Rondinella, 5 OCB2d 13 (BCB 2012)

(IP) (Docket No. BCB 2992-11)

Summary of Decision*:** Petitioner, a probationary employee of the Department of Sanitation, claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3), when it failed to properly assist him regarding matters related to a line of duty injury, including his termination, and then failed to seek his reinstatement. The Union and the City argued separately that Petitioner's claims were time-barred and that the Union did not breach its duty of fair representation. The Board found that the majority of the claims were untimely, and that the timely allegations did not state a claim that the Union breached its duty of fair representation or that the employer violated the NYCCBL. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JOSEPH C. RONDINELLA,

Petitioner,

-and-

THE UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF SANITATION,

Respondents.

DECISION AND ORDER

On October 28, 2011, Joseph C. Rondinella ("Petitioner") filed a *pro se* verified improper practice petition against the City of New York ("City"), the New York City Department of Sanitation ("DSNY"), and the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters ("Union"), alleging that the 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 failure to properly assist him in dealing with DSNY regarding matters related to a line of duty injury ("LODI"), including his termination, and the Union's failure to seek his reinstatement. Both the Union and the City argue that Petitioner's claims are time-barred and that the Union did not breach its duty of fair representation. This Board finds that the majority of the claims are untimely and that the timely allegations do not state facts that would, if proven, establish that that the Union breached its duty of fair representation or that DSNY or the City violated the NYCCBL. Accordingly, the petition is denied.

BACKGROUND

Respondents are parties to a collective bargaining agreement ("Agreement"). The Union represents DSNY employees in the civil service title of Sanitation Worker. Petitioner was appointed to that title at DSNY on August 11, 2008. Prior to his appointment, Petitioner signed a form stating that his appointment was "subject to a 18 month probationary period" that, pursuant to Civil Service Rule ("CSR") 5.2.8, may be extended without his consent by the number of days he does not perform the duties of his position and that, with his consent, may be extended by up to six months.[2] (*See* City Ans., Ex. 14)

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[1] After Petitioner's October 28, 2011 filing was deemed insufficient, he filed additional allegations on November 10, 2011. The combined submissions were deemed sufficient and are, together, referred to herein as the "petition."

[2] CSR 5.2.8 (published by the City's Department of Citywide Administrative Services ("DCAS") as Personnel Rule and Regulation 5.2.8) states, in pertinent part, that:

On January 5, 2010, Petitioner was hit by a car while working, suffering injuries including a "hairline fracture in the proximal fibula bone, herniated disc[s] . . . , and traumatic injury to the left ankle." (Pet., Ex. 1, p. 3) DSNY's LODI procedures require that an employee provide documentation of all authorized medical visits within 48 hours of the visit, and the LODI form includes the following:

> **All LODI Employees**
>
> **You must** request **and receive in advance authorization for each visit** to a doctor, chiropractor, therapist and also for x-rays, medical tests and surgical appliances.
>
> You cannot use an authorization more than one time!
>
> **Bills will not be paid** by [DSNY] **if employee does not obtain prior approval!!!**

(Pet., Ex. 4) (bold in original; other emphasis removed)[3] After his January 5, 2010 LODI, Petitioner was out on leave almost continuously until August 3, 2010.[4]

> (a) . . . with the written consent of the probationer, [DCAS] may authorize the extension of the probationary term . . . not exceeding in the aggregate six months; . . .
>
> (b) . . . the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned in a different job title; . . .

(City Ans., Ex. 4) CSR 5.2.8(a) and (b) both explicitly state that "the agency head may terminate the employment of the probationer at any time during any such additional period or periods."

[3] Unnumbered exhibits submitted by Petitioner have been denominated by the Trial Examiner.

[4] Petitioner's Leave Usage Details from the City Human Resource Management System records that between his appointment on August 11, 2008, and his termination on October 6, 2010, Petitioner missed work on 190 days, consisting of 178 eight hour shifts, four 16 hour shifts, and eight shifts of four hours or less. (*See* City Ans., Ex. 12) Of the 190 days, 132 were credited as medical leave or LODI, 129 of which were subsequent to Petitioner's January 5, 2010 LODI.

On January 22, 2010, DSNY's Medical Director recommended that Petitioner's probation be extended by six months plus the time he was not performing the duties of his position. On February 4, 2010, DSNY hand delivered a letter notifying Petitioner that his probation would be automatically extended under CSR 5.2.8(b) by the number of days he had not performed the duties of his position. DSNY calculated that between his appointment on August 11, 2008, and February 4, 2010, Petitioner had not performed the duties of his position on 55 days, including 21 days related to the January 5, 2010 LODI.[5] Thus, DSNY calculated that Petitioner's probationary period was automatically extended to April 6, 2010. Also on February 4, 2010, DSNY presented Petitioner with a consent form to extend his probationary period by an additional six months to October 5, 2010, pursuant to CSR 5.2.8(a). Petitioner states that he was ordered to sign the consent form when he was incapacitated and medicated.

On March 31, 2010, DSNY issued a disciplinary complaint against Petitioner for his failure to provide medical documentation within 48 hours of a February 2010 doctor's visit as required by DSNY's LODI procedures. This failure to timely provide medical documentation also led to a probation evaluation interview on April 2, 2010. The Probation Evaluation Interview form states that it was explained to Petitioner "that the failure to follow sick leave rules & regulations while on LODI may result in further extension of his probationary period or termination from job." (Pet., Ex. 6) Petitioner signed the form, noting that he objected to the extension of his probationary period and that he requested Union representation.

In April 2010, Petitioner applied to the New York City Employees' Retirement System ("NYCERS") for an accident disability retirement, alleging that he was incapacitated due to the

[5] Petitioner neither confirmed nor denied DSNY's calculations but explicitly disputes one day—January 2, 2010—for which he was listed as "absent without authority." (Pet., Ex. 5) Petitioner insists that he was ready and willing to work on that day.

January 5, 2010 LODI. On May 14, 2010, Petitioner filed for disability with the Social Security Administration ("SSA").[6]

On May 19, 2010, DSNY ordered Petitioner to report to light duty work. Upon returning to DSNY, Petitioner found that his locker had been emptied, that some of his belongings were bagged and left near the slop sink, and that others were missing. On May 21, 2010, Petitioner injured his knee on the metal hasp under a desk and went out on a second LODI leave. Petitioner avers that, from May 21 until his termination, DSNY repeatedly ordered him to light duty work when he was physically unable to work. Petitioner would inform DSNY of his condition and report sick. DSNY would then order Petitioner to be evaluated. The DSNY doctor repeatedly found that Petitioner could perform light duty work, and this finding would result in DSNY again ordering Petitioner to light duty work, repeating the cycle. Petitioner claims that he repeatedly sought Union assistance regarding this matter.

By June 2010, Petitioner had numerous unreimbursed medical bills related to the January 5, 2010 LODI.[7] Petitioner acknowledges that the Union's Secretary-Treasurer arranged for him to meet with the DSNY Medical Director on June 17, 2010, and that, subsequent to that meeting, DSNY reimbursed some of his medical expenses.

On July 19, 2010, DSNY issued a second disciplinary complaint against Petitioner for his failure to provide medical documentation within 48 hours of two doctors' visits in June 2010 as

[6] Petitioner was represented by counsel before SSA. In January 2011, Petitioner requested that SSA conduct a hearing, which ultimately was held on August 16, 2011.

[7] The Union avers that its Secretary-Treasurer advised Petitioner in January 2010 how to secure reimbursements from DSNY, and that Petitioner responded that he had retained private counsel and was seeking reimbursement through No-Fault insurance. Petitioner disputes the Union's characterization but acknowledges that he had a conversation regarding reimbursement with the Union's Secretary-Treasurer, that he had retained an attorney, and that he initially sought to have his medical expenses reimbursed through No-Fault insurance.

required by DSNY's LODI procedures. In a July 23, 2010 letter, DSNY's Medical Division notified Petitioner that a review of his medical records indicated that he had "been unable to perform the duties of [his] title as a sanitation worker" and was "not eligible for disability retirement." (Pet., Ex. 7) The letter states that "the Medical Board has forwarded [Petitioner's] case to the Legal Bureau in order to begin the Medical Separation Process" and concluded by instructing Petitioner to contact the Medical Division "[i]f you are medically able to return to regular duty." (*Id.*)

On August 3, 2010, DSNY held a counseling session with Petitioner and presented him with a "Notification of Sick Leave Category/Responsibilities/Sanctions" form stating that he "had 12 incidents of medical leave in the last 12 months for a total of 131 days." (Pet., Ex. 8) The form explained Petitioner's obligations regarding medical leave and noted, in bold type, that "[f]ailure to comply with the rules . . . will subject you to disciplinary charges which may result in termination of your employment." (*Id.*) (emphasis removed)

On or around September 14, 2010, Petitioner began a three week vacation. While he was on vacation, DSNY's Medical Division and its Personnel Management Division recommended to its Evaluation Review Board that Petitioner's probation again be extended. On October 1, 2010, the Evaluation Review Board recommended to DSNY's Commissioner that Petitioner be terminated "due to Medical Review and violation of [DSNY] Time and Leave Policy." (Pet., Ex. 9) The recommendation states, in pertinent part, that:

> [Petitioner] has been out on [LODI] with multiple injuries. His medical records . . . indicate he is unable to perform the duties of a Sanitation Worker. Since he is not eligible for disability retirement, the DSNY Medical Review Board voted to medically separate . . . However, after reviewing his case, the [Evaluation Review Board] has voted to terminate. . . . During his extended period [Petitioner] incurred an AWOL . . .

(*Id.*)

On October 6, 2010, DSNY terminated Petitioner. Petitioner avers that on October 7, 2010, when he sought the Union's assistance, the Union's attorney replied: "I can't help you. Your beef is with NYCERS not Sanitation."[8] (Pet. ¶ 8) The Union denies that this statement was made, but acknowledges that Petitioner contacted a lawyer who has represented its members and avers that the lawyer advised Petitioner to contact the Union directly.

On October 19, 2010, Petitioner applied to the Union's Security Benefit Fund, which provides LODI related benefits to members, for an award related to his January 5, 2010 LODI. The amount of an award is set by a schedule linked to the percentage of disability as determined by a DSNY doctor after a medical evaluation conducted one year after the LODI. In December 2010, Petitioner applied for benefits from the Union's Sanitationmen's Compensation Accrual Fund and received a total of $4,046.31 in three installments between December 6, 2010, and March 18, 2011.

On May 20, 2011, NYCERS denied Petitioner's May 2010 request for disability retirement.[9] The NYCERS' notification letter informed Petitioner that he had three options: (i) to challenge the determination by filing a state court Article 78 proceeding; (ii) to seek medical review by a Special Medical Review Committee; or (iii) to re-file for a disability retirement. The Union advised Petitioner that it only plays a role in Option ii (medical review) by paying for the

[8] Petitioner also avers that in October 2010 he requested from the Union's attorney a copy of a statute referenced in the Agreement. (*See* Pet. ¶ 12) The Union denies the October 2010 request but acknowledges a later request, and it is undisputed that the Union provided the requested copy to Petitioner in November 2011.

[9] In June 2010, NYCERS Medical Review Board concluded that Petitioner was not fully disabled and recommended that his application for a disability retirement be denied. Petitioner then submitted additional documents to NYCERS in November 2010.

panel that conducts the review. Petitioner, however, retained private counsel, chose Option i (Article 78 proceeding), and filed suit against NYCERS in state court on September 13, 2011.

On August 15, 2011, the Union's Security Benefit Fund acted upon Petitioner's October 19, 2010 application regarding his January 5, 2010 LODI, awarding him $2,819 based on a medical finding of a 25 percent disability. Petitioner disagrees with the finding of only a 25 percent disability and claims that he was unaware that he could appeal the award until after he cashed the check.[10] Petitioner submitted an appeal in March 2012, which the Union has accepted and is processing.

On September 7, 2011, SSA ruled on Petitioner's May 14, 2010 application for disability benefits ("SSA Decision"), finding that, due to mental and physical impairments resulting from the January 5, 2010 LODI, Petitioner was disabled as defined by the Social Security Act.[11] The SSA Decision notes that "the demands of [Petitioner's] past work exceed [his] residual functional capacity." (Pet., Ex. 1, p. 5)

On September 14, 2011, Petitioner filed a second claim with the Union's Security Benefit Fund, this time seeking an award related to the May 20, 2010 LODI. At the Conference, Petitioner requested that the Union expedite the required medical evaluation, which was subsequently conducted on February 25, 2012.

In October 2011, Petitioner brought the SSA Decision to the Union's attention and requested that the Union secure his reinstatement and return to LODI status. Petitioner avers that

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[10] This allegation was not made in the petition but raised for the first time at an on-the-record conference on January 25, 2012 ("Conference"), cited to herein as "Tr."

[11] Specifically, SSA determined that Petitioner "has the following severe impairments; lumbar radiculopathy, left proximal fibula hairline fracture, bilateral upper and lower extremity movement, left hand tremor, post-traumatic stress disorder, major depressive disorder and bipolar disorder." (Pet., Ex. 1, p. 3)

in response the Union President said: "I can't do anything. I got a 100 guys like you." (Pet. ¶ 21) The Union denies this allegation, but acknowledges that the Union President met with Petitioner in October 2011 and informed Petitioner that he did not have a contract grievance.

On October 7, 2011, Petitioner filed *pro se* a federal lawsuit against DSNY under the Americans with Disabilities Act. On October 28, 2011, Petitioner filed the instant petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that all of his claims should be considered timely because he "began to fight" as soon as he was able as his physical and mental condition prevented him from filing sooner. (Tr. 8) Petitioner also argues that his filing was "significantly delayed" due to allegedly incorrect instructions from the Office of Collective Bargaining ("OCB") *pro se* officer. (Pet. ¶ 22) At the Conference, Petitioner explained that these instructions concerned how to serve Respondents. (*See* Tr. 13-15)

Petitioner alleges that he repeatedly sought assistance from his Union and was repeatedly rebuffed, and thus the Union breached its duty of fair representation from October 6, 2010, to the present. The specific complaints in his petition regarding the Union are that: (i) when he was forced to return to light duty work, the Union "was unable to keep me in LODI status" (Pet. ¶ 5a); (ii) when he complained to the Union's attorney on October 7, 2010, the attorney replied: "I can't help you[.] Your beef is with NYCERS not Sanitation" (Pet. ¶ 8); (iii) when he requested from the Union's attorney a copy of a statute referred to in the Agreement, the attorney failed to provide it, stating that "he does not have it." (Pet. ¶ 12); and (iv) after he brought the SSA Decision to the Union's attention in October 2011, the Union still did not seek his reinstatement,

with the Union President stating: "I can't do anything. I got a 100 guys like you." (Pet. ¶ 21) The request for relief references Petitioner's second application to the Union's Security Benefit Fund, made on September 14, 2011, seeking a monetary award related to the May 20, 2010 LODI. At the Conference, Petitioner argued that the Union should expedite the medical evaluation for his second application to the Security Benefit Fund and complained that the Union did not tell him before he cashed the check from his first application that he could appeal the finding of a 25 percent disability. Petitioner acknowledges that he has received some assistance from the Union, but describes such as the Union merely doing its job, the equivalent of a bus operator opening and closing the bus door for passengers on his route.

Petitioner argues that DSNY refused to acknowledge his disability, failed to reimburse all of his medical expenses, failed to safeguard his personal property, improperly ordered him to return to work where he suffered a second LODI, and terminated him in violation of Civil Service Law ("CSL") § 71, which, he contends, provides for a minimum of one year disability leave. Petitioner asserts that all of his post-January 5, 2010 absences were attributable to his LODI and that he always followed DSNY's orders. He does not agree with DSNY that the days he was not working due to the LODI should have extended his probation and contends that, instead of termination, he should have been provided with an accommodation.

As a remedy, Petitioner seeks reinstatement with full back pay; placement on LODI status; restoration of all medical and dental benefits; a second award from the Union's Security Benefit Fund; reimbursement of the annuity funds he received from the Union's Sanitationmen's Compensation Accrual Fund; and payment for all prescriptions.

Union's Position

The Union argues that the petition must be dismissed in its entirety as untimely. An improper practice petition must be filed within four months of when a petitioner knew, or should have known, of the complained-of-acts. The initial petition was dated and notarized on October 22, 2011. Thus, any acts or omissions alleged to have occurred prior to June 22, 2011, are time-barred. Petitioner's request that the statute of limitations be tolled is based solely upon his alleged incapacity and must be denied. The Board has never extended the doctrine of equitable tolling to a NYCCBL statute of limitations. Further, Petitioner has failed to establish incapacity as, during the pertinent period, Petitioner actively pursued various claims. His SSA claim was filed on May 2010, he requested a hearing in January 2011, and attended that hearing in August 2011. Petitioner filed for a NYCERS disability retirement in April 2010, submitted additional material in November 2010 after he was terminated, and filed an Article 78 proceeding in September 2011. Petitioner also had sufficient capacity to file applications with the Union's Funds in October and December 2010 and September 2011. Further, the Board has repeatedly rejected tolling based upon a petitioner's alleged ignorance of his right to file a claim.

Petitioner's only timely claim concerns his October 2011 request that the Union secure his reinstatement and return to LODI status. Board precedent holds that an untimely claim based on the failure of a union to advance a grievance is not made timely by renewing that request within four months of filing a petition. Thus, as the Union had refused this request prior to June 22, 2011, any claim based on the October 2011 renewal of that request is time-barred.

Should the Board find that some aspect of the petition is timely, it must still be denied because the Union assisted Petitioner by helping him navigate DSNY procedures, arranging a meeting with DSNY's Medical Director that resulted in the reimbursement of most of his

medical expenses, advising him of his options in appealing the NYCERS' determination, and providing him thousands of dollars in Union funds. Further, Petitioner has not, and could not, allege any improper motive for the Union's alleged omissions.

Petitioner's desire for the Union to do more—including requesting that the Union advance a meritless claim—does not provide the basis to find an improper practice. The Union is not required to pursue every claim proposed by a member. The burden is on Petitioner, who has not alleged, as he must, any arbitrary or discriminatory basis for the Union's decisions or that a Union member similarly situated to Petitioner was treated differently than him.

Petitioner expresses his belief that both NYCERS and DSNY erred in not finding him completely disabled and alleges that CSL § 71 has been violated. These, however, are not questions addressed by the Agreement nor contractual grievances, and the Union is not obligated to pursue them. Thus, the petition should be denied.

City's Position

The City argues that all of Petitioner's claims against Respondents are untimely and that both the Board and the New York Public Employment Relations Board ("PERB") have consistently rejected equitable tolling arguments. As Petitioner was terminated more than four months prior to the filing of the petition, any claims related to his employment or termination are time-barred. Further, Board precedent expressly recognizes the City's managerial right to terminate an employee during his probationary period. No violation of NYCCBL § 12-306(a)(1) or (3) has been pled. It has not been alleged that the City interfered with, constrained, or coerced Petitioner in the exercise of protected Union rights, or discriminated or retaliated against him due to protected Union activity. Finally, an employer cannot be liable in breach of the duty of fair

representation cases unless the union is liable and, here, Petitioner has failed to show that the Union breached its duty. Thus, the petition must be dismissed in its entirety.

DISCUSSION

As "a *pro se* Petitioner may not be familiar with legal procedure [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. New York City Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 AD3d 401 (2010), *lv denied*, 17 NY3d 702 (2011). We review Petitioner's allegations "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). Though not citing specific provisions, the petition alleges that the Union violated the duty of fair representation and, thus, we construe it as alleging violations of NYCCBL § 12-306(b) and (d).[12] *See Seale*, 79 OCB 30, at 7 (BCB 2007). We also interpret the petition as alleging that DSNY violated NYCCBL §12-306(a)(1) and (3).[13]

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[12] NYCCBL § 12-306(b)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

[13] NYCCBL § 12-306(a) provides, in pertinent part, that:

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

Although the parties disagree over several tangential background facts, "we need not resolve these disputes to decide the instant case. Rather, we are able to decide upon the record before us as the factual disputes which exist are not material to the legal claims raised." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009) (citing *DC 37*, 79 OCB 37, at 8-9 (BCB 2007)). Further, "[s]ince no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings, and assume, *arguendo*, that the factual allegations contained in the petition are true, analogous to a motion to dismiss." *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (quoting *Seale*, 79 OCB 30, at 6-7).[14] We find that, upon all the pleadings and exhibits submitted, Petitioner has failed to plead factual allegations which would, if proven, establish that the Union or the City violated the NYCCBL.

Timeliness

Prior to proceeding to the merits, we must address Respondents' argument that part or all of Petitioner's claims are time-barred. *See Nardiello*, 2 OCB2d 5, at 28 (timeliness is a threshold question). NYCCBL § 12-306(e) and OCB Rule § 1-07(d) set the statute of limitations at four months.[15] Thus, "it is well established that an improper practice charge 'must be filed no later

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NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

[14] As Petitioner chose not to file a reply, "additional facts or new matter alleged in the answer[s]" are deemed admitted. Section 1-07(c)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1)("OCB Rules"); *see also Turner*, 51 OCB 44, at 5 (BCB 1993). However, to afford Petitioner every opportunity, we will treat his denials made at the Conference as if these denials were made in a written reply.

[15] NYCCBL § 12-306(e) provides, in pertinent part, that:

> A petition alleging . . . 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

than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd., Matter of Mahinda v. City of New York., et al.*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d 564 (1st Dept. 2012) (quoting *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. New York Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.)). Any "claims antedating the four month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007). While such claims are not remediable, "factual statements comprising untimely claims may be admissible as background information, and are so taken here." *Id.* Such material is also admissible "to illuminate the intent of the employer." *Rosioreanu*, 1 OCB2d 39, at 14; *see also Benjamin*, 4 OCB2d 6, at 12 (BCB 2011).

Petitioner's claim that his physical and mental incapacity allegedly made it impossible for him to file sooner raises an equitable tolling argument. However, Petitioner has not alleged that any act or omission by DSNY or the Union prevented him from filing sooner, a pre-requisite for equitably tolling. *See Mora-McLaughlin*, 3 OCB2d 24, at 12-13 (BCB 2010); *UFA*, 3 OCB2d 13, at 12-13 (BCB 2010); *cf. OSA*, 1 OCB2d 45, at 10-11 (BCB 2008).[16] Further, as Petitioner's

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> improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(d) provides, in pertinent part, that: "A petition alleging . . . an improper practice . . . may be filed with the Board within four (4) months thereof . . ."

[16] PERB also does not toll the statute of limitations due to extraordinary circumstances unrelated to the conduct of respondents. *See Pub. Empl. Fedn. (Mankowski)*, 33 PERB ¶ 3022 (2000); *cf. Local 32, Intl. Assn. of Firefighters (Simon)*, 37 PERB ¶ 4526 (ALJ 2004).

alleged incapacity did not prevent him from filing in federal and state court, as well as with SSA and NYCERS, it is insufficient to toll the statute of limitation.[17]

As the instant petition was initially filed on October 28, 2011, we are constrained to find that all claims arising prior to June 28, 2011, are untimely. Thus, all claims regarding the Union's handling of Petitioner's removal from LODI status, his assignment to light duty work, his termination, and the lack of assistance from the Union's attorney, are time-barred as these all occurred prior to or in October 2010. Also untimely are any claims related to the lack of Union assistance with NYCERS' May 2011 denial of Petitioner's request for a disability retirement. Further, to the extent that the petition can be construed as alleging claims directly against DSNY, any such claims also would be time-barred because any action taken by DSNY occurred on or before Petitioner's October 2010 termination.

We find timely Petitioner's claim that the Union violated its duty of fair representation by not seeking his reinstatement and return to LODI status in October 2011 after Petitioner had informed the Union of the SSA Decision.[18] Taking into consideration Petitioner's statements at

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[17] As to Petitioner's allegation that his filing was delayed by allegedly incorrect instructions from the OCB *pro se* officer regarding serving Respondents (*see* Pet. ¶ 22; Tr. 13-15), while his October 28, 2011 filing was found deficient, *inter alia*, for improper service, that deficiency was cured by his November 10, 2011 filing. Pursuant to OCB Rule § 1-07(c)(2)(iii), having cured the deficiency, the "petition shall be deemed filed from the date of the original petition." Thus, the alleged incorrect service instructions had no impact on the timeliness of the petition. Further, where a regulation or statute is clear on its face, "ambiguity in the agency's communications" does not estop the application of a statute of limitations. *See Matter of Patrolmen's Benevolent Assn. of the City of New York, Inc. v. New York City Off. of Collective Bargaining, et al.*, Index No. 116942/08, slip op. at 5 (Sup. Ct. N.Y. Co. Aug. 5, 2009) (Figeroa, J.).

[18] The Union argues that Petitioner's October 2011 request that it secure his reinstatement to LODI status is time-barred as a renewal of earlier time-barred requests. The Union relies upon *Lewis*, 4 OCB2d 24, at 13 (BCB 2011), where we held that claims concerning a union's repeated attempts to have a member sign a stipulation were not timely if the initial attempt was untimely, even if later attempts were made within four months. *See also Minervini*, 71 OCB 29, at 13 (BCB 2003). The instant case, however, is distinguishable from *Lewis* and *Minervini* as SSA's

the Conference, we read the petition as also timely alleging two claims related to the Union's Security Benefit Fund: that in August 2011 the Union failed to timely inform Petitioner that he could appeal the award related to his first application and that the Union has not expedited the medical evaluation required for his second application made in September 2011.

NYCCBL §12-306(b)(3): Alleged Breach of the Duty of Fair Representation

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. However, "a union is entitled to broad discretion . . . the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Sicular*, 79 OCB 33, at 13 (BCB 2007). The "burden of pleading and proving that the [u]nion has breached its duty of fair representation lies with the Petitioner." *Nardiello*, 2 OCB2d 5, at 39. Petitioner's "mere dissatisfaction with the outcome, or questioning the strategic decisions of the [u]nion is insufficient." *Lewis*, 4 OCB2d 24, at 15.

Regarding Petitioner's claim that the Union did not pursue his reinstatement and return to LODI status, we have held that "where a petitioner complains that a union failed to take a specific action and in doing so allegedly breaches the duty of fair representation, the petitioner must first demonstrate a source of right to the action sought." *Howe*, 79 OCB 23, at 10 (BCB 2007). Petitioner is a probationary employee, and thus is "unable to establish any entitlement to grievance or other appeal rights from the termination of his employment." *Sicular*, 79 OCB 33, at 15. Therefore, the Union's conclusion that there was nothing under the Agreement that it could do to secure his reinstatement cannot be considered arbitrary, discriminatory, or in bad faith and did not violate the duty of fair representation. *See Rivera-Bey*, 73 OCB 20, at 12 (BCB

September 2011 determination that Petitioner was disabled makes his October 2011 request more than a mere renewal of earlier requests. *See CSTG, L. 375*, 4 OCB2d 61, at 22-23 (BCB 2011).

2004); *see also Edwards*, 65 OCB 35, at 9 (BCB 2000) (no breach of duty of fair representation when union refused to grieve the denial of a probationary employee's LODI request). Also, to the extent that the Union's alleged obligations are not contractual or statutory, "the bargaining representative's duty is limited to evenhanded treatment of the members of the unit." *Morris*, 3 OCB2d 19, at 11; *Sicular*, 79 OCB 33, at 15.. Nothing in the record indicates that the Union has done more for similarly situated members than it did for Petitioner. Thus, we find that the Union did not violate its duty of fair representation by not seeking Petitioner's reinstatement and return to LODI status in October 2011 after Petitioner had informed the Union of the SSA Decision.

Regarding Petitioner's claims concerning his two applications to the Union's Security Benefit Fund, the actions that he had requested have occurred. In March 2012, the Union accepted and is processing Petitioner's appeal of the August 2011 award related to his January 5, 2010 LODI. On February 25, 2012, Petitioner had the requested medical evaluation for his second application related to the May 20, 2010 LODI. As the requested actions have been undertaken, these claims are dismissed. *See Minervini*, 71 OCB 29, at 14-15 (timely claim dismissed where resolved by subsequent union action). Further, the duty of fair representation does not extend to the Union's management of its Security Benefit Fund as it is an internal affair that does not "affect terms and conditions of employment or have an effect on the nature of the representation accorded employees by the union." *Shapiro*, 37 OCB 9, at 18 (BCB 1986); *see also Vazquez*, 75 OCB 36, at 9-10 (BCB 2005). Nothing in the record indicates that Petitioner was treated differently than other similarly situated Union members. *See Morris*, 3 OCB2d 19, at 12. Thus, these claims, even if the requested actions had not subsequently occurred, would not state a breach of the duty of fair representation.

Were we to reach the merits of Petitioner's time-barred claims against the Union, we would find that they would not, if proven, establish a breach of the duty of fair representation. As with Petitioner's request for reinstatement, his probationary status meant that the Union could not file a grievance on his behalf regarding his removal from LODI status, his assignment to work light duty, and his termination. *Howe*, 79 OCB 23, at 10. Nothing in the record indicates that the Union did more for any similarly situated member than it did for Petitioner. *See Sicular*, 79 OCB 33, at 15. As to Petitioner's complaint that the Union failed to provide to him a copy of a law referenced in the Agreement, it is undisputed that the Union subsequently provided him a copy of the requested law. *See Minervini*, 71 OCB 29, at 14-15. Regarding the NYCERS' determination, there was no avenue open exclusively to the Union and its failure to challenge the NYCERS denial of a disability retirement request is not related to the negotiation, administration, and enforcement of the Agreement. *See Vazquez*, 75 OCB 36, at 10; *Turner*, 51 OCB 44, at 4. Thus, the duty of fair representation extends only to the extent that the Union voluntarily assumed the obligation. *See Morris*, 3 OCB2d 19, at 11. As nothing indicates that the Union did more for any similarly situated member than it did for Petitioner, this claim also fails to state a breach of the duty of fair representation.[19]

NYCCBL §12-306(b)(1) and (3) claims against DSNY

Although we need not address the merits of Petitioner's claims regarding DSNY because they are untimely, if we were to reach the merits, we would find that Petitioner has failed to state a claim. *See Rivera-Bey*, 73 OCB 20, at 11. Petitioner has not alleged, and the record does not

[19] The record indicates that, of the three options open to a member denied by NYCERS a disability retirement, the Union would only be involved in seeking medical review, an option that Petitioner did not pursue. Petitioner chose to retain private counsel and file an Article 78 proceeding, and nothing in the record indicates that the Union ever assisted a similarly situated member to file an Article 78 proceeding in response to a NYCERS denial of a disability retirement request.

indicate, that he had engaged in any protected activity, that DSNY discriminated or retaliated against him, or that DSNY interfered with, restrained or coerced him in the exercise of any rights granted in the NYCCBL. *See Smith*, 3 OCB2d 17, at 10 (BCB 2010); *Keitt*, 23 OCB 16, at 4 (BCB 1979). Petitioner does not dispute that he did not perform the duties of his position for a significant portion of his employment. Rather, he argues that most of the days that he did not perform the duties of his position were due to his LODI and, thus, should not have extended his probationary period. However, it is well settled that the probationary period is measured by the number of days a probationer is performing the duties of his position. *See DC 37, L. 2627*, 3 OCB2d 45, at 9-10 (BCB 2010) (explaining *Garcia v. Bratton*, 90 N.Y.2d 991, 993 (1997)). The record indicates that Petitioner never completed his initial 18 month probationary period. (*See* City Ans., Ex. 12) Therefore, had Petitioner timely filed an improper practice charge against DSNY or the City, we would find that the undisputed facts could not support the finding of a NYCCBL violation.[20]

Thus, we 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)." *Nardiello*, 2 OCB2d 5, at 42 (citations omitted).

[20] As "our jurisdiction is limited to the NYCCBL," Petitioner's CSL § 71 claim "fall[s] outside of our purview." *Smith*, 3 OCB2d 17, at 10.

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-2992-11, filed by Joseph C. Rondinella against the City of New York, the New York City Department of Sanitation, and the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters, hereby is dismissed in its entirety.

Dated: April 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER