Morales, 3 OCB2d 25 (BCB 2010)

(IP) (Docket No. BCB-2814-09).

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), by failing to adequately represent him in proceedings which led to his termination and, after his termination, by failing to adequately challenge the termination. The Union claimed that the petition was untimely filed and that Petitioner failed to state a claim that it breached its duty of representation. The City also argued that the petition was untimely filed and that Petitioner failed to state a claim. As Petitioner's grievance is proceeding to Step III of the grievance procedure, the Board dismissed this matter without prejudice to re-file. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JOSE E. MORALES,

Petitioner,

- and -

UNITED FEDERATION OF TEACHERS and THE NEW YORK CITY POLICE DEPARTMENT, SCHOOL SAFETY DIVISION,

Respondents.

DECISION AND ORDER

On October 29, 2009, Jose E. Morales filed a verified improper practice petition *pro se* against the United Federation of Teachers ("UFT" or "Union") and the City of New York ("City"), named as the New York City Police Department, School Safety Division ("SSD").[1] Petitioner claims

[1] Because petitioner appears before us *pro se*, we treat the petition as naming the appropriate employer, the City of New York, and not merely the agency, the New York City

that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), by failing to adequately represent him in proceedings which led to his termination and, after his termination, by failing to adequately challenge the termination. The Union claims that the petition is untimely in part and that Petitioner failed to allege facts sufficient to state a claim that it breached its duty of representation. The City also argues that the claim is untimely in part and that Petitioner fails to allege facts sufficient to state a claim. As Petitioner's grievance is proceeding to Step III of the grievance procedure, the Board dismissed this matter without prejudice to re-file.

BACKGROUND

Petitioner was a member of the Union and held the civil service title of Supervisor of School Security until his termination by the NYPD on July 15, 2009. Petitioner's employment was terminated as a result of disciplinary charges first served on him on July 21, 2008. The NYPD charges and specifications alleged that Petitioner: removed the contents of Vincent DeGioa's safe deposit boxes on July 14, 2007; withdrew $15,000 combined from two of DeGioa's bank accounts on August 20 and 25, 2007; and removed a pension check from DeGioa's mailbox, deposited it into his own account, and immediately withdrew the funds, on August 20, 2007.

On July 15, 2007, Petitioner was granted a durable power of attorney by DeGioa, with whom Petitioner claims he has had a lengthy "father-son" type relationship. (Pet. ¶ 1). Petitioner's power of attorney was revoked on July 27, 2007. (City Ans., Ex. 4). On that same date, another person was named as the appointee. (City Ans., Ex. 5). Petitioner asserts that he was not aware that his power of attorney had been revoked, or that another appointee had been named, and as a result he continued

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Police Department "NYPD").

to act as if he had power of attorney. Petitioner claims that, from the inception of the investigation, he made NYPD aware of the circumstances surrounding his relationship with DeGoia and the fact that he did not know that his power of attorney had been revoked. Petitioner also disputes the validity of the revocation of his power of attorney.

On June 5, 2008, as part of NYPD's internal investigatory and disciplinary process, Petitioner was interviewed at a GO-15 hearing.[2] The NYPD interviewed Petitioner regarding his actions in July and August 2007: his removal of the items from DeGoia's safe deposit box; his withdrawals from DeGoia's bank accounts; and his cashing of DeGoia's pension check. Union Representative Reginald Sawyer appeared at the GO-15 interview to represent Petitioner. Petitioner asserts that the Union promised, yet never provided him with, an attorney for the interview. Petitioner alleges that, in the middle of the interview, Sawyer told him that he could not say anything because the process "was way over my head." (Pet, p.1, ¶ 5). Petitioner also claims that Sawyer "alluded to the fact that the UFT representatives told the membership that any one who goes to a [GO-15] . . . will be represented by a Union rep." (*Id.*). Petitioner also claims that Sawyer was upset that even though Sawyer had sent information regarding the GO-15 hearing to two other Union representatives, neither appeared, and Petitioner was left with no adequate defense. Petitioner contends that after the interview, he asked the Union to obtain a copy of the transcript, but the Union did not do so.

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[2] These hearings, so known from the pre-Patrol Guide General Order which instituted them, are conducted pursuant to Patrol Guide § 203.08 as part of internal disciplinary investigations. *See also James-Reid*, 1 OCB2d 26, at 5 & n. 3 (BCB 2008). Any answers given in the interviews cannot be used against an accused in a criminal proceeding. *Id.* The Patrol Guide "is an internal manual – nearly 1,500 closely printed pages – containing thousands of rules, procedures and policies adopted by the Police Commissioner for the governance, discipline, administration and guidance of the Police Department." *James-Reid*, 1 OCB2d 26, at 7, n. 5 (quoting *Galapo v. City of New York*, 95 N.Y.2d 568, 574-575 (2000)).

On July 21, 2008, the NYPD served Petitioner with the aforementioned charges and specifications in relation to the DeGoia power of attorney.

On February 2, 2009, DeGoia's niece wrote a letter to the SSD Investigative Unit on Petitioner's behalf. The letter states that DeGoia viewed Petitioner as DeGoia's son, and that he had told her that he had voluntarily given Petitioner power of attorney during an August 2007 hospitalization. The niece wrote that during DeGoia's several hospital stays, and the resultant care necessary after his release, DeGoia did not contact any of his family and was cared for exclusively by Petitioner. The niece described DeGoia as an angry man who held hostile feelings toward his relatives. She wrote that Petitioner and his family were the only people DeGoia considered family. Her letter further states: "I say this with no malice; I know that my uncle is not very bright or [credible]. Throughout the years I watched and listened to him make up stories or give things to family members then say that he did not and his belonging [were] stolen." (Rep., Ex. 3). She closed by writing that she wished the disciplinary proceedings against Petitioner would cease, because she considered anything that her uncle may have claimed or any action he may have initiated against Petitioner to be suspect. Petitioner claims that no one from NYPD or the Union contacted DeGoia's niece to discuss the contents of the letter.

On February 3, 2009, a Personnel Officer for the SSD held an informal conference regarding the charges and specifications against Petitioner. Calvin Lloyd was listed as appearing as a Union representative. At the conference, Petitioner was advised that the NYPD sought Petitioner's resignation or his termination. He refused to resign. Petitioner elected the grievance procedure before the NYPD Office of Labor Relations as per A.G. 319-19 rather than proceeding under § 75 of the Civil Service Law. Petitioner claims that Lloyd was "clueless" as to the severity of the charges

and "had no idea as to how to proceed on this writers behalf." (Pet., p. 1, ¶ 6).

On June 18, 2009, the Deputy Commissioner of NYPD Labor Relations held a Step II hearing regarding the charges. At this hearing, Petitioner was represented by UFT Special Representative Jeff Huart. Petitioner points out that at the Step II hearing, the NYPD attorney used a written transcript of his GO-15 interview in questioning Petitioner. Petitioner asserts that the Union did not have a copy, and had never requested one. Petitioner also asserts that when he asked the representative to ask the attorney for a copy of this transcript, the attorney said, "Not now." Petitioner contends that the UFT representative did not pursue the matter after that, and the Union did not obtain a copy of the transcript at any point thereafter.

On July 15, 2009, Petitioner received a letter notifying him that as a result of the Step II hearing, he was dismissed from employment as a School Security Supervisor. After the effective date of his termination, Petitioner attempted repeatedly to gain assistance from the Union. The Union's Special Representative simply told him that the Union could challenge the termination at Step III but that he should not expect the NYPD to overturn the termination because all of the steps are controlled by the NYPD. He states that the Special Representative also told him on several occasions that his case was unfamiliar territory to them and that they were not quite sure how to proceed. Petitioner claims that on August 18, 2010, the Special Representative told him to be patient on a decision to proceed to Step III because at the end of August, the Union's grievance panel was scheduled to convene to discuss how to approach the appeal. Petitioner asserts that at the end of August and in September, he made repeated calls to the Special Representative and another Union representative for an update. He also states that the Union representatives either did not return his calls or told him that they were busy at the moment and would call him back, but they did not.

Petitioner claims he submitted a comprehensive defense to the allegations against him to several people, including the Union President, yet he did not receive a response.

As of October 29, 2009, the date this proceeding was filed, neither the Union nor the Petitioner had submitted a request for a Step III hearing. On December 11, 2009, Huart wrote to the Commissioner of the New York City Office of Labor Relations to request a Step III hearing on behalf of Petitioner. The City initially dismissed the Step III request as untimely on January 28, 2010. However, the City and the Union, on April 29, 2010, agreed to move the grievance process to Step III, so long as the City could reserve its right to raise the issue of timeliness as a defense. A Step III conference is scheduled for May 27, 2010.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union breached its duty of fair representation when it failed to represent him properly regarding the allegations against him, in violation of NYCCBL § 12-306(b)(1) and (3).[3] Petitioner claims that the charges against him are without merit, that the Union had no idea how to deal with charges of such magnitude, that it never properly investigated the charges, and that it ignored him after he was terminated. Petitioner argues that the charges against

[3] NYCCBL § 12-306(b) provides that it shall be an improper practice for a public employee organization:

> (1) to interfere with, restrain or coerce public employees in the exercise of 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.

him would constitute felony charges if he were to be criminally charged, and the charges involve the legal question of power of attorney. Therefore, he argues, the Union should have had a Union attorney represent him throughout the process, and not standard Union representatives who were unskilled in the legal arena. Petitioner also expressed the suspicion that the Union chose to move to Step III only because he filed a charge with the Office of Collective Bargaining.

Petitioner contends that DeGoia, who raised him since he was a young boy, was a father figure to him. DeGoia had always insisted that Petitioner take care of him as he progressed into his old age, since DeGoia's relationship with his blood family was nonexistent. Petitioner asserts that the revocation of the power of attorney submitted by the City is invalid, since the principal, DeGoia, must put his intent to revoke Petitioner's power of attorney in writing, and the submitted document did not include such a statement by DeGoia. Petitioner stresses that he was never arrested as a result of these charges against him, and that he has had an impressive record as a City employee with over 21 years of service.

Petitioner claims that the Union processed his claim in a perfunctory manner, and acted in bad faith throughout the investigation and the grievance process. The Union did not request any transcript or written documentation of the GO-15, which Petitioner repeatedly requested to challenge the charges against him. Further, after his termination, Petitioner repeatedly contacted people at all levels in the Union, including the Union President, providing evidence in his defense. His calls and pleas were consistently ignored, or he was told that an appeal would be pointless. The Special Representative previously made several verbal commitments to Petitioner that the Union would represent him throughout the grievance process.

Petitioner argues that it is the Union's responsibility to prepare a rebuttal to the charges with

whatever resources are available to it, whether skilled labor relations personnel or attorneys. Petitioner contends that he would not have been terminated if the Union had challenged the actual charges that led to his dismissal, instead of merely attending the hearings.

Union's Position

The Union contends that the petition is untimely in part. Since the petition was filed on October 29, 2009, any allegations of misconduct occurring prior to June 29, 2009 are untimely. Further, the Union contends that Petitioner has not shown that it acted in a manner that was arbitrary, discriminatory, or in bad faith. It contends that mere negligence is an insufficient basis upon which a Petitioner may establish a claim for a breach of the duty of fair representation.

The only remaining timely claims are those relating to the Union's alleged failure to file a Step III grievance on Petitioner's behalf, and to a series of allegedly unreturned phone calls. Since Petitioner could have filed the Step III grievance himself, no requirement exists that the Union do so on the member's behalf. Additionally, Petitioner has failed to demonstrate that the Union's failure to proceed to Step III was arbitrary, discriminatory, or made in bad faith. The entire history and context of the Union's actions on Petitioner's behalf belie his allegations that the Union acted in bad faith. He was represented by Union representatives at his GO-15 hearing, his Step I conference, and his Step II hearing. Ultimately, the Union did file a Step III grievance on his behalf, and is continuing to seek reversal of his termination of employment.

City's Position

The City also claims that the incidents that occurred more than four months prior to the filing of the petition are untimely and must be dismissed. Additionally, Petitioner failed to show that the Union breached its duty of fair representation, so those claims and any derivative claims against the

City on that basis must be dismissed. The Union did not breach its duty of fair representation because the Union enjoys wide latitude in the handling of grievances, and exercised its discretion with good faith and honesty.

The City argues that while Petitioner has not specifically pled violations of the NYCCBL, to the extent that his pleadings could be construed to do so, he has failed to set forth facts establishing that NYPD violated the statute.

DISCUSSION

The Board must first decide whether the petition is timely. Section 12-306(e) of the NYCCBL and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action took place. Failure to file a petition within this period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *Feder*, 1 OCB2d 27, at 12 (BCB 2008); *Howe*, 77 OCB 32 at 16 (BCB 2006); *Castro*, 63 OCB 44 at 6 (BCB 1999). However, "factual statements comprising untimely claims may be admissible as background information, and are so taken here." *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citations omitted). Such allegations "are considered by this Board solely as background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations." *Id.* Thus, such allegations, "while not actionable, may have bearing upon the employer's motivation for subsequent acts occurring within the statute of limitations and included within the scope of the petition." *Id.* (quoting *PBA*, 77 OCB 10, at 10

(BCB 2006) (editing marks omitted); *see also Rosioreanu*, 1 OCB2d 39, at 14 (BCB 2008) ("information regarding untimely allegations may be admissible as factual background, or to illuminate the intent of the employer."). Because the petition in the instant matter was filed on October 29, 2009, we consider Petitioner's allegations regarding acts that occurred between June 29, 2009 and October 29, 2009, as timely. Evidence of acts committed before June 29, 2009 will be admitted for the purpose of establishing the background and context of timely acts alleged.

NYCCBL § 12-306(b)(3) makes it an improper practice for a union to "breach its duty of fair representation to public employees under this chapter." Petitioner claims that the Union failed in any number of respects, including failing to prosecute his grievances, failing to provide adequate representation throughout the grievance process, and otherwise processing his grievance in an arbitrary manner. 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." *Okorie-Ama*, 79 OCB 5, at 14; *see also Whaley*, 59 OCB 41, at 12 (BCB 1997); *New York City Transit Authority*, 37 PERB ¶ 3002 (2004). A union is not obligated to advance every grievance, *see Nardiello, supra*, at 40 (citing *Minervini*, 71 OCB 29, at 15 (BCB 2003)), and 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 22 (BCB 2008) (citations omitted).

In *Fabbricante*, 59 OCB 43, at 9-10 (BCB 1997), the Board held that where Petitioner stated a grievance arguably based upon the applicable contract and the Union offered no good faith rationale for failing to pursue it, the Union breached its duty of fair representation. In that matter, the Union failed to file an answer to the petitioner's improper practice. Here, the Union answered

Petitioner's improper practice, but its pleadings did not specify a rationale for processing his grievance in the manner that it did. It also did not state a specific reason for initially ceasing to pursue the grievance process beyond Step II. The Union's contention is that because it provided an agent to accompany Petitioner at the proceedings, and because Petitioner could have proceeded to Step III himself, it did not breach the duty of fair representation.

However, at this juncture the Board cannot determine whether the Union breached its duty of fair representation. As part of the Board's consideration of whether the Union had breached its duty in the past, we have examined the prejudicial impact, if any, of the Union's actions, upon its member, including whether the member was denied a forum to challenge discipline. *Parks Enforcement Officers*, 59 OCB 39, at 8 (BCB 1997); *see also Morgan*, 71 OCB 10, at 6 (BCB 2003). In *Fabbricante*, 59 OCB 43, petitioner's avenues of reaching arbitration had been foreclosed because of the Union's inaction. In the instant matter, because, as of April 29, 2010, the parties have agreed to move Petitioner's grievance to Step III, he is not now precluded from reaching arbitration. *Compare Parks Enf. Off, supra; Morgan, supra, with Fabbricante.* Therefore, we dismiss the petition without prejudice to re-file if necessary, following the conclusion of the grievance/arbitration process. *Id.*

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 Jose E. Morales, docketed as BCB-2814-09 be, and the same hereby is, dismissed in its entirety, without prejudice to re-file.

Dated: May 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

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MEMBER