Okorie-Ama, 79 OCB 5 (BCB 2007)

[Decision No B-05-2007] (IP) (Docket No. BCB-2568-06)

***Summary of Decision*:** Petitioner alleges that in violation of the NYCCBL, the Union breached its duty of fair representation with regard to an arbitration and a settlement agreement. Petitioner also alleges that HHC wrongfully terminated her employment. Both the Union and the City assert that the petition should be dismissed because Petitioner has failed to allege sufficient facts to state a claim under the NYCCBL. This Board found that most of petitioner's claims were time-barred and that the timely the allegations failed to establish a *prima facie* case that the Union breached its duty of fair representation or that the City had coerced her to execute the stipulation of settlement at issue. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

VICTORIA OKORIE-AMA,

Petitioner,

-and-

1199/SEIU UNITED HEALTHCARE WORKERS EAST, and
THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On August 23, 2006, Victoria Okorie-Ama ("Petitioner") filed a verified improper practice petition against 1199/Service Employees International Union, United Healthcare East (the "Union") and the New York City Heath and Hospitals Corporation ("HHC" or the "Corporation"). Petitioner alleges that the Union breached its duty of fair representation in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

("NYCCBL"), in failing to actively represent her with regard to disciplinary charges arising from incidents and job performance alleged to have taken place between July 30, 2005 through February 2006, culminating in a step conference on April 29, 2006 at which petitioner and HHC entered into a settlement agreement. In her reply, Petitioner also alleges that HHC wrongfully terminated her employment. Both the Union and the City assert that the petition should be dismissed as time-barred, and in any event that Petitioner has failed to allege sufficient facts to state a claim under the NYCCBL. This Board dismisses the petition because all of the allegations of events prior to the date on which the settlement was executed are outside of the four month statute of limitations applicable under NYCCBL § 12-306(e), and dismisses the allegations of a breach of the duty of fair representation in negotiating and executing the settlement for failure to establish a *prima facie* case, and as against the City for failing to allege facts sufficient to establish any wrongful act on its part.[1]

BACKGROUND

The Union is duly certified as the collective bargaining representative for the title of Dietician. Victoria Okorie-Ama, employed for approximately ten years in the title of Dietician Level II by HHC, was a member of the Union until her resignation from her employment for purposes of retirement pursuant to the stipulation of settlement at issue in this matter, signed on April 24, 2006, but effective on July 30, 2006 (the "Stipulation").

[1] Because this Board's jurisdiction is limited to claimed breached of the NYCCBL, "[a]ny claim under a statutory scheme other than the NYCCBL which Petitioner may have ... is also unavailing in this improper practice proceeding....[u]nless such a claim would also otherwise constitute an improper practice." *Edwards*, Decision No. B-35-2000, *citing*, *Pruitt*, Decision No. B-11-95, n. 7.

Prior to her being served with the disciplinary charges giving rise to the Stipulation, Ms. Okorie-Ama was employed in at least two HHC facilities, Gouverneur Skilled Nursing Facility and Diagnostic & Treatment Center ("Governeur") until October 3, 2005, and Coler-Goldwater Memorial Specialty Hospital & Nursing Facility ("Coler") from that date until November 28, 2005, at which point she was transferred back to Gouverneur.[2]

In her initial employment at Gouverneur, Okorie-Ama asserts, she was repeatedly targeted for harassment by Lee Fernandez, the Director of the Special Supplemental Nutrition Program for Women, Infants, and Children – better known as the "WIC Program" at Gouverneur, under whose jurisdiction Ms. Okorie-Ama fell.[3] Specifically, Ms. Okorie-Ama claims that Ms. Fernandez slapped her on March 21, 2000 with sufficient force to break her eyeglasses, forced her to run personal errands for her through 2001, and otherwise abused her. She asserts that as a result of undergoing "many years of torture, verbal, physical, mental emotional abuse [she] developed health problems," specifically high blood pressure and chest pain.

More formally, Ms. Okorie-Ama was charged in 2002 with patient abuse, and was found

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[2] Petitioner and the respondents agree to the dates of the transfers (Petition at 4-5; Union Answer at ¶ 15; HHC Answer at ¶¶ 15, 17.) The Union asserts that prior to being transferred to Coler, Ms. Okorie-Amie was transferred to Bellevue Hospital. *Id.* In her reply to the Union's Answer, Ms. Okorie-Ama denies being transferred to Bellevue, stating that during September 2005 she worked one day at that location, relieving another dietician who was traveling. Although the factual discrepancy does not bear any legal relevance, as explained in more detail below, Ms. Okorie-Ama's account, inferentially corroborated by HHC, is credited here.

[3] Although none of the parties have submitted allegations or documents specifying the nature of the WIC Program, this Board takes administrative notice that the WIC Program is described by the United States Food and Nutrition Service as a federally funded program that "serves to safeguard the health of low-income women, infants, and children up to age 5 who are at nutritional risk by providing nutritious foods to supplement diets, information on healthy eating, and referrals to health care." *See* http://www.fns.usda.gov/wic/aboutwic/default.htm

guilty at a Step 1A hearing . Although protesting her innocence of these charges, Ms. Okorie-Ama, represented by the Union, reached a resolution resulting in a six month probationary period and a subsequent expungement of the charges from her record. The Union asserts, although Ms. Okorie-Ama disputes, that she was to also receive anger management counseling. Ms. Okorie-Ama further alleges that the incident was never expunged as agreed.

Similarly, in June 2004, Ms. Okorie-Ama was the subject of two written letters of complaint regarding patients who were children at high risk of obesity; according to Ms. Okorie-Ama, no patients corresponding to the subjects of the complaint were reflected in the records as assigned to her. Ms. Okorie-Ama sought a hearing to clear her name, asking Joan Carter from the Union to assist her in so doing. No formal charges were ever pressed, nor did any hearing take place.

These allegations, and others, including those leading to the disciplinary charges giving rise to the instant petition, are asserted by Ms. Okorie-Ama to be false, and motivated by Ms. Frenandez's malice toward Ms. Okorie-Ama.

Ms. Okorie-Ama asserts that she was denied training opportunities afforded other employees, such as attending a WIC Program National Conference in New York City during Memorial Day weekend in 2003. Ms. Okorie-Ama alleges that Ms. Fernandez additionally impeded her ability to perform her job by denying her access to her office and to lavatory facilities, by not giving her keys to either upon her return to Gouvernour in January 2006. Ms. Okorie-Ama alleges that Ms. Fernandez opposed her return to Gouvernour, leaving voice mail messages for Union representative Joan Carter asking Ms. Carter to not "allow her [Okorie-Ama] back to [the] WIC program."

Ms. Okorie-Ama protests that the personnel evaluations she received in the year and a half

prior to her being served with disciplinary charges (Petition Exhibit H and I) constitute false claims of malfeasance, nonfeasance and incompetence against her by Ms. Fernandez. The first evaluation, covering the period from June 30, 2004 through July 30, 2005, and signed by Marline Munroe, is dated June 30, 2005. The second evaluation, covering July 30, 2005 through January 30, 2006, is dated January 31, 2006, and is also signed by Ms. Munroe, although it also bears what appears to be Ms. Fernandez's signature, dated January 27, 2006. Both evaluations are unsatisfactory, with the later evaluation stating that "in 13 out of 34 areas, performance has declined rather than improved over the five (5) months at Gouvernour," and that in her time at Coler, "she was unable to perform satisfactory [sic]."

In disputing the later evaluation, Ms. Okorie-Ama claimed that Ms. Fernandez had called Coler, both preventing Ms. Okorie-Ama from getting training to perform her work there, which was outside of her prior experience, and intervening to make sure that the evaluation would be unsatisfactory. Ms. Okorie-Ama claimed that she had sought the Union's assistance in establishing the impropriety of this evaluation, but that the Union representative declined to pursue her "stories," the truth of which management subsequently admitted in the course of the disciplinary conference.

In addition to disputing these assessments in written addenda to the evaluations, Ms. Okorie-Ama has submitted an undated letter of reference from Ms. Munroe, Petition Exhibit J, in which Ms. Munroe described her as "an employee that is punctual, reliable and a team player" who is "always willing to go that extra mile to help her colleagues as well as the clients."

On or about March 16, 2006 Ms. Okorie-Ama was suspended for 30 days without pay. Subsequently, on or about April 5, 2006, she was served by mail with the disciplinary charges

relevant to this matter, consisting of two specifications. The first specification, denominated "misconduct," charged that "on or about February 25, 26 and 27, 2006, you were absent without official leave."[4] The second specification, denominated "Incompetence," consisted of three allegations:

> 1. That during the evaluation period 7/30/2005 through January 30, 2006, your work performance was unsatisfactory as a Dietician Level II.
> 2. That you violated patients' rights to receive considerate and respectful care.
> 3. That your conduct was unbecoming an HHC employee.

(Petition Exhibit B.)

Pursuant to Article VI § 5 of the collective bargaining agreement between the City (and thus binding on HHC) and the Union, HHC scheduled a conference to be held on April 12, 2006 at Gouvereur; on April 10, 2006, Ms. Okorie-Ama received an additional notice of conference, rescheduling the conference to April 19, 2006. [5]

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[4] Ms. Okorie-Ama denies this charge, asserting that she was present on February 27, and that the 25th and 26th were her regularly scheduled days off. (Reply to Union Answer ¶ 26.)

[5] Article VI § 5 of the collective bargaining agreement provides, in pertinent part:

[T]he following procedure shall govern upon service of written charges of incompetency or misconduct:

> STEP A Following the service of written charges, a conference with such Employee shall be held with respect to such charges by the person designated by the agency head to review a grievance at STEP1 of the Grievance Procedure set forth in this Agreement. The Employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference....
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> STEP B(i) If the Employee is not satisfied with the determination at STEP A above then the

Prior to the conference, Ms. Carter allegedly met with Ms. Okorie-Ama, and instructed her to listen to the case against her, but not to present a response, which would be reserved until later in the process. In her reply to the Union's Answer, Ms. Okorie-Ama further asserts that her efforts to address purported patient complaints brought to her attention by Ms. Fernandez, which she believed to be generated by Ms. Fernandez, and other issues raised by her evaluation, resulted in a series of telephone messages left by her for Ms. Carter from November 29, 2005 through March 13, 2006. Because Ms. Carter was not returning her calls, Ms. Okorie-Ama called Betty Hughley at the Union and asked to be assigned a different representative. Ms. Hughley did not return Ms. Okorie-Ama's calls.

At the Step 1A conference on April 19, Ms. Fernandez presented the alleged grounds for discipline. According to Petitioner, Ms. Fernandez presented unsigned statements purporting to be from 20 patients complaining of rudeness on the part of Ms. Okorie-Ama. One such incident involved Ms. Okorie-Ama's alleged refusal to see a patient with a newborn who walked from Astoria, Queens during the transit strike in December 2005 to pick up WIC checks and whom she turned away for not having all of her documents. Ms. Fernandez claimed that she intervened, and took care of the patient. Brian Ellis, the conference holder, allegedly "yelled and saw [Ms. Okorie-Ama] as a heartless, wicked person." (Petition at 2.)

According to Ms. Okorie-Ama, this account was false; the patient came in weeks after the

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> Employer shall proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation. As an alternative, the Union with the consent of the Employee may choose to proceed in accordance with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to STEP IV of the Grievance Procedure.

transit strike and was, as she was signing for her check, recognized by Ms. Munroe as one who had suffered during the strike, and was sent to Ms. Fernandez's office to be photographed as an example of the strike's effects. According to Ms. Okorie-Ama, Ms. Fernandez had been on vacation during the strike.

Other alleged performance issues were raised at the conference, including Ms. Okorie-Ama's alleged destruction of WIC equipment, and errors in distributing materials and dietary packages. Again, Ms. Okorie-Ama contests these claimed deficiencies, stating that Ms. Fernandez blamed her for mistakes that Ms. Fernandez herself made.

According to both the Union and HHC, Ms. Okorie-Ama interrupted the conference on several occasions, expressing her anger at the charges in a disruptive manner. Ms. Okorie-Ama contests this allegation, and asserts that she repeatedly passed notes to Ms. Carter asking her to rebut the substance of the charges. Instead, she claims, Ms. Carter confined herself to attacking Ms. Fernandez, claiming that Ms. Fernandez had previously sought and obtained discipline against Ms. Okorie-Ama, incorrectly including in the 2004 complaint regarding children at risk for obesity. Ms. Carter refused Ms. Okorie-Ama's repeated requests to confer in the hall, an allegation denied by both HHC and the Union. Explaining Ms. Carter's lack of forceful advocacy, Ms. Okorie-Ama asserts that Ms. Carter told her that she respects Ms. Fernandez and would not act in detrimentally to her interests.

After the presentation of HHC's case, the conference holder requested Ms. Okorie-Ama to leave the room. Both the Union and HHC assert that the Union representative asked Mr. Ellis what penalty he would recommend, and, upon being informed that he would recommend termination,

stated that Ms. Okorie-Amie would be interested in retiring. According to both HHC and the Union, the Union representative stated that Ms. Okorie-Ama had told her she had previously made such inquiries, and been told that she was eligible to retire in July, 2006.[6] HHC agreed to allow Ms. Okorie-Ama to resign effective the end of July.

When Ms. Okorie-Ama was brought back to the room following these discussions, she alleges:

> [Ellis] told me he had enough evidence to terminate my job. When I asked Mr. Ellis why [he was] terminating me after 10 years of service, and to lose all my benefits he said he would offer to pay me for three months. I was under pressure and confused. They want me to lose all, but I knew come what may, I will get justice someday. So I was forced to sign on the 24th of April to resign and be paid off, starting 3/16/06.

(Petition at 3.)

In her replies, Ms. Okorie-Ama further specifies her state of mind in signing the Stipulation, stating that "[m]y signing papers of April 24, 2006 was for me to protect my retirement fund, I contributed for ten years and not to give up my right for a fair hearing on the false allegation against me." (Reply to Union Answer ¶ 25.) She also states that she refused to plead guilty to the charges. (Petition at 4.)

The parties agree that the Stipulation was subsequently prepared and signed by all parties on April 24, 2006. The Stipulation itself recites that Ms. Okorie-Ama "pleads no contest and agrees

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[6]Ms. Okorie-Ama denies in her replies that she told Mr. Ellis that she was interested in retiring (Reply to Union Answer ¶ 10; Reply to HHC Answer ¶ 23.) At the request of the Trial Examiner, Ms. Okorie-Ama submitted a copy of a letter she received in February, 2006 from the New York City Employees Retirement System estimating her eligibility for retirement, and a letter she received from Gouverneur in June, 2006 regarding the steps she needed to take to vest her benefits, in response to an inquiry from her on June 26, 2006.

to retire on or before this 30th day of July, 2006." ((HHC Answer Exhibit A at 2.) Pursuant to the Stipulation, in the event Ms. Okorie-Ama failed to retire, her resignation form, denoting that she resigned "for personal reasons," also dated July 30, 2006, would then become effective. (*Id.*) Additionally, Ms. Okorie-Ama agreed not to apply for future employment with HHC, any of its affiliates or any agency of the City of New York. Both the Union and Ms. Okorie-Ama released HHC and Gouvernour from all claims arising from the underlying dispute. (*Id.*) According to the Stipulation, the resignation form was required to be executed contemporaneously with, and attached to, the Stipulation. A copy has been introduced by both HHC and the Union, and Ms. Okorie-Ama has not denied the authenticity of the document in either reply.

In return, Ms. Okorie-Ama was to receive her full salary through July 30, 2006, the opportunity to file for retirement, and a neutral letter of reference to any employer. HHC additionally agreed to seal her personnel file except as to HHC itself, or any other City agency, and to not disclose the stipulation to any person not a party to the underlying disciplinary proceeding, except as required to enforce its terms.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that Union's counsel violated NYCCBL § 12-306 (b).[7] Petitioner asserts

[7] NYCCBL § 12-306(b), which states in relevant part:

> It shall be an improper practice for a public employee organization or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
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> * * *

that before the arbitration, Union's counsel was difficult to reach, did not return her calls, and did not press her complaints regarding her treatment by Ms. Fernandez. Petitioner claims that on the day of the arbitration, Union's counsel was unprepared and uninterested in her claims, and did not effectively or forcefully advocate for her position. Petitioner asserts that as a result her Union representative essentially denied that she had a case, and joined with HHC

Petitioner asserts that pursuant to NYCCBL § 12-306(d) and § 1-07(c)(1)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") she included HHC as a respondent.[8] Petitioner further argues that HHC independently violated NYCCBL § 12-306(a)(1)[9] in that it wrongfully allowed her to be subject to years of

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(3) to breach its duty of fair representation to public employees under this chapter.

[8] 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.

OCB Rule § 1-07(c)(1)(iii) provides in pertinent part:
The public employer shall be made a party to any improper practice charge pursuant to § 12-306(d) of the statute and shall file responsive pleadings in accordance with § 1-07(c)(3) of these rules.

[9] NYCCBL §12-306(a)(1) provides that it shall be an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted by section 12-305 of this chapter." Those rights include the "right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing, and ...to refrain from any or all of such activities." NYCCBL § 12-305.

Because Petitioner is *pro se*, we read her pleadings broadly, and therefore will address the other potential source of an independent claim against the Corporation, NYCCBL § 12-306(a)(3),

harassment by Fernandez, and then terminated her employment based on false charges motivated by Fernandez's malice toward her.

Union's Position

The Union argues that the petition is time-barred, either in full or in part. Further, Petitioner fails to state any claimed violation of the NYCCBL, in that she voluntarily settled her disciplinary case with a settlement that kept her on the payroll for three months, and then retire or resign. Furthermore, the Union asserts that Petitioner has alleged no facts supporting her contention that the Union violated its duty of fair representation to her. The Union represented her in good faith and achieved the best result obtainable under the facts and circumstances of her case.

The Union asserts that Petitioner's execution of the Stipulation of Settlement was knowing and voluntary, and that she understood fully the terms and conditions of the Stipulation, and agreed to them.

HHC's Position

Like the Union, HHC argues that the Petition is largely time-barred by the four month statute of limitations contained in Section 1-107(d) of the OCB Rules. Additionally, HHC cannot be held derivatively liable based upon the alleged breach of the duty of fair representation pursuant to NYCCBL § 12-306 (b)(3), because Petitioner fails to allege facts sufficient to establish such a breach. Petitioner has not, HHC argues, asserted facts that show that the Union's conduct in negotiating the Stipulation was arbitrary, discriminatory, or founded in bad faith.

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which forbids an employer "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization."

Because the Union did not breach its duty of fair representation, the Petition must be dismissed and any derivative claim against the City pursuant to NYCCBL § 12-306 (d) must also be dismissed. Moreover, Petitioner has not adduced facts which, if credited, would support a finding that HHC violated any rights of the Petitioner under NYCCBL § 12-306(a)(1) or (3).

DISCUSSION

As an initial matter, the Board finds that many of Petitioner's allegations contained in the instant petition are untimely. As set forth by NYCCBL § 12-306(e), implemented by OCB Rule 1-107(b)(4), the statute of limitations for filing an improper practice petition is four months from the accrual of the claim. Thus claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered. *See Castro*, Decision No. B-44-99 at 6. However, factual statements comprising untimely claims may be admissible as background information, and are so taken here. *See Patrolmen's Benevolent Ass'n*, Decision No. B-10-2006 at 13; *Schweit*, Decision No. B-36-98 at 13; *citing, District Council 37,* Decision No. B-37-92. Since the petition herein was filed on August 23, 2006, Petitioner's factual allegations of events prior to April 23, 2006 are considered by this Board solely as background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations. That includes the various alleged deficiencies of the Union's representation at the April 19, 2006 conference, and leaves timely only the alleged invalidity of the Stipulation itself.

The only issue properly before this Board, then, is whether the Union breached its duty of fair representation in representing Ms. Okorie-Ama in negotiating the terms of a settlement

agreement regarding her retirement and/or resignation resolving the disciplinary charges. We find that the Petition, to the extent it is timely, fails to state facts that if credited establish a *prima facie* case that the Union's conduct was arbitrary, discriminatory or founded in bad faith.

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. *See James-Reid*, Interim Decision No. B-29-2006 at 16-17; *Samuels,* Decision No. B-17-2006 at 12*; Del Rio,* Decision No. B-6-2005 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).

In the context of providing representation at disciplinary hearings, this Board has required a showing that the Union's actions "were arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, Decision B-29-2006 at 16-17, *citing Burtner*, Decision No. B-01-2005 at 13-14; *see also 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; *see also Richardson*, Decision No. B-24-94

(applying duty of fair representation standard to settlement by Union of a grievance); *Hodge*, Decision B-36-2006 at 17-20 (same). 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*.

In the instant case, of course, the analysis is complicated by the fact that the Union negotiated a settlement of Petitioner's disciplinary case, to which, unlike the petitioners in *Hodge* and *Richardson*, she consented, and to which she is a signatory. Now, having received the consideration for which she settled – that is, three months' pay, the opportunity to file for retirement, confidentiality with respect to the contents of her personnel file with respect to any prospective employers (other than HHC itself or its affiliates and/or other City agencies) and a neutral letter of reference to all other prospective employers–Petitioner seeks to claim that the Union breached its duty of fair representation by obtaining that consent through duress, and to press additional claims against the City. Under these circumstances, for Petitioner to pursue this claim, we hold, she must first establish that her consent to the settlement was invalid.

In New York State law, "stipulations of settlement are favored ... and are not lightly cast aside." *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984). Indeed, in subsequent cases, the Court of Appeals has reaffirmed what it terms "our State's strong policy promoting settlement." *Bonnette v. Long Island College Hospital*, 3 N.Y.3d 281, 286 (2004). For a stipulation to be set aside, the party seeking to do so must establish "cause sufficient to invalidate a contract such as fraud, duress, collusion, or mistake." *Feuer v. Darkanot*, 2007 N.Y. App. Div. LEXIS 782 (2d Dep't January 23, 2007), *citing Hallock, supra; see also, Matter of City of New York*, 12 Misc.3d 1171A, 820 N.Y.S.2d 842 (Sup. Ct. Kings.Co. 2006). Thus, stipulations of settlement resolving disciplinary

charges against public employees have routinely been upheld and found to bar actions arising from the claims settled, in the absence of a specific showing that the stipulation was invalid. *See, e.g., Quinlan v. New York City Fire Department*, 14 A.D.3d 320 (1st Dep't 2005), *following Matter of Abramovich v. Board of Educ.*, 46 N.Y.2d 450, *cert. den.*, 445 U.S. 845 (1979); *see also Matter of Croman v. City University of New York*, 277 A.D.2d 185 (1st Dep't 2001).

In the instant case, Petitioner appears to assert duress, claiming that she was "forced" to execute the Stipulation by Ellis's statement that he had enough evidence before him to recommend termination. However, to establish a claim of duress, a "party seeking to vacate a stipulation by asserting duress must demonstrate that threats *of an unlawful act* compelled his or her" adherence to the stipulation. *Feuer, supra* (emphasis in original); *see also, Board of Managers of Atrium Condo. v. W. 79th Street Corp.*, 19 A.D.3d 241 (1st Dep't 2005); *Town of Clarkstown v. M.R.O. Pump & Tank, Inc.*, 287 A..D.2d 498, 499 (2d Dep't 2001) . In the instant case, as Mr. Ellis had the option of recommending termination, based upon the admitted case presented by HHC to him, no unlawful act has been alleged. *Osborne v. County of Nassau*, 57 A.D.2d 551 (2d Dep't 1977) (where employer had right to prefer disciplinary charges, threat to do so unless case resolved did not constitute duress); *Fred Ehrlich, P.C. v. Tullo*, 274 A.D.2d 303 (1st Dep't 2000) ("threatened exercise of a legal right is not duress"). Indeed, in the specific context of public employee discipline, presenting an employee with the choice between a resolution acceptable to the employer or proceeding to arbitration – the choices with which Petitioner was confronted, shorn of rhetoric – has been specifically held not to render the resultant stipulation invalid. *Croman, supra; Osborne v. County of Nassau*, 57 A.D.2d at 552 (upholding as voluntary choice of resignation in exchange for payment of lost salary for period of suspension).

This is especially true where, as here, Petitioner accepted the benefits of the Stipulation, over the period of three months during which she received her pay, prior to seeking to vacate the Stipulation. *Bd. of Managers*, *supra, citing Kranitz v. Stober Organization*, 181 A.D.2d 441 (1992). In short, accepting Petitioner's allegations as true, we do not find that she has pleaded facts sufficient to establish duress.

Nor do we find that the conclusory assertions that Petitioner was "confused" and did not intend to give up her right to a fair hearing sufficient to raise a material issue of disputed fact as to whether she was entered into the Stipulation by mistake, or without the requisite knowledge and understanding of what she was doing. Petitioner clearly knew that this Stipulation contemplated her retirement or resignation; she executed, separately from the Stipulation although attached to it, a one page document stating explicitly that she resigned her employment, and subsequently pursued retirement.

Additionally, Petitioner explained that her reason for executing the Stipulation was to preserve her "retirement fund" (that is, her pension rights), an end which she accomplished by resigning or retiring, as opposed to being terminated. It has long been recognized by the courts that termination for misconduct for NYCERS members such as Petitioner result in the forfeiture of pension rights under the New York City Administrative Code. *See, e.g., Pell v. Board of Educ.*, 34 N.Y.2d 222, 238 (1974); *Kelly v. Safir,*, 96 N.Y.2d 32, 39 (2001). Under the sections of the Administrative Code applicable to NYCERS, the decision to retire excludes members who have been terminated for cause, and the separate option to receive accrued retirement benefits in an annuity only applies to members who "discontinue[] city service ... other than by death, retirement or dismissal." N.Y.C. Admin. Code §§ 13-150, 13-173(a)(1).

Indeed, NYCERS has in some cases been upheld for refusing to consider retirement applications designed to preserve pension rights against the disciplinary process. *See generally Matter of Mahoney v. McGuire*, 107 A.D.2d 363 (1st Dep't), *aff'd*, 66 N.Y.2d 622 (1985); *Barbaro v. New York City Employees' Retirement System*, 181 A.D.2d 437 (1st Dep't 1992), *aff'd sub nom. Waldeck v. New York City Employees' Retirement System*, 81 N.Y.2d 804 (1993) (construing cognate subdivision covering retirement of sanitation workers; holding that disciplinary proceeding could cut off retirement benefits despite service members' effort to retire prior to outcome).

Thus, Petitioner's own allegations clearly establish that she knew the nature and ramifications of the Stipulation's provisions, and that her decision to enter into the Stipulation was a rational choice to limit the potential negative consequences of the disciplinary process by resolving the charges against her. Just as the similar choice was respected in *Abramovich* and *Osborne* and the converse choice upheld in *Croman*, we find that petitioner's choice was one she had the right to make, and that she effectively did make. Accordingly, we find the Stipulation to have been validly entered into, and to be binding upon Petitioner.

Necessarily, then, the Union in assisting Petitioner in obtaining an agreement which she appropriately and validly entered into cannot be deemed to have breached its duty of fair representation by exerting duress against her. Indeed, the Union is alleged only to have insufficiently resisted the duress applied by Mr. Ellis, representing HHC. But since Mr. Ellis did not subject Petitioner to legally cognizable duress, and since Petitioner's decision to enter into the Stipulation was a rational, risk-minimizing decision, by her own account, we find no facts alleged here sufficient to find that either HHC or the Union acted in any manner sufficient to undermine the validity of the Settlement. 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 non-derivative claims alleged in the petition, or asserted for the first time in the reply to HHC's Answer, are either time-barred or released by the Stipulation, or both. Accordingly, the petition is dismissed in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-2568-06, filed by Victoria Okurie-Ama, be, and the same hereby is, dismissed.

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