

***Mora-McLaughlin, 3 OCB2d 24 (BCB 2010)***  
(IP) (Docket No. BCB-2794-09).

***Summary of Decision:*** Petitioner claimed that the Union violated its duty of fair representation by failing to represent him regarding a counseling memorandum that he characterized as a disciplinary matter. Both HHC and the Union argued that the instant petition should be dismissed as untimely. The Union further argued that no violation of this duty occurred because the Union communicated with Petitioner, assisted him, and advised him on how he could best handle the matter. In addition, HHC contended that no violation of the duty of fair representation occurred because HHC took no disciplinary action; therefore, the Union correctly declined to represent Petitioner. The Board found that Petitioner's claim was untimely filed. Accordingly, the petition was dismissed. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Petition**

***-between-***

**FERNANDO MORA MCLAUGHLIN,**

***Petitioner,***

***-and-***

**THE NEW YORK CITY HEALTH AND  
HOSPITALS CORPORATION  
and DOCTORS COUNCIL, S.E.I.U.,**

***Respondents.***

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**DECISION AND ORDER**

On September 30, 2009, Fernando Mora McLaughlin, M.D., an employee of the New York City Health and Hospitals Corporation (“HHC”) and a member of the Doctors Council, S.E.I.U. (“Union” or “Doctors Council”), filed an improper practice petition, *pro se*, against the Union alleging a violation of New York City Collective Bargaining Law (City of New York Administrative

Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(b)(1) and (3). According to Petitioner, Doctors Council violated its duty of fair representation by failing to grieve an employee counseling memorandum placed in Petitioner’s personnel file. Both HHC and the Union argue that the instant petition is untimely, as the acts giving rise to Petitioner’s claim occurred more than four months prior to its filing of this petition. Furthermore, the Union argues that it satisfied its duty of fair representation by assisting and advising Petitioner, and by properly exercising its discretion in deciding not to pursue a contractual grievance and communicating the decision and its rationale to Petitioner. In addition, HHC contends that Petitioner has not demonstrated that the Union violated its duty of fair representation because Petitioner did not plead facts sufficient to establish a violation of the NYCCBL. The Board finds that the instant improper practice petition was not filed in a timely manner. Additionally, even if the petition had been timely filed, we would find that Petitioner has not pleaded facts sufficient to set forth that Doctors Council acted in bad faith or in an arbitrary or discriminatory manner. We dismiss the instant petition and further dismiss any derivative claim against HHC.

### **BACKGROUND**

HHC provides medical, mental health, and substance abuse services through its eleven acute care hospitals, four nursing facilities, six diagnostic and treatment centers, and more than eighty community-based clinics. Morrisania Diagnostic and Treatment Center is one of HHC’s diagnostic and treatment centers and is located at 1225 Gerard Avenue, Bronx, New York (“Morrisania”). This center is part of the Generation Plus Northern Manhattan Health Network within HHC. It serves the South Bronx, runs one of the oldest School Health Programs in New York City, and ensures access

to free primary medical, dental, and mental health care for children.

Doctors Council is a certified employee bargaining representative for employees working within HHC in civil service titles, including but not limited to, Primary Care Physician, Radiation Therapist, and Anesthesiologist. HHC and Doctors Council are currently parties to a collective bargaining agreement covering the period from March 15, 2008 to March 27, 2010 (“Agreement”). Article VIII, entitled “Grievance Procedure,” sets out the process under which an employee or the Union may pursue in order to initiate the procedures set forth therein. Agreement, Article VIII § 1 defines the term “grievance” as, in pertinent part:

- b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer [HHC] applicable to the agency which employs the grievant affecting terms and conditions of employment . . . ;  
\* \* \*
- d. A claimed wrongful disciplinary action taken against:
  - i. a permanent employee covered by Section 75(1) of the [New York State] Civil Service Law; [or]
  - ii. a permanent employee covered by the Rules and Regulations of [HHC] . . . .

Article VIII § 4 of the Agreement, which addresses “Disciplinary Procedures,” sets out a four step process addressing these issues. Either an employee or the Union may initiate these procedures, except for the final step of filing for arbitration, which must be undertaken by the Union.

Petitioner works in Morrisania as a Primary Care Physician and specializes in Internal Medicine, for which he is Board Certified. An email sent by an employee of HHC to Morrisania’s Associate Executive Director, stated that, on December 19, 2008, Petitioner visited the Financial Counselor’s Office with a patient whom Petitioner insisted receive treatment. This email stated that the patient was “out of network,” and HHC could not provide services. (Pet., Ex. I). Petitioner was

said to have disputed that the patient was ineligible and went into the billing office and “stated that he was going to report” these employees to “the fraud unit.” (*Id.*). The email further states that Petitioner has previously engaged in similar behavior by “getting involved with billing information,” and that he makes the staff in that office “uncomfortable.” (*Id.*).

Morrisania’s Associate Executive Director forwarded this email to Morrisania’s Medical Director and Morrisania’s Chief of Medicine seeking their advice. On January 8, 2009, Petitioner received an Internal Memorandum scheduling a “Counseling Session” for January 15, 2009 with regard to his “behavior.” (Pet., Ex. II). Petitioner asserts that no reason was given for requesting this meeting, and “no prior investigation or informal questioning” had taken place. (Pet. ¶ 2). At this counseling session, Morrisania’s Chief of Medicine and Morrisania’s Chief of Pediatrics represented HHC. Petitioner attended with Oscar Jirau, a Contract Administrator with Doctors Council. According to HHC, “Petitioner was counseled regarding his behavior and attitude in the workplace.” (HHC Ans. ¶ 3).

Petitioner received a “Record of Employee Counseling,” dated January 28, 2009 (“Counseling Memorandum”), which stated that the counseling was held “to discuss [Petitioner’s] behavior and attitude in the workplace” and that it was scheduled in response to “a written complaint from a staff member.” (Pet., Ex. III). The Counseling Memorandum instructed Petitioner to display “professional [and] respectful behavior toward staff and patients” and to follow the “chain of command.” (*Id.*). This memorandum stated that Petitioner would be monitored for the next three months and attached a copy of HHC’s Policy regarding “Intimidating and Disruptive Behavior.” (*Id.*).

On February 10, 2009, Petitioner wrote to Union Contract Administrator Jirau requesting that

Doctors Council initiate a Step One grievance. Petitioner wrote that HHC failed to properly investigate the allegations contained in the email, which were “subjective, unclear and untruthful.”

(Pet., Ex. IV). He also wrote :

The corrective action calls for respectful and professional attitude yet with no proof that I had ever been unprofessional and disrespectful. I am ready to [prove] that I enjoy and provide a great deal of respect and professionalism with and towards my [colleagues] including the staff of the billing department.

The attached policy . . . was distributed after the alleged incident. This policy calls for a resolution of conflicts in a completely different way [than] the one undertaken by my supervisors.

(*Id.*).

On February 19, 2009, Contract Administrator Jirau sent a letter to HHC’s Chief of Staff for the Generation Plus Northern Manhattan Health Network (“Network Chief of Staff”). The letter protested the issuance of the Counseling Memorandum and asserted that Morrisania’s Chief of Medicine acted unprofessionally and disrespectfully toward Petitioner. Contractor Administrator Jirau’s letter asserted that Morrisania’s Chief of Medicine violated the “very same policy that she gave to [Petitioner] on that day.” (Pet., Ex. V). The letter further stated that HHC failed to abide by its own disciplinary procedures because, prior to issuing the Counseling Memorandum, Morrisania’s Chief of Medicine conducted no investigation, interview of Petitioner, or informal “re-education” of Petitioner. (*Id.*). Finally, Union Contract Administrator Jirau wrote that:

[Petitioner’s] actions on the day in question went beyond the call of duty, as he strove to provide his patient with the best quality care . . . . [and] the charges against [Petitioner] were neither proved nor substantiated. I respectfully request that the decision to discipline [Petitioner] be rescinded and that a proper investigation be conducted as per [HHC’s] Policy and Procedures . . . . I will make myself available for any follow up meetings that require my attendance.

(*Id.*). Petitioner admitted that shortly after that letter in February 2009, the Union informed him in a conversation that it would try to resolve his claim informally but would not file a grievance on his behalf. During this conversation, Petitioner expressed his disagreement with this decision.

On April 1, 2009, Petitioner sent another letter to Union Contract Administration Jirau requesting that the Union initiate a grievance on his behalf regarding the Counseling Memorandum. Although the Union did not respond in writing, Petitioner avers that on April 7, 2009 he discussed the Counseling Memorandum with Doctors Council's Executive Director. Petitioner asserts that the Union's Executive Director told him that the Union, as a matter of policy, generally does not file grievances in cases of "soft discipline." (Pet. ¶ 6). Petitioner objected that this memorandum could be used later as an example of progressive discipline and maintained that the Union should contest all cases of wrongful discipline. In its answer, Doctors Council stated that counseling memoranda typically are not grieved by the Union because they "generally do not have a materially adverse impact on a member's terms and conditions of employment." (Union Ans. ¶ 7).

On May 14, 2009, Petitioner initiated a grievance at Step I on his own behalf because he "had not received any further communication from Doctors Council." (Pet. ¶ 7). In his grievance, Petitioner provided a description of the events citing to the February 19, 2009 letter submitted by Doctors Council. There is nothing in the record in the instant matter indicating the progress of this particular grievance. Then, on July 7, 2009, Petitioner filed an unfair labor practice claim against the Union with the National Labor Relations Board ("NLRB"). Petitioner's charge alleged that HHC discriminated against him by issuing the Counseling Memorandum and that the Union improperly refused to file a grievance against HHC. This charge further stated that "the Union alleges that the discipline is soft and in those cases they do not proceed to Step One." (Rep., Ex. I). According to

Petitioner, the NLRB, after investigating this charge, directed him to this Board as the proper forum in which to pursue a violation of the duty of fair representation claim against Doctors Council.

On September 30, 2009, Petitioner filed the instant proceeding alleging violations of NYCCBL § 12-306(b)(1) and (3). As a remedy, Petitioner seeks the Union's written acknowledgment to its members that it made the mistake of "underrepresentation" and the appointment of independent legal counsel to pursue his grievance.

### **POSITION OF THE PARTIES**

#### **Petitioner's Position**

Petitioner argues that Doctors Council breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3).<sup>1</sup> Although the Union recognizes that the Counseling Memorandum constituted "soft" discipline, the Union failed to grieve this matter on Petitioner's behalf. Since Petitioner has a contractual right to grieve wrongful disciplinary acts taken against him, the Union should have advanced Petitioner's grievance, but refused to do so. The Union's rationale for not grieving Petitioner's complaint is inconsistent with its prior stated position that the Counseling Memorandum was wrongful discipline. A grievance could have redressed HHC's failure to properly investigate the complaint against Petitioner and to follow the procedures outlined by HHC's policies and procedures. The Union's differentiation between "soft" and "hard" discipline

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<sup>1</sup> NYCCBL § 12-306(b) provides in pertinent part:

It shall be an improper practice for a public employee organization or its agents:  
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause or attempt to cause, a public employer to do so;

\* \* \*

(3) to breach its duty of fair representation to public employees under this chapter.

is illogical because all wrongful disciplinary acts could become the predicate for enhanced penalties based upon subsequent allegations. Therefore, the Union's actions were arbitrary, discriminatory, in bad faith, and breached the duty of fair representation.

The claim by the Union and HHC that the instant petition is untimely is without merit. The Union is responsible for delaying Petitioner's filing of the instant petition because it did not communicate its refusal immediately. Moreover, the delay between that notification and the filing of the instant petition should be excused because Petitioner swiftly filed an unfair labor practice charge with the NLRB, which investigated this charge and presumably contacted HHC and the Union during its investigation. Therefore, the Union should have been put on notice of Petitioner's claim and not prejudiced by the delay. Both HHC and the Union knew of Petitioner's desire to pursue his grievance regarding the Counseling Memorandum and the Union's breach of its duty toward Petitioner.

In sum, Petitioner argues that the Union breached its duty of fair representation by refusing to initiate a grievance seeking to rescind the Counseling Memorandum, which the Union recognized as wrongful discipline. Moreover, the Union should have grieved Petitioner's complaint because HHC clearly violated its own policies and procedures, as the Union stated in its letter to the Network's Chief of Staff. The refusal to grieve "soft" discipline is irrational, and the Union is thus in violation of NYCCBL § 12-306(b)(1) and (3).

### **Union's Position**

The Union argues that the instant petition should be dismissed as untimely because Petitioner failed to initiate this proceeding within the four months of the acts alleged. As set forth in NYCCBL § 12-306(e), any improper practice petition must be filed within four months of the occurrence of



the acts constituting the improper practice.<sup>2</sup> This four month period begins to run “as soon as Petitioner is aware of the Union’s disputed conduct.” (Ans. ¶ 12). As early as February 2009, Petitioner was advised by Doctors Council that it would handle his dispute informally with HHC. Even under Petitioner’s own view, his claim accrued no later than April 7, 2009 when he was informed by the Union that it would not grieve the Counseling Memorandum as “soft” discipline. Indeed, on May 14, 2009, Petitioner initiated the grievance process on his own behalf based on the Union’s refusal to do so. Petitioner did not file the instant petition with the Board until September 30, 2009, which is well beyond the four month statute of limitations.

The Union further argues that the instant petition should be dismissed on the grounds that Petitioner failed to plead acts sufficient to state a breach of the duty of fair representation. Petitioner bore the burden of pleading and proving that the Union engaged in a wrongful act, not merely that it declined to bring a grievance on his behalf. Since Petitioner failed to allege the existence of some improper motive for its failure to advance Petitioner’s claim regarding the Counseling Memorandum, the instant petition should be dismissed.

Further, the Union argues that unions are permitted a wide discretion with regard to the manner in which they represent their members. Doctors Council represented Petitioner at the meeting at which he was disciplined and sent a letter on his behalf to HHC. In its letter, the Union aggressively defended Petitioner commending him for his actions and deploring HHC’s failure to follow its own policies and procedures. Finally, Doctors Council articulated a well-reasoned

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<sup>2</sup> NYCCBL § 12-306(e) provides, in pertinent part:

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 . . . .

rationale for not pursuing a grievance on Petitioner's behalf and communicated this rationale to Petitioner. As such, the Union did not violate the duty of fair representation.

### **HHC's Position**

HHC argues that Petitioner's claims are untimely under NYCCBL § 12-306(e). Based on the filing date of the instant petition, September 30, 2009, any claims based on occurrences that pre-date May 30, 2009 are untimely. As claimed by Doctors Council, Petitioner knew or should have known that any claim against the Union for violating the duty of fair representation accrued, at the latest, on April 7, 2009, when Petitioner spoke with Doctors Council's Executive Director. At that time, Petitioner was informed that the Union would not be grieving the Counseling Memorandum on his behalf, and his claim accrued.

HHC further avers that Petitioner failed to set forth a *prima facie* claim against the Union for violating its duty of fair representation. Petitioner has not pleaded facts which could establish that the bargaining representative acted in an arbitrary, discriminatory, or bad faith manner. Petitioner is unable to plead and/or prove that the Union's refusal to pursue Petitioner's claim against HHC regarding the Counseling Memorandum was improperly motivated. The Union acted in good faith and did not act arbitrarily or discriminatorily.

Finally, HHC points out that the instant petition does not state nor claim that HHC violated any portion of NYCCBL § 12-306(a). Therefore, HHC need not proffer any defense regarding any claimed violation of this provision.

### **DISCUSSION**

Initially, the Board must determine whether the instant improper practice petition was timely

filed. As set forth in NYCCBL § 12-306(e), an improper practice must be filed within four months of the accrual of the claim. *See also* Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”) § 1-07(b)(4).<sup>3</sup> In other words, “a petition alleging an improper practice in violation of [NYCCBL] § 12-306 must be filed within four months of the act or omission alleged to constitute the improper practice, or within four months of the date the petitioner knew or should have known of its occurrence.” *SSEU, L. 371, 79 OCB 34*, at 6 (BCB 2007). Thus, “when a claim arises more than four months prior to the filing of the petition” and no allegations were made that the action continued or in other manner accrued at any time within the four month time limitation, the petition will be dismissed as untimely.” *CEA, 79 OCB 42*, at 7 (BCB 2007) (citing *DC 37, 77 OCB 34* (BCB 2006)). Therefore, failure to file a petition within this time period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *See Castro, 63 OCB 44*, at 6 (BCB 1999).

The Board finds that the claims asserted in the petition are untimely. Doctors Council met with Petitioner and HHC management regarding the Counseling Memorandum on January 15, 2009. It is undisputed that soon after February 19, 2009, the Union advised Petitioner that it would not grieve his complaint against HHC but would attempt to resolve this dispute through an informal meeting. It is further undisputed that on April 7, 2009, Petitioner was told by the Union’s Executive

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<sup>3</sup> OCB Rules § 1-07(b)(4) provides:

One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

Director, again, that the Union would not grieve the issuance of this Counseling Memorandum. Recognizing that the Union would not initiate a grievance on May 14, 2009, Petitioner filed a grievance alleging that the Counseling Memorandum constituted discipline.

Based upon this chronology, we find that the petition does not allege any timely act or omission by the Union. The act or omission claimed by Petitioner, Doctors Council's refusal to grieve the Counseling Memorandum, was communicated, by Petitioner's own admission, no later than April 7, 2009.<sup>4</sup> Therefore, Petitioner's claim accrued on that date, which precedes the date on which Petitioner filed the instant petition by over five months. Thus, it is well beyond the statute of limitations. Moreover, Petitioner's filing of his own grievance against HHC on May 14, 2009 clearly establishes that Petitioner knew of the Union's decision not to file a grievance. As any claim which accrued prior to May 30, 2009 is untimely, no timely act or omission by the Union has been alleged, and thus no viable basis for a claim remains.

Petitioner asserts that his filing of a charge with the NLRB arising out of the same facts and upon the same theory, constituted sufficient notice to the Union and HHC, so as to toll the statute of limitations. The Board finds this argument unavailing. The filing of such claims before an agency lacking jurisdiction does not suffice to establish any basis for equitable tolling. Petitioner's error was not induced by either the Union or HHC nor do we have any basis for excusing his fatally late filing

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<sup>4</sup> Although the Union made a similar representation to Petitioner regarding its decision not to grieve the Counseling Memorandum in February 2009, the outcome of the Union's informal efforts to resolve the matter may not have been clear at that time. As of April 7, 2009, it was clear that Petitioner knew the Union was not taking any further steps to pursue his grievance and therefore this is the date the claim accrued. *See DC 37, 2 OCB2d 1, at 13 (BCB 2009)* (holding that a claim accrues, at times, when a decision is actually implemented, thereby bringing finality to the issue at hand); *see also Raby, 71 OCB 14, at 11 (BCB 2003) aff'd, Raby v. Office of Collective Bargaining, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003)*.

before us. *See OSA*, 1 OCB2d 45, at 10-11 (BCB 2008) (equitable tolling is appropriate when an employer intentionally or unintentionally dissuades a petitioner from filing a charge); *see also UFA*, 3 OCB2d 13, at 12-13 (BCB 2010) (no evidence supporting a finding that equitable tolling was proper); *Obispo v. 423 Madison Ave., LLC*, 25 Misc.3d 1215(A) (Sup. Ct. New York Co. Sep. 18, 2009) (citing *Seigel, New York Practice* § 43, at 59-60) (hiding facts or engaging in deceptive and/or fraudulent acts have been found to be grounds for equitable tolling). Therefore, the instant petition is untimely and must be dismissed.

Even if Petitioner's claims against the Union had been filed in a timely fashion, we would find that Petitioner has failed to plead a viable claim of a breach of the duty of fair representation. 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." *Finer*, 1 OCB2d 13, at 10-11 (BCB 2008) (quoting *Okorie-Ama*, 79 OCB2d 5, 14 (BCB 2007)) (quotation marks omitted); *see also Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board). Arbitrarily ignoring a meritorious grievance or processing such a grievance in a perfunctory fashion constitutes a violation of the duty of fair representation. *Sicular*, 79 OCB 33, at 13 (BCB 2007) (citing *Watkins*, 75 OCB 23, at 12 (BCB 2005)).

However, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Sicular*, 79 OCB 33, at 13 (quoting *Wooten*, 53 OCB 23, at 15 (BCB 1994) (citing *Page*, 53 OCB 31, at 11 (BCB 1994))). The "union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled." *Id.* (citing

*Hug*, 45 OCB 51, at 16 (BCB 1990)). A union “does not breach the fair representation duty merely because the outcome of a union’s good faith efforts to resolve a member’s complaint does not satisfy the member.” *Id.* (citing *Howe*, 77 OCB 32, at 17 (BCB 2006)). Accordingly, the Board “will not substitute its judgment for that of a union or evaluate its strategic determinations.” *Id.*

Accordingly, even if Petitioner had timely filed the instant petition, we would find that the facts alleged simply do not support a claim for the breach of the duty of fair representation. The Union provided representation and communicated its reasons for its strategic decision to Petitioner, and in the end, the Union made a judgment as to whether or not to bring a grievance which was founded on a rational, non-discriminatory basis. *See James-Reid*, 1 OCB2d 26, at 24-25 (BCB 2008).<sup>5</sup> Accordingly, although the Union’s conduct did not satisfy Petitioner, Doctors Council engaged in a good faith effort to resolve Petitioner’s complaint.

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<sup>5</sup> Since we find that the Union did not violate NYCCBL § 12-306(b)(3), we also find that any derivative claim against HHC pursuant to NYCCBL § 12-306(d) must also be dismissed.

**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 filed by Fernando Mora McLaughlin, M.D. docketed as BCB-2794-09 be, and the same hereby is dismissed in its entirety.

Dated: New York, New York  
May 25, 2010

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

CHARLES G. MOERDLER  
MEMBER

GABRIELLE SEMEL  
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PAMELA S. SILVERBLATT  
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