Assn.*, 9 Misc3d 112a, 808 N.Y.S.2d 817 (Sup. Ct. Suff. Co. 2005) (citing cases). Accordingly, the Petitioner has established that, on the evidence presented, the PBA can properly be deemed liable for a breach of the duty of fair representation stemming from the purported inadequacies of the representation provided her, and the only question remaining is whether the actions complained of amounted to such a breach.

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." In the context of providing representation at disciplinary hearings, we have consistently "required a showing that the Union's actions here were arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, 77 OCB 29, at 16, citing, *inter alia*, *Burtner*, 75 OCB 1, at 13-14 (BCB 2000); *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004); *see also, Okorie-Ama*, 79 OCB2d 5, 14

(BCB 2007); *Samuels,* 77 OCB 17, at 12 (BCB 2006)*; Del Rio,* 75 OCB 6, at 12 (BCB 2005); *Whaley,* 59 OCB 41, at 12 (BCB 1997) 12; *see generally Vaca v. Sipes,* 386 U.S. 171, 177 (1967) (same standard under federal National Labor Relations Act). As we informed the parties in denying the motion to dismiss:

> The burden of establishing a breach of the duty of fair representation cannot be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union. *Gertskis*, at 11, *citing, inter alia, Grace*, 55 OCB 18, at 8 (BCB 1995); *see also, Whaley*, 59 OCB 41 (BCB 1997). In short, petitioners "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Gertskis, supra* at 11, *citing Schweit*, 61 OCB 36, at 15 (BCB 1998). Even gross negligence does not breach the duty of fair representation. *Id.* at 12-13; *CSEA v. Public Employees' Relations Board and Diaz*, 132 A.D.2d 430, 432 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988); *Brockington, supra*.

77 OCB 29, at 16-17 (editing marks omitted).

At the hearing herein, Petitioner has complained of three alleged deficiencies in the representation she received: failing to claim preclusive effect on the question of whether the disciplinary action against Petitioner was motivated by discrimination; failing to seek a stay of the disciplinary hearing pursuant to the Stipulation; and entering a guilty plea against Petitioner's wishes and instructions. None of these purported deficiencies has been established on the record before this Board.

First, the terms of the Stipulation and the Final Order clearly do not support a claim that they act to preclude the City from denying that the instances of discipline Petitioner complains of were motivated by discrimination. The Stipulation clearly recites that neither the City nor the NYPD admitted liability or that they had taken action that constitutes discrimination. Moreover, the

Stipulation created a process by which class members whose disciplinary trials were ongoing could request evidence to support their claims of discriminatory discipline, or a stay of the disciplinary trial pending an investigation by the OEEO as to whether they had been the victims of discriminatory discipline. Neither of these remedies would serve any purpose if the Stipulation was intended by the parties to constitute an adjudication that the individual officers had in fact been subjected to discriminatory discipline; the officers would be seeking a review or evidence to confirm what had already been authoritatively determined. Therefore, the parties could not reasonably be deemed to have intended such a result. *See, e.g., Herzfeld v. Herzfeld*, 50 A.D.3d 851 (2d Dept. 2008) (in construing stipulation of settlement, "the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized").

More fundamentally, the Final Order "dismissed with prejudice" the class members' claims that they had been subject to discriminatory discipline. The effect of this provision, the federal courts have held, is to preclude officers within the certified class from asserting discrimination claims that were the subject of the LOA Action or could have been raised in that action. *Henry v. City of New York*, 2007 U.S. Dist. LEXIS 24763 at ** 5-8 (E.D.N.Y. March 30, 2007) (Johnson, J.); *Gonzales v. City of New York*, 396 F. Supp. 2d 411, 415-418 (S.D.N.Y. 2005); *compare Powers v. City of New York*, 2007 U.S. Dist. LEXIS 27704 (E.D.N.Y. March 30, 2007) (Garaufis, J.) (LOA Action preclusion did not apply to claims that were not and could not have been asserted as a part of that action).

These rulings are standard applications of the doctrine of *res judicata*, which, as the court in

Gonzales explained, applies when:

> (1) the prior decision was a final judgment on the merits, (2) the litigants were the same parties, (3) the prior court was of competent jurisdiction, and 4) the causes of action were the same. *Corbett v. MacDonald Moving Servs., Inc*., 124 F.3d 82, 87-88 (2d Cir. 1997) (citing *In re Teltronics Servs., Inc*., 762 F.2d 185, 190 (2d Cir. 1985)). Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Monahan v. City of New York Dept. of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000)

Gonzales, 396 F. Supp.2d at 415; *see Howe*, 77 OCB 32, at 7 (BCB 2006) (same; construing New York State cases).

It is well established that "a dismissal with prejudice arising out of a settlement agreement operates as a final judgment for *res judicata* purposes." *Gonzales*, 396 F. Supp.2d at 415; *Powers, supra* at *10, quoting *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 287 (2d Cir. 2002). Moreover, a "dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant," who is deemed to be the "prevailing party" as a matter of law. *Ninox TV Ltd. v. Fox Entmt. Group*, 2006 US Dist. LEXIS 38868 (S.D.N.Y. June 13, 2006) at *4, quoting *Nemeizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986). The preclusive effect of the dismissal is limited to the plaintiff whose cause of action is dismissed–in this case, Petitioner.

None of the parties have challenged the jurisdiction of the court to enter the settlement in the LOA Action, nor is it contested that the claims of discriminatory discipline asserted by Petitioner before the Board are the same as those asserted by her in the LOA Action. Thus, all the elements of claim preclusion have been established, and we hold, as did the federal courts in *Gonzales* and *Henry*, that the dismissal with prejudice precludes Petitioner from reasserting her claims, not the City from

denying them. *Id.* As we held previously in *Sicular*, a "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." 77 OCB 33, at 15; citing *James-Reid*, 77 OCB 29, at 18; *Gibson*, 29 OCB 13, at 4 (BCB 1982) (union's reasoned decision that proceeding with a grievance would be fruitless could not constitute a breach of the duty of fair representation). Accordingly, Petitioner's counsel, and thus the PBA, cannot be faulted for not claiming a preclusive effect in favor of Petitioner for the Stipulation when it clearly had no such impact, but rather the reverse. *Id.*

Petitioner's claim that the failure to seek a stay of the disciplinary proceedings pending an investigation by the OEEO as to whether the disciplinary charges were motivated by discrimination constituted an error so egregious as to constitute a breach of the duty of fair representation is likewise unavailing. As a threshold matter, Petitioner's claim fails to view the representation as a whole, which informs our analysis. Counsel's concededly effective representation of her at the GO-15 interviews, and his offer to represent her in an Article 78 review of the resultant termination militate against a finding that the representation lacked good faith, or was perfunctory. Absent any evidence of discriminatory animus or malice on the part of either counsel or the PBA, for a single act or omission to render representation violative of the duty would, at a minimum, require it to be particularly egregious or lacking in any defensible strategic motivation, such that it could be properly deemed "discriminatory, arbitrary or perfunctory." *See James-Reid*, 77 OCB 29, at 16; *Okorie-Ama*, 79 OCB2d 5, at 14; *Samuels,* 77 OCB 17, at 12.

In this case, Petitioner has not rebutted or challenged the reason put forward for the failure to

seek a stay and OEEO investigation of the motivation underlying the charges and that reason suffices. Petitioner admitted both at the GO-15 interviews and on the record here that she had performed the acts that formed the basis of the charges, including those arising out of the MCU Incident. Thus, counsel concluded, the bringing of true charges could not be successfully contested as an act of discrimination. Absent affirmative evidence, lacking here, that similarly situated individuals who were outside of the class were not brought up on charges, this contention is unremarkable.

By contrast, counsel testified that his firm maintained a database of all charges brought against PBA members and the outcomes of their cases, and that his review of the database established that the Commissioner had imposed the penalty of termination in a non-discriminatory manner in similar cases. Petitioner did not adduce any evidence of comparable cases that had resulted in lesser penalties, nor did she raise any claim of flaws in the law firm's database or its analysis. Additionally, counsel testified without contradiction that the Commissioner viewed officers who had engaged in behavior such as that with which Petitioner was charged as particularly offensive, as exploiting a tragedy, the terrorist attack on September 11, 2001.

As we held in *Sicular*, "even if the Union's legal assessment was erroneous, the pleadings do not show that this exercise of its legal and strategic judgment violated its duty of fair representation." 79 OCB 33, at 16, quoting *Gertskis*, 77 OCB 11, at 12, 12-13. In this case, Petitioner has not even adduced grounds upon which we could conclude the decision was erroneous, and thus has clearly failed to carry her burden of proof.

The Petitioner's remaining claim, that she did not agree to plead guilty to the charges, but believed that counsel would defend her while admitting the underlying actions, is not supported by

credible evidence. First, Petitioner herself admitted that she heard Commissioner Vinal and her attorney discuss the plea, and that Commissioner Vinal "said that they [counsel and Commissioner Vinal] had a bench conference and Stu London told him I was pleading guilty." (Tr. 191). Petitioner further admitted that Commissioner Vinal told her that he would "conduct an allocution of [Petitioner] and then [Petitioner] will testify in the mitigation [of] the misconduct she's pleading guilty to." (*Id.*). Petitioner, admitting these statements were made, dismissed them as "lawyer's talk" and stated "I was admitting to the actions," but not pleading guilty. Although Petitioner's characterization of these events differs substantially from her testimony as to the specific details, Petitioner did not object to the proceedings, did not evince any confusion or lack of understanding, and was told at the beginning and end of the hearing that it was the Deputy Commissioner for Trials' understanding that she was pleading to all of the specifications except one, as to which she was admitting the facts but not that the behavior charged constituted misconduct.

Second, the evidence adduced by Petitioner from her former attorney squarely contradicted her claim; he testified credibly that he had advised her that she should plead guilty to the specifications, except for that arising out of her failure to report to the precinct the bullet piercing her windshield, as to which she admitted the conduct but denied it constituted misconduct. Indeed, Petitioner admits that this was her understanding of the advice of her counsel, and that she has come to disagree with that advice. Such a disagreement, or dissatisfaction with the outcome of the proceeding does not, of course, constitute grounds for a claim of the breach of the duty of fair representation. *James-Reid*, 77 OCB 29, at 16-17

Petitioner's suggestion that counsel implied that he secured a "deal" other than that offered

at the negotiation stage, in which she was offered an opportunity to separate is likewise incredible. Petitioner's own testimony is that she rejected an offer as invalid because it was not reduced to writing at the negotiation stage, but then asserts that she did not protest as her counsel entered a guilty plea because she believed a deal had been concluded by which she would save her job by "admitting to the actions."

Most significantly, Petitioner did not testify that her counsel, counsel for the NYPD or Commissioner Vinal made any such representation that if she admitted her actions, she would retain her job. Rather, Petitioner relies on his advice that she seek to mitigate her behavior by placing it in context and emphasizing her lack of malicious intent, and seeks to infer from it a plea agreement dramatically better for her than that she previously rejected. This testimony is inherently illogical, does not comport with the transcript of the mitigation hearing, at which the NYPD sought termination, and Petitioner's counsel opposed so drastic a penalty. Counsel's testimony that his advice was directed at maximizing Petitioner's chance of retaining her position is both inherently more credible and is, unlike Petitioner's, consistent internally and consistent with the transcript.

In reaching this determination, we note that Petitioner's inconsistent, shifting testimony on a variety of subjects at the hearing is simply not credible, in contrast to the ample contrary documentation in the record, and the unrebutted testimony of her former counsel. By contrast, Petitioner's testimony was self-contradictory within minutes, on occasion, as well as at odds with her prior testimony in the mitigation hearing, the GO-15 interviews, and her submissions to the Special Masters. In view of the inherent implausibility of her account, the wealth of contradictory statements by Petitioner, and the admission of the key elements of the PBA's account made by Petitioner when confronted by her own prior inconsistent statements, we decline to credit her

testimony on this issue, and adopt instead that of counsel. It is simply not credible that an experienced police officer, one who had by her own testimony been subject to discipline on more than one occasion in the Trial Room, would not understand the meaning of pleading guilty, with mitigation. *SSEU*, 79 OCB 34, at 13 (BCB 2007) (finding illogical, self-contradictory account proffered by party incredible); *People v. Hymes*, 2001 N.Y. Misc. LEXIS 429 (Sup. Ct. Queens Co. August 16, 2001) (logically incoherent testimony rejected as "incredible"); *see generally Corines v. State Bd. for Professional Med. Conduct*, 267 A.D.2d 796, 799-800 (3d Dep't 1999) (where explanation for alleged misconduct was "absurd," such explanation properly deemed "incredible").

Whether or not counsel's advice was optimal, what is clear is that Petitioner has only established her dissatisfaction with the outcome, and not that the representation she received was arbitrary, perfunctory or discriminatory. Accordingly, we grant the motion for judgment at the close of the Petitioner's case, and dismiss the improper practice proceeding.

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 motion for judgment at the conclusion of the petitioner's case in the improper practice proceeding docketed as BCB-2539-06 be, and hereby is, granted, and that the improper practice proceeding is hereby dismissed in its entirety.

Dated: New York, New York
July 30, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

Note: City Member M. David Zurndorfer and Impartial Member Carol A. Wittenberg recused themselves and did not participate in the decision in this case.