Morales, 5 OCB2d 28 (BCB 2012)

(IP) (Docket No. BCB-2996-11)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), by failing to properly represent him during the grievance process both before and after his termination. The Union and the City independently argued that the petition is untimely and that Petitioner failed to state a violation of the NYCCBL. The Board found the petition timely and held that the Union breached its duty of fair representation to Petitioner by processing the appeal of his Step III grievance in an arbitrary fashion and failing or refusing to communicate with him regarding the status of the appeal. The Board further found that the City was derivatively liable for the Union's breach. The Board dismissed the remainder of Petitioner's claims. Accordingly, the petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JOSE E. MORALES,

Petitioner,

-and-

UNITED FEDERATION OF TEACHERS,
THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On December 14, 2011, Jose E. Morales ("Petitioner") filed a verified improper practice petition *pro se* against the United Federation of Teachers ("Union") and the

Office of Labor Relations.[1] Petitioner alleges that the Union breached its duty of fair representation by failing to properly represent him during the grievance procedure relating to disciplinary charges filed against him and his subsequent termination. The Union and the City independently argue that the petition is untimely, that the Union did not breach the duty of fair representation, and that Petitioner fails to state a violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). This Board finds the petition to be timely and holds that the Union breached its duty of fair representation to Petitioner by arbitrarily failing to process his grievance to Step III and by failing or refusing to communicate with him regarding the status of the appeal. The Board further finds that the City was derivatively liable for the Union's breach. The Board dismisses the remainder of Petitioner's claims. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

These parties have previously appeared before us regarding this dispute. In October 2009, Petitioner filed a verified improper practice petition *pro se* against the Union and the NYPD alleging that the Union breached its duty of fair representation by failing to adequately represent him in the proceedings which led to his termination and, thereafter, by failing to adequately challenge it. Subsequent to the filing of that petition, in April 2010, the parties reached an agreement to process Petitioner's grievance. In light

[1] The petition names the "Office of Labor Relations (NYPD)" instead of the City of New York ("City") and the New York City Police Department ("NYPD"), the appropriate employer respondents in this instance. The caption has been corrected to reflect the correct employers. We note, however, that Petitioner properly served the petition on the City's Office of Labor Relations ("OLR"), the designated agent for service on the NYPD.

of this development, on May 25, 2010, we dismissed the petition without prejudice to re-file following the conclusion of the grievance and arbitration process. *See Morales*, 3 OCB2d 25, at 11 (BCB 2010). The background facts from *Morales*, 3 OCB2d 25, are incorporated herein.[2]

The Union represents NYPD employees in the civil service title of Supervisor of School Security. The City and the Union are parties to the Supervisors of School Security Agreement ("Agreement"), which covers the period from October 13, 2007 through October 31, 2009, and which remains in *status quo*. Petitioner was a Union member and was employed as a Supervisor of School Security with the NYPD's School Safety Division ("SSD") for 21 years until he was terminated on July 15, 2009. Prior to his termination, Petitioner had no disciplinary record.

Petitioner asserts that he has had a lengthy "father-son" type of relationship with Vincent DeGioia resulting from DeGioia's long-term relationship with Petitioner's mother. DeGioia had raised Petitioner since his early childhood. On July 15, 2007, DeGioia granted Petitioner a durable power of attorney. Petitioner's power of attorney was revoked shortly thereafter, on July 27, 2007. On that same date, Rose Izzo, DeGioia's niece, was named as the appointee. Subsequent to the revocation, in July and August 2007, Petitioner executed a series of transactions pertaining to DeGioia's assets, including removing funds from DeGioia's accounts. Petitioner maintains that he was unaware that his power of attorney had been revoked and that another appointee had been named and, as a result, he continued to act as if he had power of attorney during that period. He explains that he removed these funds at DeGioia's request in order to secure

[2] All citations to the pleadings in *Morales*, 3 OCB2d 25, are denoted by using "1st". For example, "1st Pet." refers to a citation to the October 2009 petition.

them for DeGioia's future health care needs as well as to keep the funds away from family members who DeGioia feared would "steal his money and leave him nothing to provide health care." (Pet. p. 3)

The NYPD subsequently commenced an investigation into Petitioner's actions concerning DeGioia's assets. Petitioner claims that, from the inception of the investigation, he made the NYPD aware of the circumstances surrounding his relationship with DeGioia and that, during the investigation, he repeatedly explained to the NYPD the reason he had taken the actions with regard to DeGioia's assets. Petitioner also claims that he did not know that his power of attorney had been revoked and that he was never served with notice of the revocation of his power of attorney. He disputes the validity of the revocation.[3]

On June 5, 2008, as part of the NYPD's internal investigatory and disciplinary process, Petitioner was interviewed at a GO-15 hearing.[4] Union Representative Reginald Sawyer appeared at the GO-15 interview to represent Petitioner. Petitioner asserts that the Union promised him an attorney for the interview, yet never provided one. Petitioner alleges that, in the middle of the interview, Sawyer told him that Sawyer could not say anything because the process was "way over my head." (1st Pet. p. 1) Petitioner also claims that Sawyer "alluded to the fact that the UFT representatives told the membership that anyone who goes to a [GO-15] . . . will be represented by a Union rep." (*Id.*)

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[3] Notably, the New York County District Attorney's Office also investigated the charges against Petitioner but declined to pursue the matter in the criminal forum. Petitioner was never arrested or criminally charged in connection with the allegations. (City Ans., Ex. 6)

[4] GO-15 hearings are conducted pursuant to the NYPD's Patrol Guide as part of internal disciplinary investigations.

Petitioner claims that Sawyer was upset that, even though Sawyer had sent information regarding the GO-15 hearing to two other Union representatives, neither appeared, and Petitioner was left with no adequate defense. Petitioner contends that, after the interview, he asked the Union to obtain a copy of the transcript, but the Union did not do so. On July 21, 2008, the NYPD served Petitioner with disciplinary charges and specifications relating to his actions surrounding the DeGioia power of attorney.

On February 2, 2009, Loretta Vetrano, another niece of DeGioia's, wrote a letter to the SSD Investigative Unit on Petitioner's behalf. The letter states that DeGioia viewed Petitioner as his son and that DeGioia had told Vetrano that he had voluntarily given Petitioner power of attorney. Vetrano wrote that, during DeGioia's several hospital stays and the resultant care necessary after his release, DeGioia did not contact any of his family members and was cared for exclusively by Petitioner. She described DeGioia as an angry man who held hostile feelings toward his relatives. Vetrano wrote that Petitioner and his family were the only people DeGioia considered family. Her letter further states: "I say this with no malice; I know that my uncle is not very bright or [credible]. Throughout the years I watched and listened to him make up stories or give things to family members then say that he did not and his belonging[s] [were] stolen." (1st Pet., Ex. 3) She closed by writing that she wished the disciplinary proceedings against Petitioner would cease, because she considered anything that her uncle may have claimed or any action he may have initiated against Petitioner to be suspect. Petitioner claims that no one from the NYPD or the Union contacted Vetrano to discuss the contents of the letter.

On February 3, 2009, an SSD Personnel Officer held an informal conference regarding the charges and specifications against Petitioner. A Union representative appeared on Petitioner's behalf. At the conference, Petitioner was advised that the NYPD sought Petitioner's resignation or his termination. Petitioner refused to resign and elected to commence the grievance procedure set forth in the Agreement rather than proceeding under § 75 of the Civil Service Law ("CSL").

On June 18, 2009, the NYPD held a Step II hearing on the charges. At the hearing, Petitioner was represented by Jeff Huart, the Union's Special Representative. Petitioner points out that, at the Step II hearing, the NYPD's attorney used a written transcript of his GO-15 interview to question him. Petitioner asserts that the Union did not have a copy of the transcript and had not followed up on his request to obtain one.

On July 15, 2009, Petitioner received a letter of the same date notifying him that, as a result of the Step II hearing, he was dismissed from employment as a School Security Supervisor. Article 6, § 5, of the Agreement provides, in pertinent part:

> If the grievant is not satisfied with the determination of the agency head or designated representative the grievant or the Union may appeal to the Commissioner of Labor Relations in writing within ten (10) workdays of the determination of the agency head or designated representative. The Commissioner of Labor Relations shall issue a written reply to the grievant and to the Union within fifteen (15) workdays.

(1st City Ans., Ex. 2) It is undisputed that the Union did not file a written appeal requesting a Step III hearing within the period proscribed by the Agreement.

Petitioner contends that Huart made a verbal commitment to him "on several occasions" that the Union would represent him "through the whole process" all the way to arbitration. (Rep. ¶ 48) After the effective date of his termination, Petitioner

repeatedly attempted to gain assistance from the Union. Petitioner claims that on August 18, 2009, he contacted the Union and left a message requesting to proceed to arbitration and asking for an attorney. Petitioner contends that later that day, he received a call from Huart, who told him to be patient on a decision to proceed to Step III because, at the end of August, the Union's grievance panel was scheduled to convene to discuss how to approach the appeal. (1st Pet. p. 2) Petitioner contends that Huart informed him that, if the termination was not overturned at Step III, the Union would "look at the merits of the case" and determine whether to go to arbitration, and that everything could be appealed. (1st Pet. p. 2; Rep. ¶ 7) However, Petitioner also asserted that Huart advised him there was no guarantee that the Union would represent him at Step III or arbitration until the panel reviewed the case to determine whether it had merit.[5] (1st Pet. p. 3)

Petitioner asserts that, at the end of August and in September, he made repeated calls to Huart and another Union representative for an update regarding the status of his grievance. He claims that the representatives either did not return his calls or told him that they were busy and would call him back, but they did not. Petitioner contends that he submitted a comprehensive defense to the allegations against him to several people, including the Union President, yet he never received a response.

As of October 29, 2009, the date Petitioner filed his original petition, neither the Union nor Petitioner had submitted a request for a Step III hearing. On December 2, 2009, a Union attorney contacted Petitioner to inform him that the Union intended to file a request for a Step III hearing. On December 11, 2009, Huart wrote to the OLR

[5] Petitioner contends that Huart told him that the Union could challenge the termination at Step III but that he should not expect the NYPD to overturn the termination because it controls all of the steps of the grievance process.

Commissioner to request a Step III hearing on Petitioner's behalf. On January 28, 2010, the City denied the Step III request as untimely. However, on or about April 29, 2010, the City and the Union reached an agreement to advance the grievance to Step III on the condition that the City could reserve its right to raise the Union's failure to timely file the Step III request as an affirmative defense.

On May 27, 2010, a Step III conference was held before an OLR Review Officer. At the conference, the NYPD argued that the Union's request for a Step III conference was untimely filed. On June 3, 2010, the Review Officer issued a decision upholding Petitioner's termination on the ground that the Union failed to request a Step III review within the contractual time limits. Notwithstanding the Union's "apparently fatal procedural deficiency," the Review Officer also made findings on the merits of the case. (City Ans., Ex. 5) Stating that the primary issue at the Step III level was whether the NYPD had shown that Petitioner "violated the policy, rules or regulations expected of its employees," the Review Officer found that Petitioner never denied that he took the actions alleged. (*Id.*) Thus, she was "constrained to find that the [NYPD] has acted within the bounds of the parties' contract." (*Id.*) In her case analysis, however, the Review Officer noted that Petitioner's legal arguments with regard to the notice of the revocation of the power of attorney were "quite persuasive." (*Id.*) She also labeled the disciplinary action imposed by the NYPD "indisputably harsh." (City Ans., Ex. 5)

On June 14, 2010, the Union appealed the Step III determination to arbitration. An arbitration hearing was held on February 8, February 18, and March 25, 2011. At the hearing, the Union asserted that the 10-day limit on appealing a Step II denial to Step III of the grievance process was a "permissive" time frame. (City Ans., Ex. 8, p. 12) On

August 8, 2011, the arbitrator issued an Opinion and Award ("Award") denying the grievance on the ground that that the Union failed to file an appeal of the NYPD's Step II determination within the contractual time limits. Petitioner contends that he received a copy of the Award on August 14, 2011.[6]

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union breached its duty of fair representation when it failed to properly represent him both before and during the arbitration, in violation of NYCCBL § 12-306(b)(1) and (3).[7] Petitioner claims that the charges against him are without merit, that the Union representatives who handled his case were ineffective and

[6] On or about October 19, 2011, Petitioner filed an Article 75 petition with the New York State Supreme Court seeking to vacate the Award. In that petition, Petitioner stated that he received the Award on August 13, 2011. The Supreme Court denied the petition on March 6, 2012.

[7] NYCCBL § 12-306(b) provides that it shall be an improper practice for a public employee organization:

> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> . . .
>
> (3) to breach its duty of fair representation to public employees under this chapter.

We note that, pursuant to NYCCBL § 12-306(d):

> The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing or failure to process a claim that the public employer has breached its agreement with such employee organization.

ill equipped to handle charges of such magnitude, and that the Union never properly investigated the charges. Petitioner argues that, based on the magnitude of the charges, the Union should have assigned an attorney to represent him throughout the process instead of mere Union representatives who were unskilled in the legal arena. Petitioner contends that he was informed on several occasions that his case was unfamiliar territory to the Union and that it was not sure how to proceed. He argues that it is the Union's responsibility to rebut the charges against him with whatever resources are available to it, whether that is skilled labor relations personnel or attorneys. Petitioner contends that he would not have been terminated if the Union had challenged the actual charges that led to his dismissal, instead of merely attending the hearings.

Petitioner asserts that, at his Step II hearing, the Union did not have a copy of the transcript of the prior GO-15 hearing, which he believes was critical to the Union's ability to challenge the disciplinary charges against him. He contends that the Union thereafter did not obtain a copy of the transcript.

Petitioner contends that the Union failed to timely file an appeal to Step III of the grievance process. He claims that the Union acted in a "perfunctory manner," when it told him that it could take his case to Step III but that he should not expect the termination to be overturned. (1st Pet. p. 3) He alleges that the Union ignored him after he was terminated, and that the Union eventually chose to move to Step III only because he filed a petition with the New York City Office of Collective Bargaining ("OCB").

As a result of the failure to timely appeal the Step II termination, Petitioner asserts that the Union entered into a "deliberate and foolish" agreement to obtain a Step III hearing in exchange for permitting the City to preserve its timeliness defense. (Pet. p. 2)

Petitioner argues that the Union exhibited bad faith by entering into the agreement because the Union knew that the City's assertion of this defense would be determinative of the outcome of his case at arbitration. Petitioner also claims that the Union's actions were arbitrary and capricious, and that its failure to timely file at Step III prevented it from effectively advocating for him on the merits of his case.

Petitioner contends that the Union breached its duty of fair representation again by failing to effectively advocate for him at the arbitration. First, Petitioner asserts that the Union failed to challenge the NYPD when it presented evidence that he contends was prejudicial to his case. According to Petitioner, the NYPD mischaracterized the charges against him and the Union did not attempt to correct the bias allegedly created by the mischaracterization. Next, Petitioner asserts that the Union failed to effectively present evidence that he contends would have been helpful to his case. Specifically, he claims that the Union did not elaborate on the point that Degioia subsequently sued his niece, Rose Izzo, who replaced Petitioner in July 2007 as Degioia's power of attorney, for theft of his money and bonds. Petitioner believes that this information was pertinent to his defense.

Petitioner also asserts that the Union failed to effectively argue that the NYPD's penalty of termination was excessive and "without cause," even though this point was previously raised by the Step III Review Officer.[8] (Pet. p. 2) Finally, Petitioner contends

[8] Petitioner also alleges that, a few days prior to the issuance of the Award, the Union's attorney informed him that the NYPD had inquired as to whether, if they were able to get him back to work, Petitioner would return. Petitioner contends that he told the attorney that he would give him an answer the following day, which he asserts that he did. According to Petitioner, the attorney then informed him that he would be away for about a week but would inquire with the NYPD regarding its offer upon his return. Petitioner

that the Award itself is arbitrary and capricious because the arbitrator elected to rule on the procedural grounds by not "waiving" the City's timeliness defense and thus not ruling on the merits of the case.[9]

Union's Position

The Union denies all of Petitioner's claims. It contends that the petition is untimely, stating that "Petitioner's allegations arise out of an Opinion and Award dated August 8, 2011. The petition was filed on December 14, 2011, more than four months after the claim accrued." [10] (Un. Ans. p. 1) Because the Award was dated August 8,

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contends that the attorney subsequently informed him that the proposal was taken off the table with no explanation.

[9] Petitioner also contends that the arbitrator was biased against him as a result of her prior employment as OLR counsel and that she issued the Award in bad faith. An arbitrator's award is final and binding. Accordingly, this Board has no jurisdiction to address the validity of an arbitration award and will not do so in this instance. Indeed, as we previously noted, Petitioner recently sought redress for these allegations in New York State Supreme Court, the proper forum for adjudication of claims of this nature.

[10] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

Section 1-07(b)(4) of the Rules of the City of New York (Title 61, Chapter 1) ("OCB Rule 1-07(b)(4)) 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 § 12-306 of the statute . . . . must be filed within four months of the alleged violation . . . .

2011, the Union's argument is that Petitioner should have filed his petition no later than December 8, 2011.

The Union also argues that Petitioner has failed to establish a breach of the NYCCBL; that it did not act in a "discriminatory, invidious, or bad faith manner;" and that it acted reasonably and in good faith at all times. (Un. Ans. p. 2) It argues that the "entire history and context" of the Union's actions on Petitioner's behalf belie his allegations that the Union was acting in bad faith. (1st Un. Ans. ¶ 45). It notes that the Union represented Petitioner at his GO-15 hearing, and at his Step I and Step II conferences, and filed a Step III grievance on his behalf. It contends that the Board has considered, when inquiring into the motivation underlying a union's actions, the fact that a union represented a petitioner throughout the grievance proceedings.

The Union noted that "mere negligence" and errors in judgment are insufficient to state a claim for a breach of the duty of fair representation. (1st Un. Ans. ¶¶ 35, 37) The Union asserts that the Agreement provides that an appeal from a Step II determination shall be presented "by the Employee and/or the Union." (1st Un. Ans. ¶¶ 40-41) Citing *Fitzgerald*, 45 OCB 65, at 8 (BCB 1990), the Union appears to suggest that Petitioner could have pursued his claim to Step III without the Union's assistance. Finally, the Union asserts that Petitioner has suffered no legally compensable harm.

City's Position

The City argues that the petition must be dismissed for untimeliness and for failure to state a claim of a breach of the duty of fair representation. It asserts that, because the petition was filed on December 14, 2011, any claims occurring prior to August 14, 2011 fall outside the four-month statute of limitations and therefore are time-

barred by NYCCBL § 12-306(e) and OCB Rule 1-07(b)(4).[11] According to the City, the "latest possible date" for consideration on the question of timeliness is August 8, 2011, the date the arbitrator issued the Award.[12] (City Ans. ¶ 24)

The City argues that Petitioner has failed to establish that the Union breached its duty of fair representation pursuant to NYCCBL § 12-306(b)(1) and (3), and therefore the City cannot be held liable. Citing Board and New York State Public Employment Relations Board ("PERB") precedent, the City contends that, to establish a breach of the duty of fair representation, Petitioner must show that the Union's actions or inactions were deliberately arbitrary, discriminatory, or founded in bad faith. Petitioner must allege more than negligence, mistake, or incompetence to meet its burden and has not done so.

According to the City, Petitioner fails to offer evidence that the Union breached its duty of fair representation by consenting to the City's request to reserve its right to assert a timeliness defense or because the Union's arguments at arbitration did not prevail. The City asserts that the Union pursued Petitioner's grievance to arbitration, thoroughly argued the merits, and presented credible arguments on "all the key points of concern."[13] (City Ans. ¶ 49) Finally, while acknowledging that Petitioner did not

[11] The City notes that, while Petitioner claims he received the Award on August 14, 2011, Petitioner's Article 75 petition states that he received it on August 13, 2011. Regardless, according to the City, the date on which Petitioner received the Award is not dispositive of the timeliness issue.

[12] In asserting timeliness as an affirmative defense, the City acknowledges that this case is "unique," in that the Board previously issued an "interim decision" based on related facts in *Morales,* 3 OCB2d 25. (City Ans. ¶ 30) Nevertheless, it maintains that the four month statute of limitations "still applies" to the claims in this matter. (*Id.*)

[13] In its answer to the original petition, the City maintained that the Union did not breach its duty of fair representation because it made a decision not to appeal from Step II,

specifically plead violations of NYCCBL § 12-306(a)(1) or (3), if a claim of retaliation was intended, the City argues that Petitioner failed to set forth facts establishing such a claim.

DISCUSSION

We first address the timeliness of the instant petition. NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4) set the statute of limitations at four months. Thus, "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.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd., Matter of Mahinda v. City of New York*, Index No. 117487/2009 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d 564 (1st Dept. 2012).

Petitioner filed his original petition in October 2009. Subsequent to the filing, in April 2010, the Union and the City reached an agreement to proceed with the grievance following the Union's failure to timely file an appeal to Step III. Because of the possibility that the parties would subsequently resolve the dispute through the grievance process, this Board dismissed the original petition in May 2010 "without prejudice to re-file if necessary, following the conclusion of the grievance/arbitration process." *Morales*, 3 OCB2d 25, at 11 (citation omitted). Unsatisfied with the disposition of the grievance, Petitioner re-filed the petition on December 14, 2011.

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which was in good faith and was not deliberately arbitrary or discriminatory. (1st City Ans. ¶ 62) It also noted that the Agreement's language provides that an appeal from a Step II decision shall be presented by the "Employee and/or the Union," but did not elaborate on that point. (*Id.* at ¶ 63)

In light of our ruling in *Morales*, 3 OCB2d 25, we find that the only timeliness issues properly before the Board at this time are whether the grievance and arbitration process has been exhausted and, if so, whether Petitioner re-filed the petition within a reasonable period after the conclusion of the grievance and arbitration process so as not to prejudice Respondents. As an initial matter, we find that the parties exhausted the grievance and arbitration process. The arbitration marked the fourth and final step of the grievance process. It is undisputed that the arbitrator issued her decision on August 8, 2011, at which time she disposed of the Union's claims against the NYPD. Therefore, the grievance process has been exhausted. Petitioner subsequently filed an Article 75 appeal of the arbitrator's decision to the State Supreme Court. On March 6, 2012, the Supreme Court issued a decision denying the petition. Accordingly, the arbitration process has also been exhausted.[14]

Our prior order did not specify a time frame within which Petitioner had to re-file his petition after the exhaustion of the arbitration process. While the City asserts that this time should be coterminous with the four-month statute of limitations applicable to the filing of an improper practice petition, no such requirement is expressed or implied in our order. The material claims in the current petition are identical to the claims in the original petition, which were never determined on the merits. Were we to restrict the pleadings only to facts that arose during the four-month period immediately prior to the filing of the current petition, as Respondents advocate, we would foreclose consideration of Petitioner's prior timely asserted claims, through no fault of his own. Further, to hold

[14] Because the Union was not a party to the Article 75 proceeding, we find that the grievance process was exhausted, for purposes of the dispute now before us, upon the conclusion of the grievance process in August 2011.

Petitioner to an unexpressed time frame would be fundamentally unfair inasmuch as our prior order clearly contemplated the re-filing of the original timely claim. Therefore, we hold that our prior order required Petitioner to re-file within a reasonable time period. *See, e.g., Matter of Gjerlow v. Graap*, 43 A.D.3d 1165, 1168 (2d Dept. 2007) ("it is a 'well recognized principle of law that where no time for action is specified, the law will imply a reasonable time'") (quoting *Vill. of Sands Point v. Sands Point Country Day Sch.*, 2 Misc.2d 885, 888 (Sup. Ct. Nassau Co. 1955), *affd.*, 2 AD2d 769 (2d Dept. 1956) (other citations omitted)).

In determining whether Petitioner's re-filing falls outside of what we would deem a reasonable time period, we look to whether he "sat on his rights" or is guilty of laches. We have held that a claim may be barred by laches if the following elements are established: (1) the claimant was guilty of significant delay after obtaining knowledge of the claim; (2) such delay was unexplained and/or inexcusable; and (3) the delay caused injury and/or prejudice to the defendant's ability to present a defense against the claim. *See D'Onofrio*, 79 OCB 4, at 9 (BCB 2007).

Here, Petitioner re-filed the petition at most one day and four months after he received the Award and thus learned that his dispute with the NYPD had not been resolved to his satisfaction through the grievance procedure.[15] We find that such a lapse of time certainly would not implicate a finding of laches. *Cf. D'Onofrio*, 79 OCB 4, at 10 (Petitioner guilty of significant delay where it processed respondent's grievances for over three and a half years before asserting that respondent had no grievance rights).

[15] We cannot definitively determine from the pleadings on what date Petitioner received the Award or otherwise learned of the arbitration's outcome. Petitioner represented in the current petition that he received the Award on August 14, 2011; however, in the Article 75 petition, he stated that he received it on August 13, 2011.

Moreover, Respondents have not been prejudiced in their ability to present defenses against Petitioner's claims. Since the May 2010 dismissal of the original petition, Petitioner has not raised any new material claims. All material claims asserted in the current petition are restatements of Petitioner's claims in the original petition. Accordingly, we find that the petition was timely filed and that all material claims relate back to the original petition, timely filed on October 29, 2009.

Moving to the substance of Petitioner's claims, we recognize that "a *pro se* Petitioner may not be familiar with legal procedure, and 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. NYC Office of Collective Bargaining*, Index No. 116796/2008 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept. 2010), *lv. denied*, 17 N.Y.3d 702 (2011). Thus, in analyzing Petitioner's allegations, we review them "with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and [do] not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 13 (BCB 2008); *see also Seale*, 79 OCB 30, at 7 (BCB 2007) ("The principle that claims arise out of the facts asserted and not a petitioner's statutory citations is particularly salient with respect to a *pro se* petitioner.") (citations omitted).

The principal issue before the Board is whether the Union breached its duty of fair representation in handling Petitioner's disciplinary proceedings, including his termination, during the grievance process. The NYCCBL provides that it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." NYCCBL § 12-306(b)(3). In order to establish a

breach of the duty of fair representation, the Board, in interpreting NYCCBL § 12-306(b)(3), requires a petitioner to show that a union's acts in representing him were arbitrary, discriminatory, or in bad faith. *See Lewis*, 4 OCB2d 24, at 15 (BCB 2011). The standard used by the Board to interpret the NYCCBL is derived from the United States Supreme Court's interpretation of the duty of fair representation. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (under the National Labor Relations Act, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct"). A similar standard has been used by PERB and New York state courts. *See, e.g., Garvin v. New York State Pub. Empl. Relations Bd.*, 168 A.D.2d 446, 446 (2d Dept. 1990) ("In order to establish a breach of the duty of fair representation against a union, there must be a showing that the activity, or the lack thereof, was arbitrary, discriminatory, or in bad faith.").

We have held that a union has a duty "to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Smith*, 3 OCB2d 17, at 8 (BCB 2010); *Del Rio*, 75 OCB 6, at 11 (BCB 2005). The scope of the duty of fair representation extends to the processing of contractually based grievances. *See Fabbricante*, 59 OCB 43, at 9 (BCB 1997). Under the NYCCBL, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Proctor*, 3 OCB2d 30, at 13 (BCB 2010) (citation omitted). For example, it is well-settled that a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or

when the outcome of a settlement does not satisfy a grievant. *See Fabbricante*, 59 OCB 43, at 10 (BCB 1997); *Del Rio*, 75 OCB 6, at 11. Furthermore, allegations of mere negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of its fair representation duty. *See Del Rio*, 75 OCB 6, at 11. Even errors in judgment do not rise to the level of a breach of this duty, unless it can be shown that the union's actions were arbitrary, discriminatory, or in bad faith. *Id.* While a union is not obligated to advance every grievance, it has an "affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Nardiello*, 2 OCB2d 5, at 45 (2009) (quoting *Edwards*, 1 OCB2d 22, at 21 (BCB 2008) (citation omitted) (emphasis in original)); *Fabbricante*, 69 OCB 39, at 20 (BCB 2002).

Petitioner's claims stem from his allegation that the Union failed to effectively conduct and represent him in his case. Petitioner strongly disagrees with the Union's tactics and approach to his grievance and is dissatisfied with the quality of the Union's representation from its initiation through the arbitration. As an initial matter, Petitioner does not claim that the Union's representation was discriminatory, nor does he assert that it provided better or more thorough representation for similarly-situated Union members. *See Morris*, 3 OCB2d 19, at 12-13 (BCB 2010) (finding no breach of the fair representation duty in the union's refusal to challenge the termination of a provisional employee where the employee did not allege that the union represented other similarly-situated provisional employees).

Petitioner does make a broad assertion that the Union conducted itself in bad faith throughout the grievance process, and specifically contends that it acted in bad faith when, as a condition of its agreement with the City to process Petitioner's grievance to

Step III, it agreed not to oppose the City's right to assert a timeliness defense. We find no facts to support the allegation that the Union acted in bad faith. *See Fabbricante*, 59 OCB 43, at 10 ("A violation of the duty of fair representation may be found if a petitioner alleges with sufficient specificity and proves by a preponderance of evidence that a union or its agents employed bad faith in the handling of a request to pursue a contractually based grievance."). Therefore, we conclude that there is no basis for a finding that the Union's representation of Petitioner was discriminatory or motivated by bad faith.

We further find no evidence to support the claim that the Union's processing of Petitioner's grievance through the Step II hearing was arbitrary. The Union conferred with Petitioner regarding the disciplinary charges and provided him with a representative at the Step I and II hearings. It also timely filed for the Step I and II hearings and kept Petitioner apprised of the status of the case during those portions of the grievance process. While the Union's tactical decisions and approach to the grievance process may have been unsatisfactory to Petitioner, we find no basis to conclude that the Union's conduct through the Step II hearing rose to the level of a breach of the duty of fair representation. *See James-Reid*, 77 OCB 29, at 18 (BCB 2006) ("The burden of establishing a breach of the duty of fair representation cannot be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union."). For the same reason, we find that the facts, as pleaded, are insufficient to find that the Union's conduct during the arbitration

was arbitrary. *See id.* Consequently, we find that these particular allegations, without more, do not state claims for a breach of the duty of fair representation.[16]

The Board now turns to the remaining two claims, each of which is based on undisputed facts. Petitioner has specifically pleaded conduct on the part of the Union which may be deemed arbitrary: the failure to timely appeal the Step II decision and the failure to communicate with Petitioner regarding whether it would file that appeal. Arbitrary conduct, in the context of a union's duty of fair representation, has been defined as behavior that, "in light of the factual and legal landscape at the time of the union's actions . . . is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Assn., Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (citations omitted); *see Matter of Grassel v. Pub. Empl. Relations Bd.*, 34 PERB ¶ 7035 (Sup. Ct. Kings Co. 2001) ("[u]nder the arbitrary prong, a breach occurs only if the [union's] conduct can be fairly characterized as so far outside a wide range of reasonable that it is wholly irrational"), *affd.*, 301 A.D.2d 522, 36 PERB ¶ 7002 (2003); *Int'l Un., United Auto., Aerospace & Agric. Implement Workers of Am. L. Un. #376 (Colt's Mfg. Co., Inc.),* 356 NLRB No. 164, 2011 WL 2132217, at *3 (2011) (quoting standard set forth in *O'Neill*); *see also Thomas v. Little Flower for Rehab. & Nursing and 1199 SEIU,* 793 F. Supp.2d 544, 547 (E.D.N.Y. 2011) ("Arbitrary conduct includes both intentional conduct and 'acts of omission which, while not calculated to harm union members, may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate

[16] We also dismiss Petitioner's allegation that, shortly before the issuance of the Award, the Union's attorney informed Petitioner that the NYPD had inquired as to whether, if they were able to get him back to work, Petitioner would return. Petitioner contends that the attorney subsequently informed him that the proposal was taken off the table with no explanation. We find that Petitioner's allegation do not support any cognizable claim for relief. *See Feder*, 1 OCB2d 23, at 13.

union interests as to be arbitrary.'") (quoting *NLRB v. L. 282, Int'l Bhd. of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984)).

On July 15, 2009, based on the findings from the Step II grievance hearing, the Union notified Petitioner that he was terminated effective that day. Thereafter, the Union did not appeal the decision to terminate Petitioner by filing a request for a Step III hearing within ten workdays following the Step II determination, as proscribed by the Agreement. There is no evidence that anyone from the Union contacted or attempted to contact Petitioner during the remainder of July 2009 to address the appeal of the Step II termination or any other matter pertaining to the grievance process.

After receiving the Step II decision terminating his employment, Petitioner attempted to contact the Union multiple times during August 2009 to discuss his grievance. He then contacted the Union several times in September 2009 but never received a return call, with the exception of one occasion, on which a Union representative informed him that the Union did not forget about his case but that someone would have to get back to him to discuss it. Petitioner did not hear from the Union again until December 2, 2009, when a Union attorney informed him that the Union intended to file a request for a Step III hearing on his behalf.

This Board has held that ignoring a grievance that has possible merit or a grievant's information request in an arbitrary fashion may constitute a breach of the fair representation duty. *See Mora-McLaughlin*, 3 OCB2d 24, at 14 (BCB 2010) (finding that "[a]rbitrarily ignoring a meritorious grievance . . . constitutes a violation of the duty of fair representation"); *Whaley*, 59 OCB 41, at 14 (BCB 1997) (same); *Krumholz*, 51 OCB 21, at 12 (BCB 1993) (citing *Bd. of Educ. of the City Sch. Dist. of the City of New York*,

23 PERB ¶ 3042 (1990) (finding that grievant's request to his union for further consideration of his grievance or for appeal of the union's decision not to pursue it, if not merely redundant or onerous, requires a response, and failure to respond may establish a charge of arbitrariness sufficient to state a *prima facie* violation of the union's duty of fair representation)); *see also Letter Carriers Branch 529 (Postal Serv.)*, 319 NLRB 879, 881 (1995) (union breached its duty of fair representation to the grievant by arbitrarily refusing to provide her with requested copies of grievance forms).

Based on this record, we find no support for a conclusion that Petitioner's grievance lacked merit. On the contrary, there is sound evidence to support his claim that he was improperly discharged. The absence of criminal charges, the letter from DeGioia's niece, and the Step III hearing officer's conclusions all support Petitioner's claim that his grievance was not frivolous.

Given the facts presented in this matter, we are constrained to find that the Union breached its duty of fair representation. Following Petitioner's termination at Step II, the Union had a duty to either timely file an appeal or inform Petitioner that it would decline to file. *See Nardiello*, 2 OCB2d 5, at 45. The Union not only failed to file the appeal to Step III until it was effectively too late, but it offered Petitioner no explanation for this failure at the time the breach occurred in July 2009 or at any time thereafter. *See Mora-McLaughlin*, 3 OCB2d 24, at 14; *see also Young v. U.S. Postal Service*, 907 F.2d 305, 308 (2d Cir. 1990) (holding that "a union may breach its duty when it fails to process a

meritorious grievance in a timely fashion with the consequence that arbitration on the merits is precluded") (citing Second Circuit cases).[17]

In short, after pursuing Petitioner's grievance through Step II, the Union, without advising Petitioner, simply stopped acting. The Union has never provided a reason or an explanation for its failure to either state that it would not proceed to Step III or timely process the appeal, and no rational explanation for its conduct is apparent. *See O'Neill*, 499 U.S. at 67. At the arbitration hearing, the Union argued only that the Agreement did not require it to file the appeal to Step III within 10 days of the Step II decision. Further, it offered no evidence that any aspect of Petitioners' case had changed between the time it commenced the grievance process and the time he was terminated such that a decision not to advance the grievance to Step III might have been rational or justified. We find that the Union's actions-or lack thereof-under the circumstances were arbitrary because they fall outside the "wide range of reasonableness" within which unions may act without breaching their duty of fair representation. *See O'Neill*, 499 U.S. at 67.

In addition to its failure to timely file the appeal without explanation, the Union breached its duty of fair representation to Petitioner by arbitrarily failing to communicate

[17] In its answer to the original petition, the Union asserted that the Agreement provides that an appeal from a Step II determination shall be presented "by the Employee and/or the Union." (1st Un. Ans. ¶¶ 40-41) Citing *Fitzgerald*, 45 OCB 65, at 8, the Union appears to suggest that Petitioner could have pursued his claim to Step III without the Union's assistance. *Id.* Yet *Fitzgerald* stands merely for the proposition that a union does not breach its duty of fair representation simply by not processing a grievance. *Id.* at 7-8. We affirm that there exists no requirement that a union process a grievance. *See Nardiello*, 2 OCB2d 5, at 45 ("A union is not obligated to advance every grievance. . . . It enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.") (citations omitted). However, as discussed above, having already undertaken to represent Petitioner in this instance, the Union had a duty to either timely process the grievance to Step III or advise Petitioner that it would not do so. *Id.* (confirming that a union has an affirmative duty to inform a member whether or not it will pursue a grievance on his behalf). Here, the Union did neither.

with him in any meaningful way from the date of his termination in mid-July 2009 through early December 2009, when it informed him that it would appeal his termination. We have stated that a union has "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Fabbricante*, 69 OCB 39, at 20 (emphasis in original); *see also Bd. of Educ. of the City Sch. Dist. of the City of New York*, 23 PERB ¶ 3042; *SSEU, L. 371*, 11 PERB ¶ 3004 (1978). Moreover, a union has a responsibility to communicate with a grievant, including responding to the grievant's inquiries on the matter and keeping him apprised of its status. *See Krumholz*, 51 OCB 21, at 12. As PERB has stated, Petitioner's requests to discuss his case require, at the very least, an explanation for the failure to respond. *See Bd. of Educ. of the City Sch. Dist. of the City of New York*, 23 PERB ¶ 3042. Here, the Union never explained why it waited over four months after the contractual deadline had passed to file the appeal or why it did not communicate with Petitioner regarding the matter during that time period.

In reaching our decision, we reject the City's contention that Petitioner failed to state a claim pursuant to NYCCBL § 12-306(b)(1) and (b)(3) because he did not show that the Union acted with the intent to undermine his case.[18] Relying on *CSEA v. PERB*, 132 A.D.2d 430 (3d Dept. 1987), *affd. on other grounds*, 73 N.Y.2d 796 (1988), the City argues that the petition is devoid of any facts which demonstrate that the Union acted in a manner that was "deliberately invidious, arbitrary or founded in bad faith." *Id.* at 432. However, *CSEA* is distinguishable from the instant matter. In *CSEA*, the Appellate Division, Third Department, held that a union's failure to adequately train a grievance

[18] The City also offers a defense to the extent Petitioner's allegations can be construed as asserting a claim for retaliation. Because we find that Petitioner did not allege a claim of retaliation, we do not address such a claim.

representative is not a breach of the duty of fair representation. *Id.* The Court reasoned that, without evidence of bad faith, the union's alleged gross negligence was insufficient to establish an improper practice. *Id.*

Here, the Union did not assert that its conduct was the result of negligence or a mistake.[19] Rather, it was silent as to why it did not process Petitioner's grievance for four months after Petitioner's termination or communicate with Petitioner during that period.[20] Therefore, the Union's failure to act falls squarely within the definition of arbitrary, and accordingly forms a basis for its breach of the duty of fair representation. *See O'Neill*, 499 U.S. at 67; *Matter of Grassel*, 34 PERB ¶ 7035; *Thomas*, 793 F. Supp.2d at 547.

We note that, even if *CSEA* were construed to hold that arbitrary conduct can never form the basis for a breach of the duty of fair representation because it lacks the element of intent, this interpretation would lie in stark contrast to the well-established standard for a breach of the duty of fair representation noted earlier. S*ee, e.g., Mora McLaughlin*, 3 OCB2d 24, 14 ("Arbitrarily ignoring a meritorious grievance or processing such a grievance in a perfunctory fashion constitutes a violation of the duty of fair representation."); *Matter of Grassel*, 34 PERB ¶ 7035 (citing *O'Neill* standard for

[19] In its answer, the Union asserted that "mere negligence" and errors in judgment are insufficient to state a claim for a breach of the duty of fair representation, but never argued that its own actions, or lack thereof, in processing the grievance, resulted from negligence or error. (1st Un. Ans. ¶¶ 35, 37)

[20] We note that OCB Rule § 1-07(c)(3) requires Respondents to provide a "statement of facts . . . setting forth the nature of the controversy. Such statement may be supported by affidavits, documents, and other evidence that may be relevant and material. . . ." *See* OCB Rule 1-07(c)(3)(i)(B). This statement must be separate from any admissions and denials of the petition's allegations, as well as from the argument and any defenses. *See* OCB Rule 1-07(c)(3)(i)(A), (C), and (D). Contrary to this Rule, the Union did not, in either of its answers, include a statement of facts or any supporting evidentiary materials. As noted earlier, on the pleadings before us, no material factual disputes have been raised.

finding a breach of the duty of fair representation under the arbitrary prong); *O'Neill*, 499 U.S. at 67; *Int'l Un., United Auto., Aerospace & Agric. Implement Workers of Am. L. Un. #376 (Colt's Mfg. Co., Inc.)*, 356 NLRB No. 164, 2011 WL 2132217, at *3 (same); *Caputo v. Nat'l Assn. of Letter Carriers*, 730 F.Supp. 1221, 1225 (E.D.N.Y. 1990) ("A union may breach the duty of fair representation 'even in the absence of bad faith or ill will, by conduct or omission which is arbitrary or irrational.'"). It would also contradict the cases in which arbitrary conduct has been found to be a breach of the duty of fair representation. *See, e.g., Bd. of Educ. of the City Sch. Dist. of the City of New York*, 23 PERB ¶ 3042 (claim of arbitrary refusal of union to represent grievant has merit where union rejects grievance without providing a reason); *Thomas*, 793 F. Supp.2d at 547 (union's conduct in failing to initiate or process the plaintiff's grievance was more than mere negligence or a tactical error but rather "arbitrary, discriminatory or in bad faith") (citation omitted). *See also Adams v. CSEA*, 22 PERB ¶ 7518 (1989) (noting the "aberrant nature" of the *CSEA* decision and finding it "counter [to] the trend of the law in duty to fairly represent cases").

In light of the above, we find that the Union breached its duty of fair representation to Petitioner, in violation of NYCCBL § 12-306(b)(1) and (3). We further find that the NYPD derivatively violated NYCCBL § 12-306(d). In fashioning a remedy for this breach, it is paramount that Petitioner be made whole by placing him "as nearly as possible in the position [he] would have been in had the improper practice not been committed." *Dansville Cent. Sch. Dist.*, 45 PERB ¶ 3012 (2012); *see also Burnt-Hills-Ballston Lake Cent. Sch. Dist.*, 25 PERB ¶ 3066 (1992).

The facts reflect that, as a direct result of the Union's arbitrary conduct in failing to timely file for a Step III grievance hearing, Petitioner was prohibited from receiving an evaluation of his grievance on the merits at arbitration. We have long held that it is within the Board's remedial powers, upon a determination that a union breached the duty of fair representation in the processing or failure to process a contract claim, to direct a union and a public employer to process the contract claim in accordance with the parties' grievance procedure. *See Fabbricante,* 59 OCB 43, at 13 (citing N.Y. Civ. Serv. Law ("CSL") § 205(5)(d)). Accordingly, to return Petitioner to the status quo *ante*, we now order the Union and the NYPD to process Petitioner's grievance to Step IV of the grievance procedure, in order to permit him the opportunity to arbitrate his claim on the merits. *Id.*; *see Dansville Cent. Sch. Dist.,* 45 PERB ¶ 3012.[21] In considering Petitioner's grievance, the arbitrator should render an award based solely on the merits of the claim, without regard to any timeliness defenses.

To avoid a potential conflict of interest, we direct the Union to incur the cost of hiring outside counsel to represent Petitioner at arbitration. *See Matter of Buffalo Police Benevolent Assn. v. PERB*, 8 A.D.3d 958 (4th Dept. 2004) (holding that PERB did not act

[21] We note that the existence of a final arbitration award does not bar Petitioner from arbitrating his claims against the NYPD in this instance. *See Shah v. State of New York*, 140 Misc.2d 16 (N.Y. Ct. Cl. 1988) (in the context of public employment, "only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer").

We further note that, in returning Petitioner to the status quo *ante,* we would ordinarily order the Union to evaluate the merits of Petitioner's grievance and inform Petitioner in writing within a reasonable time period whether it will appeal Petitioner's termination at Step II to arbitration. *See Dansville Cent. Sch. Dist.*, 45 PERB ¶ 3012. Here, however, the Union has demonstrated that it would process Petitioner's grievance to arbitration by filing an arbitration request. Accordingly, we find that it would be redundant to order the Union to re-evaluate its determination.

unreasonably in requiring union to move police officers' grievances to arbitration and pay costs of outside counsel following finding of duty of fair representation breach).

In the event that the arbitrator issues an award in Petitioner's favor, liability shall be apportioned between the NYPD and the Union according to the damage caused by each party. *See* CSL § 205(5)(d) (permitting the Board, upon a determination that an employee organization has breached its duty of fair representation in the processing or failure to process a claim alleging that a public employer has breached its agreement with such employee organization, to "retain jurisdiction to apportion between such employee organization and public employer any damages assessed as a result of such grievance procedure"); *see also Bowen v. United States Postal Serv.*, 459 U.S. 212, 226 (1983) (damage awards in cases alleging employer's violation of a collective bargaining agreement and a union's breach of the duty of fair representation must be apportioned between the employer and the union according to the relative fault of each, with the union bearing responsibility for any increase in damages caused by its refusal to process a grievance); *Mohan v. United Univ. Professors*, 127 Misc.2d 118, 485 N.Y.S.2d 404 (1984) (acknowledging damages apportionment method set forth in *Bowen*). Finally, this Board shall retain jurisdiction over this matter to consider apportionment of damages and/or any other issues which may arise out of and/or subsequent to the arbitration. CSL § 205(5)(d); *see Fabbricante*, 59 OCB 43, at 13; *Dansville Cent. Sch. Dist.*, 45 PERB ¶ 3012; *see also Bowen*, 459 U.S. at 226.

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 Jose E. Morales against the United Federation of Teachers, the City of New York, and the New York City Police Department, docketed as BCB-2996-11 be, and the same hereby is, granted, in part, and denied, in part, as specified in the body of the Decision; and it is further

ORDERED, that the United Federation of Teachers and the City of New York and the New York City Police Department shall take all necessary steps to process Mr. Morales' grievance, filed on October 29, 2009, to arbitration pursuant to the parties' contractual grievance procedure; and it is further

ORDERED, that the United Federation of Teachers shall pay the reasonable and necessary costs of legal representation of Mr. Morales throughout the arbitration process; and it is further

ORDERED, that, in the event that the United Federation of Teachers prevails at arbitration, any damages assessed shall be apportioned between the United Federation of Teachers and the City of New York and the New York City Police Department; and it is further

ORDERED, that the Board of Collective Bargaining shall retain jurisdiction over this matter to resolve any issues, including apportionment of damages, which may arise pertaining to and/or resulting from the referenced arbitration.

Dated: July 10, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER