OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------X

In the Matter of the Improper Practice Petition

-between-

PEDRO RIVERA-BEY, NTCHWAIDUMELA BEY, ZAIMAH EL, FARUQ NOBLE-BEY, NUHA SAABIRAH EL, WAYNE BOLLIN-BEY, MICHAEL E. FLYNN, HASSAN ABDALLAH, EDWARD V. EBANKS, MICHAEL L. NICHOLS, HERBERT HINNANT, YASHUA AMEN SHEKHEM EL-BEY, and GARY BOLDEN,

Petitioners,

-and-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION and THE CITY OF NEW YORK DEPARTMENT OF CORRECTION,

Respondents.

----------X

Decision No. B-20-2004
Docket Nos. BCB-2409-04
BCB-2411-04
BCB-2412-04
BCB-2413-04
BCB-2416-04

DECISION AND ORDER

On June 1, 2004, Pedro Rivera-Bey filed a verified improper practice petition against the Correction Officers Benevolent Association ("Union" or "COBA"). The City of New York Department of Correction ("DOC" or "City") was joined pursuant to § 12-306(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The petition alleges that in 1998, the Union failed to represent him in

[1] 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.

departmental disciplinary proceedings arising out charges of tax fraud, and thereby breached the duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3). Eleven additional Petitioners filed three more *pro se* petitions on June 22 and July 2, and 13, 2004 alleging virtually identical claims. Petitioner Gary Bolden filed a *pro se* petition on July 15, 2004, alleging that the Union failed to represent him when he was arrested in 1998 for tax fraud. The petitions have been consolidated for decision. The Union contends that any fair representation claims are time-barred and that Petitioners have failed to assert facts sufficient to find a *prima facie* claim of a breach of the duty of fair representation. The City argues that Petitioners have failed to demonstrate that the Union's conduct was discriminatory, a precondition to employer liability. This Board finds that the instant improper practice petitions are time-barred and, therefore, they are dismissed.

BACKGROUND

Petitioners are 13 former Correction Officers who, for religious reasons, as members of the Moorish Science Temple of America, sought exemption from the payment of income taxes. Petitioner Bolden was arrested and prosecuted for filing false documents related to the non-payment of taxes in 1998. Beginning in 1998, the other 12 Petitioners were subject to disciplinary proceedings brought under § 75 of the New York State Civil Service Law before the New York City Office of Administrative Trials and Hearings ("OATH"). DOC alleged that, as City employees, they failed to comply with laws concerning the filing of state and federal income tax returns.

Petitioners allege that during a Union meeting on March 20, 1998, a Correction Officer,

not a petitioner herein, asked Union President Norman Seabrook if the Union would represent Correction Officers appearing before OATH on disciplinary charges as a result of their involvement in the tax matter. Petitioners allege that Seabrook responded that he would not be "spending a dime on any officer suspended or arrested for the 'tax thing'" and "indicated" that he would not provide "representation for said conduct" at OATH. The Union asserts that after a vote of the membership, the Union decided not to provide representation for tax related criminal charges; however, it did offer to represent Petitioners in their disciplinary proceedings at the OATH.

Petitioners Edward Ebanks, Herbert Hinnant, Ntchwaidumela Bey, Saabirah-El, Michael Nichols, Zaimah-El, Pedro Rivera-Bey, Hassan Abdallah, Faruq Noble-Bey, Bollin-Bey, and Michael Flynn

On March 5, 1998, Ebanks, Hinnant, Bey, Saabirah-El, Nichols, Zaimah El, Rivera-Bey, Abdallah, Noble-Bey, Bollin-Bey, and Flynn were suspended and served with charges and specifications arising out of their alleged filing of false tax returns. DOC directed them to appear at a pre-trial conference at OATH on May 20, 1998. The notice advised that they had a right to union representation and provided the telephone number for its counsel, Dienst & Serrins, LLP. A copy of Bollin-Bey's notice was not included in the record.

By letter dated April 28, 1998, Dienst & Serrins advised each of them that it "is willing and able to vigorously and zealously represent you" in the up-coming disciplinary matter and to sign and return the enclosed acknowledgment accepting representation.[2] There is no evidence in the record that Bollin-Bey was sent this letter. In the case of Ebanks, Bey, Rivera-Bey, and

[2] The letters also state "because you have previously brought an action against the C.O.B.A. and its attorneys in Federal District Court, a conflict of interest situation may exist. It is our legal and ethical obligation to inform you of this potential conflict."

Noble-Bey, the letters were unclaimed and resent by Federal Express. Those letters were also returned as unclaimed. By letter dated May 7, 1998, Saabirah-El requested legal representation. By overnight letter dated May 12, 1998, the firm advised her that it would provide representation and to contact Steven Isaacs prior to May 20, 1998, if she wanted to discuss the matter.

According to the OATH transcript, Petitioners Rivera-Bey, Ebanks, Hinnant, Bey, Saabirah-El, and Flynn, as well as two other Correction Officers on trial, appeared at the pre-trial conference on May 20, 1998. Also in attendance was Greg Watford, an attorney from Dienst & Serrins. The Union's Counsel notified the OATH Administrative Law Judge ("ALJ") that these individuals "have informed us in no uncertain terms, that they do not wish to receive our services." The ALJ confirmed this and noted on the record that the decision not to have the firm represent them "appears to be unanimous."

At the OATH hearing, Petitioners Rivera-Bey, Bey, Zaimah El, Saabirah-El, Ebanks, Nichols, Hinnant, Flynn and Bollin-Bey were tried along with eight other individuals. All appeared *pro se*. Petitioners Abdallah and Noble-Bey failed to appear at the four-day hearing. The ALJ recommended termination finding that each had knowingly submitted falsified state and federal tax forms with the intent to defraud the City and the State of their income tax contributions. *Dep't of Correction v. Keizer,* OATH Index No. 1481/98 (Nov. 30, 1998). DOC adopted OATH's recommendation and terminated the employees.

By letter dated December 23, 1998, Dienst & Serrins advised these Petitioners of their right to appeal DOC's termination decision and stated that it would represent them on appeal. Letters sent to Saabirah-El, Abdallah, and Noble-Bey were returned as unclaimed. In the case of Rivera-Bey, by letter dated January 5, 1999, Dienst & Serrins wrote to Rivera-Bey: "This letter

will confirm our conversation today, that you have filed your appeal with the Civil Service Commission. Please contact me when you receive your appeal date." Rivera-Bey claims that he never received any correspondence from Dienst & Serrins but does not deny that he had a conversation with the firm regarding his appeal.

Yashua Amen Shekhem El-Bey

On January 1, 1997, El-Bey was served with charges and specifications arising out of his alleged filing of false tax returns. On October 20, 1999, Stephen Ricci of Koehler & Isaacs sent El-Bey a letter informing him that a pre-trial conference was scheduled for November 3, 1999, and advised him that the Union would represent him if he "should so desire." Ricci met with El-Bey on November 2, 1999, to discuss the charges. According to El-Bey, Ricci stated "there is not much the firm can do" because "there was [*sic*] marching orders from City Hall" to "get rid of" similarly situated individuals who also sought exemption from income taxes.

According to records from Koehler & Isaacs as well as Ricci's affidavit,[3] El-Bey notified Ricci at the pre-trial conference that he did not want representation. On November 4, 1999, the firm confirmed with El-Bey that he wanted to represent himself and noted in its records that he "wants K & I to have nothing to do with case."

At the OATH hearing, El-Bey proceeded *pro se* and was represented by three other individuals including Petitioner Pedro Rivera-Bey. According to the ALJ's decision, during the trial, El-Bey tried to leave "to file some papers in federal court." The ALJ stated that he would

[3] Ricci's affidavit was prepared in support of the motion for summary judgment to dismiss El-Bey's four actions in federal court against the City, DOC, and the Union alleging federal and state law violations. The complaints were dismissed. *El-Bey v. City of New York*, 151 F. Supp. 2d 286 (S.D.N.Y. 2001).

not be permitted to leave and that if he did, the trial would proceed in his absence. After lunch, El-Bey did not return and the trial proceeded without him. The ALJ found El-Bey submitted false tax forms with the intent to avoid paying taxes and recommended termination. *Dep't of Correction v. El-Bey*, OATH Index No. 704/00 (Mar. 14, 2000). DOC adopted OATH's recommendation and terminated El-Bey.

Gary Bolden

On July 9, 1998, Bolden was arrested and charged with a violation of Title 18 of the United States Code § 287, which concerns the filing of false information. Bolden called Norman Seabrook and asked for representation. Seabrook allegedly stated that he was not handling any tax case and that if the matter was "anything criminal," Bolden would be required to obtain his own attorney.

That same day, Bolden was suspended from DOC for his arrest. By letter dated July 13, 1998, DOC advised Bolden to appear at a pre-trial conference at OATH. The notice advised that Bolden had a right to counsel and provided the telephone number for Dienst & Serrins. In a letter dated July 14, 1998, sent by certified and regular mail, Dienst & Serrins advised Bolden that the Union had retained the firm to represent members in disciplinary matters. Bolden claims that the letter refers to the matter identified as "DR#615/97" which concerns Bolden's arrest for a prior assault, not the tax-related matter. According to Bolden, DOC never filed departmental charges against him for knowingly falsifying state and federal tax forms. His employment was terminated in 1999 but the record is unclear for what charge.

Mildred Lambert and her Federal Trial

In May 2001, Mildred Lambert, another Correction Officer and not a petitioner herein,

was tried at OATH on a number of charges including 1998 specifications concerning violations of tax and penal law. According to the Union, Lambert requested legal representation and it was so provided. The ALJ found that Lambert had falsely claimed that she was exempt on two federal withholding certificates in 1994 and 1995 and that she took early steps to correct the erroneous filing and intended to satisfy her tax liability for that year. The ALJ recommended that Lambert be suspended for 60 days. *Dep't of Correction v. Lambert*, OATH Index No. 01-1171 (Aug. 9, 2001).

In 2000, Lambert brought a civil lawsuit in U.S. District Court against Michael Caruso of DOC. The pleadings are unclear as to the nature of this case. In May 2004, Petitioners attended Lambert's trial and heard the following testimony from Caruso:

Q: Now, prior to the OATH hearing, were you contacted by somebody who was handling the OATH hearing for the department regarding the Mildred Lambert case?
A: Do you have a name?
Q: The attorney who handled all of these Moorish national cases, do you know who that was?
A: There were different attorneys.
Q: The second one?
A: I don't know who that is referring to.
Q: Hernandez?
A: Mark Hernandez? I don't recall.
Q: Do you recall being contacted about the case?
A: I don't recall.
Q: Do you recall receiving any telephone calls from union representatives regarding Mildred Lambert?
A: I don't remember it if was a call or a visit from Norman Seabrook, the president of the COBA.
Q: And did he ask you to look at the case and see whether there could be lesser charges?
A: The main thing I remember him asking was she had just been suspended, he was upset that she was suspended because she was a union delegate, he wanted to know why she was suspended.
Q: And did you tell him why?
A: I remember telling him that she violated specific rules and regulations. I didn't

get into specific charges and specifications or anything like that.
Q: Did anybody else in the union contact you?
A: Called me or come in to see me? Not that I remember.

(El-Bey Reply, Exhibit 5, Tr. at 115, lines 22-23.)

Petitioners allege that Lambert was a Union delegate and that, as a result of the Union's failure to "intercede" on their behalf in the same manner in which it allegedly did on behalf of Lambert, they lost past and future wages, wage increases, and benefits allegedly due them under their collective bargaining agreement, the U.S. Constitution, and unspecified statutes.[4] Petitioners ask this Board to award them damages of $5,000,000 each.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners contend that they and Lambert were similarly situated as to the charges against them in their respective OATH proceedings and that the Union breached its duty of fair representation under NYCCBL § 12-306(b)(1) and (3) when it failed to "intercede" on their behalf in the same fashion that it did for Lambert.[5] Petitioners argue that lack of timeliness is no

---

[4] The Board does not have jurisdiction over claims arising outside the NYCCBL. *Centeno*, Decision No. B-7-97 at 10; *Borgese*, Decision No. B-34-97.

[5] NYCCBL § 12-306(b) provides:
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 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.

NYCCBL § 12-305 provides:
Public employees shall have the right to self-organization, to form, join or assist public

defense to their claims because it was only during Lambert's federal trial that they learned of Seabrook's efforts on Lambert's behalf. Thus, the statute of limitations should be tolled because they could not have learned about the Union's allegedly disparate treatment until Lambert's trial in May 2004.

Union's Position

The Union contends that the instant petitions are time-barred. The applicable accrual date for the statute of limitations is the date which Petitioners knew that the Union, through its attorneys, would not be representing them at OATH, and that date was more than four months before Petitioners filed the petitions. Here, Petitioners knowingly declined union representation. Moreover, the applicable limitations period is not tolled by Seabrook's making an inquiry to Caruso because Seabrook has conversations every day with City officials concerning the welfare of his members, delegates, and non-delegates alike.

The Union further asserts that, even if the instant petitions were timely, they do not state a *prima facie* claim. Letters were sent to all Petitioners informing them that the law firm would defend them at OATH. By either specifically declining representation or by not responding to the law firm's letters, all Petitioners rejected the Union's offer of legal representation.

As to Petitioners' contention that Seabrook interceded on Lambert's behalf, any such conversation would be part of Seabrook's duty on behalf of all Union members to maintain on-going dialogue with City officials. It would be wrong, the Union contends, to elevate a single comment by Seabrook to a charge of discrimination against Petitioners. Further, in spite of

---

> employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

Lambert's request for Union representation at OATH, she still was suspended.

City's Position

The City argues that: (1) the petition is untimely; (2) this Board lacks jurisdiction to determine constitutional claims; and (3) Petitioners have failed to demonstrate any bad faith conduct on the part of the Union which is a precondition to employer liability. Finally, the City argues that, even if the Union had breached its duty of fair representation, the petitions fail to set forth facts that the City independently violated the NYCCBL.

DISCUSSION

We find that the instant petitions are barred by the four month statute of limitations. Section 12-306(e) of the NYCCBL provides:

> 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. . . .

See also Section 1-07(b)(4), formerly § 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"). A charge of improper practice 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 know of said occurrence. *Antoine*, Decision No. B-8-2004 at 9; *Raby*, Decision No. B-14-2003, at 9, *aff'd sub. nom., Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).

Here, the petitions were filed on June 1 and 22, and July 2, 13, and 15, 2004. Since the

claims in the petitions allege that the Union breached its duty of fair representation between 1998 and 2000, which is more than four months before the filing of the petitions, they are untimely. Petitioners knew or should have known that they were unsatisfied with the Union when they were terminated by DOC more than four years ago.

Furthermore, we are not persuaded by Petitioners' argument that the statute of limitations should be tolled because it was only during Lambert's federal trial that they learned of Seabrook's efforts on her behalf. Even if the statement that Seabrook contacted DOC and inquired why Lambert, a delegate, had been suspended is true, this does not demonstrate that the Union was unwilling to represent Petitioners or that it provided greater representation to Lambert.

Moreover, even if we could deem these matters to have been timely filed, we would find no basis for the substantive claim of a breach of the duty of fair representation based on the record before us. 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." This duty requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Minervini*, Decision No. B-29-2003 at 15; *Hug*, Decision No. B-5-91 at 14. A union member's mere dissatisfaction with the outcome of his case is insufficient to ground a claim that a union has breached its duty of fair representation. *Minervini*, Decision No. B-29-2003 at 15; *see also McAllan*, Decision No. B-15-83.

Petitioners Rivera-Bey, Bey, Zaimah El, Saabirah-El, Bollin-Bey, Flynn, Ebanks, Nichols, Hinnant, Abdallah, and Noble-Bey were tried at OATH as a group and all appeared *pro*

se. The record demonstrates that most of these individuals knew or should have known that they had the right to union representation because DOC and the Union sent them letters so advising them. They chose not to avail themselves of the Union's counsel either expressly or by failing to accept the Union's offer. The Union has no duty to require its members to accept their offer of representation. For those Petitioners who may not have received either DOC's or the Union's letter, there is no evidence that they asked the Union to represent them and that it refused to do so. In this regard, we are not persuaded that their reliance on any alleged statements by Seabrook, at a meeting in 1998, that the Union would not provide representation for the "tax thing" is sufficient to establish a breach of the duty of fair representation in their cases. Finally, there is no evidence that the Union gave Mildred Lambert preferential treatment. The 2004 transcript from Lambert's federal trial relied upon by Petitioners shows no more than the fact that a DOC investigator testified that Seabrook inquired why Lambert had been suspended. Like Petitioners, she was brought up on charges, and despite the Union's representation which she requested, she still received a 60-day suspension. Therefore, we cannot find that the Union's absence from Petitioners' OATH trial amounted to arbitrary, discriminatory and bad faith conduct, nor that the Union treated Petitioners in a disparate manner.

With regard to El-Bey, the record demonstrates that he discussed the charges with the Union's counsel and was advised that under the circumstances there was not much that could be done. The Union's statement concerning the likelihood of an unfavorable outcome at OATH does not amount to arbitrary, discriminatory and bad faith conduct. Since El-Bey chose not to avail himself of the Union's counsel but appeared *pro se* at OATH, we cannot find that the Union breached its duty of fair representation by not appearing on his behalf.

Finally, Gary Bolden's claim that the Union failed to represent him when he was arrested is without merit. Because Bolden states that DOC never charged him with departmental discipline based on his tax related charges, and because the NYCCBL governs the employment relationship between employers and public employees, the Union had no duty to represent Bolden in the criminal matter. *Green*, Decision No. B-31-2000 (ES), *aff'd*, Decision No. B-33-99.

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 docketed as BCB-2409-04, BCB-2411-04, BCB-2412-04, BCB-2413-04, and BCB-2416-04, be, and the same hereby are, dismissed in their entirety.

Dated: New York, New York
October 28, 2004

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

VINCENT BOLLON
MEMBER

M. DAVID ZURNDORFER
MEMBER