Collins, 5 OCB2d 5 (BCB 2012)

(IP) (Docket No. BCB-2973-11).

Summary of Decision: Petitioner claimed that the Union violated its duty of fair representation by failing to properly represent her concerning disciplinary charges against her and by refusing to pursue her matter to arbitration, in violation of NYCCBL § 12-306(b)(1) and (3). Both the Union and HHC argued separately that some of Petitioner's claims were untimely-filed, that the Union acted in good faith at all times in regard to Petitioner, and that the Union did not breach its duty of fair representation by declining to bring her case to arbitration. The Board found that portions of her claim were untimely and the remaining allegations did not support a claim that the Union breached its duty of fair representation. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

TRINA COLLINS, DDS

Petitioner,

- and-

THE COMMITTEE OF INTERNS AND RESIDENTS,

-and-

THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION

Respondents.

DECISION AND ORDER

On July 28, 2011, Trina Collins, DDS, filed verified Improper Practice Petition against the Committee of Interns and Residents ("CIR" or "Union") and the New York City Health and

Hospitals Corporation ("HHC"). Petitioner claims that the Union violated its duty of fair representation by failing to properly represent her concerning disciplinary charges against her and by refusing to pursue her matter to arbitration, in violation of § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Both the Union and HHC argue separately that some of Petitioner's claims are untimely-filed, that the Union acted in good faith at all times in regard to Petitioner, and that the Union did not breach its duty of fair representation by declining to bring her case to arbitration. The Board finds that portions of her claim are untimely and the remaining allegations do not support a claim that the Union breached its duty of fair representation.

BACKGROUND

Respondents are parties to a collective bargaining agreement, entitled the CIR Contract, for the period from October 26, 2008 to October 25, 2010 ("Agreement"). The Agreement is currently in effect under the status quo provision of the collective bargaining law.

Petitioner began participating in Harlem Hospital Center's two-year Pediatric Dental Residency Program (the "Program") on July 1, 2008. By memorandum dated September 12, 2008, Harlem Hospital notified Petitioner that the facility decided not to renew her residency contract for the second year of the Program beginning July 1, 2009. In December 2008, the facility reassigned the Petitioner from medical duties with the Program. HHC asserts that she continued to receive her salary and benefits during the period of her reassignment.

On March 29, 2009, ten charges and specifications of misconduct and gross misconduct were preferred against Petitioner. Both the Union and HHC assert that, at the request of the

Union, on April 27, 2009, the parties held an informal conference at Harlem Hospital to discuss the charges and specifications. On June 30, 2009, Petitioner's residency contract with Harlem Hospital ended as scheduled and she ceased receiving wages and benefits.

On July 9, 2009, Petitioner met with CIR's General Counsel and the Area Director for New York. According to a letter from the Union, dated July 14, 2009, which summarized that meeting, those present discussed the failure of Harlem Hospital to issue an informal conference decision on the disciplinary charges. Petitioner was also informed that CIR would be willing to represent her if Harlem Hospital issued a negative decision. She was also told that if they received a negative decision, CIR's policy was that no case, including hers, could go to arbitration without the approval of the CIR Arbitration Subcommittee ("Subcommittee").

Harlem Hospital issued an informal conference recommendation in late August 2009, finding that the charges against Petitioner had been substantiated and recommending that Petitioner's employment be terminated. According to the Union, at this point, Petitioner broke off all contact with CIR until June 2010, when she requested CIR representation to appeal the decision to Step II. The Union asserts that despite the significant amount of time that had elapsed since the informal conference recommendation—an appeal from a Step I determination must be made within ten days, according Article XV, § 2 of the Agreement—CIR requested that the matter proceed to Step II to satisfy the Petitioner. On August 16, 2010, the parties attended a Step II review conference, presided over by an HHC Review Officer. The Union represented Petitioner at the conference. On October 12, 2010, the Review Officer held that the disciplinary charges were moot because the Petitioner, whose contract had expired, was no longer an employee, and HHC could not discipline, nor terminate, someone with whom it had no current employment

relationship.

The Union asserts that CIR representatives remained in communication with Petitioner from October 2010 to April 2011, providing her with leads on possible pediatric dental residency programs and acting as a liaison between her and HHC. The Union further asserts that when Petitioner was not accepted into a new pediatric dental residency program, Petitioner requested that her matter proceed to arbitration.

On April 29, 2011, Petitioner submitted a letter to the Subcommittee. The letter outlined, in detail, the reasons why Petitioner thought that the Union should take her case to arbitration, and complained about the Union's treatment of her. On May 21, the Subcommittee sent Petitioner an email telling her that after meeting with CIR Counsel and discussing her case over two days, the Subcommittee determined not to go to arbitration. The email stated: "The arbitration Subcommittee found that the decision at the Step II hearing finding the termination moot was as good as, and likely better, than any award that the Union could hope to achieve through arbitration." The Subcommittee further stated that it understood that she wished to clear her name and have the charges against her found to be unsubstantiated. In explaining why success at arbitration would not be likely and her termination likely to be affirmed, it mentioned that the arbitrator is charged with weighing the evidence and the weight carried by those superior to her in her program will inevitably be greater. It further explained that arbitrators are highly trained, but they are not doctors, and will not presume to know more than, or to place their expertise over, the established medical community.

The Subcommittee stated further:

> It is, therefore, highly likely that, if your case were to proceed to arbitration, the arbitrator would uphold the decision to terminate

> your employment. This outcome would greatly impact your future job and residency prospects as you would then always have to report a termination. Currently, you are able to move forward without a termination on your record. This opportunity should not be undervalued or bypassed. . . . Therefore, it appears that the termination has been effectively mooted. There is neither an expectation nor a guarantee that this would hold true after a hearing before an arbitrator. Therefore, with your best interests firmly before us, and recognizing that a confirmed termination is not in your best interests, we cannot recommend that your case proceed to arbitration.
>
> In your letter you expressed dissatisfaction with CIR. While the members of the Subcommittee regret that you are not happy with the representation you received, we know that several CIR staff members have spent a considerable amount of time on your case and sincerely endeavored to provide you with the best representation possible.

On August 5, 2011, Petitioner filed the instant Improper Practice Petition.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union acted in bad faith by assuming that she would not prevail at arbitration. Arbitration is not reserved only for cases presumed to have a positive outcome, and the Union should not guess at results. Petitioner argues that Article XVI, § 2 of the Agreement grants the right to an immediate appeal to an arbitrator when a grievant is removed from a clinic without a hearing, and that three years later, she still has not proceeded to arbitration.

Petitioner contends that since the Agreement does not state that arbitration can be denied based on the probability of a negative outcome, and arbitration exists to determine whether there is just cause for the proposed disciplinary action, CIR is interfering with her right to full due process and her right to defend herself against the charges. Union representatives ignored her questions,

delayed answers to her, did not give her straight answers, and were of no help in directing her to the proper forum in which she could complain about how the Union was treating her. Also, since, by law, she must exhaust all remedies before filing an Article 78 petition, the Union is denying her the right to exhaust all administrative efforts prior to filing an Article 78 petition in court.

Petitioner argues that she was never allowed to defend herself and present a defense to the bogus charges against her. She contends that she has overwhelming evidence that supports her innocence, yet she has not yet appeared in an impartial setting where the facts of the case can be weighed. She has not had her full due process and CIR has refused to allow this case to complete the process. She has not been found guilty of anything, yet the Union acts like she has. She contends that the only people to find her guilty so far have been those on HHC's payroll, yet the Union acts as though she has had full due process. CIR accepts the charges against her as factually correct even though the evidence against her has not been tested by cross-examination. She also finds it distasteful that the Union would include the charges against her in their pleadings. She asks that the Board take note that HHC gave all of the residents in 2008 non-renewals and the Union advised them not to grieve, leaving them without a remedy.

CIR's Position

CIR contends that portions of Petitioner's claims that were filed in an untimely manner. The Union urges to Board to dismiss any claim that arose in the four months prior to the filing of the petition. Further, the Union argues that the Petition is neither clear nor concise and lacking in specific dates, locations, and proper identification of persons and entities involved. The Union contends that Petitioner also does not specify the sections of the statute alleged to have been violated and fails to cite any legal authority.

The Union argues that the facts of this case demonstrate that CIR has consistently acted in good faith. CIR representatives were responsive to Petitioner's complaints and endeavored to provide her with the best representation possible. A Union's decision not to bring a matter to arbitration is not, in and of itself, a violation of the duty of fair representation. There is absolutely no evidence that the Subcommittee made its decision without good faith and in less than honest manner. Thus, the Petition should be denied.

HHC's Position

HHC's position is, in substance, the same as that of CIR's in its arguments, and it contends that the Petition should be dismissed because portions of it are untimely and that those claims that are timely fail to show that the Union breached its duty. In addition, HHC argues that since the instant claim must fail, so too must any derivative claim against HHC pursuant to NYCCBL § 12-306(d).

DISCUSSION

At the outset, we note 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 Coll. Barg.*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.); *see also Abdal-Rahim*, 59 OCB 19, at 3 (BCB 1997). Thus, "such review should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 13 (BCB 2008); *see also Castro v. City of New York*, 2007 WL 3071857, at *10 (S.D.N.Y. Oct. 10, 2007) ("[o]bligation to parse the complaint for

any arguably available legal theory is particularly acute when the pleading has been drafted by a *pro se* plaintiff"), *adopted*, 2007 WL 3224748 (S.D.N.Y. Nov. 01, 2007). Further, "[s]ince no hearing was held, in reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, *arguendo*, that the factual allegations are true, analogous to a motion to dismiss." *Seale*, 79 OCB 30, at 6-7 (BCB 2007); *Morris*, 3 OCB2d 19, at 12 (BCB 2010). Taking the above into consideration, we construe Petitioner's claims to be that, over the years, the Union violated its duty of fair representation by failing to properly represent her concerning the disciplinary charges against her and by refusing to pursue her matter to arbitration, in violation of NYCCBL § 12-306(b)(1) and (3).

Petitioner's claims span a number of years, so we now address the argument that a portion of Petitioner's claims are time-barred. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). An improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Raby v. Office of Coll. Barg.*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *see also Tucker*, 51 OCB 24, at 5 (BCB 1993).[1]

[1] 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 . . .

The instant petition was filed on July 28, 2011. Therefore, any claims arising before March 28, 2011, are untimely. In reviewing Petitioner's allegations, everything concerning the sufficiency of the Union's representation, from her removal from the clinic, to the non-renewal of her residency contract, to the informal conference in August 2009, through the Review Officer's decision in October 2010, is untimely and cannot be considered as a basis for the claim. However, the Union determined not to take Petitioner's claim to arbitration and so informed her on May 21, 2010, which is within the four month period prior to her filing the instant petition. Thus, the only timely claim is that the Union, by declining to take her case to arbitration, breached its duty of fair representation.

NYCCBL § 12-306(b)(3) makes it an improper practice for a union "to breach its duty of fair representation to public employees under this chapter." It is well established that "that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, 79 OCB 5, at 14; *see also Whaley*, 59 OCB 41, at 12 (BCB 1997). Thus, a petitioner "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Gertskis*, 77 OCB 11, at 11 (BCB 2006). Rather, the Petitioner must establish that the Union acted arbitrary, discriminatory, or in bad faith. *Proctor*, 3 OCB2d 30, at 13 (BCB 2010). A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 22, at 21 (BCB 2008).

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a public employee organization . . . has engaged in or is engaging in an improper practice in violation of [§] 12-306 of the statute may be filed with the Board within four (4) months thereof . . ."

The "burden of pleading and proving that the Union has breached its duty of fair representation lies with the Petitioner." *Id.*, at 40. This burden cannot be met "simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14.

Here, Petitioner's claims do not demonstrate that the Union's conduct was arbitrary, discriminatory, or in bad faith. Petitioner simply asserts that the Union breached its duty of fair representation when the Subcommittee decided not to take the case to arbitration. However, the Union provided Petitioner with representation throughout Step I and Step II. At Petitioner's request, the Union appealed the Step I decision, even though a substantial amount of time had already passed, and the allotted time for filing a Step I appeal had long since passed. Petitioner attempts to support her claim against the Union by attaching the May 21, 2010 email from the Subcommittee explaining the decision not to take her case to arbitration. However, rather than supporting her claims of a breach, this email shows a strong defense to her claim. The email clearly articulates the reasoning upon which the Union based its determination not to advance the Petitioner's case, and provides a lengthy recitation of why proceeding to arbitration would not be in her best interest.

Based upon the Petitioner's own recitation of the facts, and the evidence she submitted, we find that the Union's decision not to advance her case to arbitration was not arbitrary, discriminatory, or made in bad faith. Even while drawing all permissible inferences in favor of Petitioner, the record is devoid of evidence that would show that the Union breached its duty. The Union responded to Petitioner and communicated its reasons for its decision not to process the matter to Petitioner. *Proctor*, 3 OCB2d 30, at 15. In the end, the Union made a judgment as

to whether or not to proceed with a matter, which was founded on a rational, non-discriminatory basis. *Id.*

In sum, we find that the claimed violations of the NYCCBL arising from alleged acts or omissions prior to March 28, 2011, to be time-barred and that those claims which are timely do not allege facts sufficient to state a claim. We, therefore, find that Petitioner's claim that the Union breached its duty of fair representation must fail, as must any derivative claim against the employer pursuant to NYCCBL § 12-306(d). *See Nardiello,* 2 OCB2d 5, at 42. Accordingly, the instant petition is denied in its entirety.

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-2973-11, filed by Trina Collins, DDS, and the same hereby is, dismissed in its entirety.

Dated: January 25, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER