

**Howe, 79 OCB 23 (BCB 2007)**

[Decision No B-23-2007] (IP) (Docket No. BCB-2572-06).

**Summary of Decision:** Petitioner alleged that the Union breached its duty of fair representation (1) by discriminating against him by failing to provide representation when requested, (2) in failing to represent him at Labor-Management meetings, and (3) failing to appear at scheduled grievance hearings. The Union responded that Petitioner failed to allege facts stating a *prima facie* breach of the duty of fair representation and sought dismissal of Petitioner's claims. The Board found that Petitioner failed to allege facts sufficient to demonstrate a breach of the duty of fair representation and dismissed the petition. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

*-between-*

**ROYDEL HOWE,**

*Petitioner,*

*-and-*

**DISTRICT COUNCIL 37, AFSCME, LOCAL 1407, and  
THE CITY OF NEW YORK,**

*Respondents.*

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**DECISION AND ORDER**

Pursuant to Section 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), Roydel Howe ("Petitioner") filed a verified improper practice petition on September 16, 2006, subsequently amended on October 11, 2006, against District Council 37, Local 1407 ("Union") alleging a breach of the duty of fair representation. Specifically, Petitioner alleges that the Union has not represented him since October

2001 and has discriminated against him, and “his shop members” by not providing representation during the period commencing July 15, 2004 and ending June 12, 2006, while it has done so for other unit members. Petitioner also complains that despite the Union’s May 22, 2006 promise to represent Petitioner at Labor-Management meetings, no such meetings have been scheduled. Further, Petitioner alleges that the Union failed to appear to represent him at grievance hearings scheduled and convened with the employer, Administration for Children’s Services (“ACS”), on June 23, 2006 and July 19, 2006. The Union seeks dismissal of the petition claiming, *inter alia*, that Petitioner failed to state a *prima facie* claim for breach of the duty of fair representation. Accepting Petitioner’s factual allegations as true, we find that Petitioner does not state facts sufficient to establish a cause of action constituting a claim under the NYCCBL § 12-306(b)(3). Accordingly, the petition is dismissed.

### **BACKGROUND**

On September 16, 2006, Roydel Howe filed a *pro se* improper practice petition against the Union claiming a breach of the duty of fair representation. Petitioner re-submitted his petition on October 11, 2006 with all necessary attachments and proofs of service.<sup>1</sup> While Petitioner explains that his previous improper practice petition, Docket No. BCB-2523-05, “may be viewed as the historical background for this current petition,” the instant petition is “based on the occurrences from May 22, 2006, to date.”<sup>2</sup> (Pet. ¶¶ 4-5.) On January 5, 2007, the Union filed an answer seeking

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<sup>1</sup> The petition filed on September 16, 2006 referred to documents that were not attached. The Executive Secretary directed Petitioner to resubmit the petition with all documents relied on therein.

<sup>2</sup> The petition in Docket No. BCB-2523-05, alleging violations of NYCCBL § 12-306(a)(1), (3), and (5) against ACS and violations of § 12-306(b)(3) against the Union, was dismissed by this

dismissal of the petition stating, *inter alia*, that Petitioner failed to state a *prima facie* claim for breach of the duty of fair representation. Petitioner filed a reply to the Union's answer on January 16, 2007. The City filed its answer on February 16, 2006 to respond to "any possible derivative claim." (City Ans. at 1, n.1.) Petitioner filed an objection to consideration of the City's answer claiming it failed to comply with § 1-07(c)(3) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").

The gravamen of Petitioner's claim in the instant matter is that the Union failed to represent him in good faith. Specifically, Petitioner makes three distinct claims against the Union.

First, Petitioner alleges that the Union has discriminated against him, and other unit members, by not providing representation when requested, while the Union had done so for other members on other occasions. In support of this allegation, Petitioner provides a list of occasions the Union provided representation or participated in meetings from July 15, 2004 to June 12, 2006. (Pet. Ex. F7.) Petitioner also provides a January 2006 memorandum he sent the Union on behalf of a unit member urging the Union to file a grievance on behalf of the unit member. (Pet. Ex. E8.)

Second, Petitioner alleges that the Union breached its duty of fair representation by failing to convene Labor-Management meetings with ACS on his behalf. Petitioner alleges that the Union "promised . . . in writing . . . that they - the Union [-] would represent Petitioner in good faith at Labor-Management Meetings convened with ACS on Petitioner's behalf, but to date, has not done so." (Pet. ¶ 6.) At a conference conducted in the instant matter, Petitioner explained that the

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Board in *Howe*, Decision No. B-32-2006. That decision, and Decision No. B-19-2007, which dismissed Petitioner's second improper practice charge, docketed as BCB-2581-06, contain summaries of the factual allegations which Petitioner claims form the "historical background" of the instant matter. Familiarity with those decisions is assumed for purposes of this discussion, and their factual recitations need not be summarized here.

“writing” referred to in the petition is the Union’s May 22, 2006 letter, Petitioner Exhibit F1, discussed below.

Third, Petitioner alleges that the Union failed to appear to represent him at Step II grievance hearings convened on June 23, 2006 and July 19, 2006. At the conference, Petitioner clarified that the grievance at issue here was filed by the Union in February 2006 claiming, *inter alia*, that he had been assigned out-of-title responsibilities. ACS refused to process the grievance at Step II claiming that it replicated issues raised in an improper practice petition filed by Petitioner. (Pet. Ex. F1; Union Ex. B.) By letter dated May 22, 2006, the Union informed Petitioner that it believed that ACS’ failure to process the grievance violated “ACS’ obligation to continue to process and hear grievances filed by employees who have filed improper practice petitions against the Union or the City.” (Pet. Ex. F1.) Also in the May 22, 2006 letter the Union detailed its efforts to advance Petitioner’s grievance. The Union informed Petitioner that it had contacted

the Deputy General Counsel for the City’s Office of Labor Relations, and informed her that in the Union’s opinion [ACS’] Step II decision conflicted with ACS’ obligation to act in good faith under the New York City Collective Bargaining Law (NYCCBL). The Union requested written reassurance . . . that the legal position stated in the Step II decision was not the official policy of ACS and that your grievance would be fully and fairly processed through the grievance procedure.

While [the Deputy General Counsel] has acknowledged in writing that ACS’ position will not interfere with the Union’s ability to fully and fairly process your grievance . . . .

However, in order to properly remedy your situation, the Union has decided to move your grievance back to Step II to insure that ACS fully process the grievance there.

Shortly thereafter, ACS scheduled a Step II grievance hearing for June 23, 2006. According to the Union, the Assistant Director of Research and Negotiations for the Union, the Union

Representative designated to assist Petitioner with this grievance, apprised the ACS hearing officer that she might be unavailable on the scheduled date of the hearing because she had to call in for jury duty service on that date. The Union Representative and the ACS hearing officer agreed to reschedule the hearing if necessary. Petitioner was informed of this possibility. On June 20, 2006, the Union Representative was informed by the court that her jury duty obligation might continue beyond June 23, 2006. She therefore called the ACS hearing officer to postpone the June 23, 2006 hearing. Petitioner was also notified and agreed to the adjournment. The hearing was rescheduled to July 19, 2006. However, the Union Representative's mother took ill; and, she was unable to appear on this date also. On the morning of July 19, the Union Representative called the ACS hearing officer to notify him that she would be unable to attend the hearing scheduled for that day. The hearing officer informed her that the Petitioner was already in his office.

Ultimately, the grievance hearing was rescheduled for September 28, 2006. Prior to this hearing, a new Union Representative met with Petitioner to review the grievance as the prior Representative had been promoted to another position within the Union. The new Union Representative attended the hearing on September 28, 2006, and represented Petitioner. ACS denied the grievance and the Union advanced the grievance to Step III.

### **POSITIONS OF THE PARTIES**

#### **Petitioner's Position**

Petitioner alleges that the Union has failed to adequately represent Petitioner and, in so doing,

violated NYCCBL § 12-306(b)(3).<sup>3</sup> Specifically, Petitioner alleges that the Union has failed to represent him before ACS since October 2001. Petitioner also alleges that the Union provided representation or participated in meetings on behalf of other unit members from July 2004 to June 2006, yet failed to provide him “and his shop members” with representation during the same period of time. Therefore, Petitioner contends, the Union discriminated against him and other Local 1407 members. Petitioner also alleges that the Union promised in its May 22, 2006 letter, to represent him at Labor-Management meetings with ACS. However, no such meetings were ever convened. Finally, Petitioner claims that the Union failed in its duty to fairly represent him when no Union representative appeared to represent him at a Step II grievance hearing first scheduled for June 23, 2006, then re-convened on July 19, 2006.

### **Union’s Position**

The Union urges the Board to dismiss the petition in its entirety alleging that it is insufficient as a matter of law in that it fails to state a *prima facie* claim for breach of the duty of fair representation. The Union alleges that it has filed and duly processed grievances on behalf of Petitioner and provided appropriate representation. The Union affirmatively states that the Union Representative scheduled to represent Petitioner at the June 23, 2006 and July 19, 2006 grievance hearings was unavoidably prevented from attending both the hearings, and that on both dates Petitioner either failed to object or “acceded” to the Union Representative’s request for adjournments. (Union Ans. ¶¶ 4 and 6.) Moreover, the Union alleges that Petitioner fails to allege facts demonstrating that the Union was motivated by bad faith in its dealings with him or that the

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<sup>3</sup> NYCCBL § 12-306(b)(3) states, in pertinent part, as follows:  
It shall be an improper practice for a public employee organization or its agents to breach its duty of fair representation to public employees under this chapter.

Union treated him in a disparate manner with regard to its representation of him during grievance proceedings.

The Union also objects to Petitioner's request that "the Board incorporate by reference the allegations of [BCB-2523-05] as 'historical background'" which the Union claims is "inappropriate given [the] dismissal of that position by the Board in its entirety." (Union Ans. ¶ 1.) Furthermore, the Union argues that certain allegations were the subject of the earlier petition and concern matters beyond the four month statute of limitations, and are therefore untimely.

### **City's Position**

The City alleges that Petitioner fails to allege facts sufficient to establish that the Union breached its duty of fair representation, and therefore no derivative claim against the City pursuant to NYCCBL § 12-306(d) has been established. Further, the City opposes incorporation of any claim that was the subject of Petitioner's previous improper practice proceedings as time-barred pursuant to NYCCBL § 12-306(e).

### **DISCUSSION**

As a threshold matter, we find that Petitioner's discrimination claims are time barred. The filing of an improper practice petition is limited by the four month statute of limitations under § 12-306(e) of the NYCCBL. That section provides, in relevant part:

A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

*See also* Section 1-07(b)(4) of the OCB Rules. A charge of improper practice must be filed no later

than four months from the time the disputed action occurred. *Howe*, Decision No. B-19-2007 at 7; *Griffiths*, Decision No. B-03-99 at 11-12.

Here the petition was filed September 16, 2006; therefore, we are barred from considering any allegedly improper act that occurred prior to May 16, 2006. Petitioner alleges that “from October 2001 to date [September 16, 2006], the Union has been promising to represent him against ACS, and to date, in five (5) years, the Union has not met even once with ACS.” Pet. ¶ 7. However, we note that the undisputed facts alleged in the pleadings demonstrate that the Union has indeed represented Petitioner in various grievances since October 2001, including the one cited by Petitioner where he alleges that the Union failed to appear for the scheduled hearings.

Petitioner also alleges that the Union has discriminated against him “and his shop members” in that the Union has failed to provide representation when requested. In support of this allegation, Petitioner provides a list captioned “Representation denied me - Roydel Howe, during the same period similar Representations were performed for many other Local 1407 members.” (Pet. Ex. F7.) The list consists of occasions commencing July 15, 2004 and ending June 12, 2006, at which the Union allegedly provided member representation or participated in activities concerning various Union-wide issues including a grievance hearing, meetings with city agencies, Labor-Management meetings, hearings at OCB, and court litigation. Petitioner also provides a memorandum dated January 9, 2006, which he sent to the Assistant Director of Local 1407 requesting that the Union pursue a grievance on behalf of another member in Petitioner’s shop. Petitioner alleges that he sent this memorandum as part of his responsibilities as shop steward.

While Petitioner complains that he was denied representation “during the same period” as his purported examples, between July 15, 2004 and June 12, 2006, Petitioner fails to allege that he



requested and was refused union representation, for himself or his shop members, on any occasion after May 16, 2006. Therefore, Petitioner's discrimination claim is untimely and must be dismissed.

The remaining issues concern Petitioner's allegations that the Union violated NYCCBL § 12-306(b)(3) by: (1) failing to convene Labor-Management Meetings on Petitioner's behalf, and, (2) failing to appear at grievance hearings scheduled on June 23, 2006 and July 19, 2006 to represent Petitioner. The Union seeks a dismissal of the petition as a matter of law which requires us to accept Petitioner's allegations as true and then determine only "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 James-Reid*, Decision No. B-29-2006 at 11. Moreover, in making such a ruling, "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; *see also James-Reid*, Decision No. B-29-2006 at 11-12. In this case, we are therefore limited to the facts asserted in the petition and the reply, and for purposes of this decision resolve all factual disputes in favor of Petitioner. *Id.*

This Board, in interpreting NYCCBL § 12-306(b)(3), has "long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, Decision No. B-05-2007 at 14; (*citing, James-Reid*, Decision No. B-29-2006 at 16-17; *Samuels*, Decision No. B-17-2006 at 12; *Del Rio*, Decision No. B-06-2005 at 12; *Whaley*, Decision No. B-41-97 at 12; *see also Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board); *see generally Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (same standard under federal National Labor Relations Act)); *see also Minervini*,

Decision No. B-29-2003 at 15; *Hug*, Decision No. B-05-91 at 14. In the context of providing representation at disciplinary hearings, this Board has required a showing that a union's actions "were arbitrary, discriminatory, perfunctory, or in bad faith." *Okorie-Ama*, Decision No. B-05-2007 at 14, (*citing, inter alia, James-Reid*, Decision No. B-29-2006 at 16-17; *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004)).

In light of this standard, we find that the facts alleged by Petitioner, even if true, are insufficient to establish a breach of the duty of fair representation.

#### Labor-Management Meetings

Petitioner alleges that the Union breached its duty of fair representation when it failed to convene Labor-Management Meetings on Petitioner's behalf. We have held that where a petitioner complains that a union failed to take a specific action and in doing so allegedly breaches the duty of fair representation, the petitioner must first demonstrate a source of right to the action sought. For example, in *Whaley*, Decision No. B-41-97, Petitioner, a probationary employee of the NYC Housing Authority, alleged a violation of the duty of fair representation when the Union failed to file a grievance on her behalf challenging her termination. In finding that the Union did not breach its duty under the NYCCBL, we relied on the fact that the Petitioner had not articulated a "contractually recognized source of a right to grieve her employment termination." *Whaley* at 14.

In the matter before us, Petitioner alleges that the Union promised in its May 22, 2006 letter to represent him at Labor-Management Meetings. (Pet. Ex. F1.) However, the May 22<sup>nd</sup> letter speaks solely to the Union's efforts to adjudicate Petitioner's grievance and is devoid of any reference to Labor-Management meetings. Additionally, Petitioner fails to identify any source of right to have such a meeting convened on his behalf. Therefore, Petitioner's claim that in failing to

convene a Labor-Management Meeting the Union breached its duty of fair representation must be dismissed.

Moreover, we have held that a union is entitled to broad discretion in determining whether to pursue an employee's complaint through a Labor-Management Meeting, a grievance, or some other method of resolution. *See Richardson*, Decision No. B-24-94 at 10-11; *see also Brown*, Decision No. B-30-2005 at 6; *Howe*, B-32-2006 at 17. In *Richardson*, Petitioner alleged that the union breached its duty of fair representation when it did not advance Petitioner's grievance regarding allegedly unsafe and unsanitary working conditions and, instead, referred the matter to a Labor-Management Meeting. We held that Petitioner "failed to allege facts which would establish that the Union's handling of the matter was done arbitrarily, or in a way that discriminates against her insofar as her rights under the Collective Bargaining Law are concerned, or in bad faith." *Richardson*, Decision No. B-24-94 at 10.

Further, a breach in the duty of fair representation does not occur simply because a member disagrees with a union's tactics, *Burtner*, Decision No. B-01-2005 at 16, or the quality and extent of representation, *White*, Decision No. B-37-96 at 6. Rather, to establish a breach, a petitioner must present evidence of improper motivation, such as malice, hostility, or discrimination. *Del Rio*, Decision No. B-06-2005 at 13; *Hug*, Decision No. B-05-91 at 17. Additionally, we have held that a petitioner must allege facts that demonstrate that a union's strategic decision regarding its handling of an issue was arbitrary or perfunctory or that the union did more for other similarly situated unit members than it did for petitioner. *Gertsakis*, Decision No. B-11-2006 at 11; *see also Schweit*, Decision No. B36-98 at 15 *and Page*, Decision No. B-31-94 at 11. Conclusory statements are insufficient. *See Del Rio*, Decision No. B-06-2005 at 2, 14; *Kapetanios*, Decision No. B-02-2005 at

5,7; *Edwards*, Decision No. B-22-94 at 8.

Here, Petitioner, without elaboration, simply complains that the Union failed to convene a Labor-Management Meeting to address his complaints. However, the undisputed facts contained in the pleadings indicate that the Union has processed and is processing several grievances on his behalf, including the grievance that was the subject of the May 22<sup>nd</sup> letter. Since a union has discretion in the handling of a member's complaint, and the Union has handled numerous complaints on behalf of this Petitioner, even if Petitioner had articulated a basis for such a meeting, the failure to convene a Labor-Management meeting, alone, would not constitute a breach of the duty of fair representation, since it is within the Union's discretion to pursue the matter as grievance. *See Samuels*, Decision No. B-17-2006 at 13 (*citing Wooten*, Decision No. B-23-94 at 15 and *Page*, Decision No. B-31-94 at 11).

In short, Petitioner alleges no facts that would indicate that the failure to convene a Labor-Management meeting was discriminatory, arbitrary, or capricious or even implicates the duty of fair representation. Furthermore, Petitioner fails to establish that the Union's actions were motivated by malice, hostility, or discrimination. Accordingly, this part of Petitioner's claim must be dismissed.

#### Grievance Hearings

Petitioner complains that the Union failed to appear at grievance hearings scheduled on June 23, 2006 and July 19, 2006 to represent Petitioner at Step II grievance hearings convened by ACS. As discussed above, a union has discretion in the handling of members' complaints. We have held that while "[a]rbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation . . . [i]t is not enough for a petitioner to allege negligence, mistake, or incompetence on the part of the union." *Richardson*,

Decision No. B-24-94 at 9; *see also Okorie-Ama*, Decision No. B-05-2007 at 14-15; *Del Rio*, Decision No. B-06-2005 at 13-14. Petitioner alleges that the Union failed to appear for a scheduled Step II grievance hearing, rescheduled the hearing for another day, and failed to appear on that date as well. (Pet. ¶¶ 9, 11.) The Union concedes that its Representative did not appear at either of these scheduled hearings. As for the June 23, 2006 hearing date, the Union explains that a jury duty obligation prevented the Union Representative from appearing. The Union also explains that Petitioner was made aware of the Union Representative's jury duty obligation prior to the scheduled hearing and "did not object to the possibility of an adjournment." (Union Ans. ¶ 4.) As for the July 19, 2006 hearing date, the Union explains that the Union Representative had a personal family emergency that required her attention, and it alleges that Petitioner "acceded to [the Union Representative's] request to adjourn the Step II hearing." (Union Ans. ¶ 6.)

Petitioner's claims against the Union lack merit. Without considering the Union's proffered reasons, we find that Petitioner has failed to plead facts that would establish that the Union's actions, or lack thereof, were arbitrary, capricious, or discriminatory. There is no dispute that the hearing was rescheduled and the grievance processed. Petitioner fails to demonstrate that rescheduling a grievance hearing, even on more than one occasion, for valid reason with consent of the parties, amounts to "processing a grievance in a perfunctory fashion." *Richardson*, Decision No. B-24-94 at 9; *see also Okorie-Ama*, Decision No. B-05-2007 at 14-15; *Del Rio*, Decision No. B-06-2005 at 13-14. Therefore, we find that Petitioner's claim that the Union breached its duty of fair representation when it failed to appear at scheduled grievance hearings must be dismissed.

### Conclusion

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 Samuels*, Decision No. B-17-2006 at 16.

**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 docketed as BCB-2572-06 be, and the same hereby is, dismissed.

Dated: New York, New York  
June 18, 2007

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

ERNEST F. HART  
MEMBER

CHARLES G. MOERDLER  
MEMBER

GABRIELLE SEMEL  
MEMBER