Banerjee, 3 OCB2d 15 (BCB 2010)

(IP)(Docket No. BCB-2780-09)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation under the NYCCBL by failing to arbitrate a wrongful discipline grievance arising out of the termination of her employment and that HHC retaliated against her earlier out-of-title grievance. The Union contended that, because a Court of Appeals decision vitiating contractual provisions affording disciplinary grievance rights to provisional employees such as Petitioner rendered impossible the arbitration of Petitioner's disciplinary complaint, it could not be deemed to have breached its duty to her by not pursuing such an arbitration. HHC asserted that Petitioner failed to allege sufficient facts to demonstrate that either the Union breached its duty of fair representation in the handling of the grievance, that the petition is untimely as to it, or that HHC retaliated against her. Because the Board finds that Petitioner's claim is untimely as to HHC and fails to allege facts sufficient to state a claim under the NYCCBL as to the Union, the petition is dismissed in its entirety. **(Official decision follows.)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

MUKTI BANERJEE,

Petitioner,

-and-

LOCAL 1199, SERVICE EMPLOYEES INTERNATIONAL UNION,
Respondent,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On July 6, 2009, Mukti Banerjee ("Petitioner") filed a verified improper practice petition

alleging that Local 1199, Service Employee International Union ("Union" or "Respondent") violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b)(3).[1] Petitioner, a provisional employee, alleges that the Union breached its duty of fair representation under the NYCCBL by failing to seek arbitration of her grievance arising from the termination of her employment by the New York City Health and Hospitals Corporation ("HHC"). The Union contends that the petition is barred, in whole or in part, by the four-month statute of limitations applicable to improper practice claims under the NYCCBL, and further, that its decision to not pursue arbitration of Petitioner's grievance was not arbitrary, discriminatory or in any other way violative of its duty of fair representation, particularly in view of the New York State Court of Appeals' authoritative ruling that contractual provisions purporting to grant provisional employees disciplinary grievance rights were void as contrary to public policy. HHC similarly asserts that Petitioner's claims are time-barred, do not establish a breach of the duty of fair representation, and that, as pleaded against HHC, do not allege facts sufficient to establish that her termination was the result of retaliation for protected activity. The Board finds that the petition is untimely as to HHC and fails to allege facts sufficient to state a claim as to the Union; accordingly, the Board denies the petition in its entirety.

BACKGROUND

On October 1, 2001, HHC hired Petitioner as a provisional employee in the title Laboratory

[1] Subsequent to the *pro se* filing of the petition by Petitioner, Robert Burzichelli, Esq., filed an amended petition. The amended petition adopts the factual allegations of the *pro se* petition, but re-pleads the causes of action, continuing its paragraph numbering from that of the original petition. References to the amended petition are designated "Am. Pet."

Microbiologist, assigned to Bellevue Hospital. By June 2003, Banerjee had attained Level II of her title. From then until March 2006, she performed work commensurate with the level of difficulty of the higher title Associate Laboratory Microbiologist, Level I. She filed an out-of-title grievance, docketed as A-11183-05, for the difference in salary, and on March 7, 2006, the parties agreed to settle this claim by compensating Banerjee the difference between the salary of her appointive title and that of the higher level title for the period of time from June 26, 2003, through March 7, 2006.

Banerjee alleges that in May 2006, not long after she received the compensation for the out-of-title work, she received a letter from "the administration" directing her not to continue to perform out-of-title work. (Pet. ¶¶ 2, 5). She contends that, even after the parties' stipulation settling her grievance, she "had no choice but to continue doing [out of title work] just as before," because of "long-drawn, difficult procedures [which] followed and many complexities in the clinical tests performed in [the] lab," in her view, necessitating "all the extra work." (Pet. ¶ 2). She further asserts that, during this period, "supervisor retaliation and harassment started." (Pet. ¶ 3). For example, Banerjee asserts that other employees in her unit were permitted to take personal phone calls but that she was not. (Pet. ¶ 7). She asserts that she was not permitted to take vacation to observe a religious holiday and that she was verbally attacked in front of the other technicians over this time and leave matter. (Rep. Attachment, Letter dated Oct. 9, 2007.) Banerjee further asserts that her Union representative "tried to talk to [her] supervisors many times, but failed." (Pet. ¶ 3.)

In June 2006, Banerjee filed another out-of-title grievance. On August 2, 2006, Banerjee met with her Union representatives for 15 minutes. She alleges that rather than having her leave bank charged for the 15 minutes, she was erroneously charged an entire day's time. (Pet. Ex. E, p.1.) She alleges that, when she attempted to discuss the matter with her immediate supervisor, that

supervisor hung up on her before they concluded the conversation.

On August 29, 2006, Banerjee was counseled in a meeting with the assistant director of the Bellevue pathology department. Banerjee asserts that she brought several examples of what she calls "continuous harassment and mistreatment" to the assistant director's attention. She asserts that she attempted to dispute the charges against her, including failure to follow laboratory policy, insubordination, excessive errors, and abuse of time and leave rules. Nevertheless, Banerjee agreed to make an effort to comply with applicable protocols, rules and regulations.

From February through August 2007, Banerjee's supervisor allegedly observed several incidents in which she allegedly failed to follow laboratory protocols and procedures, procedures for filing reports, and procedures for updating lab inventory, among other things. (HHC Answer, Ex. 6). For her part, Banerjee contends that she continued to experience workplace harassment by her immediate supervisor motivated she alleges, by her resort to the grievance process and Union assistance. By letter dated July 16, 2007, to the assistant director who counseled her in August 2006, Banerjee complained that her immediate supervisor was refusing to meet with the Union representative about repeated directives from the supervisor to work past her normal work hours in order to handle tasks Banerjee thought could be completed the next day. Banerjee complained to the assistant director that her immediate supervisor had labeled Banerjee as "argumentative" and insubordinate. (Pet. Ex. D, ¶ 1.)

On August 17, 2007, HHC suspended Petitioner from employment. On August 27, 2007, Bellevue Hospital Labor Relations served her with disciplinary charges alleging poor work performance, misconduct and insubordination, alleging that, among other things, she neglected to perform her assigned duties and follow supervisory instructions, from February through August

2007. The penalty sought was termination.

On September 6, 2007, a Step 1A conference was held to address the work performance and insubordination charges. The Union sought a reduction in the disciplinary penalty and reinstatement of Banerjee to her position as a provisional Laboratory Microbiologist, Level II, on the ground that the employer had not adduced sufficient evidence of deficient work performance and on the ground that HHC had not complied with progressive disciplinary steps which would have permitted Banerjee to address the complaints against her. On September 20, 2007, the Step 1A decision upheld the charges and the recommended penalty of employment termination. A Step II conference was held on November 26, 2007, and the Step II decision affirming the Step IA finding and recommendation of termination was issued on December 7, 2007.

On January 14, 2008, the Union appealed for a Step III review, including but not limited to asking for reinstatement. The Union asserts that it told Banerjee on or around January 14, 2008, that it would continue to appeal the matter but that there would be little chance of proceeding to arbitration because of the ruling of the New York Court of Appeals in *Matter of City of Long Beach v. Civ. Serv. Empl. Assn.*, 8 N.Y.3d 465 (2007) (invalidating as contrary to public policy contractual provisions affording disciplinary arbitration rights to provisionally appointed public employees).[2] In response to *City of Long Beach*, the New York State Legislature enacted, effective January 28,

[2] The petition and amended petition are internally inconsistent. Petitioner alleges in her letter of June 2, 2009, to Union President George Gresham, attached to the petition as originally filed, that Union Organizer Joan Carter told Banerjee, "nearly two months ago," that is, approximately in late *circa* March or April, "that as I am a [p]rovisional [e]mployee I won't be able to get arbitration." (Pet. Ex. B.) On the other hand, Banerjee alleges, in the petition as originally filed, that it was not until August 7, 2009, that Carter wrote to her that "[d]uring the time we were seeking an arbitration date, we discovered that HHC has adopted a policy of not allowing provisional employees to utilize the grievance process," because of *City of Long Beach*. (Pet. Ex. B.) The amended petition reiterates this assertion. (Am. Pet. ¶ 46.)

2008, a new subsection (g) of § 65 (Provisional appointments) of the New York State Civil Service Law ("CSL"). Entitled "Agreements governing disciplinary procedures," the new subsection pertains to unions and agencies for which the Department of Citywide Administrative Services ("DCAS") administers Civil Service examinations for hiring and promoting employees.[3] The new subsection (g) provides, in pertinent part:

> any DCAS employer and an employee organization . . . may enter into agreements to provide disciplinary procedures applicable to provisional appointees or categories thereof who have served for a period of twenty-four months or more in a position which is covered by such an agreement . . . Any such agreement may apply upon the effective date of the chapter of the laws of [2007] which added this subdivision, and during the timely submission, approval and implementation of a plan in accordance with [a plan such as the DCAS plan for reducing the number of appointments beyond the statutory period allowed for provisionals; see below], and shall not apply to any provisional employee serving in a position for which an appropriate eligible list has been established pursuant to a plan approved in accordance with this subdivision unless such list is not adequate to fill all positions then held on a provisional basis or is exhausted immediately following its establishment.[4]

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[3] Such agencies are called "DCAS employers" and are defined, in CSL § 65, subsection 5, in pertinent part, as follows:

> (i) the city of New York; and (ii) any other entities whose civil service and examinations are administered by the New York city [DCAS], and who opt to participate in this section by written notice to the state [Civil Service] commission within thirty days of the effective date of this subdivision. . . .

Section 2.5 of the Personnel Rules and Regulations of the City of New York, promulgated by DCAS, provides as follows:

> These rules apply to all offices and positions in the classified service of the city including offices and positions in the New York City housing authority, New York City transit authority, triborough bridge and tunnel authority, New York City board of education, and the offices of all district attorneys and all public administrators within the City of New York.

[4] The Sponsors' memorandum in support of the measure states, at § 3, any agreement entered into as a result of the added subsection (g) "may include protections for provisional employees who were covered, prior to [January 28, 2008], by agreements similar to those authorized by such paragraph. Any agreement entered into pursuant to such paragraph may

The memorandum of the amendment's sponsors states, in part, that an agreement entered into as a result of the added subsection (g):

> may include protections for provisional employees who were covered, prior to [January 28, 2008], by agreements similar to those authorized by such paragraph. Any agreement entered into pursuant to such paragraph may include, but shall not be limited to, the appropriate arbitration, adjudication or other disposition of disciplinary or other matters concerning provisional employees that were pending on the effective date of this act.

In addition to agencies specified in § 2.5 of the DCAS Rules and Regulations, the New York City Municipal Water Finance Authority and certain pension systems have opted to permit DCAS to administer the civil service system covering their employees.[5] HHC is not referenced in either § 2.5 of the DCAS Personnel Rules and Regulations or the DCAS plan addressing provisional appointments.[6]

The Union continued to work on Banerjee's behalf with respect to her contract grievance and,

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include, but shall not be limited to, the appropriate arbitration, adjudication or other disposition of disciplinary or other matters concerning provisional employees that were pending on the effective date of this act."

[5] We take notice of the letter dated March 28, 2008, from Martha K. Hirst, DCAS Commissioner, to Nancy G. Groenwegen, Commissioner, New York State Civil Service Commission ("CSC") conveying a plan submitted pursuant to CSL § 65(5)(b) ("DCAS plan"). In response to *City of Long Beach*, this section of the CSL requires implementation within five years of approval by the state CSC of the DCAS plan to move a limited number of provisionally appointed employees into permanent positions, by means of, *e.g.*, examinations, establishment of eligible lists, and consolidation of titles through reclassification). At § 1.1.2, the DCAS plan identifies agencies which must comply with the plan.

[6] No other documentation is offered tending to establish that HHC is included within such DCAS Rules and Regulations or any plan or agreement for dealing with provisional appointments or their grievances in the wake of the Court of Appeals decision. Moreover, no factual allegations have been made suggesting any other source of authority empowering HHC to enter into such an agreement. Indeed, no factual basis has been provided upon which this Board could conclude that DCAS has been a party to any such agreement, let alone HHC.

on May 20, 2008, a Step III conference was held. On July 18, 2008, the Step III decision was issued, upholding the findings at Step II as well as the recommended penalty of termination. On August 18, 2008, the Union filed a request for arbitration with the Office of Collective Bargaining. The Union described the nature of the dispute as wrongful discipline, identifying the violation alleged to have been committed as a breach of the parties' collective bargaining agreement ("CBA"), specifically, Article I (Recognition) and Article VI (Grievance Procedure)(g).[7]

The Union alleges that, on or about the same day, Union Organizer Carter reminded Banerjee that *City of Long Beach* posed an obstacle to a successful outcome of the grievance. The Union alleges that, for the next several months, it nevertheless continued to call HHC to press for an arbitration date. The Union further alleges that HHC informed Carter that Banerjee's personnel file could not be located. The Union contends that Carter told Banerjee during this time that she believed that the reason behind the inaction was the Court of Appeals decision disallowing disciplinary grievance rights for provisional employees.

On March 18, 2009, the Union filed a second request for arbitration of the wrongful discipline grievance, this time, for expedited treatment. (Docket No. A-13048-09.) The Union asserts that from April 2008 to April 2009, in April 2009, HHC informed Carter that HHC could not find Banerjee's file but that Carter kept Banerjee informed of this fact and further that Carter

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[7] Article I of the Microbiologists' CBA, July 5, 2007, to August 4, 2009, memorializes HHC's recognition of the Union as the sole and exclusive collective bargaining representative for the bargaining unit including, but not limited to, employees in the title which Banerjee held throughout her employment with HHC.

Article VI defines a contractual grievance, in relevant part, as:

> A claimed wrongful disciplinary action taken against a provisional employee who has served continuously for two years in the same or similar title or related occupational group in the same agency.

believed that the reason behind the inaction was the Court of Appeals decision denying disciplinary grievance rights to provisional employees.

Early in April 2009, Petitioner wrote to Union President Gresham. By letter dated April 17, 2009, Gresham responded to her by referencing "your letter dated April 8, 2009, which I received on April 16, 2009."[8] In his letter, Gresham states, in pertinent part, as follows:

> In order to expedite a response, I have asked Neva Shillingford, Executive Vice President, to look into your concern and attempt to resolve it with you.
>
> If you have not received a response within one week, please feel free to contact my office at (212) 261-2273.

(Pet. Ex. B). Petitioner asserts that in May 2009, Carter told her that, "as I am a [p]rovisional [e]mployee I won't be able to get arbitration." *Id*. She related this to Local 1199 President George Gresham in a letter dated June 2, 2009, in which she told him about specific dates on which she spoke directly with Union representatives or officers, by phone or in person, about her grievance. In that June 2, 2009, letter to Gresham, Petitioner stated that on May 29, 2009, Carter "repeated the baseless assertion she gave me nearly two months ago that as I am a [p]rovisional [e]mployee I won't be able to get arbitration." *Id*. Petitioner insisted in the letter to Gresham that the collective bargaining agreement provides arbitration as a means of resolving contract grievances for public

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[8] No letter dated April 8, 2009, is included in the instant petition; however, a document in letter format appears at Petition Exhibit B, dated April 7, 2009, signed by Banerjee and addressed to Gresham. It appears to be the April 76, 2009, letter from Banerjee to Gresham. The letter references "Subject: Workplace harassment, retaliation and termination." In it, Banerjee states, "I am waiting for my arbitration, which my union rep has submitted on August 8th, 2009 . . ." The August 2009 date does not comport with the statement of the facts in ¶ 4(b) (nature of the controversy) of the petition as originally filed. The petition recites August 18 in the year 2008 as the date the Union filed for arbitration. Neither discrepancy – the April 2009 date of the Banerjee letter, and the date of the Union's filing for arbitration – is dispositive of the legal issues at bar.

employees "like me working for six years." *Id*. On August 7, 2009, Carter wrote to Petitioner reiterating the Union's determination, adding, "[a]lthough this Union does not particularly agree with the [C]ourt's ruling, all parties must adhere to it," and encloseing a copy of *City of Long Beach*.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union breached the duty of fair representation in the processing of her grievance which sought to appeal disciplinary action by HHC.[9] As to the procedural challenges to her complaint against the Union, she does not dispute that *City of Long Beach* precludes arbitration of disciplinary grievances by provisional employees; rather, she argues that, by virtue of the amendment to the CSL allowing such agreements provisionals, and by the Union's continuing to press HHC for arbitration of the contract grievance even after the Court's ruling, the Union and HHC, working together, created new disciplinary grievance rights of which she could avail herself, although such rights are not predicated upon the Microbiologists' CBA.[10] Petitioner asserts two theories under which she claims to be able to arbitrate her termination. First, Petitioner claims that the amendment to the Civil Service Law states that "the Legislature's amendment covered all pending arbitration, adjudication or other disposition of disciplinary matters concerning provisional

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[9] NYCCBL § 12-306(b)(3) states that it "shall be an improper practice for a public employee organization to breach its duty of fair representation to public employees under this chapter."

[10] The petition does not deny or dispute the requirement in the new subsection (g) of CSL § 65 that the parties to such an agreement must be "an employee organization"on the one hand and "any DCAS employer" on the other. The amended petition does not assert that HHC is such a DCAS employer or that it has opted to bring itself under the aegis of DCAS for the purposes of complying with court-ordered or statutory mandates pertaining to provisional employees.

employees as of January 28, 2008." (Am. Pet. at 3) (emphasis in original). Additionally, she claims that the parties' actions in this case establish their intention to reach an agreement retroactively affording disciplinary rights to provisional employees situated as were Petitioner:

> By utilizing the contractual grievance process from day one and continuing to use the contractual grievance process after the Legislature's amendment to § 65 demonstrates that the Union and HHC reached an agreement governed by CSL § 65(5)(g) which applied contractual grievance-arbitration protection to provisional employees.

(Am. Pet. ¶ 41).

As evidence of the Union's and HHC's putative agreement to reinstate disciplinary grievance rights for provisionals, Petitioner points to the following conduct by the Union and HHC: (i) the holding of a Step III hearing "in conformance with both the parties' prior actions and [assertedly] the recent amendment to § 65(g) of the [CSL]," (ii) "neither Respondent [Union nor HHC] argued that the Step III should not go forward as a result of the [*City of*] *Long Beach* decision," (iii) "OLR issued a Step III decision upholding Respondent HHC's decision to terminate Petitioner," and (iv) "[n]either the Union nor HHC ever indicated that Petitioner was not entitled to the contractual grievance process . . . ." (Am. Pet. ¶¶ 38, 39, 40).

As to the timeliness of the fair representation claim, the amended petition argues that the accrual of the applicable limitations period is August 7, 2009, the date of Carter's letter to Petitioner stating, allegedly "for the very first time," that City of Long Beach would preclude arbitration of the grievance which Petitioner sought and one month after the petition was originally filed. (Am. Pet. ¶ 46). Thus, Petitioner contends that the charge against the Union is timely.

As to the Union's alleged failure to respond to her attempts to engage it in a fuller discussion

of the grievance, Petitioner does not deny that the Union filed a request for arbitration of her wrongful discipline grievance on August 18, 2008, as well as a request for expedited arbitration on March 18, 2009. She also does not deny that a Union representative communicated with her about it on a number of occasions from the time that the grievance was filed through the date that the instant petition was filed in July 2009 and even up to August 7, 2009, when the Union representative put in writing the Union's explanation about the impact of *City of Long Beach*. Rather, she points to dates in 2009 (April 27, May 4, and May 8, 18, 25, and 29) when she either went to the Union offices seeking assistance or called a Union representative and allegedly failed to get a response. When petitioner wrote to Local 1199 President Gresham on June 2, 2009, she specified dates on which she admits that she actually did speak directly, by phone or in person, with Union representatives or officers about the grievance. In fact, she told Gresham in that letter that it was on one of the dates cited above (May 29, 2009), that Carter "repeated the baseless assertion she gave me nearly two months ago that as I am a [p]rovisional [e]mployee I won't be able to get arbitration." (Emphasis added.) Petitioner questions "how can [the Union] deny my allegations about the biased and unilateral decision against me especially when they themselves brought complaints of my supervisors' 'arbitrary and capricious' behavior." She asserts that the reasoning for the Union's conduct is "conflicting and contradictory." (Rep. at 5.)

With respect to HHC, the petition complains that Petitioner's supervisors initiated acts of "retaliation" and "harassment" in May 2006 shortly after Petitioner received compensation for the out-of-title grievance settlement that year. (Pet. ¶ 3.) After she filed another out-of-title grievance later that year, in June, she met with Union representatives on August 2, 2006, for 15 minutes but her leave bank was allegedly charged erroneously for an entire day. (Pet. Ex. E, p.1.) She alleges

that, when she attempted to discuss the matter with her immediate supervisor, the supervisor hung up on her before the conversation was concluded, conduct which she contends resulted from seeking the Union's assistance.

Petitioner asserts that, at a counseling session later that month, on August 29, 2006, she attempted to dispute work performance charges against her, including failure to follow laboratory policy, insubordination, excessive errors, and abuse of time and leave rules. She maintains that she could successfully defend against the charges, which she describes as harassment and mistreatment, if permitted to arbitrate the matter.

The amended petition asserts that, by HHC's conduct in processing the grievance as if Petitioner had disciplinary grievance rights, assertedly without telling her to the contrary, HHC has effectively agreed to such grievance rights. HHC's failure to permit her to avail herself of those rights violates NYCCBL § 12-306(a)(1) and (3).[11] The amended petition contends that the petition

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[11] 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 § 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (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. . . .

Section 12-305 provides, in pertinent part, as follows:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

The amended petition also asserts a violation of § 12-306(a)(2). That section provides that it shall be an improper practice by a public employer or its agents "to dominate or interfere with the formation or administration of any public employee organization." Petitioner's assertion

is timely because Petitioner did not learn until August 2009 that her grievance would not be processed.

As remedies, Petitioner asks for reinstatement and transfer as well as expungement of the disciplinary record from her personnel file, restoration of all benefits and back pay. Petitioner also demands a posting of a notice of the Board's finding of the asserted improper practice.

Union's Position

The Union claims that Petitioner's allegations fail to state a claim upon which relief may be granted and, as well, that claims pertaining to events prior to March 6, 2009, are time-barred. With respect to Petitioner's arguments arising from her June 2006 grievance and HHC's work-related charges against her, the Union contends that it adequately and in good faith responded to her requests for assistance. The Union asserts that it represented her throughout the lower steps of the grievance procedure all the way through the Step III determination of July 2008 and, further, that its representative continued to communicate with her even after it became clear that HHC would not consider the grievance due to City of Long Beach denying disciplinary grievance rights to provisional employees.[12]

The Union further contends that Petitioner has failed to allege facts tending to establish any improper motivation on the part of the Union in its handling of Petitioner's disciplinary grievance and that it has fully and fairly represented her at every step of the grievance procedure including filing for arbitration twice. The failure of the disciplinary matter to be heard at arbitration is, the

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of this claim is without exposition or explanation. We deem this claim abandoned.

[12] The Union asserts that it first notified Petitioner orally of the effects of *City of Long Beach* in January 2009, then again in April 2009, and in writing in August 2009.

Union maintains, out of its control, and, notwithstanding the Union's opinion on the merits of *City of Long Beach*, the Union asserts that it is without recourse to do any more for Petitioner in this matter, and that HHC's refusal to move her disciplinary grievance to arbitration in reliance on the decision, despite the Union's repeated efforts, cannot be deemed to constitute a breach by the Union of its duty of fair representation.

HHC's Position

HHC asserts that the instant petition is untimely under NYCCBL § 12-306(e).[13] The petition's allegations against HHC consist of events that occurred prior to December 12, 2007, thus, as it pertains to HHC, the petition is untimely by 19 months following the final action of which Petitioner complains. HHC cites *Kane*, 41 OCB 59 (BCB 1988) and *Howe*, 77 OCB 32 (BCB 2006), for the principle that the application of the four-month limitations period is not discretionary; thus, the Board is precluded from considering the merits of the case and for this principle.

As all of the alleged acts and omissions on the part of HHC alleged by Petitioner took place well outside of the limitations period, no independent claim can be stated against HHC under the NYCCBL, and any such claim must be denied; nor is the duty of fair representation claim meritorious. The Court of Appeals decision came down three months before disciplinary charges were issued against Petitioner. As a result of that decision, since May 2007, no disciplinary

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[13] NYCCBL § 12-306(e) provides that:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in 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 of the date the petitioner knew or should have known of said occurrence. . . .

arbitration proceedings filed on behalf of provisionally appointed public employees within the City have proceeded to completion. Petitioner's complaints about either the Union's or HHC's failure to process her disciplinary grievance to arbitration are without merit inasmuch as *City of Long Beach* prohibits this grievance, among others, to proceed to arbitration. HHC asserts that the petition alleges no facts supporting Petitioner's conclusory allegations that the employer's failure to proceed to arbitration were based on retaliation for union activity or anything other than compliance with binding decisional law. HHC urges dismissal of the petition.

DISCUSSION

Petitioner alleges that the Union breached the duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to pursue to arbitration her grievance appealing her termination by HHC and, separately, that HHC's termination was retaliatory in violation of NYCCBL § 12-306(a)(1) and (3) resulting from animus caused by her filing the earlier out-of-title grievances. Upon all the pleadings and exhibits submitted, we find that Petitioner has failed to assert sufficient factual allegations from which we could find any breach of the Union's duty of fair representation. In addition, we find that Petitioner's claim against HHC is untimely asserted. Thus, we find no viable claims of violation of the NYCCBL.[14]

It is well established that an improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should

[14] Admissions in the original pleading superseded by the amended petition "are still evidence of the facts admitted." *Kwiecinski v. Hwang*, 65 A.D.3d 1443 (3rd Dept. 2009) (citing, *inter alia*, *Ranken v. Probey*, 136 App. Div. 134 (1909)). Thus, the admissions contained therein do not lose their effect as admissions merely because the pleading has been superseded by the amendment. *Id*. at 135.

have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); see also *DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Mahinda*, 2 OCB2d 38 (BCB 2009), at 9; *Tucker*, 51 OCB 24, at 5 (BCB 1993).[15] Therefore, "claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009); *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)).

The improper practice petition here was filed on July 6, 2009. To be timely under NYCCBL § 12-306(e) and OCB Rule § 1-07(d), the acts about which Petitioner complains must have occurred, or she must reasonably have become aware of them, no earlier than March 6, 2009. It is undisputed that the City's decision to terminate Petitioner was made on September 20, 2007, and was upheld at Step II on December 7, 2007. Thus, Petitioner's employment was terminated in December 2007, one and a half years before the filing of the instant petition and more than three years prior to the most recent, earlier cited incident of alleged retaliation, having her leave-bank charged an entire day's time for a 15-minute meeting with Union representatives on August 2, 2006. These actions, and all of the events leading up to them, are time-barred, and cannot form the basis for claims pursuant to the NYCCBL, although they are admissible as background information.[16]

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[15] *See* n. 14, above. OCB Rule § 1-07(d) provides, in relevant part: "A petition alleging that a public employer or . . . a public employee organization . . . has engaged in or is engaging in an improper practice in violation of [§] 12-306 of the statute may be filed with the Board within four (4) months thereof. . . ."

[16] Section 1-07(d) of the Rules of the City of New York (RCNY) provides:

> Improper Practices. A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed

Similarly, Petitioner claims that the Union failed in its duty of fair representation in pursuing her complaints that HHC was subjecting her to wrongful discipline. Petitioner acknowledges that the Union took steps to address her wrongful discipline complaint from the time, in December 2007, well over fifteen months prior to the filing of the petition in July 2009. Petitioner cannot therefore belatedly assert any purported deficiency in the representation afforded her by the Union as constituting or contributing to a claim under the NYCCBL. However, in view of Petitioner's admission, in her June 2009 letter to Local President Gresham, that her Union representative told her at some point in April 2009, some two months prior to the letter to Gresham, that, despite the Union's attempts to pursue it, arbitration would not be successful, we date her awareness of the Union's decision not to pursue arbitration to at least that date. Thus, to the extent that Petitioner complains of the Union's not taking further steps to pursue her grievance to arbitration on or after that date, we find sufficient evidence that the claim may be timely to warrant an examination of the merits of the claim.

It is an improper practice under NYCCBL § 12-306(b)(3) for a union to "breach its duty of fair representation to public employees under this chapter." We have "long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Nardiello*, 2 OCB2d 5 (BCB 2009), at 39; see also *Whaley*, 59 OCB 41, at 12 (BCB 1997); *New York City Transit*

> with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf . . .

DC 37, 61 OCB 13 (BCB 1998), at 12 (no remedy available for wrongful acts occurring more than four months prior to filing improper practice petition, but evidence of such acts admissible as background information to establish ongoing violative conduct).

Authority, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board). To establish a breach of the duty of fair representation, Petitioner must establish that the Union actions in representing her were "arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, 77 OCB 29, at 16-17 (BCB 2006); *see* also *Hug*, 47 OCB 5, at 14 (BCB 1991); *New York City Transit Authority*, 37 PERB ¶ 3002 at 3006.

A union, however, is not obligated to advance every grievance. *See Minervini*, 71 OCB 29, at 15 (citing *Keyes*, 37 OCB 32, at 7 (BCB 1986)). It "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Edwards*, 1 OCB2d 22, at 21 (BCB 2008) (citations and editing marks omitted). Further, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Id*. (citations and editing marks omitted). In particular we have found that a Union's "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." *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008), quoting *Sicular*, 79 OCB 33, at 15 (BCB 2007) (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)).

Such a reasoned decision need not be unassailable in order to be outside of the scope of a breach of the duty owed by a Union; even an erroneous decision, made in good faith and absent any malice toward or discrimination against the complaining Union member is not actionable. *James-Reid*, 1 OCB2d 26, at 25-26. Here, where the Union has credibly alleged that no disciplinary grievances filed on behalf of provisional employees have proceeded to arbitration since the Court of Appeals rendered its decision in *City of Long Beach*, and the records of the Office of Collective

Bargaining, of which we take administrative notice, corroborate that allegation, we find no basis for a finding of discrimination or malice can be made as to that decision, the only timely act or omission pleaded herein.

Moreover, as was the case in *James-Reid*, Petitioner has not pleaded a basis upon which this Board could conclude that the Union's decision not to try to force the issue of an arbitration on Petitioner's behalf was even erroneous, let alone "particularly egregious or lacking in any defensible strategic motivation, such that it could be properly deemed "discriminatory, arbitrary or perfunctory." *James-Reid*, 1 OCB2d 26, at 25. Here, Petitioner's claim that contract grievance rights existing prior to *Matter of City of Long Beach* were revived by the course of conduct between the Union and HHC is unpersuasive, as it conclusorily asserts without support in the statute or case law that such rights exist without pleading that HHC is a DCAS employer, as § 65(5) of the CSL requires, or that HHC opted to come under the aegis of DCAS with respect to the statutory plan to enable public employers in the City of New York to address the Legislature's concerns with respect to provisional employees. Nor has Petitioner identified any written agreement pursuant to which DCAS employers or HHC have agreed to arbitrate disciplinary grievances brought on behalf of provisional employees. Rather, her claim is that the course of conduct between the parties is sufficient to establish their agreement under the amendment to Civil Service Law § 65(5). So novel a claim, absent the pleading of any timely act to support it, is at a minimum not so self-evident that a Union's refusal to claim it as a basis for arbitration cannot, absent any more, constitute a breach of the duty of fair representation. *James-Reid*, 1 OCB2d 26, at 25-27. *Greece Part-Time Unit, CWA Local 1170*, 32 PERB ¶ 4590 (1999) (ALJ) (finding no binding agreement to amend collective bargaining agreement prior to execution of written agreement upon parties' custom and prior behavior in amending their

agreements; citing *Deer Park Teachers' Ass'n*, 13 PERB 3048 (1980).[17]

[17] A union has an "affirmative duty to inform a member whether or not it will pursue a grievance on his behalf." *Fabbricante*, 69 OCB 39, at 20 (BCB 2002) (emphasis in original). There is no dispute that the Union informed Petitioner that it would not arbitrate the wrongful discipline matter because of the unlikelihood of success due to the impact of *City of Long Beach.*

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, Docket No. BCB-2780-09, filed by Mukti Banerjee against Local 1199, SEIU, and the New York City Health and Hospitals Corporation be, and the same hereby is, denied in its entirety.

Dated: New York, New York
April 6, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER