Thomas, 5 OCB2d 40 (BCB 2012)

(IP) (Docket No. BCB-3009-12)

Summary of Decision: Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) and that HHC discriminated against her in violation of NYCCBL § 12-306(a)(3) by wrongfully terminating her employment. The Union and HHC independently argued that Petitioner's claims were untimely. In addition, the Union and HHC argued that, assuming the petition was timely filed, Petitioner's claims lack merit because she was a provisional employee without due process rights to appeal her termination. The Board found that Petitioner's claims against HHC were untimely, that some of Petitioner's claims against the Union were untimely, and that the remaining claims against the Union were without merit. 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-

DEBRA ANN THOMAS,

Petitioner,

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On April 16, 2012, Debra Ann Thomas ("Petitioner") filed a *pro se* verified improper practice petition against Local 237, International Brotherhood of Teamsters ("Union") and the New York City Health and Hospitals Corporation ("HHC").[1] Petitioner subsequently filed an

[1] On April 24, 2012, the Executive Secretary issued a deficiency letter stating that the petition had been found deficient on the grounds that it: (1) lacked proof of service on the designated

amended petition on June 20, 2012.[2] Construing the claims broadly, Petitioner alleges in her petition and amended petition that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") and that HHC discriminated against her in violation of NYCCBL § 12-306(a)(3) by wrongfully terminating her employment. Both the Union and HHC assert that Petitioner's claims are untimely because the incidents that form the basis of her claims occurred more than four months prior to the filing of the petition. In addition, both Respondents argue that, even assuming that the petition was timely filed, Petitioner's claims lack merit because she was a provisional employee without due process rights to appeal her termination. This Board finds that Petitioner's claims against HHC are untimely, that some of Petitioner's claims against the Union are untimely, and that the remaining claims against the Union are without merit. Accordingly, the petition is denied.

BACKGROUND

Petitioner was employed by HHC as a provisional employee for 18 years in the title of Associate Radiographer Level II at Kings County Hospital Center ("Facility"). She commenced her employment at the Facility on July 7, 1993. Petitioner alleges that, after the hiring of Courtney Gordon as Senior Associate Director of Radiology in August 2010, her conditions of employment worsened. She asserts that Gordon "exhibited a hostile work environment" and began writing up staff for errors, including Petitioner, despite the fact that she and her colleagues

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agents of service for HHC and the Union; and (2) did not contain sufficient specificity concerning the Union's and HHC's actions.

[2] Following the completion of the pleadings, Petitioner retained counsel who represented her at the conference in this matter.

"were not trained in certain areas." (Pet., at 2) Petitioner asserts that Gordon "belittled and humiliated" her. (*Id.*) According to Petitioner, Gordon's first question to her was "How long have you been here?" and that, upon replying 18 years, he stated, "So that means you have eight more years to retire?" (Am. Pet. ¶ 8) Following this exchange, Petitioner contends that Gordon discriminated against her "because I was a senior tech." (*Id.*) Petitioner asserts that she was unfairly accused of making errors, although she admits to having committed some of them.[3] Petitioner received two write-ups from Gordon, but was never suspended.[4] She alleges that for the 17 years prior to Gordon's arrival at the Facility her performance evaluations were satisfactory. Nevertheless, she received an unsatisfactory rating on her evaluation for the period of October 15, 2010 to July 6, 2011.[5]

On July 5, 2011, Petitioner was given a letter, which stated that "a meeting has been scheduled with your union representative and representatives from your department to discuss" specified instances of "poor job performance" and "errors in work product," including transmitting images under the wrong identifying number, incorrect labeling, and, on one occasion, x-raying the wrong patient. (Pet., Ex. A) The letter further stated that, after the meeting, a determination would be made as to what course of action would be necessary to address the alleged deficiencies. The letter provided that "[t]his determination may result in disciplinary action leading up to and including the termination of your services as a Radiographer Level II." (*Id.*)

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[3] Petitioner asserts that training to prevent the errors was inadequate. She explains that the "errors that they accused [her] of were not at all detrimental to the patient[s'] li[ves]." (Am. Pet. ¶ 13).

[4] Petitioner asserts that a July 6, 2011, written warning that she received for her failure to sign in and sign out was not warranted.

[5] According to HHC, Petitioner received three unsatisfactory evaluations prior to her termination.

The meeting took place on July 12, 2011, and Petitioner was accompanied by Union representative George Wade. However, Petitioner alleges that Wade sided with HHC and did not satisfactorily represent her.[6] According to Petitioner, Wade did not argue that HHC failed to follow the correct procedure, did not recommend a lesser penalty or "allow" HHC to give her options, and did not recommend that she file a grievance. (Pet., at 2) Following the meeting, Petitioner was terminated and received a letter to that effect. Petitioner alleges that she was not offered the opportunity to resign.

Following her termination, Petitioner claims that she called the Union several times and spoke to representatives other than Wade. One week after her termination, Petitioner alleges that she spoke with Union representative Felicia Cannon, who told her that Wade would be contacting her soon. On July 22, 2011, Wade sent a letter to HHC requesting a Step II hearing to appeal "the unacceptable decision to terminate" Petitioner. (Pet., Ex. C)

On July 29, 2011, HHC's Chief Review Officer denied Wade's request in a letter to the Union that contained the following explanation:

> Please note that following a decision issued by the New York State Court of Appeals in Long Beach v. Civil Service Employees Association,[7] provisional employees do not have disciplinary grievance rights under the parties' collective bargaining agreement. Consequently, [Petitioner] does not have the right to grieve her termination from her position at Kings County Hospital Center. Therefore, the instant grievance is dismissed without a hearing.

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[6] The Union denies that Wade colluded with HHC administrators or otherwise acted in bad faith.

[7] In *Matter of City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465 (2007) ("*City of Long Beach*"), the Court of Appeals held that permitting the arbitration of a provisional employee's termination "would violate Civil Service law and public policy" because provisional appointments "carry no expectation nor right of tenure" and, therefore, a "provisional employee cannot be entitled to any right of continued employment under the terms of" a collective bargaining agreement. 8 N.Y.3d at 470-72 (2007).

(Pet., Ex. D) Petitioner acknowledges that the Union informed her of these facts and confirmed that she "could not go through the grievance process because I am a provisional employee and I have no rights." (Am. Pet. ¶ 6) Nevertheless, on September 9, 2011, Donald Arnold, the Union's Citywide Director, wrote to the assistant personnel director at the Facility, requesting a meeting to discuss Petitioner's termination. According to Petitioner, the request was denied.

Petitioner asserts that in January 2012, she received a telephone call from Arnold who told her that:

> [I]t's hard to get a job when you're in fire status. He tried to persuade me not to go through with the procedure at the office of collective bargaining. He stated [that] if I follow through with it he can't help me. He told me he has to find a way to get my job back. He'll get back to me. He also mentioned that he will try to have me come in[] [for] a meeting and resign because it will be easier for me to get a job in that status.[8]

(Pet., at 3) On January 25, 2012, Petitioner asserts that she again spoke with Arnold. According to Petitioner, Arnold told her that he would try and get a meeting with Senior Associate Director Gordon. Thereafter, Arnold allegedly told Petitioner that it was not necessary for her to attend the meeting. According to Petitioner, after the meeting, Arnold informed her that HHC would not agree to bring her back to the Facility. Petitioner alleges that Arnold also told her that he would "keep on trying to see what he could do for me. He promised to place me in an 1199 hospital. He told me first he would have to get me off fire status." (*Id.*)

[8] In Petitioner's reply, she reiterated that "Arnold stated it would be hard to get a job in 'termination status'. He said he would have to try to have me reinstated. He never mentioned that I should seek help at the Office of Collective Bargaining but instead he told me not to go through with the Collective Bargaining Office because he would not be able to help me further." (Rep., at 3-4)

Thereafter, the Union continued to assist Petitioner. Specifically, Arnold referred her to job openings and requested that she contact prospective employers and send them her resume.[9] The Union asserts that Petitioner advised Arnold that "she was uninterested in working at any other hospital." (Union Ans. ¶ 8) Nevertheless, Petitioner claims that Arnold went on vacation without notice in February 2012 and did not return her telephone calls. The Union denies that it did not return Petitioner's calls and asserts that, although Petitioner "often called 15 times in a day, only one or two return calls were made." (Union Ans. ¶ 8) In late March 2012, Petitioner alleges that Arnold's secretary informed her that there was a job freeze and that Arnold left her a message telling her to call two agencies. However, Petitioner claims that "[a]gency work is not at all like having a permanent job" and, therefore, she "became frustrated because this is not what he promised me." (Pet., at 4) Petitioner contends that she subsequently left Arnold a message on April 9, 2012, but alleges that Arnold did not return her call.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that her petition was timely filed because, based on the Union's actions, she was "led [] to believe" and, indeed, "trusted that [the Union] would have helped [her] to seek justice . . . ." (Rep., at 2)

Petitioner asserts that the Union breached its duty of fair representation because she did not receive due process since a Step 1 conference was not held after she was terminated. Thus, Petitioner contends that Wade "inadequately" represented her and failed to properly defend her

[9] According to Petitioner, Arnold provided her with a job code and application deadline for an x-ray technician position at Harlem Hospital, Women's Pavilion. Petitioner alleges that Arnold told her that she "would not go through the hiring process [and] that I will be pulled directly into the department." (Pet., at 4)

in the grievance process. (Am. Pet. ¶ 2) According to Petitioner, Wade acted in bad faith because he appeared to be on HHC's side and did not inform HHC administrators that they did not go through the proper steps of the termination process, as Petitioner was not suspended before she was terminated. In addition, she contends that Arnold acted in bad faith and was negligent because he did not follow through on his promises. Specifically, Petitioner alleges that Arnold failed to get meetings with HHC, failed to get her transferred to another hospital, failed to get her termination converted into a resignation, and failed to call her back or return her calls in a timely manner. In short, Petitioner claims that for more than six months Arnold "lead[] her on" and the Union made promises that it did not keep. (Am. Pet. ¶ 7)

In addition, Petitioner alleges that HHC discriminated against her by wrongfully terminating her employment. She contends that her supervisor harassed her and discriminated against her because she was a senior technician. Petitioner claims that, when deciding to terminate her, he ignored her many years of service and satisfactory performance evaluations. She contends that she was treated unfairly because she was written up and terminated for conduct that was not a basis for discipline, but instead were minor errors or commonplace occurrences that resulted from inadequate training and understaffing. Petitioner further alleges that her termination was wrongful because she never received a warning, counseling, or a suspension with probation like other employees had received.

Union's Position

The Union argues that the petition is untimely because it was not filed within the four month statute of limitations. The initial petition was filed nine months after Petitioner's termination. Even assuming that the statute of limitations did not begin to run until the Petitioner received HHC's July 29, 2011, letter stating that provisional employees do not have disciplinary

grievance rights, the Petition is still untimely because its filing far exceeds the four month statute of limitations.

Nevertheless, the Union did not breach its duty of fair representation to Petitioner. Petitioner was a provisional employee who did not have disciplinary grievance rights. Therefore, the Union could not grieve her termination. Without any rights under the law, the Union argues that it did not have a duty of fair representation to Petitioner following her termination. However, despite these legal constraints, the Union filed a Step II grievance, asked to meet with HHC on Petitioner's behalf, and attempted to assist Petitioner in securing other employment.

HHC's Position

HHC argues that Petitioner's claims against HHC are untimely because any and all interactions between Petitioner and HHC or the Facility's employees occurred on or before July 12, 2011, the date that she was terminated. Petitioner did not file her initial petition until eight months later. Since all of HHC's alleged violations of the NYCCBL occurred more than four months prior to the filing of the petition, Petitioner's claims against HHC are untimely. HHC also argues that Petitioner's claims against the Union are untimely because her complaints regarding the Union's representation concern a meeting with HHC that took place on July 12, 2011. Even assuming that the statute of limitations did not begin to run until July 22, 2011, when the Union filed its request for a Step II hearing, the petition still was not timely filed because Petitioner knew at that time that the Union would not be taking her grievance to arbitration due to her status as a provisional employee.

Even if the Board finds that Petitioner's claims are timely, to the extent that Petitioner asserts that HHC discriminated against her in violation of NYCCBL § 12-306(a)(3), Petitioner

has failed to articulate sufficient factual allegations and has merely engaged in speculation. Petitioner claims that actions taken by her supervisors were discriminatory; however, she fails to establish that she engaged in any union activity prior to the alleged discriminatory actions. Although Petitioner also alleges that there was a conspiracy between HHC and the Union, she does not offer any facts in support of her speculative and conclusory allegations. Therefore, Petitioner's claims against HHC should be dismissed.

Furthermore, Petitioner failed to allege facts sufficient to establish a breach of the Union's duty of fair representation. Rather, Petitioner makes speculative statements and the conclusory assertion that the Union breached its duty of fair representation by determining not to proceed with a grievance concerning her termination. The Union informed Petitioner that it could not proceed with a grievance on her behalf because she was a provisional employee without any due process rights. Petitioner's mere dissatisfaction with the Union's decision does not establish a breach of the duty of fair representation. Furthermore, because *City of Long Beach* nullified and voided provisions of collective bargaining agreements that afforded provisional employees disciplinary grievance rights, the Union had no ability to process Petitioner's grievance. Therefore, the Union had no further duty with respect to Petitioner and there is no basis for finding a violation of NYCCBL §12-306(b)(3).

DISCUSSION

As a threshold matter, an improper practice petition "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003)

(Beeler, J.) (citing NYCCBL § 12-306(e) and § 1-07(d) of the OCB Rules);[10] *see also DC 37, L. 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Tucker*, 51 OCB 24, at 5 (BCB 1993). Therefore, "claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009); *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *Castro*, 63 OCB 44, at 6 (BCB 1999).

Here, Petitioner was terminated on July 12, 2011. On July 29, 2011, HHC denied the Union's request for a Step II hearing because Petitioner was a provisional employee and, therefore, not entitled to disciplinary grievance rights pursuant to the New York State Court of Appeals' decision in *City of Long Beach*. Petitioner acknowledges that the Union contemporaneously informed her of this determination. Petitioner filed her original improper practice petition on April 16, 2012, more than nine months after she was terminated and notified that she did not have a legal right to appeal her termination. Consequently, Petitioner's claims against HHC are untimely and are hereby dismissed.[11]

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[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. . . .

OCB Rule § 1-07(d) provides, in relevant part: "A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . . ."

[11] Notwithstanding the above, were we to construe Petitioner's claims against HHC to be timely, we would find them to be without merit because Petitioner does not claim that union activity was the basis for the allegedly wrongful actions taken against her. *See Lewis*, 4 OCB2d 24, at 14

Petitioner's claims against the Union arising from her termination are also untimely. Petitioner acknowledges that the Union advised her that she was a provisional employee and, as such, did not have disciplinary grievance rights. Although the Union nevertheless attempted to grieve Petitioner's termination, by a letter dated July 29, 2011, HHC explicitly refused to process the Union's grievance. Therefore, no later than July 29, 2011, Petitioner knew that the Union could not appeal her termination. Since Petitioner did not file her petition until April 16, 2012, any and all claims against the Union regarding events that occurred prior to December 16, 2011, are time-barred. Accordingly, we will only consider the merits of Petitioner's claims against the Union for conduct that occurred on or after December 16, 2011.[12]

During the four-month period that preceded the filing of the petition, Petitioner's only claims against the Union arise from her allegations that the Union's Citywide Director told her that he could not help her if she were "to go through with the procedure at the office of collective bargaining," failed to get HHC to convert her termination into a resignation, and did not keep his promises regarding the securing of other employment for her. (Pet., at 3) In considering the substance of these remaining 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. N.Y.C. 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). Accordingly, we

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(BCB 2011) (finding that the petitioner did not establish a claim under NYCCBL § 12-306(a)(3) because she did not allege that she was engaged in union activity).

[12] We take administrative notice that Petitioner contacted the Office of Collective Bargaining as early as December 29, 2011. Even if Petitioner had elected to file her improper practice petition on that date, it still would be untimely with respect to her claims against HHC and her claims against the Union arising from her termination in July 2011.

review Petitioner's allegations "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).

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees . . . ." To establish a breach of the duty of fair representation, the Board has explained that the burden is on the petitioner to show that "a union's acts in representing him or her were arbitrary, discriminatory, or in bad faith." *Morales*, 5 OCB2d 28, at 19 (BCB 2012); *see also Lewis*, 4 OCB2d 24, at 15 (BCB 2011). The duty of fair representation "does not reach into and control all aspects of the Union's relationship with its members." *McAllan*, 31 OCB 14, at 30 (BCB 1983). Significantly, "[t]he scope of th[e] duty of fair representation generally extends only to the negotiation, administration, and enforcement of collective bargaining agreements[.]" *Lopez*, 59 OCB 31, at 8 (BCB 1997); *see also McAllan*, 31 OCB 14, at 30-31. Thus, 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 duty of fair representation applies to the processing of contractual grievances. *See Morales*, 5 OCB2d 28, at 19; *Fabbricante*, 59 OCB 43, at 9 (BCB 1997). However, 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). Thus, a "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *Morris*, 3 OCB2d 19, at 10 (BCB 2010) (quoting *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008)). A union is not

obligated to advance every grievance and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 45 (BCB 2009); *Fabbricante*, 59 OCB 43, at 10; *Del Rio*, 75 OCB 6, at 11. Additionally, allegations of negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of the duty of fair representation. *See Del Rio*, 75 OCB 6, at 11.

Here, the Union's representation of Petitioner concluded when the Union correctly determined that it could not process Petitioner's grievance because she was a provisional employee and, therefore, not entitled to disciplinary grievance rights. *See DC 37*, 5 OCB2d 24 (BCB 2012) (finding that a union's grievance was not arbitrable because HHC has no obligation to arbitrate a provisional employee's termination); *Morris*, 3 OCB2d 19, at 10 (finding that a union had a reasonable basis for determining that filing a grievance on behalf of a provisional employee without grievance rights would be without merit). During the many communications that Petitioner allegedly had with the Union over the course of the eight months that followed, the Union did not deviate from its position that Petitioner's termination was not grievable. Although there was no legal recourse under the collective bargaining agreement to appeal Petitioner's termination, the Union continued to try and assist Petitioner.[13]

Even if we were to find that the Union owed a duty of fair representation to Petitioner after it correctly determined that it could not process Petitioner's grievance, we would find that

[13] In certain circumstances, the duty of fair representation has been extended to services a union voluntarily provides to members that are not contractually or statutorily mandated, such as representation in an Article 78 proceeding. *See James-Reid*, 1 OCB2d 26, at 19 (BCB 2008). However, the instant matter does not concern such circumstances. *See Morris*, 3 OCB2d 19, at 12-13 (finding no breach of the duty of fair representation where the union refused to challenge the termination of a provisional employee under the NYCCBL and the provisional employee did not allege that the union represented other provisional employees in similar situations).

the Union did not violate the duty of fair representation in connection with its efforts to get HHC to convert her termination into a resignation and to secure other employment for her.[14] Although the Union was unsuccessful in these endeavors, Petitioner does not claim, nor could we find, that the Union's actions were taken in an arbitrary, discriminatory, or bad faith manner. Moreover, Petitioner's claim that the Union's Citywide Director told her that he could not help her if she were "to go through with the procedure at the office of collective bargaining" does not independently give rise to a breach of the duty of fair representation. (Pet., at 3) Petitioner has not provided any basis upon which we could conclude that Petitioner had any arguably meritorious claim that the Union refused to process before the Board.[15] *Morris*, 3 OCB2d 19, at 10. Furthermore, by Petitioner's own admission, the Union continued to assist her for three months after this statement allegedly was made. Under these circumstances, we cannot conclude that the Union acted in an arbitrary, discriminatory, or bad faith manner.

For the reasons stated above, we dismiss the petition in its entirety.

[14] Petitioner acknowledges that the Union contacted HHC and met with HHC administrators to try and convert her termination into a resignation. Petitioner also acknowledges that the Union assisted her with her job search by referring her to job openings.

[15] Even if Petitioner could establish that the Union's Citywide Director's statement dissuaded her from independently pursuing any claims before the Board in January 2012, we would find that any claims that she could have filed in January 2012 would have been untimely and non-meritorious. *See supra* notes 11-12.

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 verified improper practice petition filed by Debra Ann Thomas, docketed as BCB-3009-12, is denied.

Dated: December 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

GWYNNE A. WILCOX
MEMBER