D'Onofrio, 79 OCB 3 (BCB 2007)

[Decision No B-03-2007] (IP) (Docket No. BCB-2537-06).

Summary of Decision**:* Petitioner alleged that the Union breached its duty of fair representation when it discriminated against him by failing to properly represent him, refusing to proceed to arbitration after his employment was terminated, and refusing to pay for the cost of arbitration after he hired his own attorney to take the claim that he was wrongfully terminated to arbitration. Petitioner asserted that the Union's breach of its duty was predicated on his reporting misconduct including the Union's Shop Steward, who was subsequently assigned by the Union to represent Petitioner. The Board found that Petitioner's claims were not sufficient to state a breach of the duty of fair representation and dismissed the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ROBERT D'ONOFRIO,

Petitioner,

-and-

ENTERPRISE ASSOCIATION OF STEAMFITTERS, LOCAL 638 and NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

The petition in this matter, filed by Robert J. D'Onofrio on March 1, 2006, alleges that Enterprise Association of Steamfitters, Local 638 ("Local 638" or "Union") breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), when it discriminated against him by failing to properly represent him, refusing to proceed to arbitration after his employment was

terminated, and refusing to pay for the cost of arbitration after he hired his own attorney to take the claim that he was wrongfully terminated to arbitration. Petitioner asserts that the Union's breach of its duty is predicated on his reporting misconduct to the employer of his co-workers, including the Union's Shop Steward, who was subsequently assigned by the Union to represent Petitioner. The Union claims that it did not breach its duty of fair representation, that it vigorously represented Petitioner throughout his proceedings, and, after careful deliberation, it declined to take the matter of Petitioner's termination to arbitration, which was its right. The New York City Police Department ("NYPD") claims that Petitioner failed to allege facts sufficient to establish that NYCCBL § 12-306 was violated.[1] The Board finds that Petitioner's claims are not sufficient to state a breach of the duty of fair representation and, therefore, dismisses the petition.

BACKGROUND

Petitioner, first hired in 1997 by the NYPD as a General Supervisor of Buildings, has held the civil service title of Steamfitter in the Building Maintenance Section at NYPD since June 30, 1999.[2]

The "Mongo" Allegations

Petitioner alleges that, around September 2003, it became known that certain employees at

[1] NYPD was made a party to the claim by virtue of NYCCBL § 12-306(d), which provides for the employer to be made a party to a charge of a breach of a duty of fair representation.

[2] We note that BCB-2570-06 (A-11999-06), an arbitrability matter in which the City challenged Petitioner's right to proceed to arbitration over his claimed wrongful termination, was filed at the time that this matter was pending. For purposes of this decision, we take administrative notice of the facts as elicited from the pleadings in BCB-2570-06 (A-11999-06).

his work location were selling scrap materials which belonged to NYPD to outside vendors for cash and splitting the profits. (Reply ¶ 48.) This practice, according to Petitioner, is called "Mongo." The Deputy Commissioner of Management and Budget launched an investigation into his allegations regarding Mongo, and during the investigation, employees at Petitioner's work location were questioned. As Petitioner's evidence of the sale of Mongo, he also submitted to the investigators tape-recordings of his coworkers' conversations. (Petition Exhibit 3.)

Petitioner contends that Thomas Incantalupo, a co-worker and Union Shop Steward, was involved in the sale of Mongo, and presents as proof a recorded statement, taped by Petitioner, in which Incantalupo states, "Maybe the intention was – at one time – but my opinion is, I told Jack if they catch you your fuckin' gone." (Petition Exhibit 8.) Petitioner contends that upon learning that Petitioner had recorded him and reported the alleged corruption, Incantalupo became irate and belligerent and tore up copies of letters that Petitioner had made for him.[3] (*Id*.)

On September 6, 2004, the Deputy Commissioner of Management and Budget concluded the investigation into the Mongo accusations and, after considering the evidence, deemed the allegations unfounded. On September 28, 2004, a Sergeant completed an Internal Affairs Bureau ("IAB") investigating officer's report, which noted that Petitioner believed that he was subject of below-standard evaluations and command disciplines after he made the Mongo allegations, and the Sergeant recommended an investigation. The Sergeant noted that Petitioner would provide IAB with copies of audiotapes that were part of the original Mongo investigation in order to support his claim. (Petition Exhibit 3.)

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[3] Petitioner does not specify the exact date on which this incident occurred, but in a March 2, 2005, letter, he states that it happened "upon [his] reporting corruption within the Department." (Petition Exhibit 8.)

On March 2, 2005, Petitioner wrote a letter to John Torpey, President of the Union, at which time he claimed that he had been notified that he was to be deposed "regarding incidents that I am both a witness to and the subject of" on March 15, 2005. (Petition Exhibit 8.) He wrote to request "competent and unbiased representation" for the deposition and contended that Incantalupo should not represent him because of the earlier allegations. (*Id.*) Petitioner contends that he was to attend several of these depositions, which, according to the NYPD notifications provided by Petitioner, were held pursuant to Patrol Guide 206-13 ("PG 206-13".)[4] The notifications stated in part that "[Petitioner] must bring representation that is satisfactory to him. Representation cannot be subject of any allegations advanced by [Petitioner]." (Petition Exhibit 7.)

On March 7, 2005, Torpey responded to Petitioner by letter. Torpey noted that he had received Petitioner's letter and indicated that Incantalupo would be in attendance at Petitioner's deposition, should Petitioner wish to have Incantalupo represent him.

NYPD's First Set of Disciplinary Charges Against Petitioner

In July 2002, NYPD filed disciplinary charges with two specifications (Charge No. 78053/2) against Petitioner based upon a criminal matter unrelated to his employment, and he was suspended without pay for 30 days. The criminal charges against Petitioner were subsequently dismissed and, on January 22, 2003, a Step I grievance was filed that claimed that, under § 75 of the New York State Civil Service Law, Petitioner should receive back pay for his time spent on the 30-day suspension since the charges against him were dismissed.

On March 26, 2003, NYPD filed additional charges and specifications (Charge No.

[4] The parties did not submit the text of PG 206-13, but the language of the provision is not relevant to the outcome of this matter.

78744/03) against Petitioner. The charges alleged that Petitioner screamed at a Lieutenant, failed to perform his duties for five hours and failed to notify his supervisor of conditions which made him unable to perform his duties. On April 10, 2003, a third specification, which alleged that Petitioner violated his Steamfitter's pistol license by possessing his handgun outside of his designated residential borough of Brooklyn when not directly en route to an authorized range, was added to Charge No. 78053/2.

NYPD filed further charges and specifications (Charge No. 79063/03) against Petitioner on July 14, 2003, which alleged that Petitioner was observed having coffee in a marked NYPD vehicle rather than attending to his assignment at a plumbing supply vendor location as assigned and that, on another date, he sat in a vehicle for 30 minutes rather than being at his assigned post performing his assigned duties. Petitioner contends that the allegations against him were baseless.

On November 13, 2003, Petitioner; Robert Bartels, then a Union Organizer; Richard S. Brook, the Union's attorney; and NYPD's Personnel Officer, Deputy Commissioner, Management and Budget attended an Informal Conference regarding all of the charges and specifications pending against Petitioner. Those present, including Petitioner, signed an agreement that the first two specifications of Charge No. 78053/2 would be dropped. (Union Exhibit 4.) Furthermore, the parties negotiated an agreement whereby the remainder of the charges against Petitioner would be dropped if he agreed to 30 days time on suspension already served and a one year "dismissal probation." (Union Exhibit 5.) Petitioner refused to sign the agreement so the parties negotiated a revised penalty that eliminated the one-year probation but retained the suspension. Petitioner again refused to sign the agreement. The Union claims that after Petitioner initially agreed to the terms, and the Union had notified NYPD of his acceptance, he then changed his mind and declined to sign

the revised agreement.

In a letter dated November 20, 2003, Brook wrote to Petitioner and claimed that since the Union had obtained what it believed was a fair and reasonable resolution to this matter, it would not attempt to renegotiate any further on his behalf. Brook attached a copy of the revised agreement, signed by both he and Bartels, and wrote that he included the copy in the event Petitioner decided change his mind and accept the terms.

On November 23, 2003, Petitioner responded to Brook's letter. Petitioner claimed that he was not guilty of any of the charges and specifications. He also claimed that Brook was "totally unaware" of his position since they met for the first time at a diner only 45 minutes prior to the Informal Conference, had nothing to do with the successful resolution of Charge No. 78053/2, refused to mount a defense, refused to proceed to Step II of the grievance procedure, and generally had no idea what he was doing. (Union Exhibit 6.) Petitioner closed his letter by stating that he would seek all and any legal remedies available and thanked Brook for "any effort and time" he afforded Petitioner. (*Id*.)

Brook responded to Petitioner by letter on November 26, 2003. Brook wrote that, even though he was under no obligation to attend the Informal Conference, the Union had invited him and he chose to attend. He wrote that while he and Petitioner had not met before the date of the Informal Conference, he had spoken to Petitioner via telephone, and Bartels had kept him informed of developments in the case. He wrote that the Union represented him fully, fairly, and successfully in light of the charges against Petitioner and the Union's perception that NYPD would be able to sustain some of the charges against him. Brook stated that, under the circumstances, the resolution the Union obtained was fair and reasonable and it was in Petitioner's best interest to accept the

revised penalty, especially since a new disciplinary charge had been filed against him that could result in his dismissal.[5]

Petitioner responded to the letter on December 1, 2003. Petitioner stated that he and Brook spoke for only five minutes prior to the Informal Conference and that Brook was annoying him when Brook stated he accepted the proposed agreement and then reneged because "**I NEVER AGREED TO ADMIT TO THINGS I DID NOT DO. GET THAT THRU YOUR THICK HEAD – PLEASE**" (emphasis in original). Petitioner's letter also asserts that Brook fell prey to NYPD's "chicanery" when he negotiated with NYPD; he owed no debt of gratitude to the Union because Brook refused to allow him to mount a defense; and the Union was too eager to "throw in the towel." (Union Exhibit 9.) Petitioner's letter concludes, "Finally, you talk the talk now it's time to walk the walk." (*Id.*)

On December 5, 2003, Petitioner and the NYPD Personnel Officer, Deputy Commissioner, Management and Budget held another Informal Conference, at which Petitioner claimed that he was not guilty of the charges, declined a proposed penalty of 30 days time on suspension already served, and exercised his alleged right to grievance proceedings under Administrative Guide 319.19.[6]

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[5] Brook did not specify the disciplinary charge to which he referred and the pleadings do not clarify this matter. However, the specific charge to which Brook refers in this letter is not relevant to the outcome of this dispute.

[6] We note that although the right of Petitioner to grieve the Informal Conference determination and proposed penalty under Administrative Guide 319.19 has not been disputed in the present case, the City in a separate but related matter, Docket No. BCB-2570-06, has challenged the arbitrability of a grievance contesting Petitioner's subsequent termination on other charges. In the latter case, the City argues that as a § 220 employee, Petitioner does not possess the right to challenge alleged wrongful discipline through the grievance process. Our decision in the arbitrability matter does not reach the merits of this argument, and we do not address that claim here. *D'Onofrio*, Decision No. B-XX-2007.

A Step II disciplinary hearing,[7] which Charles Krass, a Union Business Agent, attended with Petitioner, was held on the majority of the charges and specifications against Petitioner, as the third specification of charge 78053/2 was handled separately by Step II. On November 1, 2004, the Deputy Commissioner of NYPD's Office of Labor Relations ("NYPD's OLR") found that, based on Petitioner's testimony at the Step II hearing and the investigation by his office, the first two specifications of Charge No. 78053/02 would be dismissed, and Charges and Specifications Nos. 78744/06 and 79063/03 were sustained. The Deputy Commissioner imposed a penalty of 30 days time on suspension already served.

On November 23, 2004, Petitioner requested a Step III review of the charges against him. He appealed NYPD's determination and claimed that NYPD took wrongful disciplinary action. The Step III hearing was scheduled for January 31, 2005.

On December 2, 2004, Petitioner wrote to Torpey to complain about the representation that had been afforded him. He stated that he had "now come to the conclusion that this representation is incompetent at least and malfeasance at its worst." (Union Exhibit 12.) He then listed a number of his perceived deficiencies on the Union's part, notably detailed complaints about the adequacy of Krass' representation of him. He wrote that he was "sick and tired" of Krass appearing at his proceedings "like a lost puppy dog" and demanded that the "intolerable situation must cease now!" (*Id*.) He also demanded "competent" counsel who would meet with him to formulate a defense and prepare and furnish written rebuttals to allegations that are "slanderous, scurrilous and without merit." (*Id*.)

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[7] The date of the Step II disciplinary hearing was not revealed in the pleadings, but the date of the Step II hearing is not relevant to the outcome of this matter.

In response to Petitioner's letter on January 6, 2005, Torpey summarized the Union's account of the events up to the date of the letter and stated his belief that the Union had represented him fully and fairly despite his unjustified comments. He wrote that, although Petitioner had attracted an unusually large number of charges based on disputes with supervisors and/or coworkers, and despite the Union's efforts to help settle the matters, Petitioner still unreasonably rejected the two proposed settlements. Torpey advised Petitioner that the Union had done all it would do regarding the five charges, but that Krass would seek back pay due to him for the suspension that resulted from the two charges that had been dismissed, and the Union would be available to assist him with any new charges.

On January 14, 2005, Krass wrote a letter to the Lieutenant of Labor Relations at NYPD. Krass sought to arrange for back pay for Petitioner for the 30-day suspension imposed on him for the charges that were dismissed. He noted Petitioner's earlier grievance regarding the matter and asked the Lieutenant to call or write to him as soon as possible to discuss the matter since he had not been able to reach her by phone.

The Step III hearing was held on January 31, 2005, and Incantalupo attended as Petitioner's Union representative. On March 7, 2005, a New York City Office of Labor Relations ("OLR") Hearing Officer issued a Step III determination. The OLR Hearing Officer found that the charges against Petitioner had been substantiated and that the penalty implemented at Step II was appropriate. The OLR Hearing Officer noted that the penalty was appropriate in light of the numerous charges against Petitioner, as well as Petitioner's testimony, which essentially admitted the conduct with which he was charged.

Torpey wrote to Petitioner on March 21, 2005, and attached a copy of the Step III decision.

Torpey informed Petitioner that because there appeared to be merit to the charges against him, the Petitioner provided no credible evidence to refute the charges, and Petitioner had previously agreed to accept then rejected the penalty that he was eventually given, the Union would not proceed to arbitration on the five charges that were upheld in the Step III decision. Torpey also wrote that although the Union had previously sought to obtain back pay for Petitioner for the original 30-day suspension on which the charges were eventually dismissed, the Union would no longer seek to obtain back pay since the new 30-day suspension on which the charges were upheld replaced the original suspension.

Petitioner submitted a request for arbitration on April 22, 2005, which was given the file number A-11162-05. The page of the request that includes the waiver of the right to submit the underlying dispute to any other tribunal contained a handwritten addendum which stated, "Mr. D'Onofrio appeals from the Step III decision. . . . Local 638 has been requested by Mr. D'Onofrio to allow him to pursue Step IV arbitration on his own: he will provide his own attorney and Local 638 has no responsibility for this arbitration." (Union Exhibit 11.) The waiver was signed by Krass and Petitioner.

Although the third specification of charge 78053/2, filed on April 10, 2003, was considered at the Informal Conferences with the other charges against Petitioner, the charge was considered separately by Step II. At Step II, this charge was deemed substantiated and NYPD imposed a 30-day annual leave penalty upon Petitioner. Petitioner appealed the Step II decision for this particular charge on February 15, 2005. In a Step III reply, issued on June 15, 2005, an OLR Review Officer found that NYPD substantiated the charge, that the penalty imposed was appropriate, and denied the grievance. Petitioner again sought arbitration on his own on July 8, 2005, with the Union's approval,

and this request for arbitration was given the file number A-11294-05. Both A-11162-05 and A-11294-05 were consolidated by the Office of Collective Bargaining on August 2, 2006, and an arbitration hearing is scheduled for February 2, 2007.

Petitioner's Performance Evaluations

Petitioner claims that between September 2002 and September 2004, he received five "Well-Below Standard" evaluations from a particular supervisor because Petitioner had made statements that were critical of that supervisor. Petitioner alleges that on September 10, 2004, an appeal hearing of his performance evaluations was held and he asked for Union representation at the hearing. Krass arrived to represent him, but Krass was asked to leave the room by the Captain who held the hearing and left without protesting the "clear violation of [Petitioner's] *Weingarten* rights." (Petition ¶ 47.)[8]

On July 5, 2005, Petitioner wrote to Krass and asked him to file a grievance regarding the "Well-Below Standard" evaluations. He claimed to have tape-recorded evidence of several people to support his allegations. (Reply Exhibit 11.) Krass responded on July 14, 2005, and wrote that since the time period for filing a grievance was 120 days from the date the grievance arose, the grievance would be untimely. Krass also wrote that the Union would consider the matter further if Petitioner could obtain a written commitment from an authoritative person in NYPD to allow such a grievance despite the fact that it was untimely.

Events Leading Up To Petitioner's Termination

A Step I Informal Conference regarding 24 new charges and specifications that NYPD filed

[8] The outcome of Petitioner's appeals regarding his performance evaluations is not known, but the outcome is not relevant to this matter.

against Petitioner was held on July 22, 2005.[9] The charges and specifications alleged, among other things, that he engaged in conduct prejudicial to the good order, efficiency, and discipline of NYPD, drove the wrong way down a one-way street in an NYPD vehicle, failed to perform his duties, and disobeyed orders. The dates of the alleged infractions ranged from 2003 through 2005. Petitioner was represented by Incantalupo at the Informal Conference and was offered the option of resignation or termination as a penalty, but he declined to accept it and signed a statement that he declined the decision and penalty offered to him and elected to exercise his alleged right to grievance proceedings under Administrative Guide 319-19.

A Step II disciplinary hearing regarding the new charges was held on September 26, 2005, and Incantalupo attended with Petitioner as his Union representative. On November 2, 2005, the Deputy Commissioner of NYPD's OLR found that all of the charges and specifications against Petitioner were substantiated, and terminated Petitioner's employment. On November 7, 2005, the Director of NYPD's Employee Management Division sent Petitioner a letter making the termination effective.

On November 9, 2005, Petitioner requested a Step III hearing to protest his termination and on December 5, 2005, a Step III hearing was held. Incantalupo attended the hearing as a Union representative. On December 28, 2005, and before a Step III decision was issued, Petitioner sent a request for arbitration form to the Union. On that same date, December 28, Krass sent Petitioner a letter which stated in part:

> . . . As was done once before we will sign this Form only on condition that you will represent yourself (with your own attorney or by yourself) and that you agree that the

[9] The pleadings do not reveal when the new charges were served upon Petitioner, but no material issue of disputed fact turns upon the date of service upon Petitioner.

> Union has no responsibility for this Arbitration. Please sign and return a copy of this letter agreeing to this condition and I will then sign the Form with the notations indicated. Also, there is no contract Arbitrator and the Forms should so note. . . . (Petition Exhibit 5.)

On January 4, 2006, in a Step III decision, an OLR Review Officer found no evidence to support a contractual violation, that NYPD had substantiated the charges against Petitioner and that termination was appropriate. It is undisputed that after the Step III decision was rendered, Petitioner asked the Union to take the claim to arbitration and the Union notified him that it would not do so. (Petition ¶ 8.) Petitioner alleges that once the Union refused to go forward, he was forced to sign the form and seek an attorney at his own expense so that he could go to arbitration and dispute the charges.

Petitioner submitted, through counsel, a letter to Krass on January 4, 2006, inquiring when the Union would sign the request for arbitration form and what portion of the arbitration costs would be paid by the Union. Petitioner's attorney demanded that the Union pay at least 50% of the Arbitrator's per diem fee, since the fee was a "union cost" that Petitioner would be required to pay. (Union Exhibit 17.)

Brook responded to Petitioner's attorney on January 12, 2006. He wrote that the Union had provided Petitioner with an arbitration form modified to reflect that Petitioner would present his arbitration case independent of the Union, and that upon receipt of the signed form, the Union would sign it and return it to him. Brook also wrote that since it was Petitioner's desire to initiate arbitration, he should be responsible for his own attorney's fees and for the half of the total arbitration fees that are usually paid by the Union.

On January 17, 2006, Petitioner's attorney sent Krass the modified request for arbitration

form signed by Petitioner, and on January 18, 2006, Krass signed the modified request. The request for arbitration stated the grievance to be arbitrated as, "Grievant maintains that grievant was wrongfully terminated" in violation of Section 75 of the Civil Service Law. The portion which states "Grievant maintains that" was added in handwriting and initialed by Petitioner. Other sections of the request were modified in a similar way to indicate that Petitioner brought the grievance on his own. On the second page of the request, a handwritten addendum notes, "Grievant, Robert D'Onofrio asked Local 638 to file this request for arbitration, and he agreed to represent himself (or provide his own attorney) and Local 638 has no responsibility for this arbitration." In an area near this addendum, Petitioner signed his initials. A similar addendum appears on the page of the request that includes the waiver of the right to submit the underlying dispute to any other tribunal.

As a remedy, Petitioner seeks to have the Union pay all costs for the arbitration proceedings or, at a minimum, the arbitrator's fee.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation to him since it never came to his aid, never represented him properly and, as a result, violated NYCCBL § 12-306(b)(3).[10] Petitioner alleges that Union representatives, including Bartels, Krass, and Incantalupo, never mounted any defense for him or spoke on his behalf during all of his proceedings.

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[10] Section 12-306(b) of the NYCCBL provides:
It shall be an improper practice for a public employee organization or its agents:
* * *
(3) to breach its duty of fair representation to public employees under this chapter.

Regarding the charges and specifications against him, Petitioner claims that he submitted nearly 3,000 documents and 74 audio tapes to the Union to support his assertion of innocence on the disciplinary charges and to show that his well-below standards evaluations were unjustified, but the Union ignored the evidence. Petitioner also claims that the Union unduly weighed the cost of pursuing legal avenues on behalf of Petitioner, and that the Union did not want to spend money.

Because of the Union's failings and its refusal to take his claim to arbitration, he had to seek his own counsel, at his own expense, to proceed to Step IV. Petitioner argues that Krass wrote the section on the request for arbitration where it states that the Union would not represent him and he had no choice but to sign the form because the Union refused to go forward, or to allow the form to be filed at all without the modification, and that constituted duress. After Petitioner expressed his dissatisfaction with Incantalupo to Torpey, he was not offered the service of Krass or the Union's attorney even though Petitioner believed that Incantalupo's representation of him presented a conflict of interest, and that Incantalupo was more concerned with his overtime earnings than providing impartial representation. The Union treated Petitioner differently than others, he argues, in retaliation for being a whistle-blower and also for having engaged in other activities unfavorable to the Union, and its actions can only be interpreted as hostile and discriminatory.

Petitioner also argues that the Union's attorney should recuse himself from the current proceedings since he and the Union's attorney had conversations in 2003, and the Union's attorney has now been retained to bring legal proceedings against him, which Petitioner asserts is a violation of the attorney-client privilege.

Regarding NYPD's actions, the Petitioner alleges that after NYPD informed him that he could not be represented by anyone who was a subject of his allegations, and the Union failed to

provide him with alternate representation to Incantalupo, he appeared at several PG 206-13 hearings representing himself. Thereafter, NYPD took steps to harass, intimidate, and cause undue financial hardship on the part of the Petitioner by threatening disciplinary action in the form of a Command Discipline for appearing without an attorney.

Union's Position

The Union argues that it exercised its discretion in good faith, avoided arbitrary conduct, and responded to Petitioner's concerns in a timely fashion. Regarding the first set of charges against Petitioner in 2003, the Union negotiated a proposed settlement for a reduced penalty, to which Petitioner initially agreed but later rejected. The Union contends that when Petitioner elected to proceed, it continued to provide representation to the Petitioner up to arbitration and, when Petitioner complained about the representative provided by the Union, the Union offered the services of a different delegate. As NYPD's proposed penalty continued to be that which the Union initially negotiated on Petitioner's behalf, and the Union came to determine that the charges and specifications against Petitioner had merit, the Union determined not to proceed to arbitration but assisted Petitioner in completing the appropriate paperwork so that he could proceed on his own. Petitioner expressly agreed to waive any further obligations on behalf of the Union.

When Petitioner was charged with a significant range of new charges and specifications, the Union, after careful consideration and investigation of the facts and circumstances, determined that given the seriousness of the charges it was not in the best interests of the Union membership as a whole to defend Petitioner beyond Step III. Additionally, the Union prides itself on a productive and healthy relationship with the City and NYPD and, after careful deliberation and consideration, determined it would not condone nor defend Petitioner's persistent and flagrant violations of proper

orders and procedures.

The Union alleges that Incantalupo was offered to Petitioner as a representative late in Petitioner's proceedings because, by that point, Petitioner had already declared the other representatives incompetent, including Bartels, the Union's attorney, and Krass. Thus, the Union's conduct was not arbitrary, discriminatory, or founded in bad faith.

Moreover, the Union contends that Petitioner failed to plead and failed to provide proof that its actions, or lack thereof, were arbitrary, capricious, or discriminatory. According to the Union, Petitioner offers speculative allegations regarding irrelevant matters to the current proceeding rather than proffering relevant allegations of fact pertaining to the disciplinary charges against him. Petitioner's displeasure with the outcome of the disciplinary proceedings does not establish, of its own weight, that the Union breached its duty of fair representation. Thus, the petition should be dismissed in its entirety.

City's Position

The City asserts that there has been no breach of the duty of fair representation and the petition must be dismissed. Furthermore, the City argues that Petitioner has mischaracterized actions taken by NYPD in order to substantiate his duty of fair representation claim against the Union and, thereby, has raised the specter of an improper practice by Respondents. Petitioner's allegations make it appear that NYPD attempted to or was involved in directing which Union representative could represent Petitioner at his PG 206-13 hearings in early 2005, which is not the case. NYPD was not involved and took no action as to who could represent Petitioner in his hearings. The City contends that due to Petitioner's consistent refusal to work with the Union representative, thus delaying the hearings, the notification reads only that Petitioner must bring someone that is acceptable to him.

There is no indication that the City or NYPD discriminated against him or interfered with his right to have a hearing or to representation.

DISCUSSION

The issue before this Board is whether the Union breached its duty of fair representation in the manner in which it processed the disciplinary charges against Petitioner that led to his termination, and because of its refusal to take Petitioner's claim to arbitration or pay for the fees associated with arbitration.

We find that Petitioner has not alleged facts sufficient to state a *prima facie* case that the Union's conduct was arbitrary, discriminatory, or founded in bad faith.

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

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

Id. at 177. 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 Samuels*, Decision No. B-17-2006 at 12; *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*, 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. 386 U.S. 171.

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, this Board has held that in order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary, or founded in bad faith. *Gertskis*, Decision No. B-11-2006 at 10; *Watkins*, Decision No. B-23-2005 at 11; *Hug*, Decision No. B-51-90 at 14. 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, and this Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *Gertskis*, Decision No. B-11-2006 at 11; *see Grace*, Decision No. B-18-95 at 8. 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.

Furthermore, Petitioners must allege more than negligence, mistake, or incompetence to meet a *prima facie* showing of a union's breach. *Del Rio*, Decision No. B-6-2005 at 13; *Schweit*, Decision No. B-36-98 at 15. Unless a petitioner shows that the Union did more for others in the same circumstances than it did for the petitioner, or that its actions were arbitrary or perfunctory, even errors in judgment do not breach the duty. *Id*; s*ee also James-Reid*, Decision No. B-29-2006 at 17. Petitioner has the burden to plead and prove that the union engaged in prohibited conduct. *See Minervini*, Decision No. B-29-2003 at 15-16.

In the instant matter, Petitioner's allegations are insufficient to warrant a finding that a charge of the breach of the duty of fair representation should be sustained.[11]

Petitioner clearly had suspicions about the Union's desire and ability to represent him after he made the Mongo allegations, and he alleges these facts as the basis for hostility between him and the Union. However, he does not allege facts which would show that the Union's representation of him and his dissatisfaction with the outcome of his disciplinary matters was a result of deliberately invidious, arbitrary, or bad faith actions on the part of the Union.

The written documentation, the authenticity of which Petitioner does not dispute, evinces that after Petitioner was served with his first set of disciplinary charges and after the alleged sale of

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[11] Because Petitioner is *pro se* for purposes of this proceeding, and a hearing was not held, we draw all permissible inferences in favor of Petitioner from the pleadings, and assume, *arguendo*, that the factual allegations from the pleadings are true, analogous to a motion to dismiss. *James-Reid*, Decision No. B-29-2006 at 11. Furthermore, Petitioner submitted a number of letters and documents outside of the allowed pleadings under OCB rules. Here again, because Petitioner is *pro se*, we have considered all of those documents in our evaluation of this matter.

Mongo became known, the Union's attorney and/or several of the Union's representatives attended conferences and hearings regarding the disciplinary charges against Petitioner; attempted to settle the original disciplinary charges; explained the Union's position regarding settlement of those charges to Petitioner; wrote letters to the employer on his behalf regarding the proposed settlement and regarding the back pay that Petitioner believed he was owed; responded to Petitioner's letters, which complained about his representation; and, in relation to the first set of disciplinary charges against Petitioner, explained that it would not proceed to arbitration, in part, because it had determined that there appeared to be merit to the charges against him. *Vaca,* 386 U.S. at 192, 194.

It is undisputed that the Union took these actions on Petitioner's behalf. Assuming, as Petitioner asserts, that there had been conflict and animosity between him and Incantalupo, this conflict is not sufficient to establish of its own weight a breach of the duty of fair representation. With regard to the first set of disciplinary charges, it is undisputed that the Union made various efforts to represent Petitioner. Further, Petitioner has not shown that the Union breached its duty of fair representation with respect to the proceedings surrounding his termination. With respect to those events, we note that the Union provided Petitioner with representation during the grievance process by sending a representative to the Step I Informal Conference and the Step II and III hearings. It was after the Union exercised its right not to proceed to arbitration that Petitioner and the Union reached an accommodation wherein Petitioner could proceed to arbitration on his own. Although Petitioner claims he was treated differently from other Union members because he was a whistleblower, the materials he submitted adduce no probative facts or assertions that would raise a material issue of disputed fact that he was treated any differently from other Union members or that the Union's decisions were arbitrary or perfunctory. *See James-Reid*, Decision No. B-29-2006 at 17; *Gertskis,*

Decision No. B-11-2006 at 11.

Petitioner also asserts that for a variety of reasons, including general incompetence and cost factors, he was unhappy with the Union's representation. His dissatisfaction focuses on the quality and extent of the representation afforded him and the outcome of the disciplinary charges. In considering these specific allegations, we again take all of the facts as alleged by Petitioner as true and construe those facts in a light most favorable to him. Although Petitioner was dissatisfied with the Union's representation throughout the grievance process, he has not pled facts that would show that the Union's actions were arbitrary or perfunctory. *Id.* Petitioner must allege more than negligence, mistake, or incompetence to meet a *prima facie* showing of a union's breach. *Del Rio*, Decision No. B-6-2005 at 13; *Schweit,* Decision No. B-36-98 at 15.

Nor do the allegations support Petitioner's claim that, under duress, he signed the January 2006 modified request for arbitration form, which forced him to pay for his own counsel and the arbitration fees. In New York, a contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat that precluded the exercise of its free will. *Third Avenue LLC v. Orix Capital Markets, LLC*, 26 A.D.3d 216 (1st Dep't 2006), *appeal dismissed*, 26 A.D.3d 294 (1st Dep't 2006); *Stewart M. Muller Construction Co. v. New York Telephone Co.,* 40 N.Y.2d 955 (1976). The Courts have held that the threatened exercise of a legal right cannot constitute duress. *Third Avenue LLC,* 26 A.D.3d at 217; *Marine Midland Bank v. Stukey*, 75 A.D.2d 713 (1st Dep't 1980), *aff'd*, 55 N.Y.2d 633 (1981). Petitioner's allegations cannot sustain a claim that he was under duress when he signed the request for arbitration because the facts, as he alleges, do not show that the Union made any unlawful threat when it refused to bring his grievance to arbitration. We construe from the pleadings that Petitioner

claims that the Union's refusal to proceed to arbitration on a matter concerning his unjust termination constituted a threat which placed him under economic duress. A union's decision to pursue or refrain from pursuing a grievance to arbitration is a union's exclusive right under the NYCCBL, *Samuels,* Decision No. B-17-2006 at 14-15, and, thus, is legal. In the instant matter, when the Union exercised its right not to pursue arbitration on Petitioner's behalf and informed Petitioner of its decision, the Union conveyed a proposed course of action which was legal and, therefore, did not place Petitioner under what could legally be considered duress. *Third Avenue LLC,* 26 A.D.3d at 217.

Furthermore, Petitioner's attorney and the Union negotiated an agreement and reached an accommodation wherein Petitioner could proceed to arbitration in consideration for the Union surrendering its right to take that grievance to arbitration as consideration. Additionally, in examining the circumstances surrounding these events, at the time the Union refused to proceed with the grievance, Petitioner was given an alternate option in that he could pursue the grievance on his own, which he had already chosen to do once before in April 2005. Petitioner had also retained an attorney who represented him during negotiations with the Union on the issue of advancing to arbitration on his own. Therefore, considering the totality of the circumstances, including the lack of an unlawful threat and the other factors discussed above, Petitioner has not alleged facts that would show that he was placed under duress by the Union's actions. Indeed, we note that by signing the agreement, Petitioner was not precluded from obtaining the result he desired, which was the ability to proceed to arbitration on his claim. As the instant petition fails to allege facts sufficient to state a claim against the Union for a breach of its duty of fair representation, it is hereby dismissed.

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. Any allegations by Petitioner that the City independently violated the NYCCBL by harassing, intimidating, and causing him undue financial hardship by threatening disciplinary action for appearing *pro se* at PG 206-13 hearings are untimely. The documentation Petitioner submitted shows that the PG 206-13 hearings were held in April 2005, and Petitioner did not file the instant petition until March 1, 2006, which is outside the 120-day statute of limitations prescribed by the NYCCBL.[12] Accordingly, the petition is dismissed in its entirety.

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[12] 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); *Samuels*, Decision No. B-17-2006 at 11; *Burtner*, Decision No. B-1-2005 at 17.

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-2537-06, be and the same hereby is, dismissed in its entirety.

Dated: February 26, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER