

**Johnson, 4 OCB2d 11 (BCB 2011)**

(IP) (Docket No. BCB-2823-10).

**Summary of Decision:** Petitioner asserted that the Union breached its duty of fair representation by allegedly failing to assist him in enforcing the terms of a stipulation of settlement that resolved an out-of-title grievance, which he believed entitled him to an upgraded title and a higher salary rate. Petitioner also alleged that Respondents violated the NYCCBL by making unilateral changes in mandatory subjects of bargaining during a period of negotiations. The Union argued that Petitioner's claim regarding an upgraded title was untimely, and that he was not entitled to the upgrade. The Union also argued that Petitioner's fair representation claim should be denied because the Union ultimately filed a lawsuit on his behalf. The Board found the petition timely, but denied the fair representation claim. Further, the Board found that Petitioner did not have standing to bring a claim that the Union and the City made unilateral changes in mandatory subjects of bargaining. Accordingly, the petition was dismissed in its entirety. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**KEITH JOHNSON, *pro se***

Petitioner,

*-and-*

**LOCAL 924, DISTRICT COUNCIL, 37, AFSCME, AFL-CIO and  
THE NEW YORK CITY POLICE DEPARTMENT,**

*Respondents.*

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**DECISION AND ORDER**

On January 6, 2010, Keith Johnson ("Petitioner") filed a verified improper practice petition, alleging that Local 924, District Council 37 ("Union") violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-

306(b)(1) and (3) by allegedly failing to assist him in enforcing the terms of a stipulation of settlement that resolved an out-of-title grievance with the City of New York (“City”) and the New York City Police Department (“NYPD”). Petitioner also alleges that the City and the Union violated the NYCCBL by unilaterally changing mandatory subjects of bargaining during a period of negotiations. The Union argues that Petitioner’s claim that the Union failed to advance his claim for an upgraded title is untimely. The Union also contends that the Board should deny Petitioner’s fair representation claim because the Union has filed suit in New York State Supreme Court on his behalf to enforce the stipulation of settlement. The City argues that Petitioner failed to establish that the Union breached its duty of fair representation, and that he could not establish derivative claims against the City. The Board finds that Petitioner’s claims are timely, but that Petitioner did not establish that the Union breached its duty of fair representation. The Board also find that Petitioner did not have standing to bring a claim that the Union and the City made unilateral changes in mandatory subjects of bargaining without bargaining in good faith. Accordingly, the petition is dismissed.

### **BACKGROUND**

Since 1990, the NYPD has been employed Petitioner as a City Laborer (“B Laborer”). Petitioner is a member of Local 924, DC 37. Another local, Local 376, DC 37, represents employees in the title Construction Laborer (“C+ Laborer”). On October 21, 1991, while Petitioner was working in the NYPD’s Maintenance Division, the Union filed a grievance on Petitioner’s behalf, claiming that he was assigned to perform out-of-title work in violation of the collective bargaining agreement. On March 8, 1993, the parties signed a stipulation of settlement resolving the grievance (“Stipulation”), which stated that:

[U]ntil [Petitioner] is either upgraded or is assigned duties consistent with the title of B Laborer, the NYPD shall pay him, on a bi-weekly basis, an amount equal to the difference between his salary as a B Laborer and the minimum salary of a Construction Laborer.

(Pet. Ex.12).

After the Stipulation was signed, the NYPD started paying Petitioner at the salary rate for C+ Laborers. Since then, the NYPD has paid Petitioner at a rate set for C+ Laborers. In 1996, he was transferred from the Maintenance Division to the Fleet Services Division. Since his transfer to the Fleet Services Division, the NYPD contends that Petitioner has been performing duties within the B Laborer job specification, not C+ Laborer duties. The NYPD admits that it has continued to pay Petitioner at the higher C+ Laborer rate, but contends that, following his transfer, payment at the C+ Laborer rate was in error.

New rates for the C+ Laborer title were established for the period from July 1, 2002 to June 19, 2010, pursuant to a Consent Determination, dated April 5, 2007 (“Consent Determination rate”). While the NYPD has paid Petitioner as a C+ Laborer since 1993, it did not promote him to that title and it is not authorized to use the C+ Laborer title. After the Consent Determination rate was set and C+ Laborers were then paid at the Consent Determination rate, Petitioner continued to be paid at the old C+ Laborer rate. From 2002 to present, he has been paid the C+ Laborer rate effective prior to the July 1, 2002.

After the Consent Determination was issued in April 2007, Petitioner asked the Union for a copy of the Consent Determination. He was not able to obtain the information immediately. Once he learned that a new Consent Determination rate was set and obtained the information, he began contacting his union to request assistance, and in 2009, he made repeated attempts to communicate his concerns. In his written petition, Petitioner stated:

Unknowing to me because of not having access to Local 376 contract, I could not monitor my pay increases, until I made a call to Local 924 and spoke to Blue Collar Division Representative []. I explain my case over the phone with him, which he knew or I should say, heard about my case. So he sent me the contract of Local 376 by mail to my address. Once I received this information I set down with the personnel manager who was in charge of payroll at my command.

Also throughout 2009, the Union appeared before the Office of Administrative Trials and Hearings (“OATH”) in a proceeding to determine the appropriate prevailing rate for B Laborers. During the proceeding, the Union sought to demonstrate that the type of work performed by B Laborers in order to show that its members warranted wage increases based upon a private sector comparison.

On July 4, 2009, Petitioner met with Local 924 President Kyle Simmons to discuss his concerns. About this conversation, Petitioner wrote that:

We both met on July 4<sup>th</sup>, 2009 in an undisclosed area, I had the chance to bring to his attention my stipulation of settlement about non-payment of wages that were due me. During our lengthy conversation, [the Local President] informed me to make copies of my pay stubs . . . and fax them to his office, and he stated, “We’ll handle this as an oversight” and I agreed.

(Petitioner’s Brief at 3). From his statement, it is not clear precisely what action Petitioner sought from the Union.

In late October 2009, Petitioner again spoke with the Local President regarding his claims. Petitioner alleges that on October 29, 2009, he met with the Local President; as he described the meeting:

I reached out to [the Local President] in the evening of October 28<sup>th</sup>, 2009 in his office. . . . [The Local President] was preparing for Local 924 hearing scheduled for October 30, 2010 with the Office of Administrative Trails and hearing, and that was base on my conversation with [the Local President], on October 28, 2010 . . . then

on October 29, 2010 the (petitioner) talk to [the Local President] were (sic) he made a comment to me that led me to call OCB the comment that was made was “I’m not going to have no C+ Laborers in that agency, because that would just open the flood gates up & I’m not going to have that.

(Petitioner’s Br. at 5). Again, Petitioner does not specifically allege what action he desired that the Union take on his behalf. In November 2009, Petitioner sent letters to the Union and the NYPD’s Office of Labor Policy, stating that he wanted the payment he believed he was owed based upon the Stipulation.

The Union and the City did not understand the precise nature of Petitioner’s claim as articulated in his Petition. Therefore, the parties mutually agreed to mediation in an attempt to clarify Petitioner’s claims and possibly resolve the matter. They met three times for this purpose in June and July of 2010. During mediation, Petitioner clarified that his claim was based on the non-enforcement of the Stipulation. Petitioner claimed that based upon the Stipulation, he was entitled to a title upgrade from B Laborer to C+ Laborer. He also alleged that he had not been paid the incremental difference pursuant to the Stipulation, which would be the difference between the salary of a B Laborer and the Consent Determination rate.

After the mediation, the Union determined that Petitioner was not entitled to an upgrade. However, on August 10, 2010, the Union filed suit in New York State Supreme Court on Petitioner’s behalf against the NYPD and the City seeking to enforce the Stipulation to pay Petitioner the proper incremental difference between B Laborer and the Consent Determination rate. On September 16, 2010, the Union notified Petitioner that it had filed the lawsuit.

**POSITIONS OF THE PARTIES**

**Petitioner's Position**

\_\_\_\_\_ Petitioner argues that his petition is timely. Although the Stipulation was signed on March 8, 1993, it did not specify a date on which its terms would expire. In October 2009, he made efforts to remind the City and the Union of the Stipulation's terms and to notify them that he was not being paid the correct rate. He asserts that he then requested assistance from the Union, but that the Local President refused to help him. Given the four-month statute of limitations for filing under the NYCCBL, he had until February 2010 to timely file his petition. Therefore, his filing on January 6, 2010 was timely.

While Petitioner also claims that, pursuant to the Stipulation, his title should be upgraded to C+ Laborer, he argues that the NYPD has permitted full duty police officers to do the work formerly performed by C+ Laborers, thereby eliminating any opportunity for Petitioner to do this work and advance within NYPD. To support his claim that the Union breached its duty of fair representation, Petitioner asserts that the Union has done more work on behalf of other members and that the Union refused to help him.<sup>1</sup>

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<sup>1</sup> 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.

Petitioner also asserts, without specific allegations, that Respondents violated the NYCCBL by making unilateral changes in mandatory subjects of bargaining during a period of negotiations.<sup>2</sup>

### **Union's Position**

The Union argues that Petitioner's allegations do not demonstrate that it breached its duty of fair representation. First, Petitioner's claim that the Union failed to assert his right to an upgraded title is untimely. Even assuming that the Stipulation provided Petitioner with the right to an upgrade, the Stipulation was executed in 1993. Therefore, it falls outside of the four-month statute of limitations period. Further, while Petitioner claims that the Union failed to enforce the Stipulation because he did not receive an upgraded title, the Stipulation did not suggest or require that he would receive such an upgrade, and the Union continually advised him of this.

While Petitioner claims that the Union did not enforce the Stipulation's language regarding the proper incremental difference, at the time that Petitioner filed the instant petition, the Union did not understand the nature of that Petitioner's claim that the NYPD was paying Petitioner the

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

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 section 12-305 of this chapter;

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(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

improper C+ Laborer rate. Once the Union understood this claim, it filed suit on Petitioner's behalf to enforce the Stipulation. Therefore, at all times, the Union acted in good faith.

As to Petitioner's argument that he was performing out-of-title construction work encompassed in the C+ Laborer job description, and that the Union failed to support his attempt to be promoted, the Union argues that it had a legitimate reason for not supporting his claim that he should be promoted to a C+ Laborer. As the Local President expressed to him, Petitioner's position runs counter to an argument that the Union made in the prevailing rate process concerning the types of duties performed by B Laborers and the wage rates they should receive. If the Union asserted that Petitioner was doing C+ Laborer work, it would undermine the Union's strategy in the prevailing rate hearings and would threaten the earnings of the rest of the members of the bargaining unit.

#### **City's Position**

The City argues that the petition should be dismissed because Petitioner did not allege facts sufficient to show that the Union breached its duty of fair representation. Further, Petitioner mistakenly believed that it would be possible for the Union or the NYPD to upgrade him to a C+ Laborer without having passed a competitive examination. The Stipulation stated only that he would be paid as a C+ Laborer while performing the work of that title. It did not entitle him to be placed in the title of C+ Laborer. Moreover, because neither the Union nor the City was authorized to upgrade him to C+ Laborer, failing to do so was not improperly motivated. Even assuming that the Union might have brought a grievance on Petitioner's behalf years ago when he first contacted the Union, such action still would not establish a breach of the duty of fair representation.

As no breach of the duty of fair representation has been established, Petitioner's claim against the Union must be dismissed, as well as any derivative claims against the City.



### DISCUSSION

NYCCBL § 12-306(e) provides that an improper practice petition must be filed within four months of the accrual of the claim.<sup>3</sup> Claims filed outside of that period are untimely, and this Board will not rule upon the substantive merits of such claims. See Local 2627, DC 37, 3 OCB2d 37, at 15 (BCB 2010); *Castro*, 63 OCB 44, at 6 (BCB 1999). In a claimed breach of a union's duty of fair representation, the statute of limitations "runs from the date the employee organization allegedly acted or failed to act on the petitioner's behalf. *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).

During 2009, Petitioner sought the Union's assistance to enforce the Stipulation, which he believed entitled him to an upgraded title and payment at the higher C+ Laborer rate. As he was not a C+ Laborer, he did not receive immediate notice that the Consent Determination was issued. He inquired with the Union about obtaining information regarding the Consent Determination. After he learned that new rates for C+ Laborers were set pursuant to the Consent Determination, he began contacting his union to request assistance. Petitioner asserts that it was not until his October 29, 2009 conversation with the Local President that he understood that the Union would not take action on his behalf. Petitioner filed his improper practice petition on January 6, 2010. Based upon this

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<sup>3</sup> NYCCBL § 12-306(e) provides, in relevant 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 or of the date the petitioner knew or should have known of said occurrence. . . .

evidence, we find that Petitioner did not learn of the Union's refusal to pursue his claim until October 29, 2009. He filed the instant improper practice petition within four months of that date. Therefore, we find that his petition was timely filed. *See Raby*, 71 OCB 14, at 9.

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a union "to breach its duty of fair representation to public employees under this chapter." In order to establish a breach of the duty of fair representation, a petitioner must establish that a union engaged in "arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Morales*, 3 OCB3d 25, at 10 (BCB 2010) (citing *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007)). A union "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 (2008). Thus, a petitioner "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Turner*, 3 OCB2d 48, at 15 (BCB 2010) (editing marks omitted).

In his petition, Petitioner complained that the Union did not assist him in enforcing the Stipulation. Petitioner raises two claims regarding the enforcement of the Stipulation: 1) that he was entitled to be upgraded to the C+ Laborer title, and 2) that, pursuant to the Consent Determination, he was entitled to be paid the Consent Determination Rate.

Although Petitioner might have believed that the Stipulation entitled him to an upgrade to the C+ Laborer title, on its face, the Stipulation did not require that the NYPD upgrade Petitioner. The plain language required only that Petitioner be paid as a C+ Laborer so long as he performed C+ Laborer duties. Moreover, the Local President explained to Petitioner that Petitioner's position that he was doing or should be doing work performed by C+ Laborers ran counter to the Union's assertion on behalf of all of its members in the prevailing rate process. As we have stated, we "will

not substitute [our] judgment for that of a union or evaluate its strategic determinations.” *Edwards*, 1 OCB2d 22, at 21 (citations omitted); *see also Finer*, 1 OCBB2d 13, at 12-14 (BCB 2008). There is no evidence that the Union’s decision not to advance Petitioner’s claim for an upgrade was arbitrary, discriminatory, or made in bad faith.

Petitioner’s contention that the Union breached its duty of fair representation by not advancing his claim for the Consent Determination rate prior to his filing improper practice petition, that contention was not clear even in the improper practice petition. During mediation, Petitioner clarified that he had not been paid the proper salary rate pursuant to the Stipulation, independent from his alleged right to a title upgrade. Upon this clarification, the Union filed an action on Petitioner’s behalf in New York State Supreme Court to collect the correct incremental difference. Once the Union understood his claim, the Union took prompt action to enforce the Stipulation on Petitioner’s behalf. Moreover, the time that elapsed between Petitioner’s bringing the matter to the Union and its informing him of its initial decision as to his claim was not shown to have created any prejudice to Petitioner, let alone to have been arbitrary, discriminatory or in bad faith. Accordingly, we do not find that the lapse of time in seeking to enforce the Stipulation makes out a breach of the Union’s duty of fair representation. *See Hassay*, 71 OCB 2, at 11-12 (BCB 2003).

Finally, as to Petitioner’s assertion that the Union and the City failed to bargain in good faith, the Board has held that “individual employees lack standing to initiate a claim of the failure to bargain in good faith.” *Holmes*, 3 OCB2d 48, at 11 (BCB 2010); *McAllan*, 31 OCB 15, at 15 (BCB 1983) (“the duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not the union’s members”). Therefore, Petitioner’s claim that the Union and the City failed to bargain in good faith are denied. In conclusion, we hold that Petitioner has not established

a breach of the duty of fair representation against the Union or any derivative claim against the NYPD. Accordingly, the instant improper practice petition is dismissed 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 filed by Keith Johnson, docketed as BCB-2823-10 be, and the same hereby is, dismissed in its entirety.

Dated: February 14, 2011  
New York, New York

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

PAMELA S. SILVERBLATT  
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