

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

KENIA FABRE,

Decision No. B-18-2003
Docket No. BCB-2327-03

Petitioner,

-and-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, and DEPARTMENT
OF HOMELESS SERVICES,

Respondents.

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DECISION AND ORDER

On March 6, 2003, Kenia Fabre, *pro se*, filed a verified improper practice petition against the City Employees Union, Local 237 (“Union”), and the City of New York Department of Homeless Services (“City” or “DHS”). 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 represent her adequately with regard to an improper practice petition filed on her behalf, failed to inform her adequately regarding the status of that petition, and failed to pursue her grievance under the grievance procedure embodied in the collective bargaining agreement (“CBA”). Both the Union and the City assert that the petition should be dismissed as untimely and in any event, Petitioner has failed to raise a claim under the NYCCBL. Because this Board finds that the petition is untimely, it is dismissed. _____

BACKGROUND

Kenia Fabre was employed by DHS on February 14, 2000, as a per diem Special Officer. On October 17, 2001, Fabre received a letter from a DHS Investigator which informed her that she was scheduled for an investigatory interview on October 25, 2001, and advised her to contact her attorney or union representative if she wished to have representation at the meeting. The record does not indicate why Fabre was the subject of an investigation.

On October 25, 2001, Petitioner attended the meeting with Dan Matias, a Business Agent for the Union, but the DHS Investigator asked Matias to leave. Thereafter, the Investigator informed Fabre that the meeting was cancelled and would be rescheduled. On November 2, 2001, Fabre was terminated.

Fabre spoke with Matias on November 5, 2001, regarding her termination. Fabre alleges that Matias told her that he would file a grievance on her behalf. The Union, however, asserts that Matias explained to Fabre that, as a per diem employee with less than two years service, she was not entitled to a hearing under the CBA and he did not believe she was entitled to a hearing pursuant to Section 75 of the Civil Service Law. Matias then told Fabre that he would look into the matter to see if anything could be done on her behalf. The Union asserts that Matias discussed the matter with Counsel to the President of Local 237 and the Union attorneys, and they agreed that Fabre was not entitled to protections under the CBA's grievance procedure nor was she entitled to a hearing under Section 75 of the Civil Service Law. However, it was decided that the Union's attorneys would file an improper practice petition with the New York City Office of Collective Bargaining ("OCB") on behalf of Fabre and other similarly situated per

diem employees regarding DHS's denial of union representation at investigatory or disciplinary interviews.

Fabre alleges that between November 5, 2001, and February 21, 2002, she made repeated visits and phone calls to the Union but received no information regarding the alleged grievance that she believed would be filed on her behalf. On February 21, 2002, Fabre sent a letter to the Union President requesting information on the status of her case. By letter dated March 4, 2002, the Union informed her that she did not have any contractual rights because she was a per diem employee with less than two years of employment, but that it was in the process of filing an improper practice petition because she had been terminated.

On April 18, 2002, the Union filed an improper practice petition with OCB on behalf of Fabre and other per diem employees similarly situated.

On April 23, 2002, Fabre alleges that she sent another letter to the Union requesting information on the progress of her case, to which she received no response. Subsequently, Fabre claims that she visited Matias, who told her that the Union's attorney was handling her case. She then contacted the attorney, who assured her that he was taking care of the case. The Union denies these allegations but states that Fabre was informed that the Union's attorneys had filed an improper practice petition.

The improper practice petition was dismissed as untimely on May 14, 2002, by OCB's Executive Secretary pursuant to OCB Rules. *See City Employees Union, Local 237, Decision No. B-15-2002 (ES)*. A copy of the decision was received by Local 237 on May 20, 2002. After further discussions between Counsel to Local 237's President and the Union's attorneys, the Union claims, it was decided no further legal action would be pursued.

In September 2002, Fabre alleges that she contacted the Union's attorney and requested proof of work being done. Both parties agree that Fabre received no response until October, at which time Local 237's Citywide Director told Fabre that the improper practice petition was dismissed because the statute of limitations had expired. By letter dated October 10, 2002, the Union's attorneys forwarded Fabre a copy of the decision.

As a remedy, Fabre requests that: (1) her rights be reinstated as a member of the Union; (2) she be reinstated to her former position retroactively to November 2, 2001, with full back pay and benefits; and (3) any other remedy which will effectuate the purpose of the NYCCBL.

POSITIONS OF THE PARTIES

Petitioner's Position

_____Petitioner claims that the Union breached its duty of fair representation by failing to provide adequate representation with regard to the improper practice petition filed on her behalf. The Union's delay in processing the petition resulted in its dismissal as untimely. Furthermore, the Union breached its duty by failing to inform Fabre adequately regarding the status of the improper practice petition. As a consequence, Fabre argues, she has lost any recourse because the statute of limitations period has passed. In addition, Matias told Fabre that he would file a grievance on her behalf, but the Union failed to do so.

Union's Position

The Union argues that this petition is untimely because the latest accrual date is October 10, 2002, the date when the Union sent Fabre a letter informing her that the improper practice petition had been dismissed, along with a copy of OCB's Executive Secretary decision.

According to the Union, it does not breach its duty of fair representation merely by refusing to advance a member's complaint if the decision not to act is made in good faith and in a manner which is neither arbitrary or discriminatory. The current petition must be dismissed because Fabre has failed to allege facts sufficient to find that the Union discriminated against her in violation of § 12-306(b) of the NYCCBL.¹ In fact, the Union acted properly. The Union recognized certain weaknesses in Fabre's claim for denial of union representation: (1) it was not clear whether the facts would establish a violation of the NYCCBL; (2) at the time, no Weingarten rights² were recognized for public employees and; (3) Fabre's investigatory interview was cancelled and no questioning took place. Yet, the Union authorized its attorneys to prepare an improper practice charge, and paid the legal fees, on behalf of Fabre and other similarly situated employees on the theory of a continuing violation. The Union informed Fabre that it was filing an improper practice petition in a letter dated March 4, 2002, and subsequently informed her of the outcome. After the petition was dismissed, the Union carefully considered the case and decided not to pursue it further because an appeal seemed unlikely to be successful.

Finally, as early as November 5, 2001, Matias informed Fabre that as a per diem employee with less than two years' service she was not entitled to a due process hearing or the protections of the CBA's grievance procedure. The Union's Citywide Director confirmed this in

¹ § 12-306(b)(3) states:

Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

| | | | | * * *

(3) to breach its duty of fair representation to public employees under this chapter.

² This Board has recognized that a public employee is entitled to union representation during an investigatory interview which may result in disciplinary action. *See Assistant Deputy Wardens*, Decision No. B-9-2003.

the March 4, 2002, letter to Fabre. Therefore, the petition should be dismissed because the Union acted properly.

City's Position

The petition must be dismissed as untimely because Fabre's latest factual allegation against the Union relates to the October 10, 2002, letter informing her that the improper practice petition filed on her behalf had been denied as untimely. Therefore, Fabre should have filed her petition within four months of the letter, which she failed to do. The employer cannot be found liable unless the Union has breached its duty of fair representation. Fabre has failed to establish bad faith, arbitrariness, or discriminatory conduct on the part of the Union in processing her grievance pursuant to the CBA. Indeed, Fabre lacked contractual disciplinary and grievance rights because she was a per diem employee with less than two years service. Finally, Fabre has failed to allege sufficient facts to find the City in violation of § 12-306(a) of the NYCCBL.

DISCUSSION

_____ 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); *Griffiths*, Decision No. B-3-99 at 11-23;

Tucker, Decision No. B-24-95 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. 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.

In *Fair Hearing Representatives, MAP*, Decision No. B-6-97, the petitioners asked their union to file a request for arbitration after an adverse Step III decision. The union chose not to proceed to arbitration and notified petitioners but the record failed to indicate exactly when petitioners were notified. This Board found that the claim accrued on the date petitioners sent a letter asking the union to reconsider the matter because they knew by then that the union had decided not to pursue the grievance. The petition was dismissed as untimely because it was filed more than four months after that date. *Id.* at 5-6 n.4.

In *Raby*, Decision No. B-14-2003, the petitioner claimed that she was never informed of the union's decision to forego pursuing her grievances. The Board concluded that petitioner's letter to the union, in which she wrote "[a]s of this date my patience is exhausted," was "objective evidence" that after many months from the time the union had taken any action, the petitioner knew or should have known that the union would not be pursuing her grievances and was the latest accrual date that could trigger the running of the statute of limitations. The fact that the petitioner continued to seek a response from the union for the next eleven months until she filed an improper practice petition did not toll the statute of limitations because Petitioner

had no reason to believe that the Union would respond to her.

In the instant case, we find untimely Petitioner's claim that the Union did not provide adequate representation because it delayed filing her improper practice petition concerning representation rights. Petitioner received a copy of the Executive Secretary's decision and a letter of notification from the Union on October 10, 2002, stating that the improper practice petition filed on her behalf was dismissed as untimely. According to Petitioner, after she received the letter, she visited the Union at an unspecified date and was at that time informed that the Union could do nothing more. Unlike the situation in *Raby*, the Union did notify Petitioner that it would file an improper practice petition on her behalf and informed Petitioner of the unsuccessful outcome.

The fact that Petitioner sought confirmation that the Union would no longer act on her behalf after she received the letter does not serve to toll the statute of limitations. *See Raby*, Decision No. B-14-2003 at 13. On October 10, 2002, when Petitioner received the letter and a copy of the decision, she knew that the petition filed by the Union had been dismissed as untimely. She provides no explanation for her failure to file her claim with this Board until March 6, 2003, which is beyond the NYCCBL's four month limitation period.

This Board also finds untimely Petitioner's claim that the Union failed to file a grievance on her behalf. As in *Fair Hearing Representatives*, the Union here told Petitioner it would not file a grievance. As of the March 4, 2002, letter, in which the Union stated that she did not have contractual rights as a per diem employee with less than two years' service, Petitioner was on notice that the Union would not pursue a grievance under the CBA. Accordingly, we conclude that the petition against the Union is untimely and we need not reach the merits of this case.

Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail.³ Therefore, this Board dismisses the petition in its entirety.

³ NYCCBL § 12-306(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-2327-03, filed by Kenia Fabre, be, and the same hereby is, dismissed.

Dated: June 9, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER