Turner, 3 OCB2d 48 (BCB 2010)

(IP) (Docket No. BCB-2816-09)

Summary of Decision*:** Petitioner, a provisional employee, claimed that the Union violated NYCCBL §12-306(b)(3) by breaching its duty of fair representation in the handling of a disciplinary matter that resulted in the termination of her employment. The Union asserts that it is still representing Petitioner in the grievance process. The City asserts that Petitioner's claims are untimely and that she cannot establish a breach of the duty of fair representation as she was a provisional appointee without due process rights; thus, any derivative claim against the City must be dismissed. The Board found that the petition fails to make out facts sufficient to establish a breach of the duty of fair representation. Accordingly, the petition is denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

GEORGETTE TURNER,

Petitioner,

-and-

THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180,
THE CITY OF NEW YORK, and
THE CITY OF NEW YORK LAW DEPARTMENT,

Respondents.

DECISION AND ORDER

On November 12, 2009, Georgette Turner filed a *pro se* verified improper practice petition alleging that the Communications Workers of America, Local 1180 ("Union"), breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law

(New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Petitioner asserts that this breach arose from the Union's representation of her in a disciplinary matter which led to her termination from her position as a Legal Secretarial Assistant ("LSA") at the City of New York Law Department ("Law Department"). The Union asserts that it did not breach its duty of fair representation and that it continues to represent Petitioner in the grievance process. The City of New York ("City") asserts that Petitioner's claims are untimely. Further, the City asserts that Petitioner cannot establish a breach of the duty of fair representation as she was a provisional appointee without due process rights. Therefore, the City concludes, any derivative claim against the City must be dismissed. The Board finds that the petition fails to set forth facts sufficient to establish a breach of the duty of fair representation against the Union. Accordingly, the petition is denied.

BACKGROUND

Petitioner was provisionally appointed to LSA Level III at the Law Department on July 12, 2004, and promoted to LSA Level IV on September 3, 2006. The position of LSA is represented by the Union and is an open, competitive class, civil service title. It is undisputed that at all relevant times Petitioner was a provisional employee of the Law Department with no underlying permanent civil service title.

In November 2008, Petitioner sent Island Musculoskeletal Care, M.D. ("IMC") a letter identifying herself as involved in litigation with a co-worker who was an IMC patient. Petitioner

[1] Petitioner appended to the petition documents that will be referred to herein entitled "Timeframe of Events" ("Timeframe") and "Answer to [Law Department] Attachment (A) Charges and Specifications" ("Answer to Charges"). Petitioner also appended as exhibits copies of the Charges and Specifications against her ("Attachment A") and a July 7, 2009, letter to her Union representative ("July 7 Letter").

enclosed a Health Insurance Portability and Accountability Act ("HIPAA") Compliance form for the attending physician authorizing the release of that co-worker's information to her. In response, IMC sent some but not all of the co-worker's medical records. On March 12, 2009, Petitioner used a Law Department telephone to call IMC to request the remaining medical records. Petitioner states that she identified herself as a named defendant in a small claims action with one of IMC's patients. Also on March 12, 2009, Petitioner sent IMC a letter on the following letterhead:

GEORGETTE TURNER
New York City Law Department
100 Church Street Room 6-106a/6th Floor New York, NY 10007

(City Ans., Ex. 7). Petitioner states she created the letterhead solely to ensure the accurate delivery of the return correspondence and notes that she has access to actual Law Department stationery and would have used such if her intent was to deceive. The March 12 letter reads, in pertinent part:

> Re: Patient: [name omitted]
> DOB: 9/20/70
> Date of Alleged Incident: March 31, 2007
> Worker's Compensation and Private insurance Claims and Payments Schedule
>
> Dear Ms. [name omitted]:
>
> As I explained to you today, that I've called on several occasions in the months of January and February to get the much need information on the above-referenced matter, and to date, I have been unsuccessful in obtaining it.
>
> As we have agreed that you will send me the information that I've requested to me at:
>
> Attn: Ms. Georgette Turner
> The New York City Law Department
> 100 Church Street, Room 6-106a/6th Floor
> New York, NY 10007
>
> Once again, thank you for the information.

(*Id.*).

On March 24, 2009, Petitioner met with Labor and Employment Bureau Chief and Law Department Advocate Georgia Pestana, who informed her that she would be suspended. Petitioner states that she was not allowed Union representation at this meeting but does not allege that she requested Union representation or that she was questioned in the meeting. Petitioner alleges that the co-worker she was in litigation with and whose medical records she sought was Pestana's secretary.

Petitioner was formally suspended on March 25, 2009. On March 30, 2009, Petitioner and her Union Representative, Bernadette Sullivan, met with Pestana to discuss the charges against her. Charges and Specifications alleging three violations of the Law Department's Standards of Conduct were formally proffered on March 31, 2009. The first charge alleged that "with the intent to obtain a benefit or to injure or deprive another person of a benefit [Petitioner] misused [her] official capacity." (Attachment A). The accompanying specifications for the first charge refers to Petitioner contacting IMC on March 12, identifying herself as a Law Department employee, and requesting medical information related to a co-worker be sent to her at the Law Department. The second charge alleged misconduct because Petitioner "used Law Department telephones, materials, facilities and/or equipment for personal matters not related to Law Department business." (*Id.*). The third charge alleged that Petitioner violated the criminal laws of the State of New York. Its specification alleged that Petitioner committed forgery in the second degree when she "with the intent to defraud or deceive another falsely made a written instrument which purported to be a written instrument officially issued or created by the [Law Department]." (*Id.*).

Petitioner met with Sullivan, who informed Petitioner that at the Step hearings, Sullivan would raise Petitioner's concerns. These included allegations that the Law Department had violated

HIPAA and its own procedures by opening mail from a medical practice clearly addressed to Petitioner; that Petitioner was in litigation with Pestana's secretary; that this co-worker had verbally abused Petitioner; and that Petitioner filed a police incident report for harassment against the co-worker. As for the alleged forgery charge, Petitioner asked Sullivan to argue that Petitioner would have used actual Law Department stationery if her intent was to deceive.[2] Finally, Petitioner asked Sullivan to introduce her performance evaluations as evidence of her outstanding work ethic.

The Step I hearing was held on April 8, 2009. Petitioner was represented by Sullivan who, according to Petitioner, made statements Petitioner describes as hurtful to her case, including that Petitioner "used bad judgment." (Timeframe ¶ 3). Petitioner states that Sullivan did not raise the issues that she had promised to raise, that her "advocacy was not persuasive," and that her attitude was one of "not wanting to ruffle any feathers." (*Id.*). At the Step I hearing, Sullivan introduced court documents related to Petitioner's dispute with the co-worker, including a July 17, 2008, NYPD Incident Information Slip.[3] Sullivan also introduced a memorandum dated July 17, 2008, drafted by Petitioner regarding the allegedly threatening language of the co-worker.

The Step I Determination was issued on April 9, 2009, sustaining the charges and recommending termination. It noted that Sullivan did not contest that Petitioner used Law Department equipment to contact IMC and "stipulated that [Petitioner] exercised bad judgment."

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[2] Additionally, Petitioner alleges she asked Sullivan about participating in Union activities without being retaliated against or penalized. However, the record does not identify any Union activity other then the subsequently filed grievance challenging her termination. Nor has Petitioner alleged any retaliation or penalty incurred due to Union activity.

[3] Sullivan also submitted a Civil Court subpoena signed by a judge that was served on the Law Department for personnel records (including Worker's Compensation records) of the co-worker and a HIPAA Authorization form for the medical records of the co-worker.

(City Ans., Ex. 8, p. 3). It also noted that Sullivan "argued that [Petitioner] did not intentionally, or otherwise, mislead anyone or violate any criminal laws." (*Id.*). As for Petitioner's litigation with the co-worker, the Step I Determination further noted that "the existence of or cause for this litigation is irrelevant to the charges brought against [Petitioner]." (*Id.*, p. 4).

The Step II hearing was held on May 1, 2009. Once again, Petitioner was represented by Sullivan. According to Sullivan, at the Step II hearing she argued that Petitioner "exercised bad judgment, as opposed to the alleged fraud, and that her bad judgement did not rise to the level of termination." (Union Ans., Ex. A, ¶ 5). Sullivan further states that she argued that Petitioner was entitled to the information she sought and that Petitioner was willing to accept a lesser penalty. The Step II Determination was issued on May 4, 2009, upholding the recommendation of termination. The Law Department terminated Petitioner, effective May 4.

Sullivan states that she filed for a Step III hearing with the Office of Labor Relations ("OLR") on May 5, 2009.[4] According to Petitioner, Sullivan informed Petitioner that OLR is "slow-moving" and that Petitioner should "patiently wait" for a hearing date to be scheduled. (July 7 Letter). Petitioner states that she tried several times to reach Sullivan in June, leaving her several messages that were not returned. On July 6, Sullivan called and left Petitioner a message. On July 7, Petitioner sent Sullivan a letter noting that it was "incredulous" that OLR had not yet scheduled a date for the Step III hearing months after Sullivan claimed to have requested one. (*Id.*). Petitioner asked if Sullivan would continue to represent her or whether the Union "will be providing me with

[4] Article VI, § 2, of the grievance procedures for the pertinent collective bargaining agreement ("Agreement") states that: "An appeal from an unsatisfactory determination at Step II shall be presented by the employee and/or the Union to the Commissioner of Labor Relations within ten (10) work days of the receipt of the Step II determination." (City Ans., Ex. 2).

the means to obtain independent representation." (*Id.*). Petitioner noted that she had "left several voice mail messages for [Sullivan] that have gone unanswered until yesterday" and requested a response no later then July 21, 2009. (*Id.*).

On July 10, 2009, Sullivan re-sent via facsimile to OLR a copy of her May 5, 2009, request for a Step III hearing. Petitioner asserts that this was the first time Sullivan requested a Step III hearing and that the hearing request was back-dated to reflect May 5, 2009. On November 12, 2009, the instant petition was filed.

A Step III hearing was scheduled for April 14, 2010.[5] The Union avers that it was not set earlier due to OLR's backlog. Sullivan states that she called Petitioner when she learned of the April 14 hearing date. On April 14, 2010, Petitioner requested that the Step III hearing scheduled for that day be postponed and Sullivan secured a postponement; as of October 1, 2010, the Step III hearing has not been rescheduled.

Petitioner contacted Union Vice President Chris Shelton to request that the Union provide her independent outside representation both for the instant petition and for the Step III hearing as her relationship with the Union had become adversarial.[6] Shelton did not respond to Petitioner's request. Petitioner reiterated her request for outside counsel at a conference before the Trial Examiner on June 15, 2010, and Union counsel responded that Petitioner's request had been forwarded to the appropriate parties at both the national and local levels, had been considered at both levels, and had been denied. However, the Union stated that it would provide Petitioner with a different Union

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[5] The date that OLR notified the Union of the Step III hearing date and the date that the Union notified Petitioner are not in the pleadings.

[6] The date Petitioner contacted Shelton is not in the pleadings.

representative for the Step III hearing. Petitioner requested that Union counsel put the Union's refusal in writing on Union letterhead and signed by the appropriate parties. The Union did not provided the requested writing. Petitioner also requested, and Union counsel denied, to deal directly with the head of the Union's legal department.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that this is not a disagreement over tactical or strategic decisions but that the Union breached its duty of fair representation in violation of NYCCBL §12-306(b)(3). Petitioner alleges that Sullivan misrepresented how she would present Petitioner's defense, made damaging statements in the Step hearings, failed to promptly request a Step III hearing, back-dated documents regarding the Step III hearing request, and failed to maintain contact with Petitioner. This behavior by the Union, Petitioner argues, is arbitrary, discriminatory, and in bad faith.

Petitioner further argues that the Union should provide her with independent outside representation as she now has an adversarial relationship with it. Petitioner states that her lack of legal representation greatly disadvantaged her as she has no legal understanding of the Answers submitted by the City and the Union. Union counsel has not allowed Petitioner direct contact with the Union officials who allegedly decided against providing her outside counsel nor has Union counsel provided her with a writing signed by the appropriate parties. Such conduct is questionable and suspicious and Petitioner alleges that Union counsel may have fabricated the denial by the Union of her request for outside counsel.

Petitioner does not explicitly allege that the Law Department violated the NYCCBL but

argues that it violated its own procedures in order to protect Pestana's secretary, failed to comply with a lawfully issued subpoena, and violated its own policies and HIPAA by intercepting and opening medical correspondence addressed to Petitioner.

Petitioner argues that all of her claims are timely as the statute of limitations does not begin to run until Petitioner had actual or constructive knowledge of definitive acts to put her on notice of her right to complain. No such notice existed until it was clear that the Union would not abide by its duty of fair representation, which was not until several weeks after the Union failed to reply to her July 7 Letter, and thus within four months of the November 12, 2009, filing.

As relief, Petitioner seeks continuation of the Step III procedure, reinstatement, and a written apology from the Law Department and the Union for their behavior towards her.

Union's Position

The Union contends that Petitioner failed to meet her burden to plead facts that establish that the Union violated its duty of fair representation. Petitioner's complaint rests entirely upon the Union's alleged failure to pursue her grievance to Step III. However, the Union is still pursuing Petitioner's grievance. The time elapsed between the filing for a Step III hearing and the scheduling of the hearing is not within the control of the Union. Dissatisfaction with the outcome of the Step II hearing does not establish a breach of the duty of fair representation.

City's Position

The City argues that the majority of Petitioner's claims are untimely. The statute of limitations is four months and begins to run upon a party having actual or constructive knowledge of the definitive acts to put it on notice of the need to complain. As the instant petition was filed on November 12, 2009, any claim that Petitioner had notice of prior to July 12, 2009, is untimely and

can be considered only as background information. Thus, any claims based on the Union's representation of Petitioner up to and including her termination on May 4, 2009, are time-barred, as are any implicit claims of retaliation or interference by the City or the Law Department.

The City further argues that Petitioner has failed to establish that the Union breached its duty of fair representation. The petition is devoid of any facts establishing that the Union acted in a manner that was deliberately arbitrary, discriminatory, or founded in bad faith. Petitioner's claims of bad faith are based in how the Union prosecuted Petitioner's grievance; specifically, how it presented her case at the Step I and II hearings and its failure to promptly secure a Step III hearing. As for the handling of the Step I and II hearings, the Board does not substitute its judgment for the Union's. Petitioner's complaints about Sullivan's handling of the grievance amount to disagreements with, or disapproval of, the Union's tactical decisions. Such does not constitute a breach of the duty of fair representation. As for the failure to promptly secure a Step III hearing, the refusal to advance a grievance is not a breach of the duty of fair representation if that decision was made honestly and in good faith. Moreover, the grievance provision in the parties Agreement explicitly allows the employee themself to appeal an unfavorable Step II determination. Thus, there was no obligation on behalf of the Union to submit the Step III grievance. Further, as Petitioner was a provisional appointee when she was terminated, she has no grievance rights in light of *In the Matter of City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465 (2007). In *City of Long Beach*, the New York Court of Appeals held that parties cannot agree to provide rights to provisional appointees beyond the statutory time period of nine months. Thus, no relief can be granted Petitioner through the contractual grievance process and the Union cannot be deemed to have violated its duty of fair representation by not pursuing such a grievance on Petitioner's behalf. As

Petitioner has failed to substantiate her claims as to a breach of the duty of fair representation by the Union, any derivative claims against Law Department arising under NYCCBL § 12-306(d) must fail.

Finally, the City argues that Petitioner has failed to establish evidence of retaliation under the NYCCBL. Petitioner has failed to identify any protected activity that preceded her receipt of the disciplinary charges. No connection has been demonstrated between the litigation in which Petitioner is involved and her employment, other than that the other party to the litigation is also a Law Department employee. Thus, it is not protected activity. Assuming that it was protected activity, Petitioner has not demonstrated that it was a motivating factor in any action undertaken by her employer. That is, Petitioner has not established anti-union animus. Even if the Board were to find both protected activity and that protected activity in part motivated the Law Department's action, no violation exists because Petitioner would have been terminated independently of any protected activity. Petitioner was found to have misused the name of the Law Department for personal use and to forge a document. As such, she would have been terminated independently of any protected activity.

DISCUSSION

At the outset, we note that "a *pro se* Petitioner may not be familiar with legal procedure, and we therefore take a liberal view in construing such pleadings." *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd*, *Matter of Rosioreanu v. NYC OCB*, Ind. No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.); *see also Abdal-Rahim*, 59 OCB 19, at 3 (BCB 1997). Thus, "such review should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner." *Feder*,

1 OCB2d 23, at 13 (BCB 2008); *see also Castro v. City of New York*, 2007 WL 3071857, at * 10 (S.D.N.Y. October 10, 2007) ("[o]bligation to parse the complaint for any arguably available legal theory is particularly acute when the pleading has been drafted by a *pro se* plaintiff"), *adopted*, 2007 WL 3224748 (S.D.N.Y. Nov 01, 2007). Further, "[s]ince no hearing was held, in reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, *arguendo*, that the factual allegations are true, analogous to a motion to dismiss." *Seale*, 79 OCB 30, at 6-7 (BCB 2007); *Morris*, 3 OCB2d 19, at 12 (BCB 2010).

We find Petitioner's pleadings to assert a claim that the Union violated its duty of fair representation by not properly handling the disciplinary grievance, including that Sullivan misrepresented how the Union would present Petitioner's defense, made damaging statements in the Step hearings, failed to respond to Petitioner's inquires, back-dated the Step III request, failed to promptly request a Step III hearing, and failed to ensure that the Step III would be promptly scheduled. Further, the petition alleges that the Union breached its duty by not providing Petitioner with outside counsel.

Regarding possible claims against the City, a liberal reading of Petitioner's pleadings reveal that they implicitly assert claims of interference and retaliation in violation of NYCCBL §12-306(a)(1) and (3). However, we find that the facts alleged do not support such claims. The only protected activity described in the Petitioner's pleading is the filing of her grievance subsequent to her suspension. Since the suspension and filing of disciplinary charges predated the only identified protected union activity, they could not have been motivated by that activity. *See SSEU, L. 371*, 3 OCB2d 22, at 14 (BCB 2010) (citing Wilson v. New York City Housing Auth., 2007 U.S. Dist. LEXIS 25258 at * 30 (S.D.N.Y. April 2, 2007)). Moreover, Petitioner has not alleged that the City

interfered with the grievance process once the disciplinary grievance was filed. Therefore, we find that the claims of retaliation and/or interference are conclusory and unsupported by facts sufficient to state a claim. These claims against the City must be dismissed. *See Rosioreanu*, 1 OCB2d 39, at 18, n. 15 ("Petitioner has not pleaded facts which, even if credited, would tend to establish a violation of the NYCCBL arising out of [the employer's] actions.").[7]

Timeliness

As a threshold matter we address the City's argument that any allegation related to acts prior to July 12, 2009, are time-barred. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). An improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *see also Tucker*, 51 OCB 24, at 5 (BCB 1993).[8] Any "claims antedating the four month period preceding

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[7] While Petitioner contends that the Law Department favored her co-worker, Petitioner has not alleged, nor does anything in the record support finding, that the Law Department did so based upon Petitioner's involvement in protected activity. Petitioner also states that she was not allowed Union representation in her March 24, 2010, meeting with Pestana. However, nothing in the record indicates that Petitioner requested representation or was questioned in that meeting. Petitioner also alleges that the Law Department violated its own procedures and HIPAA by opening an envelope from a medical office addressed to Petitioner but nothing in the record indicates that such was motivated by any protected activity. Alleged violations of internal policies or laws other than the NYCCBL are not within the jurisdiction of the Board. *See*, *e.g.*, *Babayeva*, 1 OCB2d 15, at 7-8 (BCB 2008). Further, we note that with the exception of the scheduling of the Step III hearing, all the activity of the City and the Law Department that Petitioner raises occurred prior to July 12, 2009. Thus, even were we to find Petitioner alleged facts sufficient to state a claim that her employer violated the NYCCBL, such claims would be time-barred.

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

> A petition alleging that a public employer or its agents or a public

the filing of the Petition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)). The instant petition was filed on November 12, 2009. Therefore, all claims arising before July 12, 2009, are untimely. Thus, any claims based upon the March 24 meeting with Pestana, Petitioner's initial suspension as of March 25, Petitioner's March 30 meeting with Pestana, the March 31 issuance of the Charges and Specifications, the Step I and II hearings and determinations, Petitioner's May 4 termination, and the alleged late filing of the Step III request on July 10, are untimely. However, the factual statements that comprise these untimely claims are admissible as background information. *See Okorie-Ama*, 79 OCB 5, at 13. Such material may "illuminate the intent of the employer" regarding acts that are within the statute of limitations. *Rosioreanu*, 1 OCB2d 39, at 14.

Petitioner's timely claims are those alleging the failure to keep Petitioner properly informed of her grievance after July 12, 2009, the alleged mishandling of the Step III process after July 12, and the failure to provide her with outside counsel. Petitioner alleges that Sullivan back-dated the first request for the Step III hearing (dated May 5) in or around July 10, 2009, when the second request was faxed to OLR. As it cannot be determined from the pleadings when Petitioner learned of the Step III request, we treat this claim as timely for the purpose of this decision.

> 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. . . .

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 . . ."

NYCCBL §12-306(b)(3)

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." It is well established that "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). Thus, a petitioner "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Gertskis*, 77 OCB 11, at 11 (BCB 2006). Rather, the Petitioner must establish that the Union acted "arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, 77 OCB 29, at 16-17 (BCB 2006). A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21 (2008) (citations and editing marks omitted). Also, while a "union is not obligated to advance every grievance . . . it has 'an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf.'" *Nardiello*, 2 OCB2d 5, at 40 (quoting *Edwards*, 1 OCB2d 22, at 21) (emphasis in original).

The "burden of pleading and proving that the Union has breached its duty of fair representation lies with the Petitioner." *Id.*, at 40 (internal quotations, editing marks, and citations omitted). This burden cannot be met "simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (citations omitted).

We find that Petitioner has not met her burden. Petitioner has not alleged nor demonstrated that the Union's handling of her grievance differed from the manner in which it handled those of

other Union members. Petitioner complains about the length of time it took to schedule the Step III hearing and alleges that the document Sullivan submitted with the July 10, 2009, Step III hearing request was back-dated to reflect May 5. However, it is undisputed that a Step III hearing was scheduled and postponed at the request of Petitioner. Therefore, it is clear that the Union filed a request for a Step III hearing that was accepted and, thus, that the Union advanced the grievance to Step III, as requested. We cannot conclude that this conduct breached the duty of fair representation.

In addition, Petitioner is dissatisfied with the quality and quantity of her communication with the Union. However, the record does not indicate that the Union failed to keep Petitioner informed. As for the Union's refusal to provide her with outside counsel, Petitioner has not alleged that the Union has provided outside counsel for other Union members under similar circumstances. *See D'Onofrio*, 79 OCB 3, at 20 (BCB 2007) (no breach where petitioner has not shown that the Union did more for others in the same circumstances than it did for the petitioner); *Schweit*, 61 OCB 36, at 15 (BCB 1998); *see also Morris*, 3 OCB2d 19, at 12. Finally, the Union has continued to represent Petitioner in the grievance process.

In sum, we find that the NYCCBL claims arising from alleged acts or omissions prior to July 12, 2009, to be time-barred and that those claims which are timely are insufficient. We, therefore, find that Petitioner's claim that the Union breached its duty of fair representation must fail, as must any derivative claim against the employer pursuant to NYCCBL § 12-306(d). *See Nardiello,* 2 OCB2d 5, at 42. Accordingly, the instant petition is denied in its entirety.

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-2816-09, filed by Georgette Turner against the Communications Workers of America, Local 1180, and the City of New York Law Department be, and the same hereby is, denied in its entirety.

Dated: New York, New York
October 26, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER