Burtner v. L. 1508, DC37 & Dept. of Parks & Rec., 75 OCB 1 (BCB 2005) [Decision No. B-1-05 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

MARY ELLEN BURTNER, FRANK CAPUTO, BENARD CHAN, DENNIS GALVIN, STANLEY PODOLSKY, ANTHONY RISPOLI, HENRY ROMAN, MICHAEL SCHMIEDEL, THOMAS BOYLE, HAROLD BROWDER, AND JOHN GIORDANO,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1508, and DOES I-X, and NEW YORK CITY DEPARTMENT OF PARKS, and DOES XI-XX,

Respondents.

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Decision No. B-1-2005
Docket No. BCB-2425-04

DECISION AND ORDER

On August 23, 2004, Mary Ellen Burtner, Frank Caputo, Benard Chan, Dennis Galvin, Stanley Podolsky, Anthony Rispoli, Henry Roman, Michael Schmiedel, Thomas Boyle, Harold Browder, and John Giordano ("Petitioners") filed a verified improper practice petition, and on September 16, 2004, an amended petition, against District Council 37, Local 1508 ("DC 37" or "Union") and the New York City Department of Parks ("Department" or "City"). Petitioners allege that in violation of Section 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the Union breached its duty of fair representation by failing to keep Petitioners informed of the progress of the

arbitration after the first arbitrator died; by failing to insist on having Petitioners re-testify before the second arbitrator; by favoring some grievants over others; and by failing to inform Petitioners appropriately after the arbitrator's opinion was issued. In addition, one Petitioner argues improper exclusion from the group of grievants, and another, retaliation by the City. The Union argues that Petitioners' allegations are based on speculation and are insufficient to state a *prima facie* case; that the Union used its best judgment in processing the case; that Petitioners knew about the status of the arbitration both before and after the Award was issued; and that certain claims are untimely. The City argues that the petition must be dismissed because of the speculative nature of some allegations and the untimeliness of others. This Board dismisses the petition for failure to establish a *prima facie* case and for the untimeliness of several claims.

BACKGROUND

On January 5, 1995, Alfred Cannizzo, President of Local 1508, filed a group grievance at Step III on behalf of 80 Park Supervisors ("PS") alleging that they were performing the work of Principal Park Supervisors ("PPS"). Generally, a PPS has greater responsibilities over a larger park district than does a PS. The City denied the group grievance on May 2, 1996, and in June 1996, the Union filed a Request for Arbitration. On July 8, 1997, the first day of hearings before Arbitrator Reuben Rosenberg, the parties agreed that the group had to be reduced. Three months later, the Union submitted a list of 40 grievants to the arbitrator, and testimony was heard between December 5, 1997, through late 2000 or early 2001. During the hearings, one grievant, Henry Roman, a Petitioner in this case, was removed from the grievance because he had

previously settled his own individual out-of-title grievance and allegedly did not have a pending grievance at the time. Another grievant, not a Petitioner here, was also removed. Petitioner Frank Caputo's individual grievance was consolidated with the group. Thus, by the end of the hearing, 39 Petitioners were left. The period applicable to the grievance was from January 1, 1995, until October 16, 2000, when the PS title was "broadbanded" into a new title.

In April 2001, the parties filed post-hearing briefs, which included legal argument, specific factual discussions concerning each of the 39 grievants, and charts filled out by the individual grievants indicating the exact months that they had allegedly been working out of title. Some grievants had been stepped up to PPS for several months in the five year period and then returned to the PS level; some had already been promoted to PPS; some had not been supervised by a PPS for several months; some claimed having responsibility for a whole district, not just a park.

In the summer of 2001, the Union attorney representing grievants left his employment and Arbitrator Rosenberg unexpectedly passed away. After September 11, 2001, the Union was forced to relocate to temporary office space. According to the Union, in early 2002, the Director of Dispute Resolution at the Office of Collective Bargaining ("OCB"), met with the Deputy General Counsel of the Office of Labor Relations, and DC 37's Senior Assistant General Counsel to examine the records that they had received from Arbitrator Rosenberg's files. Included were exhibits entered into evidence, audio tapes of the proceedings, the arbitrator's notes, and the post-hearing briefs. The parties determined that the record was complete and that OCB's Director of Dispute Resolution would render a decision based on that record.

In an affidavit attached to the Union's answer, Mary J. O'Connell, then DC 37's Senior Assistant General Counsel, states that in July 2002, she went to a general membership meeting of Local 1508 where she updated the members about the status of the arbitration and said that the arbitrator would advise the parties if he needed more information. She heard no objections from the members regarding the process. Following that meeting, Arthur A. Riegel was appointed arbitrator after OCB's Director of Dispute Resolution withdrew.

The City's attorney then requested that one Parks Manager, Nam Yoon, testify, and another manager submit an affidavit concerning the tasks performed by one grievant (not a Petitioner here). Arbitrator Riegel agreed and reopened the hearing to take Yoon's testimony. Yoon testified regarding four grievants, one of whom was Frank Caputo. (The three others won awards.) The petition avers that Caputo wants to discover whether Yoon's testimony negatively impacted Caputo's claim. O'Connell states that had she found Yoon's testimony damaging, she would have called a rebuttal witness. Furthermore, if Yoon did not testify because of objections, the Union would have been in the position of re-trying the case. In O'Connell's judgment, recalling all the grievants starting in 2002 would not have been in their best interests because the record was complete and the grievants' credibility could have been impeached as they may not have testified as accurately as they had years before.

In April 2004, Arbitrator Riegel issued his opinion. He applied a two prong test by asking, first, whether the grievants performed tasks substantially different from those in their job descriptions and, second, whether the grievants spent a sufficiently substantial amount of time – about one-half their work time – on these out-of-title tasks. Riegel sustained the claims of 19

grievants and presented a rationale for each. He did not discuss his application of the standard to 20 grievants whose claims he denied. (Arbitrator Riegel, Opinion and Award, A-6329-96, April 11, 2004, Union's Exhibit B) ("Award").

O'Connell sent the Award to the Local soon after it was issued. She spoke to Petitioners Burtner, Schmiedel, Caputo, Roman, Podolsky, and other members and sent Podolsky a copy of the Award on April 28, 2004. She met with Podolsky and had plans to meet with other Petitioners and their attorney, but the meeting was cancelled after she received the improper practice petition on August 19, 2004.

Each Petitioner wrote an affidavit which is attached to the instant petition. Almost all Petitioners explain the tasks they performed during the period of the grievance; state that they did not hear their manager's testimony or that the manager's testimony was not honest; contend that they were not permitted to testify before the second arbitrator; are dissatisfied that they could not examine the documents given to the second arbitrator; and complain that they were not officially notified after the Award was issued so that they could understand the reasons they were not awarded pay and so that they could appeal the Award in a timely fashion. Some Petitioners, including Caputo, Giordano, Podolsky, and Rispoli, assert that a former head of the Union and "other Union officials" were awarded money and charge favoritism by the Union and the Department. Browder and Giordano feel that their names may have been "removed from the list" because they had retired. Caputo believes that the Union did not act in his best interest because he received only a partial award. Several Petitioners state that the Union did not inform them of the status of the case throughout the proceedings. When at membership meetings (on unspecified

dates) the Union stated only that the arbitration was proceeding smoothly, the Union was really keeping the grievants in the dark. Moreover, Petitioners assert that when they received the Award, the Union failed to give them Riegel's explanation why they did not prevail.

Two Petitioners assert claims that are different from the other allegations. In June 1995, five months after the group grievance had been filed, Henry Roman filed an individual out-of-title claim alleging that he was doing PPS work. In December 1995, he entered into a Stipulation of Settlement and received money for PPS tasks performed from June to September 1995. He claims that thereafter, when he sought to file a second grievance, Union President Cannizzo told him that the Union was planning to file a group grievance and that Roman need not file an individual grievance. In 1997 the Union chose Roman as one of the 40 grievants to continue in the proceedings. He alleges that he was not notified of the date he was to testify and that Cannizzo told him that unless Roman dropped a separate race discrimination suit against the Department, he may not be able to testify. In October 1998, Roman filed a grievance contending that he was not afforded an opportunity to testify in the group grievance. Subsequently, Roman did testify at the hearing on July 28, 1999. He claims that he spoke for only five minutes, was able to introduce only two of the many documents he had, and was then told to leave. He learned only after the Award was issued that he was removed from the group grievance. The Union states that when Roman started to testify, the City objected that since Roman had settled his individual grievance and no longer had a pending grievance, he should not be part of the group. Arbitrator Rosenberg agreed with the City that the effect of the settlement was to exclude Roman from the group, and the Union withdrew his name. In his affidavit, Roman does not address

whether he was present during discussions of the City's objection. The Union states that one can infer that Roman was aware of the City's objection and the Union's agreement to remove him from the group.

Petitioner Podolsky alleges that Mike Agnello, the manager who testified in 1999 about Podolsky's work, was retaliating against him. Podolsky relates a 1997 incident in which he reported the misconduct of a Crew Chief. Agnello grew angry at Podolsky and instead protected the Crew Chief. Agnello then used the hearing in this out-of-title case to retaliate by giving false testimony about Podolsky's refusal in 1997 to agree to a promotion to PPS in a different district from the one in which he was working. Podolsky also accuses the Union attorney for failing to present all the evidence that Podolsky had previously given him, for making no objections during his cross-examination, and for failing to call him on redirect to clarify his position. Podolsky says that although O'Connell sent him the arbitrator's Award on April 28, 2004, she refused to give him the reason that he lost until after he called the national office of AFSCME.

As a remedy, Petitioners seek an inquiry by the Board to clarify the Union's handling of the arbitration, damages apportioned between the Union and the City, and attorney's fees.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners claim that the Union breached its duty of fair representation under NYCCBL §12-306(b)(3) by engaging in arbitrary, discriminatory, and bad faith conduct and by handling the

grievance in a perfunctory manner.[1] The pattern of conduct may constitute gross negligence or collusion. Petitioners aver that they have presented sufficient evidence to justify a finding of a breach but, if not, request that the Board undertake an inquiry and/or a hearing to ascertain facts of which Petitioners are not currently aware.

According to Petitioners, the Union acted arbitrarily because it permitted the arbitrator to issue awards to some grievants and exclude others even though the merits of Petitioners' grievances were "in all manifest respects similar to those of the successful grievants." Petitioners claim that under the arbitrator's two-pronged test, successful grievants were those who had no PPS in their districts or those who had a PPS in name only and therefore performed the PPS tasks despite their PS title. Since all grievants actually performed all those tasks limited to the PPS job description, Petitioners fail to find any valid reason, short of the Union's arbitrary conduct, why they did not prevail.

Furthermore, the fact that 50 percent of the grievants received awards and 50 percent did not suggests that the Union may have engaged in "grievance swapping" in bad faith. Because Union President Cannizzo and others known to the Petitioners to be active in the Union received

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[1] 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 . . . .

awards, there may have been some favoritism and discrimination in the Union's handling of the proceeding. In addition, the Union's failure to explain or even notify Petitioners of the outcome of the proceedings and their legal options until it was too late for them to protect their rights indicates bad faith conduct. Some Petitioners still have not been officially notified and have learned of the Award only through informal channels. The Union's failure to be forthcoming is grossly negligent.

Petitioners also contend that the Union acted in a perfunctory manner by permitting the second arbitrator to arrive at the Award based upon a number of errors. Petitioners wished to testify again before the second arbitrator, and the Union should have sought their opinions. The Union placed grievants in a precarious position because of potential errors. Furthermore, the Union had a duty to review the second arbitrator's handling of the proceeding more carefully than would be customary. Unexplained inconsistencies suggest that the Union's review of the Award was perfunctory. For example, the Union should not have permitted witnesses from the City to testify before the second arbitrator and later should have discovered the arbitrator's misapplication of the two-pronged standard and the error that Petitioner Roman was removed from the grievance because of his previous settlement.

Finally, Petitioners argue, the Union had a responsibility to protect Podolsky from Agnello's testimony since he falsely represented Podolsky's conduct in retaliation for Podolsky's whistle-blowing activity.

Union's Position

The Union asserts that Petitioners have not shown that it breached its duty of fair

representation by deciding not to recall every grievant. The Union made a reasonable determination that Arbitrator Riegel had an ample record of the proceedings, and counsel concluded that having 40 grievants testify again would be imprudent since their credibility might have been impeached. An example is that after his testimony, Podolsky wrote out new charts, which he wished to put into evidence. Since, according to the Union, these charts contradict his earlier submission, they could have called into question his entire testimony.

The Union says that Petitioners, unhappy because the arbitrator did not sustain their specific claims, now surmise that they may have prevailed had they been recalled. Because some past or present Local 1508 officials' grievances were sustained, Petitioners accuse the City and Union of favoritism and grievance swapping. These allegations are speculative and without any factual basis. In handling the case, the Union made decisions that applied to all the grievants and all were treated the same.

Contrary to Petitioners' argument that the Union failed to inform them of the status of the case, their own representations indicate that the Union did apprise them of the status of the arbitration at membership meetings. No Petitioner complained about lack of information or the Union's handling of the case until after the Award was issued. Nor was there any effort to hide the results of the Award – the news of the Award spread quickly.

Furthermore, the Union argues that it did not commit a breach of its duty of fair representation by failing to inform Petitioners that they had a right to "appeal" the Award because Petitioners have no such right. Under New York law, only parties to an agreement providing for arbitration may seek to modify or vacate an award pursuant to Article 75 of the

Civil Practice Law and Rules ("CPLR"). Petitioners have not pled facts demonstrating that the Union breached its duty when it determined that it could not meet the statutory standard to vacate the Award and, therefore, did not seek to do so.

Finally, the Union contends that the Board should dismiss any claims based on allegations that occurred more than four months prior to the Award. This argument includes Petitioner Roman's claim since he was excluded from the group on July 28, 1999. Based on his assertion that he was allowed to testify for only five minutes, one could infer that he was aware of the City's objection and his removal from the arbitration. Because he knew or should have known that he was no longer included in the group grievance, his claim that the Union breached its duty of representation is time-barred.

City's Position

The City argues that the petition must be dismissed because it fails to allege facts sufficient to amount to a breach of the duty of fair representation. Petitioners have not shown that the Union's conduct was arbitrary, discriminatory, or founded in bad faith. A union is permitted wide discretion in its handling of grievances. Even if Petitioners allege that the Union was guilty of negligence or an error of judgment, they have not presented sufficient evidence to show that the Union's conduct was improperly motivated, and thus have not shown a violation. Petitioners' affidavits contain allegations that are speculative and conclusory. For example, Petitioner Browder speculates as to various reasons which could account for his name being "removed" from the list of grievants by stating that "any one or more of these reasons might have motivated whoever it was that removed me from the arbitration"; Podolsky "believes strongly"

that Agnello retaliated against him during his testimony because of "possible" ties to the person whose illegal conduct Podolsky revealed; Giordano "feels" that his name was "taken off the list" because of favoritism. According to the City, these speculative comments cannot support a claim of improper motive under the NYCCBL.

Furthermore, the City contends that the Board may not evaluate the Union's strategic determinations in handling the grievance, and Petitioners are asking the Board to re-examine the Union's judgments in this matter. Petitioners have failed to allege sufficient facts to indicate that any supposed errors by the Union were based on improper motivation; consequently, the petition must be dismissed and the Department cannot be held derivatively liable. In addition, like the Union, the City argues that any claim that occurred more than four months prior to the filing of the petition must be dismissed as untimely.

Finally, while Petitioners have not expressly cited to Sections 12-306(a)(1) and (3) of the NYCCBL, the City wishes to respond to allegations of retaliation against Podolsky.[2] The City contends, first, that reporting a co-worker's misconduct is not protected activity under NYCCBL § 12-305. Even if he could establish a *prima facie* case, the Department had a legitimate reason to call Agnello, one of grievant's managers, to testify in the out-of-title arbitration. Therefore, to the extent a retaliation claim exists, it must be dismissed.

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[2] 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. . . .

DISCUSSION

The issue in this case is whether the Union breached its duty of fair representation because it conducted the group grievance in a perfunctory manner and because it failed to keep the grievants informed during the proceedings and after the issuance of the Award. This Board finds that Petitioners have not presented sufficient facts to state a *prima facie* case that the Union's conduct was arbitrary, discriminatory, or founded in bad faith, and determines that some claims are untimely.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), defined the duty of fair representation:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177. A breach of the duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id*. at 190. While the Court interpreted the National Labor Relations Act, the Public Employment Relations Board ("PERB"), in New York State, uses a similar standard:

> In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded

in bad faith.

CSEA v. PERB and Diaz, 132 A.D.2d 430, 432, 20 PERB ¶ 7024 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796, 21 PERB ¶ 7017 (1988). *Diaz* rejected a standard that "irresponsible or grossly negligent" conduct may form the basis for a union's breach. *Id*. Similarly, pursuant to NYCCBL § 12-306(b)(3), 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. *Minervini*, Decision No. B-29-2003 at 15; *Hug*, Decision No. B-5-91 at 14.

Sufficiency of Representation

Under the NYCCBL, a union enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty. *See Page*, Decision No. B-31-94 at 11; *Hug*, Decision No. B-5-91 at 14; *see also Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004). This Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *See Grace*, Decision No. B-18-95 at 8; *Miller*, Decision No. B-21-94 at 14. A grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation. *Whaley*, Decision No. B-41-97; *White*, Decision No. B-37-96 at 6; *Brockington*, 37 PERB ¶ 3002. In *Hug*, Interim Decision No. B-51-90 at 17, petitioners complained that the union settled a group grievance to their detriment. The Board found that the petitioners presented no evidence of improper motivation, such as malice, hostility, or discrimination, in the union's accepting a settlement agreement. Under those circumstances, a union does not breach its duty even if the

union decision has an adverse effect on some bargaining unit members. *See Miller*, Decision No. B-21-94 at 14; *Hug*, Decision No. B-5-91 at 14; *Migliaro*, Decision No. B-42-87.

Furthermore, Petitioners must allege more than negligence, mistake, or incompetence to meet a *prima facie* showing of a union's breach. *Schweit*, Decision No. B-36-98 at 15. Unless a petitioner shows that the Union did more for others in the same circumstances than it did for the petitioner, or that its actions were arbitrary or perfunctory, even errors in judgment do not breach the duty. *Id*.; *see Page*, Decision No. B-31-94 at 11. Petitioner has the burden to plead and prove that the union engaged in prohibited conduct. *See Minervini*, Decision No. B-29-2003 at 15-16.

Petitioners' first claim is that the Union handled the arbitration in a perfunctory manner and that the Union placed members in a precarious position with a potential for error. This Board finds that allegations that the grievants were not solicited as to whether they wanted to re-testify or to re-examine the exhibits forwarded to the second arbitrator concern the Union's strategy in conducting the grievance. The Union's decision not to retry the case was based on its judgment that having 40 grievants take the stand again could expose them to impeachment, especially because of the many years that had passed from the time the grievance was filed. Similarly strategic are questions regarding the Union's agreeing to allow two managers, one in person, another by affidavit, to present evidence to the second arbitrator. Nam Yoon testified as manager for four grievants, including Petitioner Caputo. Indeed, despite Yoon's testimony, Caputo won a partial award, and the three other grievants about whose duties Yoon testified won awards. The Board will not second-guess the Union's judgment. *Hug*, Interim Decision No. B-

51-90 at 15, 17. Even if the Union's legal assessment was erroneous, the pleadings do not show that the Union acted arbitrarily or in bad faith.

Furthermore, Petitioners argue that even if the Union used its discretion not to retry the case, it should have proceeded "more carefully than would be customary" to assure that Arbitrator Riegel would not make errors. Petitioners do not say what exactly the Union might have done since it, the City, and OCB's Deputy Director, deemed the record complete, and the post-hearing briefs were extensive both legally and factually.

Petitioners also postulate that the Union acted in bad faith by discriminating against them while it assisted others. Because the Union president and other active Union members received awards and because the percentage of those who received awards and those who did not was 50-50, Petitioners surmise that the Union colluded with the City and Arbitrator Riegel to treat one group better than the other. Petitioners do not state any facts – including the names of the alleged favored members, or positive actions that the Union took with some but not others, or any statements by any individual – to support the suggestion of grievance swapping or favoritism. *See Crescente*, Decision No. B-45-99 at 7; *Hug*, Interim Decision No. 51-90 at 17 (with no showing of malice or hostility, allegations of conspiracy between the union and the City are wholly conclusory). Nor do any facts indicate that Petitioners Browder and Giordano received disparate treatment because they had retired.

Petitioners' dissatisfaction with the Award is not a basis for finding a breach. *See Green*, Decision No. B-34-2000 at 9; *White*, Decision No. B-37-96 at 6. Basically, Petitioners do not accept the arbitrator's denial of their claims because they assert that their tasks were the same as

those of other PSs who prevailed. They ask this Board to conduct an inquiry that goes to the merits of the issues before the arbitrator. However, although this Board may inquire in a limited fashion into the merit of a grievance, *see Galleano*, Decision No. B-39-96 at 13; *see also United Federation of Teachers (Grassel)*, 23 PERB ¶ 3042, at 3084 (1990), the NYCCBL, unlike laws governing other administrative agencies, does not empower this Board to investigate claims. Further, this Board does not have appellate review powers over an issue litigated in arbitration. *See Zeigler*, Decision No. B-13-97 at 4.

Some Petitioners also allege in affidavits that the grievants either did not hear their manager's testimony at the arbitration hearing or that the manager was dishonest. This Board finds that these claims are 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. . . .

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"); *Raby*, Decision No. B-14-2003 at 9; *Griffiths*, Decision No. B-3-99 at 11-12. 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 or the petitioner knew or should have known of such action

or failure. *See Raby*, Decision No. B-14-2003 at 9. By the end of 2000 or early 2001, when testimony before Arbitrator Rosenberg was completed, Petitioners here knew or should have known of the Union's actions regarding their managers' testimony. Nothing in the record indicates that any grievants complained to the Union at the time of the hearing. Since Petitioners knew or should have known of this issue over three years ago, this claim is untimely.

Thus, Petitioners have not presented timely claims or pleaded sufficient facts to show any improper motive in the Union's conduct during the arbitration. *See Hassay*, Decision No. B-2-2003 at 11.

Information to Grievants on the Status of Case

Petitioners' other claims that the Union breached its duty of fair representation when it failed to inform its members of the status of the grievance and then the issuance of the Award are also unavailing. In the Board's seminal case on this subject, *McAllan*, Decision No. B-15-83, the petitioner claimed, among other things, that the union failed to inform its members of a settlement concerning their work schedules until after the improper petition was filed at the OCB. Following PERB and New York State courts, this Board held that when there is no evidence that the Union's failure to inform its members of an ongoing dispute "resulted from or reflected improper motivation, arbitrariness, or grossly negligent conduct, and where petitioner cannot establish that he has been, or will be prejudiced or injured by any failure to inform, there is no basis for a finding of a breach of the duty of fair representation." *Id*. at 24. In *Hug*, Interim Decision No. B-51-90, Petitioners pursuing a grievance claimed that their union failed to give them prior notice of a settlement of a larger group grievance in which they also participated. The

Board determined that to demonstrate a breach based on a union's failure to disclose, Petitioners had to show not only improper motivation or grossly negligent conduct but also extreme prejudice to the rights of the employees. *Id*. at 15. *See also Lein*, Decision No. B-27-99 (union's failure to inform grievant for almost one year that it had cancelled his arbitration and would not proceed was not improperly motivated and did not prejudice or injure petitioner); *Whaley*, Decision No. B-41-97 (petitioner's allegations that union withheld information did not include facts to indicate arbitrary or bad faith conduct by the union or prejudice to petitioner); *Urban*, Decision No. B-20-97 (union's failure to notify petitioner for six months of Step 3 determination of out-of-title grievance was not arbitrary or discriminatory and evinced, at most, poor judgment, which does not rise to level of breach); *but cf. Fabbricante*, Decision No. B-39-2002 (union's failure to respond to petitioner as to whether it would grieve his failure-to-promote claim was perfunctory and discriminatory and prejudiced him since promotional list had expired).

A. Information Before the Issuance of the Award

In the instant case, Petitioners maintain that the union did not apprise them of the status of the case before the Award was issued. They do not claim that they affirmatively sought information but the Union did not respond. *See Hassay*, Decision No. B-2-2003; *Lein*, Decision No. B-27-99 (union's failure to respond to a unit member's request for the status of a grievance may be actionable under the NYCCBL). The Union counters that it gave reports at membership meetings, that O'Connell spoke at a membership meeting after the first arbitrator died, and that no Petitioner has asserted that he or she called the union and was denied a response. Petitioners here have not claimed that once the arbitrator had the record, the Union received more

information to divulge to the members. We find that even if the Union did not continually inform the grievants, Petitioners have not pleaded sufficient facts to show either improper motive or gross negligence by the Union or prejudice to them.

B. Information After the Issuance of the Award

Petitioners have not shown a breach of duty based on the Union's alleged failure to provide information following the issuance of the Award. The Union claims that its counsel sent Local 1508 the Award soon after it was issued on April 11, 2004. It is undisputed that as of April 28, 2004, Petitioner Podolsky had spoken with O'Connell, who sent the Award to him on that date. O'Connell also spoke to other Petitioners, to whom she sent copies of the Award. Some Petitioners complain that the Union withheld information because they mistakenly believed that they received only partial copies of the Award. These Petitioners did not recognize that the arbitrator explained why he sustained individual grievants' claims but did not describe his application of the standard to those grievants he denied. Nor have Petitioners shown that the way the Union disseminated information was discriminatory or in any way improperly motivated.

Furthermore, Petitioners have not demonstrated prejudice. They could not "appeal" the Award within a certain period, as they allege. The Union used its discretion to decide that it had no grounds under the strict requirements of CPLR § 7511 to seek to vacate or modify the Award. Therefore, Petitioners have not presented a *prima facie* case on the issue of failure to provide information.

Petitioner Roman's Claims

Five months after Union President Cannizzo filed the group grievance, Petitioner Roman filed an individual out-of-title grievance in June 1995 and settled it in December 1995. Roman alleges that Cannizzo told him not to file another grievance because Cannizzo would be filing a group grievance in the future. This Board finds that Roman's rendition of Cannizzo's statement is questionable since Cannizzo had filed the grievance at least 12 months prior to the time Roman contends this statement was made. Even if Cannizzo made the statement as alleged, his bad advice or poor judgment does not rise to the level of a breach of the duty of fair representation. Petitioner has made no allegation that Cannizzo acted in bad faith. *See Schweit*, Decision No. B-36-98 at 14-15. Moreover, the Union did make Roman part of the 40 grievants who would continue in the arbitration in 1997. Only when the City objected in 1999 did the Union, based on its assessment of Arbitrator Rosenberg's potential ruling on the effect of Roman's settlement, withhold his name from the grievance. No facts pleaded show that the Union's removing Roman's name was arbitrary, discriminatory, or done in bad faith. *See Whaley*, Decision No. B-41-97 at 20 (union acting in good faith has no obligation to pursue grievance which it believes lacks merit).

In addition, we are not persuaded that the Union breached its duty of fair representation by its alleged failure to inform Roman in 1999 that his name was withdrawn. Again, nothing in the record suggests that the Union's failure was improperly motivated or grossly negligent. *See McAllan*, Decision No. B-15-83. Therefore, we do not reach the second question whether Roman presented sufficient facts to show prejudice.

Petitioner Podolsky's Claims

Turning to Petitioner Podolsky's claims of retaliation and improper representation, we find both untimely. Agnello, Podolsky's manager, testified in 1999. Any claim that he used the hearing to retaliate against Podolsky should have been filed four months after the testimony was given. Similarly, any petition alleging that the Union's attorney did not properly present Podolsky's case should have been filed within four months of the time that Podolsky knew or should have known of the alleged violation. *See Raby*, Decision No. B-14-2003. The instant petition having been filed in 2004, we deny Podolsky's claims of retaliation against the City and breach of the duty of fair representation against the Union.

Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail.[3] *See* OCB Rule § 1-07(f)(2); *Raby*, Decision No. B-14-2003 at 13. Accordingly, the petition is dismissed in its entirety.

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[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-2425-04, filed by Mary Ellen Burtner, Frank Caputo, Benard Chan, Dennis Galvin, Stanley Podolsky, Anthony Rispoli, Henry Roman, Michael Schmiedel, Thomas Boyle, Harold Browder, and John Giordano, be, and the same hereby is, dismissed.

Dated: January 27, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER