Samuels, 77 OCB 17 (BCB 2006)

[Decision No. B-17-2006(IP)] (Docket No. BCB-2496-05)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation by refusing to pursue a grievance to arbitration. Petitioner argued that because he was wrongly disqualified by DCAS, the Union should have arbitrated the issue of back pay. This Board found that there was insufficient evidence to make out a *prima facie* case that the Union acted in an arbitrary or perfunctory manner in refusing to take the case to arbitration. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

HENRY SAMUELS III,

Petitioner,

-and-

DISTRICT COUNCIL 37, and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES and NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

DECISION AND ORDER

Henry Samuels III filed a verified improper practice petition on August 2, 2005, and an amended petition on September 2, 2005, against District Council 37 (“DC 37” or “Union”) and the New York City Department of Citywide Administrative Services (“DCAS” or “City”). Petitioner alleges 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 refusing to request arbitration to seek back pay for Petitioner's wrongful termination. The Union argues that after careful research, it reached the decision that the grievance was not arbitrable. The City argues that Petitioner cannot show that DC 37 acted in an arbitrary or capricious manner or that DCAS violated Petitioner's rights. This Board dismisses the petition for failure to establish a *prima facie* case that the Union breached its duty of fair representation.

BACKGROUND

On December 6, 1999, Henry Samuels III was hired to work in the competitive title of Eligibility Specialist I at the Human Resources Administration ("HRA"). In January 2001, DCAS determined that under Civil Service Law ("CSL") § 50(4)(a), (f), and (g), Samuels did not meet the qualification requirements for that title and informed HRA.[1] By letter dated January 25, 2001, HRA

---

[1] Under CSL § 50(4), DCAS may investigate the qualifications and background of an eligible employee for up to three years after appointment, and longer in the case of fraud.

In addition, CSL § 50(4) provides, in relevant part:

> Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
>
> (a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or
>
> * * *
>
> (f) who has intentionally made a false statement of any material fact in his application; or
>
> (g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment. . . .
>
> * * *
>
> No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

terminated Samuels's employment effective that day because he was "marked not qualified."

In March 2002, the Union represented Petitioner at a hearing at the Civil Service Commission ("Commission") to appeal the termination. On July 17, 2002, the Commission found that Samuels gave reasonable explanations concerning questions on his original application, reversed DCAS's finding that Petitioner was not qualified for his position, and ordered his reinstatement. On November 15, 2002, DCAS informed HRA that Samuels should be restored to his position as Eligibility Specialist I and that his time off the payroll should be treated as a leave of absence without pay. Samuels was reinstated on December 18, 2002.

Samuels states that after reviewing various documents from the City, he sought help from the Union on April 2, 2003, to file a grievance to get back pay.[2] On that same day, DC 37 council representative Kenneth Mulligan assisted Samuels in filing a Step I grievance claiming that the employer's wrongful and discriminatory disqualification resulted in Samuels's dismissal and his becoming destitute. The grievance cited to Article VI, § 1(e), of the parties' Clerical Contract ("Agreement").[3] The remedy sought was to be made whole from the date of dismissal to reinstatement, including back pay, benefits, and seniority.

On April 6, 2003, Samuels called the Union. The day after, Mulligan told him that HRA had not yet acted and helped Samuels file a Step II grievance alleging essentially the same claims and

---

[2] Petitioner has attached as exhibits, among other documents, five "Employee Updates," each from the Payroll Management System and each with a different code for the leave.

[3] Article VI, § 1(e), defines "grievance" as:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the employee is serving in the employee's permanent title or which affect the employee's permanent status.

requesting the same remedy. Samuels spoke with Mulligan by phone on several occasions over the summer to learn about the progress of the Step II grievance. In denying the Step II grievance on September 5, 2003, the Director of Labor Relations at HRA stated that the Commission did not recommend that Samuels be compensated for the time during which he was terminated and that HRA had converted the period of his termination to a leave without pay.

On October 6, 2003, the New York City Office of Labor Relations received the Union's request for a Step III review. The grievance was denied on September 15, 2004, on the grounds that the Commission had not recommended back pay and no contractual provision other than Article VI, § 1(e), defining "grievance," was cited for an alleged violation.

On April 4, 2005, Mulligan sent a memorandum to the Legal Division of DC 37 to ask whether an attorney would be assigned to Samuels's case and whether the case would be sent to arbitration. Robin Roach, Senior Assistant General Counsel at DC 37, wrote a memorandum to Mulligan on April 5, 2005, explaining the history of the case and stating that:

> The grievance is not viable. Mr. Samuels was not terminated as a result of disciplinary charges. He was disqualified pursuant to Section 50 of the Civil Service Law, as well as DCAS rules. As such, DCAS's decision could not be grieved under the contract. Mr. Samuels availed himself of the remedy to which he was entitled. Neither he nor the Union can pursue the matter at arbitration.
>
> While Mr. Samuels is unhappy because he did not receive back pay for the period of time he was off payroll, the Civil Service Commission lacked the authority to award him back pay. The Commission is only authorised to review DCAS's actions. It may affirm, modify or reverse DCAS's determination, but the Commission cannot award back pay to Mr. Samuels or another appellant. In *Department of Personnel v. City Civil Service Commission*, 79 N.Y.2d 806 (1991), the Department of Personnel ("DOP"), DCAS's predecessor agency, filed a court action challenging as illegal a Civil Service Commission decision reversing a DOP's disqualification of an employee and awarding him back pay.
>
> In that case, New York State's highest court ruled: "An administrative agency has

> only those powers expressly or impliedly given it. We have delineated the powers reserved to the Commission as 'those of an appeals board: to hear and decide appeals by persons aggrieved by [petitioner's] determinations.'" *Id*. at 807. The Court further stated that since the power to award back pay is neither [sic] expressly given, it may not necessarily be implied as part of the Commission's delegated powers. Therefore, in the absence of such authority, the Commission may not grant back pay. 79 N.Y. 2d at 807.
>
> In sum, this matter was pursued in the appropriate forum (Civil Service Commission). It cannot be re-constituted as a grievance in order to give Mr. Samuels back pay because Mr. Samuels has already had his "day in court." In light of the above, the Legal Department will not file a request for arbitration in this matter.

On April 7, 2005, Mulligan and Roach as well as a Division Director and Assistant Division Director met with Petitioner to inform him of the decision not to pursue arbitration. According to Petitioner, he asked Roach to explain the meaning of Article VI, § 1(e), because Mulligan had filed the grievance under that section of the Agreement. Petitioner says that Roach replied: "Find it on your own." Petitioner also claims that Roach added: "You should be thankful that you have your job back," and "You should work hard to keep your job." When Petitioner asked how DCAS had the right to convert a reinstatement to a leave of absence without pay, Roach purportedly replied that the Union could work to get Petitioner's job back but could not send the case to arbitration.

In an affidavit attached to the Union's answer in this case, Roach states that she was well aware of Petitioner's situation since she was the supervising attorney in his case before the Commission. Prior to the Commission hearing, she had met with Petitioner three times for two hours each time and had researched and discussed the case. According to Roach, because Petitioner was disqualified, not terminated for wrongful discipline, his case was properly before the Commission, which reviews DCAS's determinations under CSL § 50(4). Based on her experience and judgment, Roach determined that Petitioner was not wrongfully disciplined for misconduct

within the meaning of Article VI, § 1(e), of the Agreement; therefore, a claim seeking back pay for wrongful termination was not grievable. When Roach attempted to explain her position, Samuels was upset and, according to Roach, insisted that the Union could pursue some action against DCAS and accused Roach of wishing that he had not been reinstated. Roach also states that Petitioner never asked for a copy of the contract but for a copy of the Court of Appeals decision noted in her memorandum to give to local politicians with whom Petitioner had spoken. Roach responded that they could find the decision based on the citation in her memo.

Petitioner has also included as an exhibit an article in the *Public Employee Press* headlined: "OTB Maintainer Wins Upgrade and Retro Pay," which states that DC 37 assisted a member who had been rehired instead of reinstated and had thereby had a reduced salary and a 15-year loss of seniority. This employee was restored to his position and given back pay for the years after he was rehired.

As a remedy, Petitioner requests that this Board send his case to arbitration so that he can recoup lost wages for the almost two years that he was out of work. He also seeks to be compensated for lost benefits, including repayment to the pension fund.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims 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 his

grievance in a perfunctory manner.[4] The essence of Petitioner's claim is that because his termination was wrongful, the Union acted in bad faith when it refused to arbitrate DCAS's decision not to provide back pay and accrued sick time and annual leave upon his reinstatement. Pursuant to NYCCBL § 12-306(d), Petitioner named the City as a co-respondent.[5]

Petitioner states that various City documents indicate that he was reinstated, and Barron's Law Dictionary defines "to reinstate" as "to restore to a former state, authority, station, or status for which one has been removed; to restore all benefits accruing under the policy." It was DCAS that determined not to allow Petitioner to recoup almost two years of lost wages and accrued sick and annual leave time and then claimed in letters/step responses that the responsibility fell on the Commission. The payroll codes concerning reasons for Petitioner's leave were false in the City documents. Since he was disqualified and then reinstated, in his view, he was wrongfully terminated, not on a leave of absence without pay. Petitioner says that he cannot understand how

---

[4] 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 . . . .

[5] 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.

a wrongful dismissal could be converted to a leave without pay.

Furthermore, Mulligan, the council representative, assisted Petitioner in filing grievances at the earlier steps. These grievances specifically claimed wrongful disciplinary action, cited to Article VI, § 1(e), of the Agreement, and sought back pay from the date of dismissal through reinstatement. Petitioner asks how Mulligan could be wrong in filing these grievances and wonders how he could not have consulted with the DC 37 Legal Department before doing so. In Petitioner's opinion, the Union started out with the right intentions but then misled Petitioner, strung him along for 18 months while telling him to be patient before making an unfavorable decision, and acted in a perfunctory manner by refusing to address the issue of the leave without pay. Moreover, Petitioner asserts that the form language at the conclusion of the Step III denial noting the time in which the Union may appeal creates a substantive right on the part of Petitioner to arbitrate his grievance.[6]

As to his meeting with the Union, Roach's statements that Petitioner should get the contract himself and that he had had his "day in court" made him feel that the Union believed that he was not qualified as an Eligibility Specialist and that the Commission did him a favor in restoring his job. Even if the Union did not so intend, the statements indicate that the Union acted in bad faith. Petitioner cites to NYCCBL § 12-306(c), which provides:

> Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
> (1) to approach the negotiations with a sincere resolve to reach an agreement. . . .

Petitioner argues that the Union breached its duty of fair representation by failing to negotiate in

---

[6] Following a conference at the Office of Collective Bargaining on February 7, 2006, Petitioner was permitted, with the consent of all parties, to submit a letter to clarify the claimed contractual basis for his assertion that the Union should have arbitrated his back-pay grievance. The Board has reviewed and considered the matters raised in Petitioner's February 28, 2006, submission.

good faith with the City on his behalf.

Finally, Petitioner asserts that the newspaper article discussing the member whom DC 37 assisted in getting back pay shows disparate treatment and that the Union's failure to support him in challenging the conversion of his wrongful termination to a leave without pay demonstrates its bad faith.

Union's Position

The Union asserts that it did not breach its duty of fair representation when it determined that taking the grievance to arbitration would not be viable. The Union's Legal Department exercised sound legal and professional judgment in making its decision.

DCAS's original finding that Petitioner was not qualified for his position was appealable to the Commission, not an arbitrator. The Union took efforts to have Petitioner restored to his position. After the reinstatement, Mulligan did assist Petitioner in filing the grievance at the early steps. However, when the Legal Department reviewed the grievance, Roach determined that the disqualification did not fall within the contractual definition of "grievance" because the agency had not served written charges of incompetence or misconduct, as provided in Article VI, § 1(e). Thus, Roach found that the claim did not fall under the Agreement and, therefore, could not be brought to arbitration.

Moreover, the New York State Court of Appeals found in a case similar to Petitioner's that the Commission lacked the express authority to award back pay for actions brought under CSL § 50, as was Petitioner's, and the Court would not imply such authority. Thus, Petitioner had no legal right to back pay.

Finally, the Union contends that it did not treat Petitioner's grievance in a perfunctory

manner. Roach states that she never intimated to Petitioner or anyone else that he should not have been reinstated. She understood that Petitioner was upset, but the Union did not act in bad faith and there has been no breach of the duty of fair representation.

City's Position

The City argues that Petitioner has not alleged sufficient facts to make out a *prima facie* claim of a breach of the duty of fair representation. A petitioner must show that a union's action was arbitrary, discriminatory, or founded in bad faith, and a union does not violate its duty even if it makes an error of judgment or is negligent.

The City contends that DC 37 did not act in bad faith when it determined that Petitioner's request for back pay was not grievable. The Union reviewed the law, met with Petitioner, and furnished him with a memorandum explaining its decision. The Union has authority to judge whether a claim is meritorious and evaluate when to prosecute it. Thus, the Union did not act in a perfunctory manner even if it first thought that the Commission could grant back pay and later determined that it had no such authority. Inquiry into strategic decisions is outside the scope of the Board's review.

In addition, the newspaper article submitted does not demonstrate that the Union acted in a disparate manner. Even if the article validly portrayed the facts of that case, any comparison with the instant case is based on surmise. Since the Union has not contravened the statute, the action against the City must be dismissed.

Nor does Petitioner allege an independent claim of improper practice against the City, DCAS, or HRA, the City argues. Petitioner's appeal was pursuant to CSL § 50(4), over which this Board has no jurisdiction. DCAS and HRA appropriately acted in accordance with the Commission's July

17, 2002, decision, which directed reinstatement but not back pay.[7]

Finally, according to the City, the claim is untimely because the Step II decision was issued in September 2003, well before this petition was filed.

DISCUSSION

As an initial matter, this Board finds the petition timely. 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. . . .

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); *Burtner*, Decision No. B-1-2005 at 17. In a petition alleging breach of the duty of fair representation, the filing of an improper practice claim must be within four months 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. Here, Petitioner filed the petition on August 2, 2005, within four months from the time he knew on April 5, 2005, that the Union would not proceed to arbitration. Therefore, the petition is not time-barred.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), defined the duty of fair

---

[7] The City notes that the exact characterization of the period during which an individual is separated from a City position is crucial, and the length of separation when there has been a "reinstatement following a break in service" can affect rights and benefits. To eliminate negative consequences in cases such as Petitioner's, DCAS instructs agencies to characterize such separations as "reinstatement following a leave of absence."

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.

Under NYCCBL § 12-306(b)(3), the duty of fair representation similarly requires a union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *See Del Rio*, Decision No. B-6-2005; *Whaley*, Decision No. B-41-97 at 15; *see also Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employee Relations Board).

In *Vaca v. Sipes, supra*, the petitioner, whose doctor certified that he was fit to resume work after a sick leave, was discharged after the employer's doctor found petitioner medically unfit. The union processed the grievance through all the lower steps of the grievance process and then sent the petitioner to another doctor, who did not support the petitioner's position. Therefore, the union refused to take his grievance to arbitration. The Supreme Court stated that the evidence revealed that the union diligently supervised the grievance, with the business representative serving as advocate during the first steps. Only when the union's efforts proved unsuccessful did the union conclude that the arbitration would be fruitless. *Vaca*, 386 U.S. at 193, 194. The Supreme Court determined that an individual employee could not compel arbitration of his grievance regardless of its merit, for permitting such action would undermine the grievance and arbitration procedure, which gives the union discretion to invoke arbitration and contemplates attempts to settle grievances in good faith prior to arbitration. *Id*. at 191. If, as in *Vaca*, a union does not act in an arbitrary or perfunctory manner, the union does not breach its duty of fair representation merely because it refuses to pursue

the grievance to arbitration. *Id*. at 192, 194.

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 Wooten*, Decision No. B-23-94 at 15; *Page*, Decision No. B-31-94 at 11. A union does not breach its duty of fair representation for failing to pursue a grievance if the decision is not perfunctory and the union informs the grievant. *See Minervini*, Decision No. B-29-2003 at 15; *Keitt*, Decision No. B-16-79 at 8. This Board may evaluate the "arguable merit of a claim, in a limited fashion, to determine whether a union's failure to pursue" a grievance was arbitrary or perfunctory. *Whaley*, Decision No. B-41-97 at 18; *see Anzevino*, Decision No. B-32-92 at 25. However, the 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. A grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation alone does not constitute a breach of the duty of fair representation. *Burtner*, Decision No. B-1-2005 at 14; *Whaley*, Decision No. B-41-97.

In *Keyes*, Decision No. B-32-86, the Director of the Department of Personnel, the predecessor agency to DCAS, found the petitioner ineligible for her position four months after she completed her probationary period, and her agency discharged her. The petitioner alleged that the union breached its duty of fair representation by failing to file a grievance on her behalf or by failing to represent her before the Commission. The petitioner asserted that the union could not refuse to process a grievance merely because the termination was effected by the Personnel Director. *Id*. at 4. The union responded that Article VI of the parties' collective bargaining agreement specifically provides that the disputes involving decisions by the Personnel Director are not subject to the grievance and arbitration procedure. *Id*. at 6. This Board held that since the contract unambiguously excluded

disputes involving the Personnel Rules and Regulations, the union's determination that filing a grievance on the petitioner's behalf would be pointless was neither arbitrary nor in bad faith. *Id*. at 8.[8]

Here, just as in *Vaca v. Sipes, supra*, the council representative assisted Petitioner through all the lower steps of the grievance process. And here, just as in *Keyes, supra*, Petitioner sought assistance from the Union concerning a disqualification under the Personnel Rules and Regulations. Like the Supreme Court in *Vaca* and this Board in *Keyes*, we cannot in this case deem the Union's decision not to pursue the grievance arbitrary or perfunctory. First, the Union helped Petitioner win his reinstatement at the Commission, the jurisdiction the Union deemed appropriate to appeal his disqualification under the Personnel Rules. The council representative, without the aid of counsel, then assisted Petitioner in filing grievances at the lower steps concerning his back pay. After the Step III determination in September 2005, the council representative sought assistance from the Union's Legal Department. Only after conducting research and writing a legal memorandum did the Union determine that the grievance was not meritorious and arbitration would be fruitless. The Union then immediately informed Petitioner of its decision. The Union's actions were neither perfunctory nor in bad faith.

Although Petitioner argues that his disqualification and subsequent reinstatement consisted of wrongful discipline, not a leave of absence without pay, the Union found that Petitioner's discharge was not a result of a "wrongful disciplinary action," defined in the Agreement as taken against a permanent employee who is covered by the CSL and upon whom the agency "has served

---

[8] The Board also found that the union did not breach its duty of fair representation by refusing to represent the petitioner before the Commission.

written charges of incompetence or misconduct." Thus, the Union reasonably determined that the issue of back pay was not arbitrable under the Agreement. Further, we find no merit in Petitioner's argument that he had a "right" to go to arbitration because the form language in the Step III response indicated that the Union could appeal within a certain time. The Supreme Court and this Board have emphasized the Union's broad discretion in making the strategic decision to proceed with a grievance. *See Vaca*, 386 U.S. at 191; *Minervini*, Decision No. B-29-2003; *Urban*, Decision No. B-20-97.

The Union also found that Petitioner could not appeal the Commission's failure to award back pay since the New York Court of Appeals has ruled that the Commission is not authorized to make such an award under these circumstances. Even if the Union had misinterpreted the Court of Appeals decision and its applicability or subsequent history, which has not been claimed or demonstrated, this Board will not substitute its legal judgment for that of a union when the union acts in good faith. *See Burtner*, Decision No. B-1-2005 at 14.

Petitioner also asserts that the Union acted in bad faith when, at a meeting to discuss his case, the Union refused to provide him with a copy of the Agreement and when Union representatives' statements made him feel that he was not qualified for his position. The Union disputes these claims, but even if they are accurate, Petitioner has failed to demonstrate that the Union's actions were perfunctory or prejudicial under the circumstances of this case. *See Keyes*, Decision No. B-32-86 at 10. Moreover, Petitioner's reference to NYCCBL § 12-306(c)(1) is inapplicable to duty of fair representation claims because that section deals with collective bargaining negotiations between the Union and the City and not with an employee's rights under the Agreement.

Nor has Petitioner made out a *prima facie* case that the Union treated him in a disparate

manner from the way it treated other members. Petitioner points to a newspaper article indicating that DC 37 assisted a member in receiving back pay when he was rehired instead of reinstated. First, newspapers articles have limited probative value. *See Communications Workers of America, Local 1182*, Decision No. B-3-2005 at 7. Second, nothing in the article indicates that the Union helped another employee to receive back pay through the Agreement's grievance mechanism after the employee was disqualified under a provision in the CSL. Moreover, in the instant case, the Union did assist Petitioner in being reinstated, not rehired, so that he was returned to the pay scale and seniority at the position he had held at the time of his termination. Thus, the evidence is insufficient to support a claim of disparate treatment. *See Burtner*, Decision No. B-1-2005 at 16.

Finally, this Board has no jurisdiction over the administration of statutes other than the NYCCBL. *Del Rio*, Decision No. B-6-2005 at 15. Thus, while we sympathize with Petitioner, who was incorrectly disqualified from his position, we do not consider claims that DCAS, upon reinstating Petitioner, erred in characterizing his discharge as a leave without pay or falsified the codes for that leave. If Petitioner is alleging that the Union should have grieved these issues as part of the claim for back pay, we find, as stated above, that the Union researched Petitioner's claims and made its strategic decisions in good faith.

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

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-2496-05, filed by Henry Samuels III, be, and the same hereby is, dismissed.

Dated: May 30, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER