Porter, 4 OCB2d 9 (BCB 2011)

(IP) (Docket No. BCB-2873-10).

Summary of Decision: Petitioner alleged that the City violated § 12-306(a)(1) and (3) of the NYCCBL by threatening and intimidating Petitioner into resigning. Petitioner also alleged that the Union breached its duty of fair representation by failing to properly communicate with Petitioner, and/or investigate and advise her as to her alleged claims against the City. The City argued that Petitioner failed to establish a *prima facie* case of interference, coercion and/or retaliation. The Union claimed that Petitioner's allegations failed to state a claim that the Union breached its duty of fair representation. The Board found that Petitioner's claims do not establish a violation of the NYCCBL. Accordingly, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DENISE PORTER,

Petitioner,

- and -

COMMUNICATION WORKERS OF AMERICA, LOCAL 1180, and THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondents.

DECISION AND ORDER

On June 29, 2010, Denise Porter ("Petitioner") filed a verified improper practice petition against Local 1180, Communication Workers of America ("Union") and the New York City Department of Finance ("DOF"), a mayoral agency within the City of New York ("City"). Petitioner alleges that DOF violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law

(New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by threatening and intimidating Petitioner into resigning. Petitioner also alleges that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by failing to properly communicate with Petitioner, and/or investigate and advise her on the disciplinary process and any potential claims that she might have against DOF. The City argues that Petitioner fails to establish a *prima facie* case of interference, coercion and/or retaliation. The Union claims that Petitioner's allegations fail to state a claim that the Union breached its duty of fair representation. The Board finds that Petitioner's claims do not establish a violation of the NYCCBL.

BACKGROUND

DOF collects "more than $24 billion in annual tax and fee revenues, valuing almost one million properties, administering tax audit and enforcement actions, and conducting hearings on more than one million parking tickets each year." (City Ans. ¶ 43).[1] For approximately one year, Petitioner worked in the title of Principal Administrative Associate as a Settlement Clerk at the Adjudications Division of DOF.[2] Petitioner's position entailed accepting pleas and offering settlements to customers as an alternative to appearing at a hearing before an administrative law judge. The customer could be the owner, operator, or authorized representative (a "broker") of the vehicle owner ("Customer"). Specifically, when a Customer entered the Adjudications Division of

[1] Although afforded an opportunity to respond to the Union's and the City's answers in accordance with the NYCCBL and the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), Petitioner's counsel chose not to file a reply. Pursuant to OCB Rule 1-07(c)(4), "additional facts or new matter alleged in the answer are deemed admitted unless denied in the reply."

[2] Petitioner worked for the City in other capacities for at least 19 years.

DOF to obtain hearing information, Petitioner would offer the Customer the opportunity to settle the claim by accepting a reduced fine. If the Customer chose to settle, Petitioner would enter the name and address of the Customer standing before her into the DOF computer system, as well as whether the Customer was the vehicle owner, the vehicle operator, or a broker. Petitioner would then enter the summons information into the computer to complete the process and obtain a reduced fine. Petitioner has no discretion in setting the reduced fine, as it is determined solely by the computer system. The Customer agrees to the reduction by signing his own name on an electronic key pad. For example, a broker would sign his own name, rather than the vehicle owner's name. By signing, the Customer waives his right to a hearing and accepts the settlement. Petitioner verifies the Customer's signature and the information provided.

On February 2, 2010, the New York City Department of Investigation ("DOI") directed Petitioner to appear at the Office of the Inspector General ("IG") for an interview. The purpose of the meeting was to obtain information concerning Petitioner's role in what the DOI believed constituted a fraud scheme. The alleged fraud involved Petitioner's colleague entering transactions with DOF on behalf of her "friends" and with the aid of Settlement Clerks. Allegedly, the colleague collected parking ticket settlement claim forms and cash from friends. Then, in front of a Settlement Clerk, the colleague allegedly forged the friends' signatures and supplied the friends' information. She then paid the reduced fine with a check that would not clear, and she pocketed the cash that she had received from the friends. The City interviewed the Settlement Clerks, including Petitioner, who processed the colleague's allegedly fraudulent transactions. According to the City, during a ten month period, Petitioner processed eleven tickets for which the colleague signed the electronic keypad with names other than her own.

Although Petitioner alleges that she did not know about this underlying scheme, she admits that she failed to notice that the colleague did not sign her own name on the electronic keypad. Petitioner asserts through counsel, in a letter addressed to DOF, that "normal practice included 'brokers' coming in with multiple tickets, or individuals coming in with either their own tickets to settle or those belonging to others. Thus, there was nothing unusual when [the colleague], came to her with tickets stating that they were from friends of hers." (Pet. Ex. 8, at 2).

Two individuals were present with Petitioner at the February 2, 2010 meeting at the IG: an armed officer from the Fraud Unit and a confidential investigator from the DOI. The Union did not receive notice of this meeting. The City claims that it informed Petitioner of her right to union representation before asking her questions. According to the letter sent by Petitioner's counsel to DOF, Petitioner did not recall whether she was informed of her right to representation. In any event, Petitioner did not request union representation at this meeting and no Union representative attended.

On or about February 2, 2010, Petitioner informed Union representative Michael Lamb of the details of the meeting. Lamb informed Petitioner that he would try to obtain a recording of the meeting; according to Lamb, that day, he called the investigator who conducted the meeting, but she refused to discuss the details of the interview.[3] In an affidavit submitted in support of the Union's Answer, Lamb asserts that he had approximately three telephone conversations with Petitioner between February 2, 2010, and March 4, 2010, during which they discussed the investigation. Petitioner does not claim that she requested that the Union file a grievance on her behalf. She claims, however, that Lamb did not apprise her of her right to grieve the fact that DOF conducted

[3] Lamb asserts that he called the investigator to obtain information, but does not specifically indicate that he requested the tape recording during this conversation. He does generally assert, however, that he was unable to obtain the tape recording from the City.

a meeting involving possible disciplinary action without affording her the right to representation. No grievance was filed.

Some time after February 2, 2010, DOI indicated to DOF that, based on its investigation, it suspected that Petitioner "had to have been complicit in [the colleague's] fraud for it to have worked for as long as it did." (City Ans. ¶ 55). On March 4, 2010, Petitioner received a notice from DOF that suspended her without pay for 30 days. The notice did not list a reason for the suspension. That day, Petitioner spoke with Lamb, who informed her that the City would likely file charges against her within the next 30 days. Petitioner does not allege that she requested that the Union file a grievance regarding her suspension, but claims that Lamb never informed her of her right to grieve the suspension.

On March 9, 2010, DOF sent Petitioner a notice to appear and testify at the Department Advocate Office on March 17, 2010, regarding a confidential non-public disciplinary matter that DOF was investigating. The letter advised Petitioner: "You may contact your union representative or counsel about this matter, and your representative or counsel may accompany you to this interview." (Pet. Ex. 4). That day, Petitioner spoke with Lamb by telephone, and he answered all of her questions and concerns regarding the March 17, 2010 appearance. Petitioner does not assert that she requested a meeting with Lamb prior to the March 17, 2010 appearance, but claims that Lamb never met with her to prepare her for the March 17, 2010 appearance. The Union asserts that Lamb generally meets in person with members only upon request.

Upon Petitioner's request, Lamb accompanied Petitioner to the March 17, 2010 appearance, where DOF representatives asked Petitioner questions about her own job functions and those of the colleague. At this appearance, Petitioner received a Notice and Statement of Charges ("Notice"),

which alleged that over a ten month period, Petitioner processed eleven parking ticket settlement claims for respondents who did not physically appear before her, with knowledge that the colleague forged the respondents' signatures on the electronic keypad. The specific charges against Petitioner include falsifying entries, failing to report corruption or criminal activity, violating DOF rules and regulations, performing duties in an improper, negligent or careless manner, and engaging in conduct tending to bring the City into disrepute. The Notice indicated that an "Informal Conference" was scheduled for April 14, 2010, and that Petitioner may file a written answer within eight days. The Notice also gave Petitioner the option to contact a named DOF attorney to discuss settlement options up until March 21, 2010. DOF representatives told Petitioner that DOF was seeking termination for her misconduct, but that it would allow her to resign instead. Lamb states in his affidavit that DOF representatives indicated that Petitioner would have several weeks to consider this settlement offer.

Further, although nothing in the record indicates that Petitioner requested that the Union file a written answer on her behalf concerning the charges, Petitioner asserts that Lamb never discussed filing a written answer and never advised her to file a written answer. The Union notes that it is not the Union's customary practice to prepare a written answer; rather, the Union recommends that members use subsequent steps in the disciplinary process to rebut any disciplinary charges.

Between March 17, 2010, and April 2, 2010, Lamb asserts that he and Petitioner had approximately four conversations. During these conversations, Lamb addressed the pros and cons of resigning, the effects of termination, the validity of the charges, and the grievance process. Specifically, he told Petitioner that she would need to make a decision to resign or to proceed under the disciplinary process. According to Lamb, Petitioner indicated during one of these conversations that she was "leaning towards resigning." (Lamb Affidavit, at ¶ 16). Petitioner generally asserts that

Lamb never discussed her grievance rights under the collective bargaining agreement, but she does not deny Lamb's assertions concerning their conversations after the March 17, 2010 appearance.

On April 2, 2010, nearly two weeks after the settlement deadline stated in the Notice, DOF called Lamb to discuss whether Petitioner was interested in the settlement. After speaking to DOF, Lamb called Petitioner. According to Lamb, he told Petitioner that DOF called him to ask if she wanted to accept the settlement offer. Petitioner asserts that Lamb told her at 2 pm that DOF "demand[ed]" her decision by 5 pm that day. (Pet. ¶ 20). Petitioner alleges that Lamb offered no advice. According to Lamb, however, he again discussed the pros and cons of resignation and termination. It is undisputed that Lamb told Petitioner that a "fight would entail a long, arduous process" and that resignation offered certain benefits, such as remaining on a city employment list and maintaining eligibility for re-hire by a different City agency. (Pet. ¶ 21). During this conversation, Petitioner told Lamb that she "would resign." (Lamb Affidavit ¶18).

After Lamb's telephone conversation with Petitioner, he informed DOF that Petitioner would resign.[4] On April 5, 2010, Petitioner signed a Stipulation of Resignation ("Stipulation") at DOF's Advocate's Office. The Stipulation contains two clauses that provide:

> 1) The Respondent agrees to resign on or before April 5, 2010;
>
> 2) The Respondent acknowledges that she entered this Stipulation knowingly, after being advised of her right to consult with her attorney and/or union representative and does accept all terms and conditions contained herein.

[4] Petitioner's Exhibit 10, a letter from DOF addressed to Petitioner's counsel, indicates that Lamb called DOF on April 2, 2010, and informed DOF that Petitioner would resign. DOF and Lamb agreed that Petitioner would resign at DOF's Advocate's Office on April 5, 2010. (Pet. Ex. 10).

(Pet. Ex.6). No Union representative was present at the signing, although Petitioner claims that Lamb said he would attend. Lamb, however, executed the Stipulation later that day.

On June 29, 2010, Petitioner filed the instant petition claiming that DOF threatened and intimidated Petitioner into resigning and that the Union breached its duty of fair representation.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that DOF violated NYCCBL § 12-306(a)(1) and (3) by threatening Petitioner with discharge without just cause and intimidating her into resigning. Petitioner argues that the claims against her were unsubstantiated and that she had no knowledge of any fraud scheme. Despite this, Petitioner claims that DOF provided her with only three hours notice to accept the resignation offer or else face termination under the disciplinary process. Thus, under duress, she signed the Stipulation without Union representation and without being fully advised of her contractual rights. By its actions, DOF circumvented Petitioner's contractual right to the April 13, 2010 Informal Conference, as well as her right to return to pay status as of April 3, 2010.[5]

Additionally, Petitioner claims that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by failing to take certain actions on Petitioner's behalf. In particular, Petitioner cites the Union representative's failure to: (1) obtain a recording of the February 2, 2010 meeting or grieve its inability to do so; (2) meet with Petitioner prior to the March 17, 2010 and April 5, 2010 meetings; (3) prepare a written answer to the charges presented to

[5] The period of suspension without pay cannot exceed thirty days under the Collective Bargaining Agreement, which would have been April 3, 2010.

Petitioner on March 17, 2010; (4) investigate and advise Petitioner on the charges against her; (5) advise Petitioner of the contractual steps involved to participate in the grievance procedure; (6) grieve, or advise Petitioner to grieve, her right to union representation at the February 2, 2010 meeting and/or the propriety of the March 4, 2010 suspension; and (7) explain the meaning and import of the Stipulation.

As relief, Petitioner seeks rescission of the Stipulation, an Informal Conference under the grievance procedure, and reinstatement with back pay.

City's Position

The City argues that Petitioner's claims arising from the February 2, 2010 meeting are untimely. Because Petitioner filed the instant petition on June 29, 2010, the City argues that the Board may review only alleged acts and omissions that occurred after February 28, 2010, exactly four months prior to the filing of the petition. Therefore, the alleged violations of NYCCBL § 12-306(a)(1) and (3) based upon the February 2, 2010 interview are time-barred.[6]

The City also maintains that Petitioner's NYCCBL § 12-306(a)(1) and (3) claims must fail. First, Petitioner fails to allege a § 12-306(a)(3) violation because the service of disciplinary charges preceded any protected union activity. Further, Petitioner fails to present any evidence that DOF's settlement offer was motivated by anti-union animus. If the Board, however, were to find a causal nexus, the City maintains that involvement in a fraud scheme warrants termination. Second, Petitioner fails to show duress or that her consent to the Stipulation was invalid because Petitioner

[6] Petitioner initially contended that DOF violated her right to union representation at or before the February 2, 2010 meeting because she was never informed that the interview could lead to disciplinary action and that she had a right to have her union representative or an attorney present during the meeting. Petitioner conceded, however, in a letter brief to the Office of Collective Bargaining, dated January 5, 2011, that this claim is time-barred.

had two weeks to weigh the consequences of accepting the March 17, 2010 resignation offer. Therefore, the Board must dismiss Petitioner's NYCCBL § 12-306(a)(1) and (3) claims.

Last, the City asserts that Petitioner fails to allege facts that the Union acted in a manner that was arbitrary, discriminatory, or founded in bad faith. Therefore, Petitioner's duty of fair representation claim, as well as any derivative claim against DOF arising under NYCCBL §12-306(d), must be dismissed.

Union's Position

The Union asserts that its representation was not arbitrary, capricious or in bad faith, and thus, it did not violate its duty of fair representation. The Union maintains, and Petitioner does not deny, that beginning on February 2, 2010, Lamb communicated with Petitioner through many telephone conversations during which he provided advice, preparation, and ample opportunity for Petitioner to present her questions and concerns. He also accompanied Petitioner to the March 17, 2010 appearance, which was the only time that Petitioner requested the presence of a Union representative. Lamb, in good faith, advised Petitioner that a "fight would entail a long, arduous process." (Pet. ¶ 21).

Moreover, the alleged failures complained of do not, as a matter of law, rise to the level of a breach of the duty of fair representation. Petitioner never requested union representation at the February 2, 2010 meeting, and the Union lacked prior notice of this meeting. Thus, the Union did not have the opportunity to represent Petitioner at the meeting. Nevertheless, the Union attempted to obtain a copy of the tape recording even though the Union considered it unnecessary to the investigation. Further, the Union made a good faith determination that Petitioner's claims regarding

the February 2, 2010 meeting lacked merit.[7] Moreover, Petitioner never requested that Lamb meet with her in person; because Lamb does not generally meet with members in person, the Union did not discriminate against Petitioner by failing to do so. Likewise, Petitioner did not request that the Union file a written answer, and it is not customary for the Union to file answers in response to charges because it recommends that members use the grievance procedure to adjudicate disciplinary charges. Nor did Petitioner request that the Union file a grievance when she received her notice of suspension, which, the Union claims, would have been premature in light of the circumstances. The Union adds that where, as here, there is no arbitrary, discriminatory, or bad faith action, the Board should not evaluate a union's investigation into the basis of a grievance. Last, the meaning and import of the Stipulation was apparent on its face and did not require explanation. There was no need for Lamb to attend the April 5, 2010 non-investigatory meeting, and Petitioner never requested that Lamb do so. Thus, the Board should dismiss Petitioner's claim that the Union breached its duty of fair representation.

DISCUSSION

It is well established 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 Coll. Barg.*, No. 109481/03 (Sup. Ct. N.Y.Co. Oct. 8, 2003); *see also Banerjee*, 3 OCB2d 15, at 17 (BCB

[7] Even though Lamb tried to obtain the recording, the Union argues that Petitioner had no contractual or legal entitlement to the recording of the February 2, 2010 meeting. The Union maintains that the IG does not have to notify a public employee of a right to Union representation. Union Memorandum of Law in Support of Respondent's Answer, at 10 (citing *CWA, L. 1182*, 57 OCB 8 (BCB 1996)).

2010). "[C]laims antedating the four-month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 27 (OCB 2009); *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)). The actions underlying time-barred claims, as well as the events leading up to them, may be admissible only as background information. *Rosioreanu*, 1 OCB2d 39, at 14 (BCB 2008), *affd., Rosioreanu v. NYC Office of Coll Barg.*, No.116796/08 (Sup. Ct. N.Y. Co.April 7, 2009), *affd.*, 78 A.D.3d 401, 910 N.Y.S.2d 65 (1st Dept. 2010); *DC 37*, 61 OCB 13, at 12 (BCB 1998).

In a letter brief to the Office of Collective Bargaining, Petitioner concedes that "any direct claim" that DOF failed to inform Petitioner that the February 2, 2010 meeting at the IG involved, or could lead to, matters of a disciplinary nature and that Petitioner could have her union representative present during the meeting is time-barred. (Letter Brief, at 1). Thus, the Board will not consider this claim and will only view the February 2, 2010 meeting as background information.

Petitioner's claims that DOF violated NYCCBL § 12-306(a)(1) and (3) by allegedly retaliating against Petitioner with the threat of discharge on April 2, 2010 and intimidating her into signing the Stipulation on April 5, 2010, remain before the Board.

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL §12-306(a)(3). This test states that 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 [the] petitioner's showing on one or both elements or 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) (citation omitted)).

Here, Petitioner fails to make out a *prima facie* showing of retaliation for protected activity. Petitioner identifies the following dates as encompassing protected union activity: February 2, 2010 (when she consulted Lamb and he stated that he would try to obtain a recording), March 4, 2010 (when she consulted Lamb on her suspension), March 9, 2010 (when she received the notice to appear), and March 17, 2010 (when she appeared with Lamb as her representative). There is no claim that DOF had any knowledge of Petitioner's union activity prior to March 17, 2010, when Lamb appeared with Petitioner at the disciplinary interview. At that time, however, the disciplinary charges had already been drafted against Petitioner for her alleged misconduct. Accordingly, where, as here, the City's decision to file charges against Petitioner, and offer her the option to resign or seek her termination through the disciplinary process, antedated any known involvement in union activity, Petitioner's retaliation claim fails. *See DEA*, 79 OCB 40, at 22 (BCB 2007); *see also Edwards*, 1 OCB2d 22 (BCB 2008). Moreover, DOF took no adverse employment action after Petitioner appeared with Union representation. The Stipulation that was offered as an alternative to termination did not have an adverse impact on Petitioner. *See Local 1181*, 3 OCB2d 23 (BCB 2010); *DC 37*, 73 OCB 6, at 12 (BCB 2004) (finding no adverse employment action where petitioner's punishment was reduced).

Nor does Petitioner allege sufficient facts to show that DOF violated § 12-306(a)(1) by coercing her into signing the Stipulation. Although Petitioner asserted that on April 2, 2010, she was given only three hours to accept the settlement offer, the Notice that she received on March 17, 2010, informed her that DOF was seeking termination and that she had until March 21, 2010, to discuss settlement. By extending that period through April 2, 2010 (when DOF asked Petitioner if she had made a decision), DOF provided Petitioner more than two weeks to consider the settlement. Further, prior to making her decision, Petitioner admits that she discussed the Stipulation with Lamb on April 2, 2010, and that he provided her with advice and highlighted the benefits that resignation would offer. After this consultation, Petitioner told Lamb that she would resign. She then had an additional three days to reconsider her decision before choosing to appear and sign the Stipulation on April 5, 2010. As a result, we do not find that Petitioner has established a § 12-306(a)(1) or (3) violation.

The remaining question is whether the Union's actions and omissions constitute a breach of the duty of fair representation in violation of NYCCBL §12-306(b)(3). To establish a breach of the duty of fair representation, Petitioner must establish that the Union's actions or omissions in representing her were "arbitrary, discriminatory, or in bad faith." *Morales*, 3 OCB2d 25, at 10 (citation omitted); *see also Hug*, 47 OCB 5, at 14 (BCB 1991). Mere dissatisfaction with the outcome of Union representation is insufficient. *Smith*, 3 OCB2d 17, at 9 (BCB 2010) (citing *James-Reid*, 77 OCB 29, at 16 (BCB 2006)). In short, Petitioner "must allege more than negligence, mistake or incompetence to [establish] a *prima facie* showing of a union's breach." *Proctor*, 3 OCB2d 30, at 12-13 (BCB 2010) (quoting *DelRio*, 75 OCB 6, at 13 (BCB 2005)).

Here, Petitioner's claims do not demonstrate that the Union's conduct was arbitrary, discriminatory, or in bad faith. Beginning on February 2, 2010, Lamb attempted to obtain

information regarding the DOI investigation. During the three months that followed, Lamb had at least ten telephone conversations with Petitioner and accompanied her on the one occasion for which she requested his presence. During their communications, Lamb advised Petitioner of the pros and cons of resignation, the effects of termination, the validity of the charges, and the grievance process.

Although Petitioner cites several alleged errors or omissions by the Union, we do not find that the Union's conduct breached the duty of fair representation. Based on the circumstances presented here, failure to meet in person with a member is not a breach of the duty of fair representation. *See Galleano*, 57 OCB 39, at 13 (BCB 1996). Here, Lamb repeatedly communicated with Petitioner via telephone. *See Turner,* 3 OCB2d 48 (BCB 2010) (finding that the petitioner's dissatisfaction with the quality of communication did not amount to a breach of the duty of fair representation where the record failed to show that the union did not keep the petitioner informed). Further, no facts indicate that Lamb regularly meets with members in person to suggest that Lamb treated Petitioner differently from any other member. *See D'Onofrio*, 79 OCB 3, at 20 (BCB 2007) (finding no breach where the petitioner failed to show that the Union did more for others in similar circumstances than it did for the petitioner). Likewise, because it is the Union's practice to recommend utilizing the grievance procedure, as opposed to filing a written answer to charges, Lamb's failure to prepare a written answer does not amount to a breach. *See Rosioreanu*, 1 OCB2d 39, at 15 (finding that the Union did not breach its duty of fair representation when it applied its general policy of "advis[ing] the employees not to present in writing their arguments at all steps during the grievance procedure" to the petitioner's case).

Likewise, the record fails to establish that the Union chose not to submit a grievance on Petitioner's behalf for reasons that are arbitrary, discriminatory, or in bad faith. *See Perlmutter*, 59

OCB 16, at 6 (BCB 1997). Here, Petitioner asserts that the Union should have grieved DOI's alleged denial of the right to union representation at the February 2, 2010 meeting, the denial of access to the tape recording of the meeting, and the propriety of the March 4, 2010 suspension.[8] The Union, however, contends that there was no merit to these claims. In evaluating the Union's handling of grievances, the Union "enjoys wide latitude . . . as long as it exercises discretion with good faith and honesty." *Sicular*, 79 OCB 33, at 13 (BCB 2006) (quoting *Wooten*, 53 OCB 23, at 15 (BCB 1994)). A Union's "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008) (quoting *Sicular*, 79 OCB 33, at 15).

Here, the Union did not breach the duty of fair representation. The Union acted reasonably with respect to obtaining the tape recording. On its own initiative, the Union tried to obtain the tape recording. When it could not, the Union discussed the details of the February 2, 2010 meeting with Petitioner multiple times. During those discussions, Petitioner could not recall whether the DOI informed her of her right to representation. Based upon this investigation, the Union concluded that her claims concerning the meeting lacked merit. Thus, the Union had no reason to submit a grievance on Petitioner's behalf. With respect to the suspension, the Union did not grieve the suspension because it correctly anticipated that formal charges would be filed, and it prefers to use the disciplinary process to challenge these charges. Thereafter, the Union advised Petitioner that proceeding under the disciplinary process would entail a "long, arduous process," while resignation had certain benefits. (Pet. ¶ 21). Petitioner chose to settle her claims by signing the Stipulation.

[8] Petitioner's claim concerning the Union's failure to grieve the City's refusal to produce the tape recording was not articulated until January 1, 2011, in a letter brief to the Office of Collective Bargaining.

Because she entered the Stipulation, the Union had no reason to file any grievance. Throughout this process, the Union answered Petitioner's questions and never refused to investigate Petitioner's claims. Thus, the Union's actions were not arbitrary, discriminatory, or in bad faith.

Finally, Petitioner's claim that Lamb failed to explain the meaning of the Stipulation lacks merit. Petitioner admits that, during their conversation discussing the settlement, Lamb indicated that resignation offers several benefits and that a "fight would entail a long, arduous process." (Pet. ¶ 21). With this information, Petitioner chose to resign and told Lamb that she would resign. Petitioner also indicated on a prior occasion that she was "leaning towards resigning." (Lamb Affidavit, at ¶ 16). Based on Petitioner's representation that she intended to resign, Lamb organized a place and time for her to resign. She appeared and signed a two-sentence Stipulation that is clear on its face. Accordingly, the facts show that Petitioner knew that by signing the Stipulation, she resigned from her position. *See DC 37, L. 1549*, 77 OCB 13, at 12 (BCB 2006) (finding that the words "may lead to termination" in a Last Chance Agreement indicated that the employer may terminate the employee). Moreover, by signing the Stipulation, Petitioner specifically attested in the second clause that she knowingly signed it. *See Okorie-Ama*, 79 OCB 5, at 16 (finding no breach in the duty of fair representation where an employee consented to and signed a stipulation that the employee "agree[d] to retire"). Therefore, Lamb's failure to accompany Petitioner to the signing was not arbitrary, discriminatory, or in bad faith and does not amount to a breach of the duty of fair representation.

In conclusion, this Board finds that Petitioner has not shown that the City or the Union violated the NYCCBL. Thus, 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, docketed as BCB-2873-10, filed by Denise Porter, 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
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER