Gonzalez, 10 OCB2d 20 (BCB 2017)

(IP) (Docket No. BCB-4227-17)

Summary of Decision*:** Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to pursue his termination to arbitration and not challenging the City's failure to provide him with informal conferences on five disciplinary charges or to adhere to the time limits of the contractual grievance procedure. The City argued that his claims were untimely. The City and the Union also argued that Petitioner failed to state a claim for a breach of the duty of fair representation. The Board dismissed some of Petitioner's claims as untimely and found that Petitioner's timely claims did not establish that the Union breached its duty of fair representation. Accordingly, the improper practice petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ALFRED GONZALEZ,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 371 and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On August 1, 2017, Alfred Gonzalez, filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO, Local 371 ("Union") and the City of New York ("City").[1] Petitioner alleges that the Union breached its duty of fair representation in violation of

[1] Petitioner filed the petition *pro se,* and on October 11, 2017, retained a non-attorney consultant to represent him.

§ 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to pursue his termination to arbitration and not challenging the City's failure to provide him with informal conferences on five disciplinary charges or to adhere to the time limits of the contractual grievance procedure. The City argues that Petitioner's claims are untimely. The City and the Union also argue that Petitioner failed to state a claim for a breach of the duty of fair representation. The Board dismisses some of Petitioner's claims as untimely and finds that Petitioner's timely claims do not establish that the Union breached its duty of fair representation. Accordingly, the improper practice petition is dismissed.

BACKGROUND

Petitioner was employed at New York City Human Resources Administration ("HRA") for approximately 24 years. He worked as a Job Opportunity Specialist from December 14, 2001, to March 2, 2015, the date of his termination. The City and the Union are parties to a collective bargaining agreement, which covers the period March 3, 2010, to July 2, 2017, and currently remains in the *status quo* pursuant to NYCCBL § 12-311(d) ("Agreement"). Article VI, § 5, of the Agreement sets forth the procedure that governs a grievance for a claimed wrongful termination, which may culminate in arbitration ("Grievance Procedure").[2]

[2] Article VI, § 5 provides in relevant part that:

> Step [I]A
>
> Following the service of written charges, a conference with such employee shall be held with respect to such charges by the person designated by the agency to review a grievance at Step I of the Grievance Procedure set forth in this Agreement. . . . The person

> designated by the agency head to review the charges shall . . . issue a determination in writing . . . .
>
> Step [II]B(i)
>
> If the Employee is not satisfied with the determination [at] Step [I]A [ ] the Employer shall proceed in accordance with the disciplinary procedures set forth in Article 75 of the Civil Service Law . . . . As an alternative, the Union with the consent of the Employee may choose to proceed in accordance with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to Step IV of such Grievance Procedure. As a condition for submitting the matter to the Grievance Procedure the Employee and Union shall file a written waiver of the right to utilize the procedures available to the Employee pursuant to [§§] 75 and 76 of the Civil Service Law. . . .
>
> If an election is made to proceed pursuant to the Grievance Procedure, an Appeal of [the Step I determination. . . must be made in writing within five (5) work days of the receipt of the [Step I] determination. The agency head or designated representative shall meet with the Employee and the Union for review of the grievance and shall issue a determination to the Employee and the Union by the end of the tenth work day following the day on which the appeal was filed.
>
> Step [III]C
>
> If the grievant is not satisfied with the determination [at Step II], the grievant or Union may appeal to the Commissioner of Labor Relations within ten (10) days of the [Step II] determination. . . The Commissioner of Labor Relations shall issue a written reply to the grievant and the Union within fifteen (15) work days.

Step IV of the Grievance Procedure provides that "[a]n appeal from an unsatisfactory determination [ ] may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) work days of the receipt of" the Step [III] determination under Article VI, § 5. (City Ans., Ex. 2)

Petitioner's Disciplinary Record

Petitioner was disciplined seven times between 2003 and 2011 for being absent without prior approval and/or authorization ("AWOL"). These disciplinary penalties ranged from a five-day suspension to a 45-day suspension.[3]

Ultimately, Petitioner's termination resulted from six sets of disciplinary charges that cover alleged incidents of misconduct that occurred between July 30, 2012 and November 11, 2014. On October 7, 2013, Petitioner was charged with being AWOL from July 30, 2012 to August 8, 2012 ("Charge 1"); AWOL from October 15, 2012 to January 8, 2013 ("Charge 2"); and AWOL from March 1, 2013 to April 17, 2013 ("Charge 3"). On July 14, 2014, Petitioner was charged with submitting fraudulent doctor notes and violating HRA's confidentiality policy for accessing information about his relatives and himself in HRA's Welfare Management System database 121 times ("Charge 4"). Further, on August 22, 2014, Petitioner was charged with being AWOL from February 20, 2014 to April 2, 2014 ("Charge 5"). Finally, on December 9, 2014, he was charged with being AWOL between October 20, 2014 and November 11, 2014 ("Charge 6").

In each Step I determination of Charges 1 through 6 (collectively "Discharge Grievances"), the City found Petitioner guilty of the alleged misconduct and recommended the termination of his employment. The Union appealed the Step I determinations on Charges 1 through 5 to Step II, which resulted in Step II hearings that were attended by Petitioner and a Union representative. The Union asserts, and the City denies, that the Step I determination on Charge 6 was appealed to Step II. Although, Petitioner did not recall signing a waiver of his statutory disciplinary rights pursuant to § 75 of the Civil Service Law, the record reflects that he signed waivers for grievances on

[3] These disciplinary actions predate the disciplinary charges at-issue in Petitioner's duty of fair representation claim.

Charges 1 through 6. Between February 15, 2015 and March 2, 2015, the City denied the Union's appeals at Step II on Charges 1 through 5 and issued decisions affirming the recommended penalty of termination on each Charge. In addition, on March 2, 2015, the City issued a letter "affirming" each recommended penalty of termination on Charges 1 through 3. (City Ans. Ex. 17) On March 12, 2015, the City issued a revised letter, "affirming" each recommended penalty of termination on each of the six Charges.[4] (City Ans. Ex. 18)

The Union asserts, and the City and Petitioner deny, that on March 26, 2015, it appealed the Step II decisions on the each of the disciplinary charges to Step III of the Grievance Procedure.[5]

Unemployment Insurance Claim

On or about March 17, 2015, Petitioner filed a claim for unemployment insurance benefits for which he was deemed eligible. On April 14, 2015, the City appealed Petitioner's eligibility for unemployment benefits. The appeal resulted in an October 8, 2015, determination that Petitioner was ineligible for unemployment benefits because of "misconduct in connection with [his] employment." (City Ex. 21) Thereafter, Petitioner successfully appealed the unfavorable determination. In a March 4, 2016 decision ("Unemployment Appeal Decision"), an ALJ found that the doctor's notes that were, in part, the basis for Charge 4, "were not fraudulent" and that Petitioner "had good cause for his absences from March 1, 2013 through April 17, 2013 [(Charge 3)] and from February 20, 2014 through April 2, 2014 [(Charge 5])." (Pet. Ex. 1)

[4] While we do not have documentary evidence of an appeal of Charge 6 to Step II, we note that the City "affirmed" a Step II decision to terminate Petitioner on Charge 6 in its March 12, 2015 letter. (City Ans. Ex. 18)

[5] At the pre-hearing conference, Petitioner alleged that between March 2015 and 2017, the Union assured him on numerous occasions that it was appealing his disciplinary grievances to Step III.

Union's Decision on the Discharge Grievances

In mid-April 2017, over a year after receiving a favorable Unemployment Appeal Decision, Petitioner contacted the Union's Vice President of Grievances and Legal Services, who, according to Petitioner, assured him that the Union would appeal his termination to arbitration. According to the Union, the Vice President of Grievance and Legal Services informed Petitioner in mid-April 2017 that "the Union was considering whether . . . to appeal his discharge grievances to arbitration." (Union Ans. ¶17) In mid-May 2017, the Union decided not to appeal the Discharge Grievances to arbitration "based solely upon Petitioner's prior disciplinary record . . . and the Union's good-faith evaluation of Petitioner's Discharge Grievances" and advised Petitioner of its decision. (Union Ans. ¶ 17)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union breached its duty of fair representation when it proceeded to Step II of the Grievance Procedure on Charges 1-3, 5 and 6 without Petitioner's consent and waiver of his § 75 rights. Petitioner also claims that the Union denied him his due process rights and "violated [his] right to appeal the matter in accord with the [Grievance Procedure]" by not challenging the City's failure to provide him with an informal conference on Charges 1-3, 5 and 6, not challenging the City's failure to adhere to the Steps I and II time limits in the Grievance Procedure, and failing to appeal his Discharge Grievances to Step III. (Pet. Reply ¶ 71)

Petitioner also alleges that the Union breached its duty of fair representation by failing to arbitrate his termination. He asserts that the Unemployment Insurance ALJ's findings that his medical documentation was not fraudulent and that he had good cause to be absent during the time

the City claims that he was AWOL in Charges 3 and 5, is proof that he did not engage in the misconduct alleged by the City and required the Union to arbitrate his discharge.

Finally, Petitioner argues that his claims are timely because he filed the petition within four months of the date he became aware of the Union's decision not to pursue arbitration.

Accordingly, Petitioner requests that the Board grant the petition.

Union's Position

The Union argues that it did not breach its duty of fair representation. It asserts that Petitioner did not allege that the Union acted arbitrarily, discriminatorily, or in bad faith in its decision not to arbitrate his termination. Rather, the Union argues that its decision was "made in good faith and was reasonable under all the circumstances." (Union Ans. ¶ 19) It asserts that its decision was "based solely on Petitioner's extensive prior disciplinary record and the Union's good faith evaluation of the merits of his discharge grievances." (Union Ans. ¶ 17) Accordingly, the Union argues that the petition must be dismissed for failure to state a claim for which relief can be granted.

City's Position

The City argues that Petitioner's claims are untimely. It argues that his claims accrued on March 2, 2015, the date of his termination, and that any claims filed on August 1, 2017, are well beyond the four-month statute of limitations, and should be dismissed as untimely under NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[6]

[6] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a . . . public employee organization or its agents has engaged in or is engaging in an improper practice in

The City also argues that Petitioner did not plead facts that establish that the Union's decision not to appeal his termination to arbitration was "deliberately arbitrary, discriminatory, or founded in bad faith." (City Ans. ¶ 69) The City asserts that even if the ALJ's findings in the Unemployment Appeal Decision are a defense to some of the Charges, the basis for Petitioner's termination was not limited to the submission of fraudulent doctor's notes. It argues that the Union's decision was reasonable considering Petitioner's (1) prior disciplinary record, (2) pattern of violating HRA's time and attendance policies, (3) inappropriate use of HRA's Welfare Management System, and (4) that each of the six sets of disciplinary charges were a separate basis for termination. Under these circumstances, the City argues that Petitioner's disagreement and dissatisfaction with the Union's decision not to pursue arbitration does not amount to a breach of the duty of fair representation.[7]

Accordingly, the City requests that the Board dismiss the petition for failing to state a claim for which relief can be granted.

> violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or the date the petitioner knew or should have known of said occurrence.

OCB Rule § 1-07(b)(4) provides, in relevant part: "A petition alleging that. . . a public employee organization. . . has engaged in or is engaging in an improper practice violation of [§] 12-306(e) of the statue may be filed with the Board within four (4) months thereof. . . ."

[7] The City also argues that Petitioner has not plead any facts to establish a claim of retaliation or discrimination on the basis of union activity, in violation of NYCCBL § 12-306(a)(1) and (3). Because the Petitioner did not allege that the City took any actions motivated by union activity, we do not address this claim.

DISCUSSION

Petitioner did not identify the subsection(s) of NYCCBL § 12-306(b) alleged to be violated, thus we review the petition and construe it to allege violations of the duty of fair representation under NYCCBL § 12-306(b)(3) and (d). *See Seale*, 79 OCB 30, at 7 (BCB 2007). We find that Petitioner has not established that the Union violated NYCCBL § 12-306(b)(3) or (d). Therefore, we dismiss the petition.

As a preliminary matter, we find that any factual disputes over how the disciplinary charges were processed through the Agreement's Grievance Procedure "need not [be] resolve[d] . . . to decide the instant case. Rather, we are able to decide upon the record before us as the[se] factual disputes . . . are not material to the legal claims raised." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009) (citing *DC 37*, 79 OCB 37, at 8-9 (BCB 2007)). However, "[s]ince no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition [and reply] are true." *Morris*, 3 OCB2d 19, at 12 (BCB 2010).

First, we address the timeliness of Petitioner's claims. *See* NYCCBL § 12-306(e); OCB Rule § 1-07(b)(4) (stating that a petition must be filed within four months of an alleged violation); *see also Nardiello*, 2 OCB2d 5, at 28 (timeliness is a threshold question). The statute of limitations regarding an alleged breach of a duty of representation runs from the date the employee knew or should have known that the Union "allegedly acted or failed to act on the petitioner's behalf." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept 12, 2003) (Beeler, J.). Any claims prior to "the four month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007).

Since the petition was filed on August 1, 2017, all claims arising more than four months prior to that date are untimely. Thus, to the extent Petitioner seeks to raise claims including, but not limited to actions or omissions by the Union or the City in the processing of Petitioner's disciplinary grievances through Steps III of the Grievance Procedure, all of which occurred between 2013 and 2015, such claims are time-barred. However, we find timely Petitioner's claim in connection with the Union's decision not to arbitrate his termination, which was communicated to Petitioner within four months of his filing the instant petition. *See Mora-McLaughlin,* 3 OCB2d 24, at 12 (BCB 2010) (finding that the time to file a duty of fair representation claim accrues from the Union's communication of its decision not to appeal a disciplinary action).

Pursuant to NYCCBL § 12-306(b)(3), "[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." With regard to the processing of employee grievances, "it is well-settled that a union does not breach its duty of fair representation merely because it refuses to process every complaint made by a unit member. The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and non-discriminatory." *Reid*, 65 OCB 21, at 8 (BCB 2000). The burden of pleading and proving a breach of this duty lies with the petitioner, and "a grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation alone does not constitute a breach of the duty of fair representation." *D'Onofrio*, 79 OCB 3, at 19 (BCB 2007). Indeed, to meet this initial burden, a petitioner must "allege more than negligence, mistake or incompetence" because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Evans,* 6 OCB2d 37, at 8 (BCB 2013); *see also Smith*, 3 OCB2d 17 (BCB 2010).

We find that the Union satisfied its duty of fair representation. The record establishes that the Union represented and processed grievances on Charges 1 through 6 on Petitioner's behalf, at a minimum, at Step I and Step II of the Grievance Procedure.[8] Thereafter, it is undisputed that Petitioner contacted the Union in mid-May 2017 and sometime thereafter the Union reviewed his cases and advised him of its decision not to appeal his termination to arbitration. Petitioner does not offer any basis to dispute that the Union's decision not to pursue the grievances was "based solely upon Petitioner's prior disciplinary record . . . and the Union's good-faith evaluation of Petitioner's discharge grievances". (Union Ans. ¶ 17) It is within the Union's discretion to conclude that it could not successfully appeal the discharge and decline to pursue further action on Petitioner's behalf. Here, Petitioner disagrees with the Union's conclusion. However, this Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21 (BCB 2008) (citations and editing marks omitted).

Moreover, a different finding is not warranted even if the Union had initially assured Petitioner of its intent to arbitrate the Discharge Grievances on or before mid-April 2017. A Union does not violate the duty of fair representation if it changes its mind about pursuing a grievance. *See Garces*, 9 OCB2d 8, at 9 (BCB 2016). Petitioner offers no bad faith, arbitrary, or discriminatory reason for the Union's subsequent decision not to proceed to arbitration. In the absence any such allegations, we find that the Union did not breach its duty of fair representation. *See Sicular*, 79 OCB 33, at 13 (BCB 2007) (finding that a union's decision not to pursue a

[8] Petitioner's assertion that he did not waive his § 75 rights on Charges 1-3, 5 and 6 is inconsistent with the evidence in the record. Even were we to accept Petitioner's allegations regarding the waivers, it would not support the improper practice charge. The Agreement expressly required Petitioner to waive his § 75 rights to proceed to arbitration. In the absence of these waivers, the Union could not proceed to arbitration and therefore had no duty to appeal these Charges to arbitration. *See D'Onofrio*, 79 OCB 26, at 12 (BCB 2007) (finding that a union's failure to pursue or advise a grievant of their § 75 rights does not violate a union's duty of fair representation).

grievance based on a good faith evaluation of the merits of a grievance does not violate the duty of fair representation).

Finally, we also reject Petitioner's assertion that the Union should have pursued arbitration on Charges 3, 4 and 5 (or any of the other charges) based on the ALJ's findings in his unemployment insurance appeal. In a similar case, the Board held that a Union's failure to progress a grievance despite a favorable decision in an unemployment insurance appeal did not violate its duty of fair representation. *See Jenkins*, 57 OCB 34, at 2, 9 (BCB 1996) (decision not to challenge an employee termination for tardiness and absenteeism despite a favorable decision granting unemployment benefits did not violate duty of fair representation). In addition, here, Petitioner's termination was not limited to the allegations of misconduct addressed in the ALJ's findings. The Unemployment Appeal did not address the allegations in Charges 1, 2, portions of 4, or 6, and Petitioner does not otherwise dispute any of the allegations contained in these Charges, each one of which, considered alone, may have been sufficient grounds for discharge by the City.

Consequently, we find that the Union's decision not to arbitrate Petitioner's termination was not arbitrary, discriminatory, or in bad faith and dismiss the instant improper practice petition in its entirety.[9]

[9] Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Raby*, 71 OCB 14, at 13.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-4227-17, filed by Alfred Gonzalez against District Council 37, AFSCME, AFL-CIO, Local 371 and the City of New York is hereby dismissed in its entirety.

Dated: December 14, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROLE O'BLENES
MEMBER

DANIEL F. MURPHY
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER