

**Swakeen, 5 OCB2d 16 (BCB 2012)**

(IP) (Docket No. BCB-2941-11)

**Summary of Decision:** Petitioner alleged that the Union breached its duty of fair representation in violation of the NYCCBL by refusing to arbitrate his out-of-title grievance. Petitioner also alleged that HHC violated the NYCCBL by suspending him and failing to promote him. The Union and HHC both argued that Petitioner's claims were untimely, and that his allegations failed to state a claim. The Board found that the petition was untimely in all respects, and that even if it was timely, Petitioner's claims did not establish a violation of the NYCCBL. Accordingly, the petition was dismissed. (*Official decision follows.*)

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

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

*-between-*

**BENSAM SWAKEEN,**

*Petitioner,*

*-and-*

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 420, and  
THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,**

*Respondents.*

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**DECISION AND ORDER**

On March 24, 2011, Bensam Swakeen ("Petitioner") filed a *pro se* verified improper practice petition against District Council 37, AFSCME, AFL-CIO, Local 420 ("Union"), and the New York City Health and Hospitals Corporation ("HHC"). The petition was amended and deemed sufficient on September 1, 2011. Petitioner alleges that the Union breached its duty of fair representation in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

(“NYCCBL”) by refusing to arbitrate his out-of-title grievance. Petitioner also alleges that HHC violated the NYCCBL by suspending him and failing to promote him. The Union and HHC both argue that Petitioner’s claims are untimely and that his allegations fail to state a claim. This Board finds that the petition is untimely in all respects and that, even if it was timely, Petitioner’s claims do not state a violation of the NYCCBL. Accordingly, the petition is dismissed.

### **BACKGROUND**

Petitioner is employed by HHC as an Assistant Bio-Medical Equipment Technician and works at Metropolitan Hospital Center; he is a member of the Union. In 2005, HHC suspended Petitioner for alleged misconduct. The record indicates that, by 2007, Petitioner returned to employment at Metropolitan Hospital Center. Petitioner asserts that, after he was suspended, HHC realized his suspension was “illegal,” and promised him promotions to compensate for his “illegal” suspension. (Pet. at 5) Petitioner states that although HHC promised that he would be promoted to the title Bio-Medical Equipment Technician, Petitioner was not promoted. Petitioner also alleges that his suspension in 2005 was orchestrated by his HHC supervisors and his fellow Union members, including the Union chairperson.

According to Petitioner, his supervisors and Union personnel acted to prevent him from winning the Union election that took place in May 2005, and as a result of his suspension, he lost this election. He asserts that the Union and HHC again worked to hinder his campaign in the Union’s 2008 election. In support of these contentions, Petitioner submitted documents from the HHC Police and New York City Police

Department. Petitioner asserts that these documents recorded his 2004 and 2008 reports of alleged harassment by Union officials in order to prevent him from winning Union elections. While these documents list the names of the police officers to whom reports were made, they do not contain the names of any Union representatives, and they do not include Petitioner's name. Further, the documents do not contain details of the alleged harassment. Petitioner also submitted a May 20, 2008 letter from HHC notifying him that union election posters were required to be placed in designated areas, and posters not placed in the proper areas would be removed.

After Petitioner returned from his suspension, he believed that he was assigned out-of-title duties, and he requested that the Union file a grievance on his behalf. On July 17, 2009, the Union filed a grievance, alleging that Petitioner was directed to "perform duties substantially different from those stated in [his] job specifications." (Pet., Ex. 10) The grievance specified that "[u]pon an official agreement with Metropolitan Hospital, Petitioner was reclassified as a Bio-Medical Equipment Technician Trainee [and, therefore, he would be] entitled to an upgrade to the position of Bio-Medical Equipment Technician after completing one (1) year of service as a trainee." (Pet., Ex. 10)

The decision issued in response to the Step 1(a) grievance states that Petitioner "was upgraded to Assistant Bio-Medical Technician and was paid the additional money retroactive from August 2008." (Pet., Ex. 11) However, the Step 1(a) decision also states that Petitioner "is not performing the duties of a Bio-Medical Equipment Technician." (Pet., Ex. 11) Therefore, the Step 1(a) grievance was denied.

Thereafter, the Union took Petitioner's grievance to Steps II and III of the grievance process. Petitioner's Step II and Step III grievances were denied on March 30,

and July 27, 2010, respectively. At both Step II and Step III, the Review Officers found that Petitioner has been assigned the duties of an Assistant Bio-Medical Equipment Technician, and that Petitioner was not performing duties “substantially different” from his job specification.<sup>1</sup> (Pet., Exs. 12, 13)

Thereafter, the Union considered bringing Petitioner’s case to arbitration. On October 21, 2010, the Union’s Legal Department wrote a memorandum to the Union representative handling Petitioner’s grievance, which states, in pertinent part:

It is our recommendation that [Petitioner’s grievance] should not proceed to arbitration. [Petitioner] contends that he has been assigned to perform the duties most consistent with the job specification for the Bio-Medical Equipment Technician title. Based on our review of the job specifications for the two titles, as well as the grievant’s own description of the work he performs, the Union would be unable to meet its burden of proving that [Petitioner] has been assigned to duties that are substantially different from those stated in the job specification.

By and large, the grievant performs duties that are within his job description, albeit some of the same or similar duties may be found in the job specification for the higher title. The fact that these titles have overlapping duties is insufficient to make an out-of-title claim.

(Union Ans., Ex. D)

On October 26, 2010, the Union representative sent a letter to Petitioner, which states in pertinent part:

I received a memorandum from the DC 37 Legal Department recommending that your case should not

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<sup>1</sup> Petitioner alleges that the Union did not submit a particular document to the grievance hearing officer and, as a result, his case was lost. The document is an October 1, 2007 letter from a Clerical Associate at the Records Management Office of Metropolitan Hospital Center. The letter, addressed “To Whom It May Concern,” lists the dates of Petitioner’s employment Metropolitan Hospital Center and lists his current job title as “Bio-Medical Equipment Technician.”

proceed to arbitration (see attached memo). . . . Although this situation may be upsetting, we wish you well in all your future endeavors.

(Union Ans., Ex. D) Petitioner denies receiving this letter.<sup>2</sup>

The Union alleges that on November 19, 2010, Petitioner met with the Union representative and a Union attorney to discuss facts concerning Petitioner's grievance. The Union submitted a copy of its November 19, 2010 sign-in sheet, which includes Petitioner's name and notes that he was visiting the Union's Legal Department. Petitioner acknowledges that he met with the Union, but did not recall the precise date. During the meeting, Petitioner discussed his job duties. Based on Petitioner's description, the Union attorney advised that he was not performing out-of-title work and informed him that the Union would not further pursue his grievance.

On December 10, 2010, the Union's Legal Department wrote a memorandum to the Union representative, which states in pertinent part:

This is a follow-up to our meeting with [Petitioner] to discuss the Legal Department's memorandum stating that the out-of-title grievance filed on his behalf should not proceed to arbitration.

After reviewing the information that [Petitioner] provided to us, namely a description of his duties, the Legal Department stands by its original conclusion that this matter should not proceed to arbitration. According to [Petitioner's] own description of his duties, he does not perform higher title duties.

(Pet., Ex. 1)

On December 17, 2010, the Union sent a letter to Petitioner, which states in pertinent part:

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<sup>2</sup> We note that the letter Petitioner denies receiving was addressed to an address other than his current address.

I received a memorandum from the DC 37 Legal Department recommending that your case still should not proceed to arbitration following further review of your case (see attached memo). . . . Although this situation may be upsetting, we wish you well in all your future endeavors.

(Pet., Ex. 1) Petitioner acknowledged receipt of this letter.

Additionally, Petitioner asserts that the Union and HHC have together been harassing Petitioner since 1996. For example, in 1996, an HHC Equal Employment Opportunity Director found that Petitioner's supervisor made a derogatory remark about Petitioner's national origin, but no disciplinary action was taken against this supervisor. Also, in 2003, at Petitioner's request, the Union asked HHC to schedule a labor management meeting regarding incidents involving Petitioner and his co-workers. Petitioner asserts that he requested a hearing on this incident, but the Union and HHC together decided not to have a hearing. Petitioner also claims that, in 2003, he was performing work for which he was not qualified; he contends that a hearing was held in 2004, and still no decision has been reached on that matter.

## **POSITIONS OF THE PARTIES**

### **Petitioner's Position**

Petitioner argues that the Union breached its duty of fair representation when the Union's Legal Department did not submit a "vital document" to the hearing officer during his Step III grievance hearing and, as a result, he lost his case. When he requested that the Union arbitrate the matter, the Union refused. (Pet. at 6) Petitioner argues that the Union's Legal Department should not determine whether he performs out-of-title

duties, but should allow an arbitrator at the Office of Collective Bargaining to decide the issue. Petitioner believes that the Union refused to arbitrate his grievance because the Union chairperson was upset that he challenged her in Union elections.

As to the Union's claim that his petition is untimely, Petitioner states that the Union's letter in which it told him it would not bring his claim to arbitration was not sent until December 2010, which would make his petition timely filed on March 24, 2010. Petitioner states that his presence at the Union building on November 19, 2010 does not confirm that he met with the Union Legal Department concerning his out-of-title grievance, and that he may have been at the Union building for another reason.

Further, Petitioner asserts that his suspension in 2005 was planned by his supervisors and his fellow Union members, including the Union chairperson. He believes that these people acted accordingly because they did not want him to win the election for chairperson that took place in May 2005, and he could not win this election as a result of his suspension. Petitioner argues that, as compensation for the improper suspension, HHC promised that he would receive a higher title, but this new title was never "legally activated." (Pet. at 7) According to Petitioner, his workload was excessive and greater than normal, but his Union did not help him. Petitioner contends that he is an outstanding employee and qualified for a higher title.

Petitioner asserts that when he took part in the 2008 election, the Union and HHC again tried to hinder his candidacy as illustrated by the "harassment" he reported to the New York City Police Department and HHC's letter directing him not to put his posters in certain locations. As a result of the recurring harassment that he has experienced, he has developed worries and sleeplessness. He asserts that he has suffered because of

Respondents' actions in ways that may violate race, color, and other anti-discrimination protections.

### **Union's Position**

The Union argues that Petitioner's claim regarding the Union's decision not to arbitrate his out-of-title grievance is untimely and should be dismissed. The Union notified Petitioner by letter on October 26, 2010, that the Union's Legal Department decided not to take his grievance to arbitration. On that date, Petitioner knew or should have known that the Union had decided not to arbitrate his grievance. After the Union sent the October 26, 2010 letter, Union representatives met with Petitioner on November 19, 2010, and told him that the Union did not believe that it could prove that Petitioner was assigned out-of-title duties, and, therefore, it would not seek to arbitrate the claim. On December 17, 2010, the Union informed Petitioner that it stood by its original decision that Petitioner's grievance should not be taken to arbitration. The Union asserts that, given the timing of these events, the petition it received on April 21, 2011, was untimely. Even giving Petitioner the benefit of the March 24, 2011 date upon which the Board received the petition, the petition should still be deemed untimely. Further, the Union argues that Petitioner's claims concerning alleged events occurring before this event, as early as 1996, are also outside of the statute of limitations and should likewise be dismissed.

Even if Petitioner's claims were timely, the Union argues that he has not provided sufficient facts or evidence to demonstrate that the Union breached its duty of fair representation. The documents that Petitioner produced do not support his conclusory allegations. The Union's decision not to proceed to arbitration on Petitioner's out-of-title



grievance was not arbitrary, discriminatory, or made in bad faith. Instead, it was based upon the Union's evaluation of the facts of Petitioner's claim, including his own description of his duties and HHC's job specification.

Petitioner's claim against HHC should also be dismissed as untimely. Petitioner complains that HHC tried to hinder his campaign in a Union election in 2008. This claim was filed over three years later and is therefore untimely. Petitioner also complains that HHC suspended him for discriminatory or retaliatory reasons in 2005. As the improper practice petition was not filed until six years later, this claim also falls outside of the statute of limitations and must be dismissed.

As to Petitioner's remaining claims, Petitioner alleges a violation of "NYCCBL § 12-306(4)"; however, there is no such provision. Petitioner's claim that the Union violated NYCCBL § 12-305 also cannot stand. This provision sets forth the right to collectively bargain, and Petitioner has not alleged any facts to show that the Union deprived him of any rights set forth in NYCCBL § 12-305.

### **HHC's Position**

HHC argues that Petitioner did not make out a *prima facie* case that the Union violated NYCCBL §§ 12-305 or 12-306. Petitioner's assertion that the Union breached its duty of fair representation is speculative and conclusory. The Union provided Petitioner with representation through every step of the grievance process, and no facts have been pleaded to support a claim that its decision not to bring Petitioner's grievance to arbitration was arbitrary, discriminatory, or in bad faith. Therefore, the Union's decision not to proceed to arbitration on Petitioner's grievance does not constitute a

breach of its duty of fair representation. Also, HHC argues that Petitioner's claims against the Union are untimely.

Further, Petitioner's claims against HHC, which span from 1996 through 2008, are untimely. Petitioner submitted a document in which HHC, in 2008, informed him that he must post election papers in designated areas. Because he filed his petition over three years later, his claim far exceeds the four-month statute of limitations. As to his 2005 suspension, this claim is also untimely because the petition was filed six years after the suspension occurred, which far exceeds the four-month statute of limitations. Moreover, the documents Petitioner cites in support of his alleged harassment do not in any way establish his claim.

Finally, Petitioner has not stated a viable claim against HHC under NYCCBL §§ 12-305, 12-306, or 12-307. As to Petitioner's claim that HHC violated NYCCBL § 12-306(a)(1) and (3), Petitioner has not articulated any factual allegations to support his claim that HHC discriminated or retaliated against him.

### **DISCUSSION**

Pursuant to NYCCBL § 12-306(e), 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." *Lewis*, 4 OCB2d 24, at 12-13 (BCB 2011) (citing *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.)).<sup>1</sup> Claims that occurred more than four months prior to the filing of the

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<sup>1</sup> NYCCBL § 12-306(e) provides, in relevant part:

petition are untimely and may not be considered by this Board. *Lewis*, 4 OCB2d 24, at 13 (citing *Nardiello*, 2 OCB2d 5, at 27 (OCB 2009)). Petitioner filed his initial petition on March 24, 2011, and we may only consider events that occurred on or after November 24, 2010.

Petitioner raises several claims that fall far outside of the four-month statute of limitations. For example, he alleges that he was harassed by the Union and HHC as early as 1996 and as recently as 2008. He also makes claims regarding his suspension in 2005. Given the four-month statute of limitations, these claims are clearly untimely. Moreover, we find that they are conclusory and not supported by any specific allegation of fact. In addition, we find that there are no timely claims against HHC, and, thus, all claims against HHC are dismissed.

Regarding his claims against the Union concerning more recent events, Petitioner alleges that the Union breached its duty of fair representation when it refused to bring his grievance to arbitration. On November 19, 2010, Petitioner met with the Union attorney and the Union representative who told him that the Union would not bring his grievance

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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. . . .

Rule 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) 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 . . . .

to arbitration. On December 17, 2010, the Union sent a follow-up letter to Petitioner confirming the discussions at that meeting.<sup>3</sup> Under our four-month statute of limitations, this claim is also untimely. We find that, at the latest, by November 19, 2010, when the Union met with Petitioner to inform him of its decision not to arbitrate his grievance, Petitioner had notice of the Union's decision. *See Raby*, 71 OCB 14, at 12; *Matter of Mahinda v. Office of Collective Bargaining*, 91 A.D.3d 564 (1<sup>st</sup> Dept. 2012). Therefore, we find that the entire petition falls outside of the statute of limitations and must be dismissed. *See Raby*, 71 OCB 14, at 10-11.

Even assuming that Petitioner's claim against the Union was timely, we find that Petitioner has not alleged facts sufficient to establish that the Union breached its duty of fair representation. To establish a breach of the duty of fair representation, a petitioner must show that a union engaged in "arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Morales*, 3 OCB3d 25, at 10 (BCB 2010)(citing *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007)). A petitioner "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Turner*, 3 OCB2d 48, at 15 (BCB 2010) (editing marks omitted). Rather, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Edwards*, 1 OCB2d 22, at 21 (2008).

Petitioner is clearly dissatisfied with the representation he received from the Union. However, a union "does not breach the fair representation duty merely because

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<sup>3</sup> The record includes a letter dated October 26, 2010, in which the Union notified Petitioner that the Union's Legal Department recommended that his grievance not proceed to arbitration, and that it therefore would not bring his grievance to arbitration. Petitioner denies having received this letter.

the outcome of a union's good faith efforts to resolve a member's complaint does not satisfy the member." *Rosioreanu*, 1 OCB2d 39, at 16 (BCB 2008), *affd.*, *Matter of Rosioreanu v. New York City Office of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401(1<sup>st</sup> Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Petitioner is unhappy with the Union's handling of his grievance during the grievance process, and he believes that his case was lost due to the Union's decision not to present a particular document to the grievance hearing officer. He believes the Union's decision was both discriminatory and negligent. We find no grounds upon which we could conclude that the Union's decision not to place the document before the grievance hearing officer could be deemed to have been discriminatory or made in bad faith.

The only allegation in the amended petition, which attributes bias to the Union, is Petitioner's allegation that his fellow Union members failed to process his grievance because they were biased against him due to his participation in a Union election. We find that these allegations are conclusory and thus insufficient to make a showing of bias. *See Khalil*, 41 OCB 30, at 17 (BCB 1988); *see also Matter of Rosioreanu*, 78 A.D.3d at 402 (affirming Board's dismissal of duty of fair representation claim based on "petitioner's conclusory assertion" of bad faith). Moreover, "we will not substitute [our] judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21.

The Union's Legal Department compared Petitioner's description of his job duties with job specifications for both Petitioner's title and the higher title, and noted that some of Petitioner's duties could be found in both job specifications. However, the Union

found that, largely, Petitioner's duties fell within his job specification and that "[t]he fact that these titles have overlapping duties is insufficient to make an out-of-title claim." Based on its analysis, the Union reasoned that it "would be unable to meet its burden of proving that [Petitioner] has been assigned to duties that are substantially different from those stated in the job specification." (Union Ans., Ex. D). We find no showing that the Union's decision not to advance Petitioner's grievance was arbitrary, discriminatory, or made in bad faith, "especially in light of the wide latitude to which unions are entitled in handling grievances." *Edwards*, 1 OCB2d 22, at 22.

Accordingly, we dismiss the petition in its entirety.

**ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by Bensam Swakeen, docketed as BCB-2941-11 be, and the same 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

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