Minervini v. L. 30, IUOE, Moccio & Donahoe, 71 OCB 29 (BCB 2003) [Decision No. B-29-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceedings

-between-

COSIMO P. MINERVINI,

Petitioner,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30, ROBERT MOCCIO, and JOHN DONAHOE,

-and-

NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES and OFFICE OF LABOR RELATIONS,

Respondents.
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Decision No. B-29-2003

Docket Nos. BCB-2280-02
BCB-2317-03

DECISION AND ORDER

On May 13, 2002, Cosimo P. Minervini filed a *pro se* verified improper practice petition, docketed as BCB-2280-02, against the International Union of Operating Engineers, Local 30, Business Representative Robert Moccio, and Field Representative John Donahoe (collectively "Union").[1] Petitioner alleges that the Union failed to process his four grievances and to provide

[1] While a public employer or a public employee organization may be held responsible for the acts of its agents, an individual cannot commit an improper practice in his or her personal capacity. *See* § 12-306 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"); *Hassay*, Decision No. B-2-2003 at 2. As Moccio and Donahoe were acting as agents of the Union, the proper party to this proceeding

him with a complete copy of the respondents' collective bargaining agreement ("Agreement"). Pursuant to NYCCBL § 12-306(d), Petitioner joined the New York City Department of Citywide Administrative Services ("DCAS") and Office of Labor Relations ("OLR") (collectively "City") as parties. On January 28, 2003, Petitioner filed a second *pro se* verified improper practice petition, docketed as BCB-2317-03, against the Union and the City. Thereafter, Petitioner retained counsel, who filed an amended petition in BCB-2317-03 on March 4, 2002. The amended petition alleges that the Union failed to process three additional grievances. Petitioner fails to specify which sections of the NYCCBL have allegedly been violated; however, his claim is, essentially, that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3). Although unclear in the petitions, Petitioner may also be claiming that the City committed an improper practice in violation of NYCCBL § 12-306(a).

The Union argues that it did not breach its duty of fair representation because it addressed the grievances and responded to the request for a copy of the Agreement. The City argues that the petitions must be dismissed because they are untimely, they do not establish a violation of NYCCBL § 12-306(a), and they do not show that the City committed a derivative violation of NYCCBL § 12-306(b)(3) since the Union did not breach its duty of fair representation. This Board dismisses the petitions on the following grounds: the claims regarding the processing of Petitioner's first three grievances are untimely; Petitioner was provided a copy of the Agreement, and, therefore, that claim has been resolved; and the remaining claims fail to demonstrate that the Union breached its duty of representation. In addition, the City has not violated NYCCBL § 12-306(a) since the claims are either untimely or fail to establish that the City's actions were

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is the Union, not the named individuals, and we dismiss the action as to them.

motivated by Petitioner's union activity.

BACKGROUND

Petitioner has worked for DCAS in the title of Stationary Engineer since 1995. Pursuant to New York State Labor Law § 220, a Comptroller's Determination sets the economic terms and conditions governing that title. The City and the Union's non-economic Agreement covering Stationary Engineers, effective April 1, 1999, through June 30, 1999, is in *status quo*. Article XI, § 2, of the non-economic Agreement provides that "the employee and/or the union" may present a grievance to the employer at Step I and Step II of the grievance process and to OLR at Step III of the grievance process. Pursuant to Article XI, § 7, of the non-economic Agreement, "if the Employer exceeds any time limit prescribed at any step in the Grievance Procedure, the grievant and/or the Union may invoke the next step of the procedure, except that only the Union may invoke impartial arbitration under Step IV."

On or about January 13, 2000, Petitioner filed Grievance No. 1 with the Union. He alleged that on October 1, 1998, he filed a request with his employer to transfer from the Manhattan Criminal Court to the Brooklyn Central Court, but he had just been informed that a provisional engineer received that position. The reasons for the request were that he had "split days off" and that he had been the lowest paid engineer in the building for two years.

Also on or about January 13, 2000, Petitioner filed Grievance No. 2 with the Union. Petitioner complained that he was notified while on vacation that he was required to work "vacation relief" in December 1999 and January 2000 and that he was required to work on New Year's Eve, which fell on a Friday, a day that was not on the regular schedule for the engineer for

whom he was covering. He noted that there were 80 hours of overtime during this period and that he should not have been on vacation relief when there were many provisional engineers. The grievance also alleged that during this period, as in prior years, Petitioner was given short notice of his work schedule.

On or about January 11, 2001, Petitioner filed Grievance No. 3 with the Union. Petitioner complained that he had not received a written determination of his first two grievances or a determination following a meeting between him, senior engineers, and a Union representative regarding the first two grievances.[2]

On the same day, Petitioner filed Grievance No. 4 with the Union. The grievance addressed "unequalization" of overtime, without specifying details.

Neither Petitioner nor the Union filed Grievances Nos. 1 through 4 with the City.

On January 11, 2002, Petitioner wrote a letter to Union agents Moccio and Donahoe requesting a written response to the four grievances by February 1, 2002. Petitioner claimed that he had not received a written determination regarding Grievance Nos. 1 and 2 or any acknowledgment from the Union or the City regarding his two additional grievances. In addition, he alleged that "harassment toward me continues to this day."

On January 30, 2002, Moccio and Donahoe wrote to Petitioner, stating that Petitioner had met with senior engineers and a Union representative, that they had looked into his overtime issue, and that he was in the top 3% for overtime at his plant. "As far as the two additional grievances," they noted, " we will do further investigations into that matter." They also requested that Petitioner fax additional information and invited him to call if he had questions.

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[2] The record does not indicate when this meeting occurred or what the participants said.

They attached to the letter a list of overtime for the five engineers, including Petitioner, at the Brooklyn Central Court for the year 2001.[3] The list indicated that Petitioner had the second highest amount of overtime. Petitioner had 240 hours of overtime, only 3 hours less than the engineer with the highest overtime and 60 hours more than the engineer with the next highest overtime. The engineers with the lowest overtime had 116 hours and 113.3 hours, respectively.

On February 6, 2002, Petitioner sent Moccio and Donahoe a second letter summarizing his four grievances and requesting a written response no later than February 21, 2002. In regard to Grievance No. 1, Petitioner added that no other engineers had submitted transfer papers at the time of his request and that he requested the transfer because he was being harassed. In regard to Grievance No. 2, Petitioner noted that two-thirds of the 21 watches during his two weeks of vacation relief were covered by "high pressure plant tender." He stated that he considered working vacation relief and receiving late notification of his work schedule to be harassment and that the harassment continued in many forms. He added a request for an audit of his last seven years of payments and complained of not receiving "the complete union agreement with the city of New York," despite multiple requests.[4] While he acknowledged that he had received ten pages of the non-economic Agreement, those pages did not address overtime, weekends, worked holidays, and "scheduled off" holiday pay. As to Grievance No. 3, Petitioner commented that when he filed it, he had been waiting one year for a determination of Grievance Nos. 1 and 2. He mentioned that he received Moccio and Donahoe's reply on February 4, 2002, and understood

[3] The record does not indicate when Petitioner received the transfer to the Brooklyn Central Court, the denial of which was the subject of Grievance No. 1.

[4] The record does not indicate when Petitioner first requested a copy of the non-economic Agreement.

the words, "we will do further investigations into that matter," to refer to Grievance Nos. 1 and 2. Petitioner explained that the Grievance No. 4 addressed overtime in 2000, not 2001. Furthermore, as to the list of 2001 overtime that Moccio and Donahoe had attached to their January 30 letter, Petitioner said that only a small portion of the overtime caused by illnesses was assigned to him.

On April 6, 2002, the Petitioner received from the Union a copy of its By-Laws and General Rules, approved on March 20, 2000.

On May 13, 2002, Petitioner filed his first verified improper practice petition, BCB-2280-02, against the City and the Union. Petitioner alleges that he asked for a complete copy of his "Union contract" and did not receive one and that Grievance Nos. 1 through 4 have not been addressed properly.

On May 18, 2002, Petitioner filed Grievance No. 5 with the Union and the City. The grievance sought "to have all forms of harassment discontinued." In an attached document, Petitioner noted that the most recent incident of harassment occurred on May 3, 2002, when the only overtime shift he was offered at the Brooklyn Central Court conflicted with his schedule at the Family Court.

On the same day, Petitioner filed Grievance No. 6 with the Union and the City. The claim was that overtime was granted unequally and Petitioner sought to earn as much money as his co-workers did. He asserted that a disparity of $1,500 existed between him and his coworkers, and if the trend continued, he would earn $8,000 less than his coworkers that year. Although he worked at the Family Court during the summer, he was told he would be participating in overtime equally at the Brooklyn Central Court.

On October 29, 2002, Petitioner filed Grievance No. 7 with the Union and the City. The grievance concerned harassment and slander by unidentified personnel in the three buildings in which Petitioner worked. Petitioner said that office personnel knew of various malfunctions that resulted in a hazardous working environment. Specifically, he alleged that in one building two chillers were not certified, there was a loss of refrigerant, the refrigerant sensors, alarms, and primary electrical exhaust never activated, and the secondary exhaust fan was malfunctioning. Petitioner claimed that he was forced to work in this building and that he was suspended for one week for "not wanting" to work there. In addition, he found a death threat note in the log book. He asserted that the stress of these situations affected his health and that he was constantly monitored by several physicians. The grievance sought "to cease all harassment."

On November 20, 2002, the Union gave Petitioner copies of both the complete non-economic Agreement and the most recent Comptroller's Determination, which addresses compensation for overtime, weekends, and holidays.

On January 28, 2003, Petitioner filed his second improper practice petition, BCB-2317-03, against the City and the Union. The petition requests cessation of all forms of harassment, threats, and slander, an end to being forced to work in hazardous conditions, equalization of overtime, processing of Grievances Nos. 5 through 7, reimbursement of out-of-pocket expenses, and lost wages. As relief, Petitioner seeks "to have all the above addressed fully and resolved." Petitioner's counsel filed an amended petition on March 4, 2003, as an addendum to Petitioner's *pro se* petition. It repeats the allegations of Grievance Nos. 5 through 7 and claims that the Union failed to pursue these grievances "pursuant to the contract."

Without providing a time frame or documentary evidence, the Union asserts that the

following events occurred prior to March 31, 2003, the date of its answer in BCB-2317-03: Petitioner was informed that it was not possible for all workers to have the same amount of overtime due to differences and conflicts in shifts, scheduling, and the number of available slots of overtime. Moccio met with Petitioner and requested documentation demonstrating the $1,500 disparity in overtime between Petitioner and his co-workers at Brooklyn Central Court. The Union asked the City to provide documents detailing distribution overtime for Stationary Engineers at Brooklyn Central Court but had not received any documentation. Ultimately, the Union informed Petitioner that it had decided not to represent him with regard to Grievance Nos. 5 and 6. However, after consulting with Petitioner, the Union did inform him that it would represent him with regard to Grievance No. 7 even though his job duties entailed monitoring and repairing the malfunctions to the electrical exhaust and the secondary exhaust fan, about which he complained. Petitioner did not deny these facts.[5]

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner essentially claims that the Union breached its duty of fair representation, a violation of NYCCBL § 12-306(b)(3), by failing to provide a complete copy of the non-economic Agreement and to properly address Grievance Nos. 1 through 7.[6] Petitioner may also be claiming

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[5] Section 1-07(i) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") provides that "additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

[6] NYCCBL § 12-306(b) provides:
It shall be an improper practice for a public employee organization or its agents:
* * *

that the City has violated NYCCBL § 12-306(a) by denying a transfer, requiring him to work "vacation relief," providing an unequal amount of overtime, imposing hazardous working conditions, and engaging in harassment, threats, and slander.[7] As a remedy, Petitioner seeks to have his grievances addressed fully and to recover out-of-pocket expenses and lost wages.

Union's Position

First, the Union argues that it has previously addressed Grievance Nos. 1 through 7 and has provided Petitioner with a copy of the non-economic Agreement. According to the Union, as long as it communicates its explanation regarding whether to handle a grievance in a reasonably understandable manner, it is not obligated to explain its decision in the form requested, or to repeat that explanation upon request.

In addition, the Union claims that it advised Petitioner with regard to Grievance Nos. 5 and 6 that it was not possible for all workers to have the same amount of overtime and that Petitioner needed to provide documentation of the $1,500 disparity in overtime. The Union made a request to the City for documentation regarding the distribution of overtime but did not

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

[7] NYCCBL §12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer 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;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

§ 12-305 provides in relevant 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 . . . .

receive any documents. The Union told Petitioner that it determined not to represent him in Grievance Nos. 5 and 6, but it would represent him with regard to Grievance No. 7. It also informed him that part of his job duties entailed monitoring and repairing the same malfunctions he complained of in Grievance No. 7.

Second, the Union asserts that a union does not commit an improper practice if an employee is dissatisfied with the outcome of a grievance – the Union does not have to process every grievance or take every grievance to arbitration as long as its refusal to advance a grievance is made in good faith and in a non-arbitrary and non-discriminatory manner.

Finally, in its answer to BCB-2317-03, the Union argues that Petitioner has prematurely asserted that the Union failed its duty to fairly represent him. The non-economic Agreement permits a grievant to file his grievances on his own until Step IV, which may be brought solely by the Union. Since Grievance Nos. 5 through 7 have not gone past Step III, Petitioner's claims are not justiciable.

City's Position

First, the City argues that the petitions must be dismissed as untimely. NYCCBL § 12-306(e) and OCB Rule § 1-07(d) require that an improper practice petition be filed with the Board within four months of the acts alleged to constitute an improper practice. With regard to BCB-2280-02, the City asserts that Grievance No. 3 did not complain about an employer action and that the City's actions of which Petitioner complained in Grievance Nos. 1, 2, and 4 occurred far in excess of four months before the filing of the petition. Concerning BCB-2317-03, the City asserts that the events which led Petitioner to file Grievance Nos. 5 and 6 occurred more than four months in advance of the amended petition's filing date. As to both petitions, the City

concludes that Petitioner's failure to follow up on his grievances did not stay the statute of limitations.

The City also argues that the improper practice petitions must be dismissed because Petitioner has failed to establish a *prima facie* case that the City violated NYCCBL § 12-306(a). Since the allegations relate only to the Union's failure to provide a copy of the non-economic Agreement and Petitioner's belief that the Union did not properly address his grievances, the City suggests that it was joined as a respondent merely to satisfy the requirements of NYCCBL § 12-306(d).[8]

The City states that the petition in BCB-2280-02 does not allege that Grievances Nos. 1 through 4 were submitted to the City or that the City failed to respond. Even if, *arguendo*, they had been submitted, it is not an improper practice if the employer fails to respond to a grievance. Rather, the employee's or union's recourse is to advance the claim to the next step of the grievance procedure.

In regard to BCB-2317-03, the City asserts that Petitioner did not allege a connection between his involvement in protected union activity and the events complained of in Grievance Nos. 5 through 7. Petitioner did not contest that the City fulfilled its obligation to process the grievances pursuant to the non-economic Agreement. Rather, Petitioner claims that the Union has not sought grievance hearings subsequent to Step I of the contractual process.

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[8] 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.

Finally, the City argues that since the petition in BCB-2317-03 is a duty of fair representation case, the City cannot be in violation of the NYCCBL unless the Union is in violation of the statute. Even if the Union did not request a hearing on the merits of Grievance Nos. 5 through 7, Petitioner has failed to establish bad faith, arbitrariness, or discriminatory conduct as is required to establish a breach of the duty of fair representation. Accordingly, the City cannot be in violation of the NYCCBL and the petition should be dismissed.

DISCUSSION

This Board finds that Petitioner's NYCCBL § 12-306(b)(3) claims in BCB-2280-02 relating to the processing of Grievance Nos. 1 through 3 are barred by the four month statute of limitations. 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.*

(Emphasis added.) *See also* OCB Rule § 1-07(d); *Griffiths,* Decision No. B-3-99 at 11-13.

A charge of improper practice must be filed no later than four months from the time the disputed action occurred. In a duty of fair representation case in which the Union allegedly failed to process a grievance, 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 10. When the petitioner claims not to have known about the alleged breach at the time it occurred, the four month period is measured from the time the petitioner knew or should have known that the union would not

process a grievance. *See Raby*, Decision No. B-14-2003 at 9-10, *appeal pending*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. filed May 22, 2003).

Grievance Nos. 1 and 2 were filed on January 13, 2000. The following year, after having had a meeting regarding Grievance Nos. 1 and 2 with senior engineers and a Union representative, Petitioner filed Grievance No. 3, alleging that he had not received a determination in Grievance Nos. 1 and 2. By this point, January 11, 2001, he knew or should have known that the Union was not processing these grievances. As this accrual date is more than a year prior to the date the first improper practice petition was filed, the claims regarding the processing of Grievance Nos. 1 and 2 are time-barred. The fact that Petitioner continued to complain regarding the processing of Grievance Nos. 1 and 2 by filing Grievance No. 3 in January 2001 and sending the Union letters in January and February 2002, does not toll the statute of limitations. *See Raby*, Decision No. B-14-2003 at 12-13; *Miller,* Decision No. B-40-1996 at 5 (petitioner's writing the union and demanding a written explanation of the reasons it decided not to process his grievance did not toll the statute of limitations).

For the same reasons, the claim regarding the processing of Grievance No. 3 is time-barred. Grievance No. 3, filed in January 2001, one year after Grievance Nos. 1 and 2, is essentially a complaint that Grievance Nos. 1 and 2 had not been resolved. The substantive issues of which Petitioner complained were already one year old at that time. Petitioner's reassertion of the same issues in a new grievance cannot serve to extend the date upon which Petitioner should have known that the Union had failed to act. *Id.* Moreover, the improper practice petition was not filed until more than one year after Grievance No. 3 was filed. Accordingly, the claims in BCB-2280-02 relating to the processing of Grievance Nos. 1 through

3 are dismissed.

The claim relating to the processing of Grievance No. 4, on the other hand, is timely. On January 11, 2002, exactly one year after filing Grievance No. 4, Petitioner wrote Moccio and Donahoe to complain, for the first time, that he had not received any acknowledgment of that grievance. About three weeks later, in a letter dated January 30, 2002, the Union responded that it had met with Petitioner and other engineers, had investigated the overtime issue and had found Petitioner to be in the top 3% of overtime earners. Since the letter could reasonably be interpreted as informing Petitioner that the Union would not process Grievance No. 4, this is the earliest point at which it could be said that Petitioner knew or should have known of the Union's alleged breach. Since the improper practice petition concerning this grievance was filed on May 13, 2002, the earliest possible accrual date is within the four-month limitations period, and the claim is timely.

Similarly, the claims in BCB-2317-03 are not barred by the statute of limitations. Because the Union does not indicate when it informed Petitioner that it would not represent him in Grievance Nos. 5 and 6, the Board cannot determine when Petitioner knew or should have known of the failure to process those grievances. Accordingly, there is no evidence that the claims regarding Grievance Nos. 5 and 6 are time-barred. *See District Council 37,* Decision No. B-1-90 at 5-6. Since Grievance No. 7 was filed on October 29, 2002, less than four months before Petitioner filed BCB-2317-03 on January 28, 2003, the petition is timely.

Although timely, Petitioner's claim in BCB-2280-02 that he was denied a complete copy of the non-economic Agreement has been resolved. In response to Petitioner's requests for "the complete union agreement with the city of New York," the Union initially gave him ten pages of

the non-economic Agreement and, later, a copy of its by-laws. The non-economic Agreement apparently did not address overtime and holiday pay issues with which Petitioner was concerned. However, the Union did provide Petitioner with the Comptroller's Determination, which addressed the financial issues he raised in his February 6, 2002, letter, as well as the complete copy of the non-economic Agreement on November 20, 2002. Since Petitioner has obtained the information he requested, this claim is dismissed.

Turning to the merits of the claims regarding the processing of Grievance Nos. 4 through 7, we find that the petitions fail to demonstrate that the Union committed an improper practice in violation of § 12-306(b)(3) of the NYCCBL.[9]

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 under this chapter." The duty of fair representation requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Hug*, Decision No. B-5-91 at 14. While a union is not obligated to advance every grievance, *see Keyes*, Decision No. B-32-86 at 7, it has "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Fabbricante*, Decision No. B-39-2002 at 20. The reason for a union's failure to process a grievance must not be arbitrary, discriminatory or in bad faith. *See Urban*, Decision No. B-20-97 at 9. A union does not breach its duty of fair representation simply because an employee represented by the union is dissatisfied with the

[9] This Board does not have the authority to determine the merits of the underlying grievances. *See Krumholz*, Decision No. B-21-93 at 14. To the extent that Petitioner alleges that the City violated the Agreement, those claims are beyond our jurisdiction. *Id*. at 15; *Urban*, Decision No. B-20-97 at 11.

outcome of his case. *McAllan*, Decision No. B-15-83 at 20. Petitioner has the burden of pleading and proving that the Union has breached its duty of fair representation. *Yovino*, B-40-2002 at 9; *Barry*, Decision No. B-38-2001 at 8.

We find that the Union did not breach the duty of fair representation in regard to the processing of Grievance Nos. 4 through 6, all of which address equalization of overtime assignments. In response to Petitioner's letter dated January 11, 2002, the Union informed Petitioner in writing that after investigating his overtime issue, it found him to be in the top 3% of overtime earners and attached a document showing that Petitioner had the second highest overtime in 2001.[10] Thus, the Union strongly implied, although it did not directly state, that it would not process Grievance No. 4. Subsequently, the Union expressly notified Petitioner that it would not represent him in regard to Grievance Nos. 5 and 6. The Union explained that it was not possible for all workers to have the same amount of overtime due to differences and conflicts in shifts, scheduling, and the number of available slots of overtime. While Petitioner may not agree with the Union's reasoning for not processing his overtime grievances, the Union's reasoning was not arbitrary, discriminatory, or in bad faith. Therefore, Petitioner's claims regarding the processing of Grievance Nos. 4 through 6 fail to establish that the Union committed an improper practice.

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[10] Petitioner's February 6, 2002, letter notes that Grievance No. 4, which did not specify a year, concerned events in 2000, not 2001. Arguably, by looking at Petitioner's current overtime, the Union could have determined that any alleged "unequalization" of overtime which may have existed in 2000 had been resolved by 2001. In the alternative, if the Union simply made an error concerning the year it examined for equalization of overtime, the Union would not have breached its duty of fair representation. "It is not enough for a petitioner to allege negligence, mistake, or incompetence on the part of the union." *See Schweit*, Decision No. B-36-98 at 15; *Wooten*, Decision No. B-23-94 at 13.

Petitioner has also failed to establish a breach of the duty of fair representation regarding the processing of Grievance No. 7, as the Union agreed to represent him in the processing of the grievance.

Since the Union has not breached its duty of fair representation, any potential derivative claim against the City for breaching the non-economic Agreement pursuant to NYCCBL § 12-306(d) must also fail. *See Stepan*, Decision No. B-11-2000 at 5. To the extent that the petitions may be construed as asserting § 12-306(a) claims against the City, those claims are also dismissed. The City's actions alleged in Grievance Nos. 1, 2, and 4 through 6 all occurred more than four months before Petitioner filed the respective improper practice petitions.[11] The improper practice claims regarding those actions are, therefore, time-barred. The City's actions alleged in Grievance No. 7 do not establish a *prima facie* case of a NYCCBL § 12-306(a) violation. Although Petitioner engaged in union activity by filing grievances, Petitioner has not established that the City's alleged actions were motivated by his union activity. In the absence of improper motivation, Petitioner's NYCCBL § 12-306(a) claim fails. *See, e.g., Frink*, Decision No. B-21-03 at 13.

Therefore, this Board dismisses the petition in its entirety.

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[11] Grievance No. 3 does not complain of any City action.

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 petitions, BCB-2280-02 and BCB-2317-03, filed by Cosimo P. Minervini be, and the same hereby are, dismissed.

Dated: September 25, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER