James-Reid v. PBA, **77 OCB 16 (BCB 2006)**, [Decision No. B-16-2006 (ES)]
OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

AMRYL JAMES-REID,

Petitioner,

Decision No. B-16-2006 (ES)
Docket No. BCB-2539-06

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,
WORTH, LONGWORTH & LONDON, P.C.,

Respondents.
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DETERMINATION OF EXECUTIVE SECRETARY

On March 14, 2006, Amryl James-Reid filed a *pro se* verified improper practice petition against the Patrolmen's Benevolent Association ("PBA" or "Union"). The New York City Police Department ("NYPD" or "City") was served, and is the subject of allegations in the petition, although not named in the caption, which arguably may constitute the requisite joinder 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 a series of transactions between petitioner, the City, and the Union, and culminates in a claim that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) when the counsel afforded

[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.

petitioner by the Union in her disciplinary hearing for alleged misconduct: (1) induced petitioner to waive her rights to a hearing and plead guilty to charges and specifications outside of the applicable limitations period provided for such charges, and of which petitioner had maintained her factual innocence; (2) failed to raise in the disciplinary process the preclusive effect of an alleged finding of a special master in a federal civil rights action that petitioner had been the subject of, and was eligible for an award of compensation for, "discriminatory discipline" arising from the facts and circumstances comprising the disciplinary charges against her; and (3) failed again to raise these issues to the Commissioner in opposing the recommended penalty of termination. Although the petition asserts a number of claims that are outside the purview of the NYCCBL, and thus, beyond the jurisdiction of this Board, these three claims are timely and present issues that fall within the scope of this Board's jurisdiction. Moreover, the petition, although it fails to name the City as a party, was timely served on it, and is amended *nunc pro tunc* to join the City as required by NYCCBL §12-306(d).

BACKGROUND

Petitioner, an African-American, was a police officer employed by the City in the New York City Police Department for approximately sixteen years. Although she alleges that she received many accolades and awards from the NYPD, petitioner also asserts that throughout her career, she "has been discriminated against because of her race by being unfairly disciplined when compared to other Caucasian police officers." (Petition at ¶1). Plaintiff was a class member in a federal civil rights class action, *Latino Officers' Association, et al. v. City of New York, et al.*, 98 Civ. 9568 (LAK), asserting discrimination in disciplinary matter based on race and national origin, as well as a pattern and practice of retaliatory discipline predicated upon

complaints of discrimination.

Petitioner asserts that she was the subject of inappropriate discipline on three specific occasions. The first occurred in July 2001, when, upon being apprised of her estranged husband's arrest, she contacted his date for that evening, apparently a witness to her estranged husband's arrest. The second took place in December 2001, when petitioner was off duty, and a stray bullet pierced her windshield. Petitioner drove her son home and called the incident in, rather than reporting directly to the nearest precinct. With respect to the latter incident, petitioner asserts that when she spoke to her commanding officer, he informed her that she had taken the appropriate action in the circumstances presented. Finally, in or about September through December, 2001, while the Municipal Credit Union's computer system was shut down in the wake of the terrorist attack of September 11, 2001, petitioner overextended her credit line by approximately $6,000. Upon being made aware of this fact, petitioner worked out an agreement with the credit union to repay the overextended amount, as well as finance charges, treating the overextended amount as a loan. All three of these incidents resulted in the service of charges and specifications served upon petitioner on December 10, 2002, charging her with violations of, respectively, Patrol Guide[2] sections 203-10 (regulating Public Contact–Prohibited Conduct), 212-32 (regulating Off Duty Incidents Involving Uniformed Members of the Service) and of Penal Law section 155.35, prohibiting Grand Larceny.

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[2]The Patrol Guide "is an internal manual – nearly 1,500 closely printed pages – containing thousands of rules, procedures and policies adopted by the Police Commissioner for the governance, discipline, administration and guidance of the Police Department." *Galapo v. City of New York*, 95 N.Y.2d 568, 574-575 (2000); *see Forster v. City of New York*, 309 AD2d 578 (2d Dept. 2003). Violations of the Patrol Guide's provisions are proper matters for discipline of employees. *Id.; see also, Williams v. Police Department of New York*, 50 N.Y.2d 956 (1980); *People v. Feerick*, 93 N.Y.2d 433, 442-443 (1999).

In or about February 2004, the class action was settled, creating a fund in the amount of $20,000,000, to be administered among the members of the class based upon the valuation of their claims by Special Masters Kenneth Feinberg and Peter Woodin. As part of the terms of the settlement, class members NYPD officers and were charged with disciplinary infractions were permitted "to seek a stay of a formal disciplinary trial that will allow the OEEO [the NYPD's Office of Equal Employment Opportunity] to investigate a claim that the hearings charges are a result of discrimination," and that "any defense of discrimination raised in a disciplinary trial be addressed and resolved in writing by the Trial Room judge." (Petition, Exhibit "C").

In June 2005, petitioner met with the Special Masters, and apprised them as to the nature of her claims that she had been subjected to discipline in a discriminatory manner. In July, she contacted the Special Masters again, informing them that the NYPD had failed to follow its usual practice of reducing settlement offers with respect to charges and specifications to writing, and of her belief that such failure represented retaliation for her participation in the lawsuit. On November 10, 2005, Special Masters Feinberg and Woodin sent a letter to petitioner in which they informed her that she had been deemed eligible to receive compensation and that her award was "$75,000 for a Discriminatory Discipline claim." (Petition, Exhibit "B").

Petitioner was afforded counsel in her disciplinary trial by the Union, which designated as her counsel Worth, Longworth & London. Stuart London, acting on behalf of the firm, undertook the presentation of petitioner's defense. According to petitioner, London was made aware of petitioner's participation in the class action, of the terms and conditions of the settlement, and of petitioner's award. (Petition ¶¶16, 19). Despite this, counsel failed to seek a stay of the disciplinary trial. (Petition ¶ 19). Although not explicitly alleged in the petition, it is

reasonable to infer from the statement of facts provided that petitioner asserts that in failing to seek a stay, counsel also failed to request an investigation by the OEEO of the disciplinary charges against petitioner, pursuant to the settlement. (Petition ¶18). Additionally, petitioner asserts, counsel failed to move to dismiss the charges against her, despite the fact that at least one, that arising from petitioner's dealings with the MCU, was clearly brought outside of the eighteen month limitations period provided by the Patrol Guide.

On November 14, 2005, petitioner's disciplinary trial was held before Commissioner Robert Vinal, and counsel allegedly entered a guilty plea on behalf of petitioner, but then stated that on the charge arising from the MCU overdrawing, petitioner would admit the underlying conduct, but would enter a legal argument that the conduct admitted did not constitute a violation of the Patrol Guide's proscriptions. Petitioner was then questioned by Commissioner Vinal with respect to these allegations. (Petition at ¶21). Petitioner was found guilty, and Commissioner Vinal recommended she be terminated.

On February 2, 2006, counsel submitted a so-called "Fogel Letter", that is, a letter to the Police Commissioner challenging the hearing officer's decision and urging reasons why the recommendation of termination should not be adopted, pursuant to *Matter of Fogel v. Board of Educ.*, 47 A.D.2d 925 (1975).[3] In that letter, petitioner alleges, counsel failed to raise the issues of the time-barred charge, to which petitioner had been induced to plead guilty, the possible preclusive effect of the Special Masters' award in her favor, and Commissioner Vinal's eliciting petitioner's testimony in a compromising and incomplete way, based upon the confusion as to

[3]The right afforded employees in *Fogel* to challenge the findings and recommendations of a hearing officer to the final decision-maker applies specifically to police officers challenging discipline recommendations. *See. e.g., Scully v. Safir*, 282 A.D.2d 305, 308 (1st Dept. 2001)

whether or not petitioner was pleading guilty to all of the charges.

Commissioner Raymond Kelly signed a final order terminating petitioner on February 23, 2006, effective that day. This proceeding was filed on March 14, 2006. In her petition, petitioner claims that the Union breached its duty of fair representation in several ways: First, she asserts that the failures to move to dismiss the time-barred claim involving the MCU, and to seek a stay of the disciplinary trial were not strategic decisions within the discretionary judgment of counsel, but so fundamentally erroneous as to constitute no representation at all. Similarly, petitioner asserts that the failure to bring the Special Masters' award in her favor to the attention of the Commissioner likewise constituted a fundamental failure of representation.

Petitioner further asserts that counsel falsely represented to her that a settlement agreement in principle had been arrived at between the NYPD and her counsel, whereby she would plead guilty at the hearing, in exchange for which she would receive a penalty other than termination. Counsel failed to obtain written confirmation of this agreement, in variance from the standard procedure. Petitioner asserts that respondents' "conduct towards Petitioner, who is an African-American female, was discriminatory and done in bad faith." (Petition at ¶4(e)).

DISCUSSION

Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and determined that it must be dismissed in part as to parties not properly subject to this Board's jurisdiction, and asserts certain claims outside of the

scope of § 12-306 of the NYCCBL.[4]

As a threshold matter, to the extent the complaint is brought against the Union for its allegedly insufficient representation in the disciplinary trial, petitioner has asserted facts such that the petition would be timely, as at least some of the acts alleged to form the basis of the petition took place within four months of the filing of the petition. NYCCBL §12-306(e); *Hassay*, Decision No. B-2-2003 at 10. Petitioner may be able to establish that the course of conduct complained of constitutes a continuing violation of the duty of fair representation, such that petitioner's time to file did not begin to run until the last complained of act, the filing of the allegedly inadequate *Fogel* letter on February 2, 2006. *Id.; Schweit,* Decision No. B-36-98 at 13-14. Even if petitioner does not establish this theory, her claim regarding the nature of her representation at the disciplinary trial, alleged to have taken place on November 14, 2006, and thereafter, is, at least on its face, timely as having been brought within the four month period.[5]

The claims asserted against Stuart London, and Worth, Longworth & London, LLP are dismissed, on the ground that an improper practice charge pursuant to §12-306(b) of the NYCCBL is properly brought against the employee organization, and not against the agent acting on behalf of the Union. *See, Reid*, Decision No. B-4-2004 (ES) at 3, *citing Hassay*, Decision No.

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[4]This Board has the inherent authority to grant partial dismissal of a petition, dismissing clearly insufficient claims while allowing claims that state a cause of action to go forward. *See, e.g., Fabbricante*, Interim Decision No. B-39-2002; *Committee of Interns and Residents*, Decision No. B-8-85; *McAllan*, Decision No. B-12-84.

[5]If a continuing violation claim can be made out, acts outside of the four month limitations period are "admissible as for purposes of background information to establish an ongoing and continuous course of violative conduct." *Schweit*, Decision No. B-36-98 at 13; *citing, District Council 37,* Decision No. B-37-92; *see also, Reid*, Decision No. B-4-2004 at 4 (ES).

B-02-2003; *Morgan*, Decision No. B-10-2003 (ES). Because a "public employer or a public employee organization may be held responsible for the acts of its agents," and the attorney respondents were acting as agents for the Union, the Union and not the law firm or lawyer, is the proper party to this proceeding. *Id.*

Petitioner's complaint does not join the City as a party as is required under NYCCBL § 12-306(d). However, the proof of service attached to the petition reflects that service was made on the City on March 14, that is, contemporaneous with filing the charge, and the petition bears a stamp denoting its receipt by the Office of Labor Relations on behalf of the City. This Board has often restated its practice to allow *pro se* petitioners "great latitude in filing pleadings" including joining the City as a necessary party. *Schweit*, *supra,* at 12-13; *citing* B-24-94; B-21-93. In the instant case, where no direct claims are asserted in the petition against the City, and the City has received actual notice of the claims asserted, and has been properly and timely served, on the evidence to date, the petition is amended, *nunc pro tunc* to join the City pursuant to NYCCBL § 12-306(d).

In pleading and proving this improper practice claim, petitioner must be aware that this Board has limited jurisdiction, and that "[a]ny claim under a statutory scheme other than the NYCCBL which Petitioner may have ... is also unavailing in this improper practice proceeding....[u]nless such a claim would also otherwise constitute an improper practice." *Edwards*, Decision No. B-35-2000, *citing*, *Pruitt*, Decision No. B-11-95, n. 7. Where such is not the case, "the Board of Collective Bargaining is without jurisdiction to consider claims in an improper practice proceeding." *Id.* Thus, petitioner's claims against the attorney respondents, or any claims against the City arising from the allegations of discrimination contained in the petition

are dismissed, without prejudice to their being brought in an appropriate forum. Likewise, any claims against the Union sounding in "discrimination and disparate treatment based on personal relationship, race or religion are not related to rights protected under the NYCCBL and may not be addressed by this Board" except to the extent they involve allegations relating to "the negotiation, administration, or enforcement of a collective bargaining agreement." *Samuels,* Decision No. B-1-2004 (ES); *citing Williams*, Decision No. B-48-97; *Siegel*, Decision No. B-23-91. In the instant case, petitioner has asserted that the representation provided by Union-appointed counsel in her disciplinary trial, held pursuant to the collective bargaining agreement, was so inadequate as to breach the duty of fair representation, and was motivated by invidious discrimination.

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." In the context of providing representation at disciplinary hearings, this Board has required a showing that the Union's actions here were arbitrary, discriminatory, perfunctory, or in bad faith. *Burtner*, Decision No. B-01-2005 at 13-14; *see also, Fabbricante*, Interim Decision No. B-39-2002 at 20. The allegations in the petition that the representation provided petitioner by the Union through its selected counsel at her disciplinary trial breached the duty of fair representation do not warrant dismissal pursuant to §1-07(c)(2) of the Rules of the Office of Collective Bargaining. The remaining charges are so dismissed, without prejudice to their being brought in an appropriate forum.

The petition is dismissed to the extent it asserts claims against Worth, Longworth & London, P.C. The petition is deemed amended to include as a respondent the City of New York

Police Department. The caption in all future filings will be amended to reflect the dismissal of Worth, Longworth & London, P.C., and the addition of the City. The sole claim to be addressed is the alleged breach of the duty of fair representation under the NYCCBL based on the representation provided by Union-provided counsel in responding to the disciplinary charges, and culminating in the final order of termination. Respondents are hereby directed to answer the petition within ten (10) business days of service of this decision. Petitioner shall have ten (10) days from the service of the respondents' answer in which to file a reply, and any supporting documentation.

Dated: New York, New York
May 2, 2006

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John F. Wirenius
Executive Secretary

Section 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1):

Executive Secretary Review of Improper Practice Petitions.

(i) Within 10 business days after a petition alleging improper practice is filed, the Executive Secretary shall review the petition to determine whether the facts as alleged may constitute an improper practice as set forth in § 12-306 of the statute. If, upon such review, the Executive Secretary determines that the petition is not, on its face, untimely or insufficient, notice of such determination shall be served upon the parties by mail. Such determination shall not constitute a bar to defenses of untimeliness or insufficiency which are supported by probative evidence available to the respondent. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, the Executive Secretary may issue a decision dismissing the petition or send a deficiency letter. Copies of such decision or deficiency letter shall be served upon the parties by certified mail.

(ii) Within 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board an original and three copies of a written statement setting forth an appeal from the decision with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

(iii) Within 10 business days after service of a deficiency letter from the Executive Secretary as provided in this subdivision, the petitioner may serve an amended petition upon each respondent and file the original and three copies thereof, with proof of service, with the Board. The amended petition shall be deemed filed from the date of the original petition. The petitioner may also withdraw the charge. If the petitioner does not seek to amend or withdraw the charge, but instead wishes to file objections to the deficiency letter, the petitioner may file with the Executive Secretary an original and three copies of a written statement setting forth the basis for the objection with proof of service thereof upon all other parties. If the petitioner does not timely file an amendment or otherwise respond, the charge will be deemed withdrawn and the matter closed. Upon review of the amended petition or written objection filed by the petitioner, the Executive Secretary shall issue either a notice that the petition is not on its face untimely or insufficient or a written decision dismissing the improper practice petition.