Affirmed, *Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003). 71 OCB 14 (BCB 2003) [Decision No. B-14-2003]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

LILLIAN M. RABY,

Petitioner,

Decision No. B-14-2003
Docket No. BCB-2297-02

-and-

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and CITY OF NEW YORK & HUMAN RESOURCES ADMINISTRATION,

Respondents.

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DECISION AND ORDER

On August 26, 2002, Lillian M. Raby, *pro se*, filed a verified improper practice petition against Local 1180, Communications Workers of America ("Union") and the City of New York and the Human Resources Administration ("City" or "HRA"). Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Union failed to pursue certain grievances and failed to respond to her inquiries about those grievances. The Union argues that the petition is untimely and that, in any event, Petitioner has not stated a *prima facie* case that the Union breached its duty of fair representation. The City also argues untimeliness and the failure to establish a *prima facie* case of improper practice. Because this Board finds that the petition is untimely, it is dismissed.

BACKGROUND

Lillian M. Raby, a Principal Administrative Associate, Level II, with about 25 years of City service, was employed by the HRA at the East Harlem Job Center. From the record, it appears that from July 1997 until May 2000, Raby, or the Union on her behalf, filed approximately 11 grievances. Five of the grievances were processed between 1998 to 2000.[1] In the petition and reply, however, Raby focuses on six others – one grievance concerning a disciplinary procedure against her and five grievances concerning sick leave – and this Board too will focus on these.

The first grievance the Board addresses concerns the disciplinary matter. On May 5, 1999, HRA filed four charges against Raby for alleged misconduct: hanging up the phone on a supervisor on March 25, 1999; being discourteous to a senior case manager on April 15, 1999; allowing a PAA I under her supervision to be absent without previous authorization on April 16, 1999; and disobeying an order to have all the staff she managed appear at a meeting on April 16, 1999. The two April 16 charges were withdrawn at the Step I conference, but the conference

[1] These grievances include: (1) a grievance filed on November 17, 1998, complaining that Raby's supervisor acted in an unprofessional manner on February 24, 1998; the outcome is unclear. That grievance was refiled on November 12, 1999, and a Step 2 determination on January 13, 2000, found the grievance untimely. In its answer, the Union alleges that it "could not have pursued" this grievance; (2) a grievance filed concerning reassignment and resulting loss of pay as of April 13, 1998; the Union negotiated a settlement under which Raby received retroactive differential for April 13, 1998, through December 13, 1998; (3) a grievance filed on November 10, 1999, concerning a vacation day that had been disapproved; it was subsequently approved at Step I; (4) a grievance filed on November 11, 1999, concerning a different vacation day that had been disapproved; the parties provide no disposition of this grievance, and the Union asserts that it has no record of it; (5) a grievance seeking removal of Raby's name as an alternative designee to sign checks after she was reassigned to a different department; the grievance was denied at Step II, on January 25, 2000, but the record includes no other information.

holder determined in August 1999 that Raby should pay a three day fine for the March 25 incident and a one day fine for the April 15 incident.

On August 20, 1999, Raby sent a Fax to Joseph Calderon, a Union representative, with a cover memo saying: "As per our conversation on August 19, 1999 (see attached), please pursue the next grievance step." Calderon did pursue the grievance, and on November 18, 1999, Calderon represented Raby at a Step II hearing on the two remaining charges. A January 24, 2000, decision affirmed the total penalty of a four day fine.

On January 27, 2000, Raby sent a Fax to Calderon with the following memo: "As per our conversation on 1-26-00. Faxing the enclosed decisions. Requesting Step III and follow up. Thanks." She sent a another Fax the next day to reiterate her request. The Union did not file at Step III. In an affidavit attached to the Union's answer, Calderon states that the Union did not pursue this grievance because the Union determined that it could not prevail on the merits of the case. (Affidavit ¶ 24; hereinafter "Aff.") Neither Calderon in his affidavit nor the Union in its answer contends that the Union informed Raby of its decision. On February 7, 2000, the City sent Raby a letter informing her that the four day fine would be taken out of her pay check.

With regard to the five sick leave grievances, all filed between 1997 and 2000, the record shows that the first three were resolved. On July 22, 1997, Raby filed a grievance seeking reversal of a disapproval of a sick leave day the previous week. At Step II management reversed itself, and the grievance was resolved. Raby at that time was suffering from chronic allergies and documented her sick leave, but the hearing officer at Step II warned her that the doctor's note must indicate the specific day of a visit. On September 4, 1997, Raby filed a second grievance

concerning sick leave, this time for disapproval of a future date to see a doctor. The Step II determination of August 25, 1998, states without explanation that the grievance was resolved. The third sick leave grievance was filed on August 6, 1999, also for a disapproval of future leave. Again, the disapproval was reversed and the grievance sustained.

On May 4, 2000, Raby filed a fourth sick leave grievance to challenge disapproval of leave for April 27, 2000. She claimed that documentation from her allergy doctor was on file, but when HRA would not accept that documentation, she obtained another doctor's note. In a Step I decision on May 13, 2000, HRA found her doctor's note unacceptable because it did not state that she was actually examined on April 27. HRA also denied having medical documentation on file for Raby's chronic illness. A July 29, 2000, Step II decision upheld HRA's determination. On August 14, 2000, Calderon wrote a letter to the New York City Office of Labor Relations demanding that the April 27 sick leave "be changed to documented/approved" and monies be restored. The record is unclear as to whether the parties deemed the letter a Step III grievance. No hearing was scheduled, and the Union received no response from the City. This grievance is unresolved. The Union asserts that it did not pursue this issue further because Raby knew she was required to provide specific medical documentation following an absence. (Aff. ¶ 28.) The Union does not provide information whether it informed Raby of its decision.

On May 24, 2000, Raby filled out a grievance form seeking to eliminate the need to file a doctor's note when she was absent because of allergies. Calderon signed the form on June 16, 2000. The record contains no response to this grievance, and apparently it remains unresolved. Calderon states that the Union decided not to pursue this grievance "based on prior unsuccessful

grievances on the same issue." (Aff. ¶ 29.) Nothing in the Union's pleadings indicates whether it informed Raby of its decision not to pursue the grievance.

Raby retired in 2000, on a date unspecified in the pleadings.

According to Raby, her attempts to reach Calderon during 2000 proved difficult. When she did reach him, he told her that he had filed the necessary grievances and was awaiting replies. Raby claims that she called Calderon repeatedly starting in December 2000. "Months turn[ed] into several years" without response from him. He was either out or unavailable, and he did not return messages left on his answering machine. However, Calderon states that he had tried to reach Raby on several occasions by phone. He does not provide dates. Raby also alleges that she called a Union supervisor, Gwen Richardson, who led Raby to believe that the grievances were in progress, for Richardson told her that filing grievances was a tedious process and receiving a reply could take a prolonged period.

Ten months after she starting calling the Union, on September 28, 2001, Raby wrote to Linda Jenkins, Vice President of the Union, and stated: "As of this date my patience is exhausted." Raby complained that when she called Calderon regarding the status of the outstanding grievances, the "responses were always negative." On October 24, 2001, Calderon wrote to Raby: "Ms. Jenkins informed me of your letter dated September 28, 2001. I have tried several times to reach you via telephone. Please call my beeper . . . so that we will be able to talk. I apologize, for any inconvenience, which occurred." In his affidavit, Calderon states that Raby never contacted him in response to his letter. Raby, however, wrote to the president of the Union, Arthur Cheliotes, on November 24, 2001, to complain that since September 28, 2001, she

has been unsuccessful in verifying the status of her grievances. In her letter she states that though she had trusted and relied on the Union representative, instead "there is disappointment, infuriation, and the sense of being deliberately ignored." Raby wrote again to Cheliotes on December 19, 2001. She also sent notes on January 25, 2002, and June 14, 2002, to a person named Elina and mentioned their conversations, resubmitted correspondence, and said she had still not received a response from the Union.

As a remedy, Raby asks that all grievances initiated be resolved in a fair and positive manner.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union breached its duty of fair representation by failing to pursue her grievances and by failing to respond to her about their status.[2] According to Raby, Calderon said that he would pursue the grievances. As the link between her and management, he was expected to address every situation in a professional manner. Calderon was aware of her

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[2] NYCCBL § 12-306(b) provides in pertinent part:
It shall be an improper practice for a public employee organization or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their 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.

§ 12-305 provides in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

wish to continue processing of the grievances since monies had been deducted from her pay.

Even if the Union decided not to follow up, she asserts, common courtesy and professionalism should have prevailed. The Union should have sent her a certified letter explaining that the Union was not pursuing the grievances. Calderon's telling her that she would be informed of the progress of the grievance procedures misled her; therefore, she was under the delusion that the grievances were being processed. Furthermore, the Union should have responded to both her calls and her letters, and its dereliction demonstrates that she was ignored and deprived of her right to representation

Finally, Raby argues that her initial filings of these grievances at Step I were timely and that she was calling the Union to pursue the grievances in a timely manner.

Union's Position

The Union asserts that the August 2002 petition is untimely because Raby's last grievances were filed in May 2000. In addition, continued contact with the Union does not toll the four month statute of limitations.[3]

According to the Union, under the law governing the duty of fair representation, the Union acted fairly, impartially, and non-arbitrarily in administering the collective bargaining agreement. Unions are afforded wide discretion in determining whether to process a complaint or advance a bargaining unit member's grievance. A union does not violate its duty of representation even if it made an error in judgment so long as the evidence does not suggest

[3] The Union also argues that because Raby served the petition on the Union only in September 2002, the four month period should be counted from that date of service. Given our analysis of this case, we need not determine this issue.

improper motivation.

The Union declares that it did file many grievances on Petitioner's behalf. Those included ongoing issues with management at her Job Center. In light of the Union's experience with Raby's work site issues, the Union argues, its decision not to pursue the disciplinary action grievance past the second step was not arbitrary. Furthermore, the Union's determination not to pursue the two unresolved sick leave grievances was not arbitrary since Raby had been told that she had to comply with HRA's sick leave policy, and repeatedly pursuing grievances on the same issue would be futile.

City's Position

The City argues that all allegations in the petition must be deemed untimely because each event occurred more than four months before the filing of the petition.

Furthermore, the employer cannot be found liable unless the union has breached is duty of fair representation. That the Union in this case did not request further hearings on the merits of all of Raby's claims does not demonstrate bad faith, arbitrariness, or discrimination, and, therefore, Raby has not established a breach of the Union's duty.

The City also argues that Petitioner has not alleged that HRA committed any independent acts that would violate the NYCCBL. There is no showing of any discrimination or retaliation.

Finally, the Board lacks jurisdiction over alleged contract violations. Petitioner has not shown that management has acted in bad faith in response to her grievance filings. Also, she herself has not exhausted the grievance procedure available under the collective bargaining agreement.

DISCUSSION

Having reviewed the issues presented by the parties in this case, this Board finds that Petitioner's claim is time-barred by the four month statute of limitations under § 12-306(e) of the NYCCBL. That section 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. . . .

(Emphasis added.) *See also* Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"); *Griffiths*, Decision No. B-3-99 at 11-12; *Tucker*, Decision No. B-24-93 at 5.

A charge of improper practice must be filed no later than four months from the time the disputed action occurred. In a petition concerning a union's duty of fair representation, that claim runs from the date the employee organization allegedly acted or failed to act on the petitioner's behalf. *See Lasky*, Decision No. B-10-97 at 8.[4] For example, this Board has found that the time may begin to run from the date the union informed petitioner that it would not pursue a grievance. *Page*, Decision No. B-31-94 at 11.

When, as here, the petitioner claims that she did not know about the alleged breach at the time it occurred, the four month period is measured from the time the petitioner knew or should

[4] The claim does not accrue on the date of the employer's alleged violation or from the time a grievance was filed at any step. *See Cunningham*, Decision No. B-15-93 at 30.

have known of the occurrence. NYCCBL § 12-306(e). In a case decided by the Public Employment Relations Board ("PERB"), *Buffalo Teachers' Federation, Inc. (Boyar),* 29 PERB ¶ 3006 (1996), the charge alleged that the employee organization failed to pursue, or respond to requests for the status of, a proceeding. For two years, petitioner communicated with the union, with the final request one month before he filed the petition. PERB wrote:

> The four months within which an improper practice charge may be filed begins to run when the charging party knew or should have known of the violation alleged in the charge. (Citation omitted.) Although there is usually a date certain for a violation of the Act, an improper practice can accrue without the conduct complained of having a date certain and the four-month filing period will commence from the date the charging party can reasonably be deemed to have known that an improper practice may have been committed. . . . [Here, Petitioner] had to have known more than four months before this charge was filed that [the union] was not even going to respond to his inquiries, let alone [proceed with the action].

Id. at 3017. PERB reasoned that after the petitioner sent a letter demanding the union's prompt response, and that response was not forthcoming despite several subsequent inquiries, the time to measure the four months began to run from any date on which petitioner could reasonably have expected a response to the initial letter. *Id*. *See also New York City Transit Authority (Sayad)*, 28 PERB ¶ 3070, at 3164 (1995) (petition untimely since petitioner failed to file within four months of the time he knew or should have known that the union would not respond to his request for information).

This Board has discussed the issue of the time a petitioner knew or should have known that a union would not act on his or her behalf in one related case, *Fair Hearing Representatives, MAP*, Decision No. B-6-97. There, petitioners sought to have their union file a request for

arbitration following an adverse Step III decision. The union determined not to proceed to arbitration and notified the petitioners, but the record failed to indicate exactly when the petitioners were notified. The record also showed, however, that the petitioners sent a letter asking the union to reconsider the matter. This Board found that the claim accrued on the date the petitioners sent the letter, for they knew then that the union had decided not to pursue the grievance. Since the improper practice petition was filed more than four months after that date, the petition was deemed untimely. *Id*. at 5-6 n.4.

Here, the Board must determine whether there was a time that Petitioner knew or should have known that the Union would not be processing her claims. Unlike the petitioners in *Fair Hearing Representatives,* Raby was allegedly never informed of the Union's decision to forego pursuing the grievances. We focus on the last activity in three grievances that were not exhausted in the grievance process. First, concerning the disciplinary action, Raby received a letter from the City dated February 7, 2000, that the fine imposed at Step II for misconduct would be deducted from her pay check. Second, as to the grievance requesting that Raby be able to file one doctor's note for her chronic illness, Calderon signed that grievance form on July 16, 2000. Third, on August 14, 2000, Calderon sent a letter to the City to seek reconsideration of an adverse Step II ruling regarding a sick leave day in April 2000.

Both Petitioner and Calderon allege that they tried to get in touch with the other by phone. Raby claims that she started calling Calderon to no avail starting in December 2000. Having filed many grievances in the previous several years, she had experience with the procedures, timing, and communication with the Union. Therefore, by December 2000, Raby

should have known that the Union was not assisting her to her satisfaction. Yet, as Raby herself asserts, "Months turn[ed] into several years." Nothing in the record indicates why Raby waited another ten months before she wrote a letter to the Union.

Indeed, Raby's September 28, 2001, letter to a vice president of the Union confirms by objective evidence that she knew she was not likely to receive the response that she was allegedly told she would. "As of this date my patience is exhausted," she wrote. At this point at the latest, Raby knew or should have known that the Union would not be pursuing her grievances – the last time the Union had taken action was one year to one and one-half years before. Raby gives no reason that she waited until August 26, 2002, well beyond the four month limitation, to file a claim of a violation of the NYCCBL. It would be reasonable to find that the accrual date for the alleged breach of the duty of fair representation is in December 2000, when Raby was calling the Union to no avail. However, even if we looked to the time she did not receive a response to the written inquiry of September 28, 2001, we must also find the petition untimely. In either case, just as PERB reasoned in *Buffalo Teachers Federation*, 29 PERB ¶ 3006, here Petitioner knew or should have known more than four months before the petition was filed that the Union was failing to act on her behalf.[5]

Nor does the fact that Petitioner continued to seek a response from the Union serve to toll the statute of limitations. *See Overstreet*, Decision No. B-37-98 at 5; *Miller*, Decision No. B-40-96 at 5. Raby continued writing to the Union president until December 2001. However, she has

[5] A union's failure to respond to a unit member's request for the status of a grievance may be actionable under the NYCCBL. *See Hassay*, Decision No. B-2-2003; *Lein*, Decision No. B-27-99; *Whaley*, Decision No. B-41-97. We do not reach the merits of this issue because the issue of timeliness disposes of the case.

not alleged that from September 2001, when she wrote to the Union in exasperation, until August 2002, when she filed her improper practice petition, the Union gave her any reason to believe that it would respond to her. *See Allcot*, Decision No. B-35-92 at 7. Accordingly, the petition against the Union is untimely and must be dismissed.[6]

Finally, Raby has not raised an independent improper practice claim against the City. Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 306(d) must also fail.[7] *See* OCB Rule § 1-07(f)(2); *Stepan*, Decision No. B-11-2000. Therefore, this Board dismisses the petition in its entirety.

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[6] To the extent that the grievances listed in footnote 1, *supra*, are part of Raby's claim, they too are untimely. The latest action was in January 2000, two and one-half years before Raby filed the petition.

[7] NYCCBL § 306(d) provides:

> 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 of or failure to process a claim that the public employer has breached its agreement with such employee organization.

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, BCB-2297-02, filed by Lillian M. Raby, be, and the same hereby is, dismissed.

Dated: April 22, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER