James-Reid, 77 OCB 29 (BCB 2006)

[Decision No. B-29-2006] (IP) (Docket No. BCB-2539-06).

Summary of Decision*:* Union moved to dismiss the petition claiming breach of the duty of fair representation asserting that it owed petitioner no such duty as discipline of New York City police officers constitutes a prohibited subject of bargaining, that representation provided was not attributable to the Union and in any event comported with the duty of fair representation. The Board found that by voluntarily assuming the duty of representing its members in disciplinary hearings, the Union had incurred a duty of fair representation, and that the delegation of that duty did not absolve the Union from liability. The Board further found that the failure to assert a meritless statute of limitations defense could not violate that duty, but the alleged failure to invoke procedures and defenses routinely employed for other similarly situated members could. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

AMRYL JAMES-REID,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. and THE CITY OF NEW YORK,

Respondents.

INTERIM DECISION AND ORDER

The petition in this matter alleges that the Patrolmen's Benevolent Association ("PBA" or "Union") breached its duty of fair representation in violation of Section § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") when the counsel afforded 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 allegedly outside of the applicable limitations period provided for such charges, and of which Petitioner had maintained her factual innocence; (2) failed to raise the preclusive effect of the 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 certain of 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 asserted a number of claims that are outside the purview of the NYCCBL, and thus were properly dismissed by the Executive Secretary as beyond the jurisdiction of this Board, these three claims were not dismissed and are all that remain of the instant proceeding.[1]

On May 24, 2006, respondent PBA filed a motion dismiss the petition ("Motion"). Because we find that the facts alleged in the petition, which we must accept as true for the purposes of deciding this motion, state a cause of action except as to the alleged failure to raise a statute of limitations defense which clearly did not apply, the motion is granted in part and denied in part, and respondent PBA is ordered to file an answer to the petition within ten (10) business days of the date of receipt of this decision.

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[1] The PBA in its motion to dismiss argues that Petitioner has attempted to assert claims sounding in racial discrimination and attorney malpractice, and that these claims are outside of the jurisdiction of this Board. PBA Motion at ¶¶ 24-26. However, any such claims have been explicitly dismissed by the Executive Secretary, and Petitioner has not sought to appeal that determination, which is now final. See *James-Reid*, Decision No. B-16-2006 (ES)at 8-9. Therefore, we need not address the merits of any such claims.

BACKGROUND

On March 14, 2006, Amryl James-Reid filed a *pro se* verified improper practice petition against the PBA. The petition was dismissed in part by the Executive Secretary pursuant to 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)("OCB Rules") in a determination dated May 2, 2006. Pursuant to that determination, the petition was amended *nunc pro tunc* to join as a respondent the New York City Police Department ("NYPD" or "City"), which had been served with the petition at the time of its filing, although not named as a party, as required by § 12-306(d) of the NYCCBL.[2]

Petitioner, an African-American, was a police officer employed by the City in the New York City Police Department for approximately sixteen years. Petitioner alleges both that she received many accolades and awards from the NYPD and 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.) Petitioner was a class member in a federal civil rights class action, *Latino Officers' Ass'n v. City of New York*, 98 Civ. 9568 (LAK), asserting discrimination in disciplinary matters based on race and national origin, as well as a pattern and practice of retaliatory discipline predicated upon her complaints of discrimination.

Petitioner asserts that she was the subject of inappropriate disciplinary charges, which resulted in her termination, and which were based on three specific incidents. The first occurred in July 2001, when, upon being apprised of her estranged husband's arrest, she contacted his date for

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[2] 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.

that evening, apparently a witness to the 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 reported the incident by telephone, rather than reporting directly to the nearest precinct. Petitioner asserts that when she spoke to her commanding officer about this incident, he informed her that she had taken the appropriate action under the circumstances. Finally, in or about September through December 2001, while the Municipal Credit Union's ("MCU") 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 alleges, she worked out an agreement with the MCU to repay the overextended amount to it, as well as finance charges, pursuant to which the MCU treated the overextended amount as a loan.

Each of these incidents became the subject of charges and specifications. The first two incidents were included in charges and specifications served upon Petitioner on December 10, 2002, charging her with violations of, respectively, Patrol Guide §§ 203-10 (regulating Public Contact–Prohibited Conduct), and 212-32 (regulating Off Duty Incidents Involving Uniformed Members of the Service).[3] The third incident (the "MCU Incident") was the subject of a second set of charges, served on Petitioner on or about December 10, 2004, asserting that she had been guilty of conduct in violation of Penal Law § 155.35, prohibiting Grand Larceny.

In or about February 2004, the class action was settled, creating a fund in the amount of

[3] 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 A.D.2d 578 (2d Dep't 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).

$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, who were NYPD officers who had been 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 Master Feinberg and Woodin, and informed them 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 to writing settlement offers with respect to charges and specifications, and that she believed 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.)

In her disciplinary trial, Petitioner was afforded counsel 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. As alleged in the petition, 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 did not seek a stay of the disciplinary trial. (Petition ¶ 19.) Additionally, Petitioner asserts, counsel did not move to dismiss the charges

against her, despite the fact that at least one, that arising from her 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 Incident, Petitioner would admit the underlying conduct, while entering 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. 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 Education*, 48 A.D.2d 925 (1st Dep't 1975).[4] In that letter, Petitioner asserts, counsel did not raise the issues of the allegedly 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, resulting from the confusion as to 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. The petition claims several breaches of the duty of fair representation: (1) counsel failed to move to dismiss the time-barred claim involving the MCU Incident and to seek a stay of the disciplinary trial, errors that were so fundamental as to

[4] 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 Dep't 2001).

constitute no representation at all, and not were not strategic decisions within the discretionary judgment of counsel; (2) counsel failed to bring the Special Masters' award in Petitioner's favor to the attention of the Commissioner, which likewise constituted a fundamental failure of representation; (3) counsel falsely represented to Petitioner that the NYPD and her counsel had reached a settlement agreement in principle, whereby she would plead guilty at the hearing, in exchange for which she would receive a penalty other than termination; and (4) 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).)

POSITIONS OF THE PARTIES

Union's Position

In its motion to dismiss, the PBA raises three principal arguments. The first is that the recent decision of the Court of Appeals in *Matter of Patrolmen's Benevolent Ass'n v. Public Employment Relations Board*, 6 N.Y.3d 563 (2006) ("*PBA v. PERB*"), holding that police disciplinary procedures that are prescribed by statute or local law constitute prohibited subjects of collective bargaining, acts to exclude from this Board's cognizance any claim against the PBA for alleged breach of the duty of fair representation in a statutorily prescribed disciplinary process. Additionally, the Union asserts that the petition alleges no act on the part of the PBA or its agents but rather acts of "petitioner's independent counsel." While Petitioner's counsel was admittedly appointed and paid by the PBA to represent Petitioner in her disciplinary hearing, the relationship of attorney and client implicates an obligation separate from any duty owed by the Union. The PBA denies that counsel is an agent of the Union and cites to counsel's independent duty under the Code of Professional Responsibility

to "not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate his or her professional judgment in rendering such legal services." (Motion at ¶ 18.)

Finally, the PBA asserts that even if the strategic and tactical decisions made by the attorney are attributable to the Union, the alleged decisions complained of do not, as a matter of law, rise to the level of a breach of the duty of fair representation. The Union defends the strategic decisions made by counsel, claiming that each contested decision was reasonable under the circumstances. In defense of counsel's alleged failure to raise a statute of limitations defense with regard to the MCU Incident, the PBA points to an exception to such statute of limitations where the charged conduct "would, if proved in a court of competent jurisdiction, constitute a crime." (Motion at ¶ 31 *quoting* Civil Service Law §75(4).) The PBA asserts that the charge arising from the MCU Incident would, if proven, constitute the crime of Larceny in the Third Degree, as defined in §155.35 of the Penal Law. Accordingly, the defense was inapplicable, and counsel cannot be censured for failing to raise it.

Similarly, the failure to obtain the plea offer in writing was at best negligent, and cannot be deemed to rise to the level of a breach of the duty of fair representation. So, too, the PBA asserts that the alleged advice offered to Petitioner to admit her conduct in the Trial Room was rational, "since it was an attempt to mitigate any penalty . . . by demonstrating an acceptance of responsibility for her wrongful acts" as well as serving to "insulate Petitioner from any charge that might have resulted from making a false statement under oath." (Motion at ¶ 36.)

In its reply, dated July 9, 2006 ("Reply") to the Petitioner's opposition to the motion to dismiss, filed on June 21, 2006 ("Opposition"), the Union rebuts Petitioner's claim that PBA's bad

faith or bias against her is evidenced in the description in the PBA's motion of Petitioner as "attempting to profit from the single deadliest attack on American soil in our Nation's history by stealing" in the MCU Incident, noting that it is entitled to vigorously defend itself against Petitioner's improper practice charge. The Union also denies Petitioner's assertion that union trustees and delegates "are responsible for 'personally appearing at all investigative hearings, including trials.'" (Reply at ¶13, *quoting* Opposition at ¶ 29.) The PBA asserts that the alleged failure of the delegate and trustee assigned to Petitioner's case to attend her trial cannot of its own weight establish a breach of the duty of fair representation, and further asserts that Petitioner could have sought a change of assigned counsel from the PBA if she felt her interests were not being adequately represented.

Finally, as to the failure to invoke the stay of disciplinary trials, the PBA asserts that if Petitioner deemed such a stay warranted, she should have so instructed her counsel, but that in any event, Petitioner had not provided any facts to support a contention that "the most damning charge for which the petitioner was terminated, theft from the MCU account, resulted from discrimination." This failure, the PBA contends, renders the decision not to seek a stay was rational, and thus it cannot support a claim for breach of the duty of fair representation.

Petitioner's Position

In her opposition to the PBA's motion to dismiss, Petitioner asserts that every disciplinary "trial/hearing against an officer is assigned a trustee and a delegate," and that although a delegate and trustee were assigned, they did not in any manner participate in petitioner's trial. (Opposition at ¶¶3, 29.) Claiming trustees and delegates "are responsible for monitoring and personally appearing at all investigative hearings, including trials," Petitioner asserts that the failure of the two PBA delegates who were assigned to assist the in the representation of Petitioner to carry out that duty was arbitrary

and in bad faith.

Likewise, Petitioner asserts that the counsel provided by the PBA was not independent but was rather "house counsel" to the PBA. (Opposition at ¶28.) Petitioner asserts that counsel is "financed and retained by the PBA for the defense of the PBA and its members." (Opposition at ¶21.) Counsel is provided by the PBA for "various matters including but not limited to disciplinary proceedings." (Opposition at ¶25.) Petitioner maintains that she at no time chose, or was given an opportunity to choose, her counsel. She further asserts that counsel was not, in fact, independent, but "has a financial obligation to the PBA first and then to the individual member when assigned by the PBA." (Opposition at ¶ 27).

Petitioner does not directly address the alleged inapplicability of the statute of limitations pursuant to Civil Service Law §75(4). Petitioner asserts that "[e]ven if the PBA trustee, delegate, and lawyer were not absolutely certain of the viability of the statute of limitations, it should at least have been raised, since it was at the very least a legitimate argument, and realistically, most probably a successful one." (Opposition at ¶32.) Likewise, Petitioner characterizes the failure to seek a stay as "beyond comprehension," and asserts that the PBA's and counsel's errors were so egregious as to constitute no representation at all. (Opposition at ¶¶ 32, 34.)

Petitioner asserts that the PBA's purported rationale for the decision not to seek a stay, which she claims was a desire to conciliate the trial commissioner and thereby obtain leniency, is belied by the PBA's own emphatic condemnation of the MCU Incident-related behavior with which Petitioner was charged, and of which Petitioner asserts the PBA presumed her guilt at the time of her disciplinary hearing and in this proceeding.

Petitioner asserts that had the trustee and delegate been in attendance at her allocution, they

could have informed her of the practice of obtaining settlement offers in writing, and insisted upon its being followed. Further, the PBA, either through the trustee and delegate, or through counsel, should have taken action as the allocution of a seeming settlement devolved into a guilty plea without any consideration in return.

Petitioner alleges that the PBA's actions and inaction in her case were arbitrary and in bad faith. (Petition at 8 (¶4(d).) In seeking to establish the existence of bad faith and discriminatory animus on the part of the PBA against her, Petitioner cites the emotive language employed by the Union: "even in their own motion to dismiss [the instant proceeding] they make a claim that Petitioner was 'attempting to profit from the single deadliest attack on American soil in our Nation's history by stealing.'" (Opposition at ¶¶ 4, 33, (*quoting* Motion at ¶ 2).) Describing the events in question as a conduct that would be "commonly viewed as an overdraft," Petitioner claims that the "PBA which she pays dues to, and represents her, says she is guilty of 'stealing,'" urging that this characterization shows a continued predisposition on the part of the PBA to accuse rather than defend her. *Id.*

DISCUSSION

For the purposes of deciding the PBA's pre-answer motion to dismiss, "the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether, taking the facts as alleged by petitioner, a cause of action within the meaning of the NYCCBL has been stated." *McAllan*, Decision No. B-25-81 at 6 ; *see also Melisi*, Decision No. B-52-96 at 3; *Farina*, Decision No. B-20-83. Indeed, the PBA in its motion acknowledges this to be the case. *See, e.g.,* Motion at ¶13 (*quoting McAllan, supra*). Moreover, in ruling on a motion to dismiss, "we will accord the petition every favorable inference and will construe it to allege whatever may be implied

from its statements by reasonable and fair intendment." *District Council 37,* Decision No. B-37-92 at 12-13. Accordingly, this Board's analysis is limited solely to the facts set forth in the petition, and not to any additional facts alluded to in the PBA's motion papers, which it is, of course, free to bring before this Board in further proceedings.

The principal issue raised by the PBA's motion is its contention that the recent Court of Appeals decision in *PBA v. PERB*, acts to divest this Board of jurisdiction over claims that the PBA has violated the duty of fair representation by holding that the New York City Charter's vesting "cognizance and control of the discipline of the department" expresses a public policy "so important that the policy considerations favoring collective bargaining should give way." 6 N.Y.3d at 576, *citing* N.Y.C. Charter §434(a). We hold that, in the circumstances presented here, the public policy undergirding the Court of Appeals decision does not require, or even support, such an outcome.

In *PBA v. PERB*, the Court of Appeals was confronted with a Hobson's Choice between two important public policies – that of collective bargaining and that of preserving local legislative determinations that discipline be outside the scope of collective bargaining based upon the "the quasi-military nature of a police force," recognized by the court since 1888. *Id.* at 575-576. In doing so, the Court honored such determinations which antedated the passage of Civil Service Law §§75 and 76. In so doing, however, the Court acknowledged that "the need for authority over police officers will sometimes yield to the claims of collective bargaining." *Id.* at 576, *citing Matter of Auburn Police Local 195 v. Helsby*. 46 N.Y.2d 1034 (1979). In other words, the public policy proscribing collective bargaining over discipline set forth in the City Charter marks not a renunciation of the policy in favor of collective bargaining, but its yielding to the need for control over discipline vested in the Commissioner. The policy favoring control over police discipline,

however, is not infringed or undermined in any way by requiring a union that provides representation in the disciplinary process established under the Charter to do so within the limited parameters of the duty of fair representation, and the PBA has not referred to any public policy that would be served by allowing the PBA to provide representation for its membership that is arbitrary, discriminatory, or perfunctory.

In the instant case, we need not decide whether the Union, as exclusive certified bargaining agent, has any obligation under any contractual provision or the NYCCBL to provide representation to its members in a disciplinary process which is, under the Court's decision, a prohibited subject of bargaining. *See, e.g., Thomas*, Decision No. B-37-97 at 9-10 (absent contractual or statutory obligation, no duty to provide representation in disciplinary proceedings). Because Petitioner alleges that the PBA in fact provides representation in disciplinary proceedings to its members by selecting and paying counsel, as well as providing union delegates and trustees who participate in the trial room proceedings, the sole question is: Does the provision of such representation trigger an obligation to do so in a fair and non-discriminatory manner. We hold that it does.

This Board has repeatedly held that "a union may voluntarily undertake to provide a service to its members that it is not otherwise contractually or statutorily obligated to do, but where it assumes such an obligation, that union violates the duty of fair representation" if it renders its services in a manner that is "arbitrary, discriminatory, or in bad faith." *Thomas*, Decision B-37-97 at 10; See also, *Edwards*, Decision No. B-35-2000 at 9 (same); *Castro*, Decision No. B-17-2000 at 3-4; *Lopez*, Decision No. B-31-97 at 9-10; *Krumholz*, Decision No. B-21-93 at 14-15. That assumption of duty can include the representation of members in legal matters beyond the confines of the NYCCBL. *See, e.g., Lucchese*, Decision No. B-22-96 at 15-16 (union's failure to pursue Civil

Service Law litigation on behalf of member not violative of duty of fair representation where no evidence union pursued such remedies for other members) (*citing McAllan*, Decision No. B-14-83 at 33); *see also Lopez*, Decision No. B-31-97 at 10 (same; Article 78 proceeding).

In this case, Petitioner has alleged just that; she has asserted that the PBA has assumed the duty of representing its membership at disciplinary hearings, but that, in her case, its appointed counsel, delegate and trustee did not perform functions that they are alleged to have routinely performed for other PBA members. Petitioner points to a series of concrete decisions on the part of her PBA selected and retained counsel that were allegedly without foundation and deeply prejudicial to her, and at least one of which – not obtaining plea agreements in writing – is alleged to constitute a variance from the standard operational procedure of the trial room.[5] She has asserted that the representation she received was different from that received by other members, and provided several concrete allegations of such differential treatment. At the pleading stage, no more is required.

The PBA's second argument, that the representation provided by Petitioner's "independent counsel" cannot be that attributable to the Union is simply not appropriate for a motion to dismiss, relying as it does on factual allegations not contained within the petition–that is, that the attorney provided petitioner in fact exercised independent judgment and was not in any way an agent of the Union. These factual contentions, if proved at a hearing, could very well support an affirmative

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[5]These allegations distinguish the instant case from our holding in *Dimps*, Decision No. B-39-99 at 7, in which this Board found that a bare allegation of inadequate representation at a disciplinary hearing held pursuant to Civil Rights Law §75 before the Office of Administrative Trials and Hearings did not amount to a violation of the NYCCBL in part because of "the absence of any allegation in the petition that the legal representation which the Union provided for Dimps discriminated against her to the advantage of any other union member." We note without resolving the tension between our decisions in *Dimps* and *Thomas, supra*, in view of the fact that under either rubric, Petitioner has stated a cognizable claim.

defense, but at the present stage, this Board must "accord the petition every favorable inference and will construe it to allege whatever may be implied from its statements by reasonable and fair intendment." *District Council 37,* Decision No. B-37-92 at 12-13.

The PBA cites in support of its motion Petitioner's averment that the attorney, whose firm was at that time named as a party, had a direct attorney-client relationship with her, and that his duties "were not limited to the duty of fair representation, but instead has all of the obligations of any other attorney in representing a client." (Petition at 7 ¶4(d).) This statement, concerning the scope of the legal duty of attorney to client, clearly asserts a cause of action outside of the NYCCBL, and independent thereof, and was properly dismissed without prejudice by the Executive Secretary. *James-Reid*, Decision No. B-16-2006 (ES) at 7-8. Petitioner asserts that the PBA was involved in her representation, that her counsel was selected and paid for by the PBA, and that the acts or omissions complained of were attributable to the PBA. (Petition at ¶¶ 10-12, 14-16, 19-20.) The petition may fairly be read to allege, and Petitioner in opposing the motion asserts that it was intended to allege, that the relationship of the PBA to counsel was such that counsel acted as agent for the Union, and, as such, his actions and omissions may create a claim under the NYCCBL of a breach of the duty of fair representation.

This Board has held that the representation provided to a member by a designee of a union may be the predicate of a claim that the duty of fair representation has been breached, on the theory that the union, having appointed an agent to fulfill its duty, is properly held responsible for any resultant breach of that duty. *See Del Rio*, Decision No. B-6-2005 at13-14*; Hassay*, Decision No. B-2-2003 (union delegate as agent); *Grace*, Decision B-18-95 at 7-8. This Board has not applied a different analysis to alleged breaches of the duty of fair representation when the union's designee

is an attorney, and the PBA provides no reason why we should do so here. *See, e.g., Gertskis*, Decision No. B-11-2006 at 10-12; *Green*, Decision No. B-34-2000 at 9 (no evidence that attorney at discipline hearing 'acted in a manner that could be classified as arbitrary, discriminatory or in bad faith."); *Reid*, Decision No. B-21-2000 at 8-9. Indeed, in *Green*, the forum in which the alleged breach of the union's duty of fair representation through an attorney took place was the same Police Department Disciplinary Unit involved here. Moreover, the fact that counsel is not a direct employee of the PBA does not change the analysis. *See, e.g., Matter of Grassel v. Public Employees Relations Board*, 34 PERB ¶7021 (Sup. Ct. Kings Co. 2001), *aff'd*, 301 A.D.2d 522 (1st Dep't 2001) (applying standard duty of fair representation analysis to claimed inadequate representation where union-employed attorney provided representation to a member of second union pursuant to an agreement between the two unions).

Accordingly, the only question remaining is whether the actions complained of could constitute a breach of the duty of fair representation. 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, *citing Page*, Decision No. B-31-94 at 11; *Hug*, Decision No. B-5-91 at 14; *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004); *see also, Fabbricante*, Interim Decision No. B-39-2002 at 20. The burden of establishing a breach of the duty of fair representation cannot be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union. *Gertskis*, Decision No. B-11-2006 at 11, *citing, inter*

alia, Grace, Decision No. B-18-95 at 8; *see also, Whaley*, Decision No. B-41-97. In short, petitioners "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Gertskis, supra* at 11, *citing Schweit*, Decision No. B-36-98 at 15. Even gross negligence does not breach the duty of fair representation. *Id.* at 12-13; *CSEA v. Public Employees' Relations Board and Diaz*, 132 A.D.2d 430, 432 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988); *Brockington, supra*. The factual allegations of the petition must establish that the Union's decisions were "arbitrary or perfunctory, or that the Union did more for others than for her." *Gertskis, supra,* at 11.

In the instant case, Petitioner has alleged several acts or failures to act that she asserts were in bad faith, or were discriminatory, arbitrary or perfunctory. The first such action, the alleged failure to assert the statute of limitations defense to the charge arising out of the MCU Incident, has been defended by the PBA on the ground that the defense was clearly not available to petitioner. Petitioner admits that the charge against her was that she was guilty of the offense of Grand Larceny. Civil Service Law §75(4) explicitly provides that :

> [N]o removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges . . . provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.
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> *Id.* (emphasis added).

Grand Larceny, as proscribed by Penal Law §155.35, is a class D felony, and therefore clearly a crime. As defined, "[a] person is guilty of grand larceny in the third degree when he steals property and when the value of the property exceeds three thousand dollars." *Id.* As Petitioner herself alleges, the disciplinary charge against her asserts that she stole approximately $6,000 from the MCU

by overdrawing her account at a time when the MCU's computer records were unreliable. Therefore, the charges and specifications did not merely accuse Petitioner of a crime by employing the term Grand Larceny, but charged her with the conduct which would, if proven in a court of competent jurisdiction, have established that crime. *Velez v. New York City Transit Auth.*, 175 A.D.2d 132 (2d Dept. 1991) (where factual allegations underlaying disciplinary charges made out crime of petit larceny, statute of limitations defense unavailable); *see also Matter of McKinney v. Bennett*, ___ A.D.3d ___, 817 N.Y.S.2d 767 (3d Dep't 2006). Accordingly, the PBA cannot be faulted for not asserting the statute of limitations defense, as it was clearly not available to Petitioner. *Id.*

As to the other decisions complained of, however, Petitioner has alleged the proper elements of a duty of fair representation. Petitioner has asserted that, unlike other PBA members, she did not receive her plea agreement in written form and that, in the absence of that writing, the PBA took no steps to enforce the plea agreement and obtain for her a penalty less than termination. Petitioner has also asserted that the PBA took no steps to enforce her rights under the settlement resolving the class action, either by seeking a stay of the disciplinary process or by having the NYPD EEO investigate the charges or by calling the Special Masters' finding that at least two of the three charges against Petitioner constituted "discriminatory discipline" to the attention of Commissioner Vinal.

The Union's arguments defending these decisions do not suffice to establish as a matter of law that Petitioner has failed to state a cause of action. The PBA's argument that the alleged failure to reduce the plea agreement to an enforceable writing asserts at most a claim of negligent representation fails to address the claim in the petition that the Petitioner was treated differently from other members in this regard. *Thomas*, Decision B-37-97 at 10; *see also Gertskis,* B-11-2006 at 11-13. Likewise, the argument that it was incumbent upon Petitioner to make certain that her

representatives made the appropriate arguments in relation to the findings of the Special Masters impermissibly shifts the burden from the representative to the member; it is scarcely a defense to a claim of inadequate representation to note that Petitioner herself failed to remedy the defects in the representation.

This Board declines to find that Petitioner has not stated a cause of action for breach of the duty of fair representation on the facts asserted. Taken as a whole, the facts as alleged in the petition could, if proven, establish that the decisions complained of were discriminatory, arbitrary, or perfunctory. Accordingly, the motion to dismiss is granted to the extent it asserts the alleged failure to assert the statute of limitations constituted a breach of the duty of fair representation, and is in all other respects denied.

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 motion to dismiss the improper practice proceeding docketed as BCB-2539-06 be, and hereby is, granted to the extent it asserts the alleged failure to assert the statute of limitations constituted a breach of the duty of fair representation and otherwise denied.

Dated: New York, New York
September 12, 2006

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER