Donnelly,et al., 7 OCB2d 23 (BCB 2014)

(IP) (Docket Nos. BCB-4015-13, BCB-4016-13, BCB-4017-13, BCB-4018-13)

Summary of Decision: Petitioners alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(3), by failing to adequately process their grievances. Petitioners further alleged that the City and DOT violated NYCCBL § 12-306(a)(1) and (3) by interfering with their attempts to pursue their grievances and retaliating against them for filing the grievances. The Union and the City argued that the petitions are untimely, that the Union did not breach its duty of fair representation, and that Petitioners failed to state a cause of action under the NYCCBL. The Board found that Petitioners' claims against the City and DOT are untimely and that, with one exception, the claims against the Union are also untimely. As to the timely claim, the Board held that Petitioners did not establish a breach of the duty of fair representation by the Union. Accordingly, the petitions were dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

TYLER DONNELLY, MICHAEL DEBARI,
DONALD HEDELS, and ROBERT ZUZIO,

Petitioners,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 246, THE CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On November 26, 2013, Tyler Donnelly, Michael DeBari, Donald Hedels, and Robert Zuzio (collectively, "Petitioners") each filed a separate verified improper practice petition against the Service Employees International Union, Local 246 ("Union"). By letter dated December 4,

2013, the Board's Executive Secretary notified Petitioners' counsel that the petitions were deficient pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") because they had not named the City of New York ("City"), a necessary party to the action, as a respondent.[1] On December 12, 2013, Petitioners filed amended petitions joining the City and the New York City Department of Transportation ("DOT") as respondents and served the petitions on the City.[2] Petitioners allege that the Union breached its duty of fair representation pursuant to § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to adequately process their grievances, and that the City and DOT violated NYCCBL § 12-306(a)(1) and (a)(3) by interfering with their attempts to pursue their grievances and retaliating against them for filing the grievances.[3] The Union and the City argue that the petitions are untimely, that the Union did not breach the duty of fair representation, and that Petitioner fails to state a violation of the NYCCBL. The Board finds that Petitioners' claims against the City and DOT are untimely and that, with one exception, their claims against the Union

[1] 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 or failure to process a claim that the public employer has breached its agreement with such employee organization.

[2] The petitions, filed under docket numbers BCB-4015-13 through BCB-4018-13, all state the same claims. Due to the overlapping facts and issues presented, the Trial Examiner consolidated the petitions for all purposes under docket number BCB-4015-13. Hereinafter, all references to the "petitions" in this Decision and Order are to the four petitions collectively.

[3] Petitioners subsequently requested and were granted permission to file a second amended petition to add additional claims. On April 10, 2014, Petitioners filed a second amended petition adding the additional claims but thereafter withdrew them.

are also untimely. As to the timely claim, the Board holds that Petitioners did not establish a breach of the duty of fair representation by the Union. Accordingly, the petitions are dismissed.

BACKGROUND

The Union is the certified bargaining representative for employees in the civil service title of Auto Mechanic at DOT. Petitioners are Union members and held the title of Auto Mechanic during the relevant time period in this matter.[4] The City and the Union are parties to the Auto Mechanics Agreement, covering the period from April 1, 2002 through May 30, 2008 ("Agreement"), and a Consent Determination covering the period from May 31, 2008 through May 30, 2010 ("Consent Determination"), both of which remain in *status qu*o pursuant to NYCCBL § 12-311d.

Pre-2013 Grievances

In 2008, Petitioners worked at DOT's Heavy Duty Shop, also known as the "Roller Shop," handling road calls and repairing trucks and equipment. Their work schedule was Sunday to Thursday, from 10:00 p.m. to 6:30 a.m. Petitioners received Sunday shift premium pay, night differential pay for each workday, and the opportunity to work morning overtime shifts, consistent with the Consent Determination and Article VIII of the Agreement. All four Petitioners had worked this shift for many years.

On or about December 1, 2008, DOT notified Petitioners that their shifts were being switched to Monday to Friday, from 10:00 p.m. to 6:30 a.m., due to a change in DOT's operational hours. Thereafter, on December 31, 2008, DeBari filed a grievance alleging that DOT violated the Consent Determination by failing to pay him the Saturday rate for working the Friday 10:00

[4] DeBari and Donnelly retired from DOT on or about February 19, 2013 and October 2, 2013, respectively. Zuzio and Hedels were still employed by DOT when this matter was filed.

p.m. to Saturday 6:30 a.m. shift. On July 30, 2010, Donnelly filed a grievance asserting the same allegation as DeBari (together, "shift premium grievances"). After both shift premium grievances were denied at Steps II and III, in February 2011, Union counsel filed requests for arbitration on behalf of DeBari and Donnelly. On June 5, 2012, the Union entered into a Stipulation of Settlement ("Settlement") with the City and DOT to resolve the shift premium grievances.[5] Pursuant to the Settlement's terms, the Union, DeBari, and Donnelly withdrew their shift premium grievances with prejudice.

Between 2009 and 2012, Petitioners filed additional grievances alleging contract violations, retaliation, and harassment by DOT.[6] The record reflects that Petitioners filed the following grievances during this period:

- On January 25, 2010, DeBari filed a grievance alleging that DOT refused to compensate him for his transportation to and appearance at a hearing, allegedly in retaliation for having filed the grievance for which the hearing was held.

- On February 18, 2011, Hedels filed a grievance on behalf of Petitioners alleging that DOT abolished their overnight shifts and transferred them to their prior work locations. Petitioners acknowledge that the Union did not process this grievance but maintain that it was for "arbitrary and capricious reasons."

- On February 18, 2011, DeBari also filed a grievance on behalf of Petitioners alleging that DOT abolished their overnight shifts and transferred them to their prior work locations.

- On April 14, 2011, DeBari filed a grievance on behalf of Petitioners alleging that DOT precluded them from volunteering for overtime on the night paving shift.

- On December 20, 2011, DeBari filed a grievance on behalf of Petitioners alleging that DOT removed them from their shifts and replaced them with less senior

[5] All of the Petitioners, including Zuzio and Hedels, received monetary payments pursuant to the Settlement.

[6] Petitioners allege that they filed "at least twelve (12) separate grievances" between December 2008 and June 2013, but only offer evidence of ten grievances filed during this period. (Second Am. Pet. ¶ 12)

employees, in retaliation for filing grievances.

- On September 9, 2012, "because the Union had failed to adequately process the prior grievances and had failed to fairly represent the Petitioners," DeBari filed a grievance on behalf of Petitioners again alleging that DOT had removed them from their shifts in order to preclude them from receiving shift premium pay.[7] (Second Am. Pet. ¶ 51)

The Union maintains that it determined that it would not pursue Petitioners' overtime claims because no contractual violation existed and the likelihood of success was low, among other reasons. It contends that it informed Petitioners that it would not process these grievances shortly after they were initiated. The Union asserts that it also advised Petitioners that they could not use the grievance process to remedy retaliation or disparate treatment by DOT and that they may seek relief through the EEOC.[8] In their Reply to the Union's Amended Answer, Petitioners admit that Union Business Agent Graziano informed them that the Union would not process these grievances.

The 2013 Transfer Grievances

In or about January 2013, Petitioners were working the night shift at DOT's Harper Street location, also known as the "Broom Shop." On or about January 5, DOT's Deputy Director of Fleet Services informed Petitioners that their shift was being terminated and that they would be transferred to other DOT facilities throughout the City. On January 7, the Union filed grievances at Step III on behalf of Petitioners ("transfer grievances"). In the transfer grievances, the Union alleged that Petitioners were involuntarily transferred to other locations without regard to

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[7] Petitioners also claim that, on or about September 29, 2010, DeBari wrote a letter to the Union on Petitioners' behalf notifying it that Petitioners were removed from their shifts in retaliation for filing grievances. Petitioners claim that the Union took no action in response to the letter.

[8] The City claims that DOT never received any of Petitioners' grievances pertaining to overtime distribution or shift changes during the referenced time period.

seniority, in violation of the Agreement. In or around February 2013, DOT posted vacancy notices pursuant to the Agreement. In response to the posting, Petitioners requested transfers back to other locations where they had previously worked. DOT granted the requests and Petitioners were moved to those locations.

On June 5, 2013, the City's Office of Labor Relations ("OLR") held a Step III conference on the transfer grievances. In a June 28, 2013 letter, OLR denied the grievances, stating that there was no contractual violation ("Step III Decision"). Specifically, OLR determined that the Union failed to produce any information regarding Petitioners' seniority relative to their Auto Mechanic colleagues or to demonstrate other factors that were necessary to show that a violation occurred. OLR also found that the Broom Shop was eliminated, thus precluding Petitioners from returning to that work location. A footnote to the Step III Decision states: "Note to Union: Failure by the Union to proceed to arbitration within 15 work days shall be deemed a waiver and abandonment by the Union of its right to proceed to arbitration."[9] (*See* Second Am. Pet., Ex. 11)

The Union contends that, "in early July following receipt of the Step III decision," Union Business Agent Thomas Graziano informed Petitioners that the Union would not take the transfer grievances to arbitration. (*See* Un. Am. Ans. to Second Am. Pet., ¶ 92) Petitioners deny that Graziano informed them of the Union's decision in early July or at any other time. Rather, they contend that they did not know until they were informed by Union President Joseph Colangelo on August 2, 2013, that the Union was "declining to pursue any of the Petitioners' grievances." (*See* Second Am. Pet., ¶ 54) The Union denies this allegation and maintains that President Colangelo did not speak with any of the Petitioners on August 2, 2013.

[9] Petitioners alleged that the Step III Decision concerns the "retaliatory transfer grievances dated February 18, 2011 and December 20, 2011." At a March 4, 2014 conference before the Trial Examiner, however, Petitioners' counsel conceded that the Step III Decision makes no reference to any 2011 grievances.

The Union maintains that following the issuance of the Step III Decision, Colangelo and Graziano conferred with Union counsel, reviewed the facts, the Step III Decision, and the applicable contractual provisions, and determined that the transfer grievances were not appropriate for arbitration. Specifically, it asserts that Petitioners did not have a viable claim because the Broom Shop was disbanded. The Union determined that DOT's decision to disband the Broom Shop was properly within its management prerogative and that its decision to relocate Petitioners back to their stated preferred work locations was proper.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners allege that the Union breached its duty of fair representation when it failed to adequately process their grievances against DOT, in violation of NYCCBL § 12-306(b)(3).[10] They allege that DOT violated NYCCBL § 12-306(a)(1) and (3) when it transferred them, precluded them from working overtime, and inequitably distributed overtime in retaliation for filing grievances and to discourage them from participating in protected activity. Petitioners contend that the City and DOT are also derivatively liable for the Union's violations of NYCCBL § 12-306(b)(3).

Petitioners assert that all of the claims in the grievances they filed between 2008 and 2013 accrued on August 2, 2013 when Union President Colangelo informed them that the Union would no longer process their previously filed grievances. Prior to August 2, 2013, they were still exhausting their internal remedies under the Agreement and were unaware that the Union was

[10] NYCCBL § 12-306(b)(3) provides that it shall be an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter."

declining to represent them. Accordingly, their claims could not have accrued before that date because any allegation that the Union failed to represent them would have been "merely speculative." (*Id.* at ¶ 17)

In response to the City's and the Union's affirmative defense of timeliness, Petitioners argue that the Board should not view each grievance they raised as a separate allegation or transaction. Rather, these allegations are "inextricably linked" and together establish a course of conduct by the Union and DOT which became "ripe for pursuit" on August 2, 2013 when the Union informed Petitioners that it would no longer pursue their grievances.[11] (Rep. to City Ans. ¶ 4; Rep. to Un. Ans. ¶ 23)

Petitioners maintain that they are permitted to use the circumstances surrounding the grievances that fall outside of the four month statutory period, as well as the Settlement, to establish both a course of conduct and the background information necessary to explain Respondents' retaliatory motives for declining to pursue their grievances on August 2, 2013. They concede that although the Settlement precludes them from raising an improper practice charge concerning the underlying events of the applicable grievances, it is necessary to explain the Union's motives and the basis for the City's retaliatory conduct against them. Citing Board law, Petitioners contend that the statute of limitations must be equitably tolled because the parties charged with the improper practices in this instance are also responsible for the delay in the filing of the petition. [12]

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[11] Petitioners contend that the City's argument for dismissal based on untimeliness presumes that the date the City was served with the petition, rather than the date the petition was filed, controls for purposes of triggering the four month statute of limitations. Petitioners argue that this argument must be rejected because OCB Rule § 1-07(c)(2)(iii) provides that an amended petition is deemed filed on the date of the original filing.

[12] Petitioners assert that they detrimentally relied on the Union's representations that their

On the merits, Petitioners argue that the Union failed to adequately address any of the grievances filed during the referenced time period. Specifically, they were never substantively evaluated, processed or submitted to DOT, and Petitioners were never informed as to why the grievances lacked merit. Petitioners assert that the Union is not permitted "unfettered discretion" merely because it is given "wide latitude" in determining which grievances will be pursued. (Rep. to Un. ¶ 28) Even if the Union evaluated their unaddressed grievances, Petitioners were never informed that it would not process them further, and the grievances remained "unanswered for." (*Id.* at ¶ 32) They contend that the Union's failure to adequately address these grievances combined with its refusal to process them on August 2, 2013 was arbitrary, capricious, and in bad faith.[13]

Petitioners allege that DOT, in retaliation for filing at least 12 grievances between December 2008 and June 2013, amended Petitioners' schedules and precluded them from receiving overtime shifts. To support their claims, Petitioners contend that they were explicitly threatened by their boss, Director of Fleet Services John Paterno, and that on July 18, 2010, Hedels was told by his supervisor that Paterno was angry about the grievances they filed. Moreover, they were removed from their Friday overnight shift whereas two other employees who did not file grievances were permitted to continue to work the shift. Paterno thereafter carried out his threats by precluding Petitioners from receiving overtime shifts "in an effort to coerce and/or restrain"

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grievances were being processed, but do not cite any factual support for this allegation except to contend that, at some point in time, they requested a release from the Union to pursue their claims with private counsel and were not provided one.

[13] In response to the Union's allegation that DeBari, by pursuing a claim with the EEOC, heeded its advice that it would not pursue Petitioners' grievances asserting retaliation, Petitioners assert that, had this actually occurred, DeBari would have known that the Office of Collective Bargaining, not the EEOC, is the proper forum for retaliation claims. The fact that DeBari attempted to file a claim with the EEOC demonstrates that he did not have knowledge from the Union.

them from filing grievances against DOT. (Second Am. Pet. ¶ 71) Petitioners claim that these actions show DOT's retaliatory motive, animus, and discriminatory conduct and were inherently destructive to employee rights.

Union's Position

The Union argues that all Petitioners' claims are time-barred. Construing the filing date of the petitions in the light most favorable to Petitioners, the Union asserts that the petitions were filed on or about November 26, 2013. Therefore, Petitioners cannot pursue any claims that occurred before July 26, 2013, four months prior to the filing date. It argues that Union Representative Graziano informed Petitioners in early July 2013 that the Union would not process the transfer grievances further.

Even if the Board finds that some or all of Petitioners' claims are timely, the Union contends that Petitioners have failed to allege any facts that demonstrate discrimination or disparate treatment sufficient to show that the Union violated NYCCBL § 12-306(b)(3). Citing Board law, the Union asserts that a union enjoys "wide latitude" in the handling of grievances as long as it exercises discretion with good faith and honesty. (Un. Am. Ans. ¶ 107) It contends that the Union's Executive Board, in assessing whether to pursue grievances to arbitration, considers the likelihood of success on the merits and the overall impact a grievance will have on the Union's membership, among other factors.

In the instant matter, the Union acted in good faith and chose not to pursue certain claims on the grounds that they were not meritorious and/or would have harmful ramifications to the membership at large. It argues that it pursued the transfer grievances through the Step III Decision but declined to process them further "where the matter was unlikely to succeed in an arbitration proceeding." (Un. Am. Ans. ¶ 86) Graziano, in conjunction with Colangelo and

Union counsel, determined that Petitioners did not have a viable claim based on their conclusion that DOT acted within its managerial prerogative to disband their shop, among other reasons. They reached this conclusion after reviewing the Step III decision, the applicable contract provisions, and the facts.

It notes that the Board has found that a union's decision not to take a grievance to arbitration, when reasonably based on the good faith advice of counsel, does not constitute a breach of the duty of fair representation, nor does a union breach this duty merely because a grievant is not satisfied with the outcome of a grievance. Moreover, it asserts that this Board has held that once a union has explained its decision about whether to handle a grievance to the grievant, it is not obligated to repeat the explanation simply because a member requests it nor must it provide the explanation in a form requested by the member, so long as the explanation is communicated in a "reasonably understandable fashion." (Un. Am Ans. ¶ 116) The fact that Petitioners are unsatisfied or disagree with the responses they received regarding the Union's decisions not to proceed to arbitration is insufficient to state a claim. For these reasons, the Union seeks dismissal of the petitions.

<u>City's Position</u>

Like the Union, the City asserts the affirmative defense of timeliness. It argues that any claims that DOT retaliated against Petitioners or interfered with protected union activity, in violation of NYCCBL § 12-306(a)(1) and (3), as well as any claims against the Union for a breach of the duty of fair representation, must fail because they fall outside the four month statute of limitations. The City claims that, because it was not served with the petitions until December 11, 2013, the statute of limitations began to run on August 11, 2013.[14] Thus any claims for alleged

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[14] Petitioners' Affidavit of Service states that it served Respondents with the amended petition by

retaliatory conduct or interference by DOT that occurred prior to that date are time-barred.

Regarding the claims related to the Union's representation of Petitioners at the June 5, 2013 Step III hearing, the City contends that the latest possible date that could be considered timely is June 28, 2013, the date the Step III decision was issued. Even if the Board determines that the August 2, 2013 date falls within the four month statute of limitations, the City argues that Petitioners knew or should have known prior to that date that the Union was not pursuing actions filed two or three years before that. The City further argues that none of the allegations against DOT that Petitioners claim occurred prior to August 11, 2013 are timely and therefore must be dismissed. It contends that the statute of limitations began to run when these alleged events actually occurred.

To the extent the Board finds that Petitioners' claims against DOT were timely filed, the City alleges that they must still fail because Petitioners have not demonstrated a *prima facie* violation of either NYCCBL § 12-306(a)(1) or (3). Initially, the City maintains that DOT was never notified of the Petitioners' grievances dated January 25, 2010, February 18, 2011, April 14, 2011, December 20, 2011, and September 9, 2012. Consequently, it could not have retaliated against them for filing these grievances. As to the remaining grievances, Petitioners have offered nothing more than unsubstantiated quotations and an incomplete statement of events in support of their claims that anti-union animus motivated the allegedly discriminatory and retaliatory actions taken by DOT.[15] Moreover, DOT has the managerial discretion under NYCCBL § 12-307(b) to direct its employees, including reassigning and transferring them. The City argues that

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FedEx Airbill on December 11, 2013. We assume that the City received the amended petition on December 12, 2013.

[15] Moreover, the City notes that a retaliation claim arises from the NYCCBL and is separate from contractual grievances arising from the parties' Agreement. Petitioners thus would have received no remedy for the alleged retaliation against them based on the contractual grievances they filed.

Petitioners have also failed to establish an independent violation of NYCCBL § 12-306(a)(1).

Finally, the City contends that Petitioners failed to allege facts sufficient to demonstrate that the Union breached the duty of fair representation. Specifically, Petitioners have not offered any evidence that the Union acted in a manner that was "deliberately arbitrary, discriminatory, or founded in bad faith." (City Ans. ¶ 173) Therefore, the claims against the Union, and any derivative claim against the City pursuant to NYCCBL § 12-306(d), must also be dismissed.

DISCUSSION

Petitioners claim that the Union violated its duty of fair representation when it declined to process their grievances against DOT for its failure to pay and equally distribute overtime and its decision to involuntarily transfer them. They allege that DOT took these improper actions against them in retaliation for filing grievances. Because a hearing was not held in this case, "in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citation omitted). Moreover, although the parties disagree over several background facts, "we need not resolve these disputes to decide the instant case. Rather, we are able to decide upon the record before us as the factual disputes which exist are not material to the legal claims raised." *Rondinella*, 5 OCB2d 13, at 14 (BCB 2012) (citations omitted).

We first address the timeliness of the claims. NYCCBL § 12-306(e) and OCB Rule § 1-07(d) set the statute of limitations at four months.[16] Thus, "it is well established that an

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[16] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a

improper practice charge 'must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd.*, *Matter of Mahinda v. City of New York,* Index No. 117487/2009 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d 564 (1st Dept. 2012). Consequently, "claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (citations omitted).

Petitioners filed their original petitions on November 26, 2013.[17] Therefore, any alleged claims or actions that occurred prior to July 26, 2013 are considered untimely. None of Petitioners' claims against DOT arose during the four month period preceding the filing of their petitions. Indeed, the most recent claim against DOT, the January 2013 transfer, occurred over six months before the July 26, 2013 time bar. Accordingly, Petitioners' NYCCBL § 12-306(a)(1) and (3) claims against the City and DOT are untimely.

The majority of Petitioners' claims against the Union are also untimely. With the

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> 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. . . .

OCB Rule § 1-07(d) 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 Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . . ."

[17] In accordance with the Executive Secretary's direction, the Petitioners subsequently filed an amended petition on December 12, 2013 to add the City and DOT, statutory parties to the action, as respondents. *See* NYCCBL § 12-306(d). The allegations in the original petition clearly stated that the petitioners asserted that the City and DOT were alleged to have violated the NYCCBL, and the amended petition contained no additional facts or causes of action.

exception of the 2013 transfer grievances, Petitioners filed their grievances between December 31, 2008 and September 9, 2012.[18] Petitioners admit that they filed the September 9, 2012 grievance precisely because the Union "had failed to adequately process the prior grievances and had failed to fairly represent the Petitioners." (Second Am. Pet ¶ 51.) Accordingly, they were aware no later than September 9, 2012 that the Union would not process any of their prior grievances.

In addition, the Union contends that it informed Petitioners that these grievances would not be processed shortly after they were initiated. Petitioners did not deny this claim. However, even if the Union did not explicitly inform Petitioners that it was declining to pursue their overtime and shift change grievances, we can construe from the grievance filing dates that Petitioners should reasonably have concluded well before July 26, 2013 that the Union would not pursue their claims. The latest of these grievances was filed in September 2012, and there is no evidence that Petitioners had any communication with the Union about these grievances during the year before the instant petitions were filed. *See Cherry*, 4 OCB2d 15, at 11 (BCB 2011) ("the occurrence of the disputed action, or when the petitioner knew or should have known of the occurrence, establishes the time of accrual, and it is at that time that a petitioner's duty to investigate and bring the claim arises"); *see also Buffalo Federation of Teachers (Boyar)*, 29 PERB 3006 (1996) (finding that union's two year failure to respond to grievant's inquiries should have put him on notice that it was not pursuing his claim).

In reply to Respondents' timeliness defenses, Petitioners assert that the statute of

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[18] Although Petitioners assert that they filed at least twelve grievances during this approximate time period, the record only reflects evidence of ten grievances. Since the record lacks specificity as to additional grievances, we address only these ten grievances. *See* OCB Rule § 1-07(c)(1)(i)(d) (claims must be pled with specificity). We also note that because Petitioners withdrew all shift premium grievances with prejudice as a condition of the parties' Settlement, any claims against the Union and/or DOT derived from those grievances are precluded and will not be considered other than as background information.

limitations should be tolled based on equitable estoppel. This Board has held that equitable tolling is appropriate when an opposing party intentionally or unintentionally dissuades a petitioner from filing a charge. *See Mora-McLaughlin*, 3 OCB2d 24, at 12-13 (BCB 2010); *see also Obispo v. 423 Madison Ave., LLC*, 25 Misc.3d 1215(A) (Sup. Ct. New York Co. Sept. 18, 2009) (hiding facts or engaging in deceptive and/or fraudulent acts is grounds for equitable tolling), *affd.*, 82 A.D.3d 680 (1st Dept. 2011). Petitioners have offered nothing more than conclusory statements to support their contention that the Union was responsible for the delay in their timely filing of the petitions. Accordingly, we reject this argument.[19]

As to the 2013 transfer grievances, the parties dispute the date on which the Union informed Petitioners following the issuance of the Step III Decision that it would not proceed to arbitration. The Union asserts that it informed Petitioners in early July 2013, while Petitioners maintain that President Colangelo informed them of the Union's decision for the first time on August 2, 2013. Drawing all permissible inferences in favor of Petitioners, we shall accept as true Petitioners' allegation that they did not learn until August 2, 2013 that the Union would not pursue their 2013 transfer grievances following the Step III Decision. *See Morris*, 3 OCB2d 19, at 12. Consequently, we find the 2013 transfer grievances to be timely for purposes of consideration of Petitioners' NYCCBL § 12-306(b)(3) claim.

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees . . . ." To establish a breach of the duty of fair representation, the Board has explained that the burden is on the petitioner to show that "a union's acts in representing him or her were arbitrary, discriminatory, or

[19] Further, we are not persuaded by Petitioners' assertion that all their allegations are timely because they are "inextricably linked." The only timely claim, the 2013 transfer grievances, arose from a specific action taken on January 5, 2013 and is not directly related to the earlier grievances.

in bad faith." *Morales*, 5 OCB2d 28, at 19 (BCB 2012); *see also Lewis*, 4 OCB2d 24, at 15 (BCB 2011) (citation omitted). The duty of fair representation "does not reach into and control all aspects of the Union's relationship with its members." *McAllan*, 31 OCB 14, at 30 (BCB 1983). Rather, a union has a duty "to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Smith*, 3 OCB2d 17, at 7 (BCB 2010).

The duty of fair representation applies to the processing of contractual grievances. *See Morales*, 5 OCB2d 28, at 19. However, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Proctor*, 3 OCB2d 30, at 12 (BCB 2010) (citation omitted). Thus, a "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *Morris*, 3 OCB2d 19, at 10 (quoting *James-Reid*, 1 OCB2d 26, at 25 (BCB 2008)). A union is not obligated to advance every grievance and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40; *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Additionally, allegations of negligence, mistake, or incompetence are not sufficient to establish a *prima facie* case against a union for a breach of the duty of fair representation. *See Del Rio*, 75 OCB 6, at 13.

Here, the Board finds that the Union's decision not to pursue Petitioners' 2013 transfer grievances following the Step III Decision was not arbitrary, discriminatory or in bad faith. The Union made a strategic decision that the grievances were not appropriate for arbitration based on its review of the facts, the Step III Decision, and the applicable contract provisions. In particular, the Union noted that Petitioners did not have a viable claim because DOT disbanded the "Broom

Shop" which, the Union determined, was a management prerogative. It therefore concluded that Petitioners could not succeed at arbitration. The fact that Petitioners disagreed with the Union's reasoning or conclusion does not establish a breach of the duty of fair representation. *See Lewis*, 4 OCB2d 24, at 15-16. Moreover, Petitioners have not refuted the Union's explanation of why it did not take the claims to arbitration nor have they provided any basis upon which we could conclude that they had a meritorious claim that the Union refused to process before the Board. *See James-Reid*, 1 OCB2d 26, at 26; *Thomas*, 5 OCB2d 40, at 14 (BCB 2012).

We therefore find that Petitioners' claims that the Union breached the duty of fair representation must fail, as must any derivative claim against the City and DOT pursuant to NYCCBL § 12-306(d). *See Nardiello*, 2 OCB2d 5, at 42. We also dismiss any claims that DOT retaliated against Petitioner in violation of NYCCBL § 12-306(a)(1) and (3). Thus, we dismiss the petitions in their 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 petitions, docketed as BCB-4015-13, BCB-4016-13, BCB-4017-13, and BCB-4018-13, filed by Tyler Donnelly, Michael DeBari, Donald Hedels, and Robert Zuzio, be, and hereby are, dismissed.

Dated: September 9, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER