Lewis, 4 OCB2d 24 (BCB 2011)

(IP) (Docket No. BCB-2841-10).

Summary of Decision: Petitioner filed a *pro se* improper practice petition against the City and the Union. The petition, as amended, asserted that the City violated NYCCBL § 12-306(a)(1), (3) and (4) by pressuring Petitioner to retire, terminating her employment in retaliation for her use of sick days and her long tenure, and offering her a stipulation of settlement that did not make her whole. Petitioner also alleged that the Union violated NYCCBL § 12-306(a)(4) by failing to bargain in good faith, and breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by mishandling the disciplinary matters that led to her termination. The City argued that Petitioner lacks standing to assert a failure to bargain in good faith violation and failed to establish a *prima facie* case of retaliation. Both the Union and the City asserted that the duty of fair representation claim was time-barred, in part, and insufficient in the remainder. The Board found Petitioner's claims untimely in part; to the extent her claims were timely, Petitioner lacked standing to assert a violation of the duty to bargain in good faith, and her allegations of retaliation and of a breach of the duty of fair representation were insufficient to make out a claim. Accordingly, the petition was dismissed in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CRYSTAL LEWIS,

Petitioner,

- and -

DISTRICT COUNCIL 37, LOCAL 1549 and
THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On February 22, 2010, Crystal Lewis filed a *pro se* improper practice petition alleging that

the City of New York ("City"), the New York Police Department ("NYPD") and District Council 37, Local 1549 ("Union") violated her rights under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Petitioner asserts that the City violated NYCCBL § 12-306(a)(1), (3), and (4) by pressuring her to retire, terminating her employment in retaliation for her use of sick days and her long tenure, and offering her a stipulation of settlement that did not make her whole. Petitioner also alleges that the Union violated NYCCBL § 12-306(a)(4) by failing to bargain in good faith, and breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by mishandling the disciplinary matters that led to her termination. The City argues that Petitioner lacks standing to assert a failure to bargain in good faith violation and fails to establish a *prima facie* case of retaliation. Both the Union and the City assert that the duty of fair representation claim is time-barred, in part, and insufficient in the remainder. The Board finds Petitioner's claims untimely in part; to the extent her claims are timely, Petitioner lacks standing to assert a violation of the duty to bargain in good faith, and her allegations of retaliation and of a breach of the duty of fair representation are insufficient to make out a claim. Accordingly, the petition is dismissed in its entirety.

BACKGROUND

Petitioner worked in the title of Police Administrative Aide ("PAA") for the City in the Brooklyn Court Section for nearly thirty years. The instant improper practice petition arises from two groups of disciplinary charges filed against Petitioner. First, Petitioner was served with two sets

[1] Local 1549 is an affiliated local union of District Council 37 ("DC37"). DC37 is the certified collective bargaining representative of the employees in Local 1549.

of disciplinary charges in 2005 that were heard jointly before the NYPD Assistant Deputy Commissioner and resulted in termination, followed by reinstatement on appeal ("2005 Charges"). Second, Petitioner was issued disciplinary charges in 2007 alleging incompetency and prohibited conduct, which resulted in termination and was upheld on appeal ("2007 Charges").

The 2005 Disciplinary Charges

The 2005 Charges consist of two sets of disciplinary charges. First, on April 25, 2005, Petitioner was served with disciplinary charges for her alleged failure to comply with an order to perform overtime on April 1, 2005. Then, on May 31, 2005, Petitioner was again served with disciplinary charges alleging that she failed to (1) submit required medical documentation concerning absences on several specified dates, (2) properly perform her duties on or about September 26, 2004, and November 9, 2004, and (3) appear for duty on October 23, 2004. Specifically, the charges of improper performance alleged that Petitioner failed to properly process warrant checks because she did not sign her name legibly, did not include her tax number, did not include the time of the warrant check, and did not properly mark the "rap" sheets.

On December 18, 2006, the Union represented Petitioner, through counsel, at the disciplinary hearing regarding these charges before the NYPD Assistant Deputy Commissioner. According to Petitioner, Union counsel arrived late to the hearing and consulted with Petitioner for only five minutes, even though he had not met with or discussed the case with Petitioner prior to this time. Petitioner alleges that she presented Union counsel with audio recordings that captured events underlying the charges, but that he never listened to the tapes or inquired as to the contents of the tapes; she claims that he only stated: "We don't need them." (Pet. ¶ 1b). On April 23, 2007, the NYPD Assistant Deputy Commissioner found Petitioner guilty of the 2005 Charges and

recommended a penalty of forfeiture of thirty days pay.

On or about October 24, 2007, the Police Commissioner disapproved of the penalty issued by the Assistant Deputy Commissioner regarding the 2005 Charges and terminated Petitioner's employment. Union counsel appealed the termination to the Civil Service Commission pursuant to Civil Service Law § 76 and appeared on behalf of Petitioner on March 13, 2008. Petitioner alleges that Union counsel arrived late to the appellate hearing, that he again refused to listen to the audiotapes, and that he refused to consider Petitioner's allegation that a witness had lied at the December 18, 2006 hearing. Petitioner also claims that she informed counsel that the prior determination had found her guilty on days that she was out sick on Family Medical Leave Act ("FMLA") leave, but he did not address this point. The Civil Service Commission found Petitioner's termination unwarranted and modified the determination to a suspension of time served, dating from the dismissal to April 1, 2008. The decision also ordered the NYPD to restore Petitioner to her position within 15 days.

The City failed to reinstate Petitioner within the ordered time period. Thus, on May 21, 2008, Union counsel filed an Article 78 Petition on Petitioner's behalf to compel reinstatement and award back pay. The City reinstated Petitioner on August 18, 2008. Union counsel wrote Petitioner on September 15, 2008, stating that he was "still trying to get back pay for [her]." (Rep., Ex. Letter from Counsel 6, September 15, 2008).[2]

On September 22, 2008, Petitioner wrote to the Union President commending the work of Union counsel and thanking the Union President for appointing him to her case. She also thanked

[2] Petitioner's Exhibit designations are not consistent. Thus, the Board has labeled the Exhibits based on the contents of the document and the date on which they were drafted. The numerical reference refers to the number that Petitioner assigned to the document.

two other Union representatives, writing:

> They both helped me tremendously. . . . [One Union representative] was very professional, and made me feel comfortable during both hearings. Then there was [the other Union representative]. . . . He always returned my calls promptly. He gave me guidance. He fought when he realized I was in the right. He's still fighting for my rights. . . . So once again, thank you, thank you, THANK YOU!

(Rep., Ex. Letter to Union President 1(e), September 22, 2008) (emphasis in original).

On December 1, 2008, the Article 78 judge awarded Petitioner "back pay . . . from April 16, 2008, until August 18, 2008, less the amount of any unemployment insurance benefits petitioner may have received during such period, together with prejudgment interest at the statutory nine percent per annum from the date of June 16, 2008 until the date of this decision." (Union Ans., Ex. C). The Article 78 decision did not address annual leave.

On or about August 13, 2009, the Union representative negotiated a stipulation of settlement with the City regarding the Article 78 decision that would pay Petitioner the sum of $12,625 ("Stipulation"); this represented her salary from April 16, 2008, to August 18, 2008, less the $265 that she received in unemployment insurance benefits. Union counsel advised Petitioner to accept this offer. Petitioner, however, rejected this offer because it allegedly did not credit her with annual leave time that she would have accrued during the period of April 16, 2008, through August 18, 2008. The Union alleges that its counsel asked the City to modify the stipulation to credit annual leave to Petitioner, but the City would not agree to Petitioner's demand. On October 5, 2009, Petitioner contacted the Union seeking an alternative remedy to the Stipulation because she believed the Stipulation did not make her whole. She alleges that she also complained to the NYPD and various agencies that the Stipulation did not make her whole, and sought help from these agencies

in challenging the disciplinary action taken against her.[3]

In November 2009, Petitioner was terminated based on the 2007 Charges, which are discussed in detail below. According to Petitioner, a Union representative contacted her on January 22, 2010, and advised her to sign the Stipulation, which she again rejected. According to Petitioner, the Union representative told her that "[she is] not going to get [her] job back," that the Union was not going back to court for her, and that he was "finish[ed] talking to [her]" because she rejected the Stipulation. (Pet. ¶ 7(b)). On June 10, 2010, however, a Union representative sent Petitioner a letter indicating that the "[C]ity called: they want to settle. Write me a note or call me at 4pm. . . ." (Rep., Ex. Letter from Counsel 3, June 10, 2010). On June 15, 2010, he informed Petitioner in writing that the offer embodied in the Stipulation was still available and again advised that she accept it. She again rejected the Stipulation. According to the Union, it told Petitioner that it would return to state court to attempt to recover any relief that Petitioner is entitled to, but Petitioner stated that she preferred to pursue her rights in a federal discrimination claim. Thus, the Union representative, on behalf of Petitioner, wrote a letter to the City on August 5, 2010, indicating that Petitioner rejected the Stipulation and that Petitioner planned to pursue the case in federal court. (City Ans., Ex. 6). Petitioner continues to reject the Stipulation because she believes that she is entitled to $2,000 more than the Stipulation awards.

The 2007 Disciplinary Charges

On September 18, 2007, Petitioner was served with the 2007 Charges, which alleged incompetency and prohibited conduct. The charges stated that Petitioner (1) demonstrated

[3] Petitioner claims to have sought help from the Equal Employment Opportunity Commission, the Civilian Complaint Review Board, the Internal Affairs Bureau, the Guardians, Senators, her councilwoman, and numerous lawyers.

incompetence as exemplified through her "Below Standards" rating on three occasions, and (2) was absent for a total of 206 days during an eighteen month period.[4]

On May 20, 2009, and June 18, 2009, Union counsel appeared on behalf of Petitioner at disciplinary hearings regarding the 2007 Charges. During these hearings, Petitioner stated that she is rated below standards because of the time that she takes off due to illness.

On September 23, 2009, the City suspended Petitioner based on the 2007 Charges. On October 6, 2009, the Assistant Deputy Commissioner found Petitioner guilty of the 2007 Charges and recommended termination. The Police Commissioner agreed with the recommendation, but offered Petitioner an opportunity to retire immediately as an alternative to termination.

According to Petitioner, on or around November 5, 2009, City lawyers allegedly called her at her home in an effort to persuade her to retire.[5] A Lieutenant also allegedly came to Petitioner's home; she did not answer the door. Petitioner claims that this Lieutenant also attempted to call her, but she did not talk to him.

On November 6, 2009, the Union representative called Petitioner. Petitioner claims that she consulted a "labor investigator" for information concerning FMLA rules and recommended that the Union consult him as well, but the Union allegedly chose not to consult him and told Petitioner that her understanding of the rules was incorrect. Petitioner also alleges that she expressed the desire to bring her case to federal court, but the Union representative stated that "he was not being paid to go

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[4] The "Below Standards" ratings were issued for the following time periods, respectively: September 16, 2005-September 15, 2006; September 16, 2006-December 15, 2006; and December 16, 2006-March 15, 2007.

[5] The record is unclear as to whether the City informed Petitioner that she must retire or face termination prior to this date.

to federal court." (Pet. ¶ 5(c)).

On November 11, 2009, Petitioner expressed to a Union representative that she did not intend to retire. Despite this, the Union representative requested that the City allow her until November 13, 2009, to consider the retirement offer. In a conversation with the Union representative on November 13, 2009, the Union representative explained that turning down the offer of early retirement would mean that Petitioner would not be eligible for her pension until she reached age 62, and that she would lose the Health Care benefits that had been provided to her as a PAA and as a member of Local 1549. The Union representative also expressed concern that Petitioner would lose a future challenge to the termination. Despite this, Petitioner again refused to retire and expressed her desire to challenge the termination. The Union representative called the City thereafter to communicate Petitioner's decision. Petitioner was terminated that day. Union counsel appealed the termination to the Civil Service Commission on November 16, 2009. On November 23, 2009, Union counsel sent Petitioner a letter expressing that:

> I am sorry that we could not avoid your recent termination. A Civil Service Commission appeal has been filed . . . . Please consider signing the attached stipulation. You would receive the money to which you are entitled, since you are not working at PD the issue of time owed as backpay is not an issue anymore.

(Rep., Ex. Letter from Counsel 5, November 23, 2009).

Petitioner alleges that she received a telephone call on November 24, 2009, from the City urging her to come to Police Plaza the next day and again discuss retiring. Petitioner chose not to attend this meeting.

On December 15, 2009, Petitioner filed a *pro se* Federal action against the City and the Police Commissioner in the Eastern District of New York that alleges violations of Title VII, the Age

Discrimination in Employment Act, and the Americans with Disabilities Act.

The instant improper practice petition followed on February 22, 2010. The Civil Service Commission affirmed the November 2009 termination on March 4, 2011.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the City retaliated against her in violation of NYCCBL § 12-306(a)(1) and (3). Petitioner argues that her November 13, 2009 termination was improperly motivated because she took sick days and by the fact that she would have begun her thirtieth year of employment with the City. She also argues that the City improperly pressured her to retire. Petitioner believes that she was harassed for complaining about the Stipulation and requesting help from the NYPD, the Union, and several other agencies in challenging the disciplinary actions. Additionally, Petitioner argues that the Union and the City did not bargain her case in good faith as required under NYCCBL § 12-306(a)(4) because both parties are urging her to sign the Stipulation, which Petitioner believes does not provide complete compensation.

Further, Petitioner contends that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3). Concerning the 2005 Charges, Petitioner alleges that Union counsel arrived late, failed to prepare her for the December 18, 2006 hearing, and ignored evidence that she deemed exculpatory to the charges. Petitioner also maintains that the Union attorney improperly ignored this evidence for a second time at the appellate level. Moreover, Petitioner alleges that the Union improperly urged her to sign the Stipulation, failed to respect her rejection of the Stipulation, and has acted rudely towards her because of this decision. Petitioner argues that each

time the Union encourages her to settle constitutes a new violation of the NYCCBL and thus her claim falls within the four month statute of limitations. With respect to the 2007 Charges, Petitioner claims that the Union improperly refused to represent her in federal court. Last, Petitioner alleges that the Union lacked sufficient knowledge of the law to provide her with adequate representation and should have sought advice from the "labor investigator" who Petitioner recommended.

Petitioner seeks back pay as required pursuant to the Civil Service Commission's order, and ten days pay for the September 2009 suspension, which exceeded thirty days.

City's Position

The City asserts that Petitioner's claims are untimely. Because Petitioner filed her petition on February 22, 2010, Petitioner's claims must relate to acts that occurred on or after October 22, 2009. Thus, Petitioner's allegations that (1) the Union failed to prepare her for the December 18, 2006, and March 13, 2008 hearings and (2) the Union failed to attend three appellate court hearings regarding the May 2008 Article 78 Petition are time-barred. The remaining claim that the Union repeatedly pressured Petitioner to sign the Stipulation also falls outside the four month statute of limitations because the Union advised Petitioner to sign the Stipulation prior to October 22, 2009.

Further, the City maintains that Petitioner fails to establish that the City violated NYCCBL § 12-306(a)(1) and (3). Petitioner has not demonstrated that her involvement in the disciplinary process motivated the City to terminate Petitioner. If, however, the Board were to find that Petitioner's protected activity motivated the termination, the claim still fails because Petitioner's excessive absenteeism, failure to properly perform overtime, failure to supply medical documentation, and failure to properly perform her duties serve as legitimate business reasons warranting termination.

The City also asserts that Petitioner has not set forth sufficient facts to find that the Union

breached its duty of fair representation. Petitioner fails to show that the Union's actions were arbitrary, discriminatory, or founded in bad faith. First, the City argues that Petitioner's claims that the Union provided insufficient representation lack credibility because the Union's actions regarding the 2007 termination led to Petitioner's reinstatement and because the Union appealed the 2009 termination. Second, the Union's advice to accept the settlement was reasonable and does not rise to the level of a breach of the duty of fair representation. Thus, the NYCCBL §12-306(b) claim must be dismissed, as well as any NYCCBL §12-306(d) derivative claims against the City.

Last, the City claims that Petitioner lacks standing to bring a NYCCBL §12-306(a)(4) failure to bargain in good faith claim. Only a certified bargaining representative, not an individual unit member, may bring this claim. Thus, the petition should be dismissed in its entirety.

Union's Position

The Union contends that Petitioner fails to show that the Union's actions were arbitrary, discriminatory, or in bad faith. The Union argues that it fulfilled its duty when it (1) represented Petitioner at her disciplinary hearings, (2) successfully appealed Petitioner's first termination, (3) sought to enforce the Civil Service Commission decision by filing an Article 78 petition, and (4) negotiated a Stipulation that, on its face, awards Petitioner the precise relief granted to her in the Article 78 proceeding. Although Petitioner claims that the Stipulation fails to adhere to the Article 78 decision, Petitioner fails to specify any inadequacy inherent in the Stipulation.

Further, the Union raises a timeliness defense to Petitioner's claims. Because Petitioner filed the initial petition on February 22, 2010, the Board may only review alleged acts and omissions that occurred on or after October 22, 2009. Accordingly, only Petitioner's allegation that the Union and the City pressured her to sign the Stipulation contains acts that fall within the statute of limitations.

Even that claim, however, is time-barred because Petitioner had notice of the Stipulation on August 13, 2009, and was informed that it was ready for signature at the beginning of October 2009.

DISCUSSION

As a threshold matter, Petitioner must have standing to bring a claim. Petitioner alleges that the Union and the City violated NYCCBL §12-306(a)(4) by failing to bargain her case in good faith. Individual unit members, however, lack standing to allege bad faith bargaining by the employer because the duty to bargain runs exclusively between the employer and the union. *See Proctor*, 3 OCB2d 30, at 11 (BCB 2010); *Fair Hearing Representatives, Map*, 59 OCB 6, at 7 (BCB 1997). Thus, the Board will not consider Petitioner's claim that the Union and the City failed to bargain in good faith.

Further, it is well established, pursuant to NYCCBL § 12-306(e), that an improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd*, *Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and Rule 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"))[6]; *see also Banerjee*,

[6] 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. . . .

3 OCB2d 15, at 17 (BCB 2010). Thus, claims that occurred more than four months prior to the filing of the petition are not properly before the Board and will not be considered. *Nardiello*, 2 OCB2d 5, at 27 (OCB 2009).

Here, Petitioner filed the initial petition on February 22, 2010. Thus, to be timely, the acts or omissions about which Petitioner complains must have occurred on or after October 22, 2009. Accordingly, Petitioner's claims that the Union breached its duty of fair representation arising from the December 2006 hearings, the appeal to the Civil Service Commission, and the Article 78 proceeding are untimely. Further we do not agree that each attempt by the Union to encourage Petitioner to sign the Stipulation constitutes a separate violation, and thus falls within the statute of limitations. On the contrary, Petitioner's claim regarding the Stipulation is time-barred because, as of August 13, 2009, Petitioner was aware that the Union supported her signing of the Stipulation– the disputed action– and she even sought an alternative remedy from the Union on October 5, 2009. *See Mora McLaughlin*, 3 OCB2d 24, at 11-12 (BCB 2010); *Mahinda*, 2 OCB2d 38, at 9-10 (BCB 2009). Thus, only Petitioner's claims that the City violated NYCCBL §12-306(a)(1) and (3) by urging her to retire and terminating her in November 2009, and that the Union breached its duty of fair representation by refusing to represent her in federal court and retain the "labor investigator," remain.

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of*

OCB Rule § 1-07(d) 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 Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . . .

Salamanca, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL §12-306(a)(3). Pursuant to this test, a petitioner must demonstrate that

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *Edwards*, 1 OCB2d 22, at 16 (BCB 2008). Where the petitioner alleges sufficient facts to state a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements to demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *Kaplin*, 3 OCB2d 28, at 13-14 (BCB 2010) (quoting *Morris*, 3 OCB2d 19, at 14 (BCB 2010)).

Here, Petitioner claims that the City's decision to issue the 2007 Charges and terminate her was motivated by her use of sick days and her tenure. These claims do not meet first prong of the test because they do not allege any Union activity. Moreover, allegations of disability discrimination do not lie within the ambit of this Board to remedy. *See Babayeva*, 1 OCB2d 15, at 7-8 (BCB 2008).

Petitioner also suggests that the City's decision to issue the 2007 Charges and terminate her in November 2009 was motivated by her complaints to the Union and to the NYPD, as well as other agencies, that the Stipulation did not make her whole. It is undisputed that Petitioner sought Union representation for the 2005 Charges and that the City knew of this activity at the time the 2007 Charges were served. However, we find no evidence that the 2007 Charges were motivated by Petitioner's union activity. Although "typically, this element is proven through the use of circumstantial evidence, absent an outright admission," here, the alleged facts do not establish that the City was motivated by anti-union animus. See Local 2627, DC 37, 3 OCB2d 37, at 16 (BCB

2010). Instead, the Stipulation of which Petitioner complained was negotiated nearly two years after she was served with the 2007 Charges. Therefore, her refusal to sign the Stipulation could not have motivated the earlier disciplinary charges. Further, Petitioner admitted to the factual foundation underlying the 2007 Charges when she conceded in her disciplinary hearing that the 2007 Charges and subsequent termination were based on her absences due to illness. That the Police Commissioner sought her termination for a second time based on these facts is not probative. Thus, the facts alleged do not suggest that Petitioner's involvement in Union activity motivated the City's actions, and the Board cannot establish a *prima facie* case of retaliation. *See Feder*, 1 OCB2d 27, at 16 (BCB 2008).

Petitioner's remaining complaints asserting a breach of the duty of fair representation do not, as a matter of law, rise to the level 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." *Banerjee*, 3 OCB2d 15, at 18 (quoting *Nardiello*, 2 OCB2d 5, at 39). To establish a breach of the duty of fair representation, Petitioner must establish that the Union's acts or omissions in representing her were "arbitrary, discriminatory, or in bad faith." *Morales*, 3 OCB3d 25 (BCB 2010). A mere dissatisfaction with the outcome, or questioning the strategic decisions of the Union is insufficient. *See Smith*, 3 OCB2d 17, at 9 (BCB 2010) (citing *James-Reid*, 77 OCB 29, at 16 (BCB 2006)).

Here, the Board cannot find that the Union's actions were arbitrary, discriminatory, or in bad faith. The Union's decision to appeal Petitioner's termination to the Civil Service Commission, instead of pursuing the matter in federal court, was a strategic decision with which the Board will not interfere. *See Turner*, 3 OCB2d 48, at 15 (BCB 2010). Likewise, Petitioner's questioning of the Union's decision not to consult a "labor investigator" who provided her with legal information that

the Union considered incorrect, does not establish a breach of the duty of fair representation. *See Smith*, 3 OCB2d 17, at 8. Thus, the Union did not violate NYCCBL § 12-306(b)(1) and (3).

In conclusion, we find that Petitioner lacked standing to assert a claim under NYCCBL §12-306(a)(4). Further, we find that Petitioner's claims arising from alleged acts or omissions prior to October 22, 2009, are untimely, and are therefore dismissed. Those remaining claims, which are timely, are insufficient. 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 docketed as BCB-2841-10 be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
April 28, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A.WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER