Fernandes, 8 OCB2d 21 (BCB 2015)

(IP) (Docket No. BCB-4095-15)

Summary of Decision: Petitioner alleges that the City retaliated against him in violation of NYCCBL § 12-306(a)(1) and (3) and that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b). Respondents argued that Petitioner's claims are untimely and, in the alternative, that Petitioner fails to state a claim. The Board found that some of Petitioner's allegations are untimely, and that Petitioner's timely allegations do not state facts that would establish claims under the NYCCBL. Therefore, the improper practice petition is dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JOEL FERNANDES,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 983, AFSCME, AFL-CIO, and THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On February 20, 2015, Joel Fernandes, *pro se*, filed an improper practice petition against the City of New York ("City") and his employer, the New York City Police Department ("NYPD"), alleging that the NYPD retaliated and discriminated against him for union activity in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York

City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Petitioner further claims that District Council 37, Local 983, AFSCME, AFL-CIO ("Union"), breached its duty of fair representation in violation of NYCCBL § 12-306(b) by not responding to Petitioner's request for assistance concerning allegedly excessive discipline and denials of his request for overtime. Both Respondents argue that Petitioner's claims are untimely and that Petitioner fails to state a breach of the duty of fair representation. Respondent City further argues that Petitioner's claims of retaliation are not properly before the Board, and that Petitioner fails to present evidence of protected activity that would support a claim of retaliation. The Board finds that the Petitioner has not stated a *prima facie* claim of a breach of the NYCCBL against either the NYPD or the Union. Therefore, the petition is dismissed.

BACKGROUND[2]

Petitioner is a Traffic Enforcement Agent ("TEA"), Level III, and has been employed by the Traffic Enforcement Division ("TED") of the NYPD since 2002. The Union and the NYPD are parties to a collective bargaining agreement ("Agreement"). For all times relevant to this proceeding, Petitioner has worked in the Brooklyn Tow Pound.

Petitioner was among four named plaintiffs in an Article 78 petition filed by the Union in November 2013 ("Article 78 Action"), alleging that the City and the NYPD violated Labor Law

[1] Petitioner filed an improper practice petition on February 20, 2015. A deficiency letter was sent on February 26, 2015. Petitioner corrected the deficiency by filing an amended petition on March 16, 2015.

[2] Omitted from Petitioner's amended pleadings, but included in the original petition, is an allegation that he is owed sick time in accordance with an October 22, 2012 decision by the NYS Workers' Compensation Board. This claim does not arise under the NYCCBL and is therefore outside of our jurisdiction.

§ 215-a by establishing and maintaining a vehicular tow quota policy.[3] He contends that due to his participation in the Article 78 Action and complaints concerning the alleged NYPD tow quota, Commanding Officer Adami and Executive Officer Longwaith have harassed and retaliated against him by (i) excessively disciplining him following a traffic accident and (ii) improperly denying his overtime requests.

September 2014 Allegation - Excessive Discipline[4]

On July 11, 2014, Petitioner's tow truck was sideswiped by a commercial vehicle ("July 2014 Accident"). Although the initial police report indicated that Petitioner bore responsibility, the amended police report concluded that the driver of the commercial vehicle was at fault. Nevertheless, the Accident Review Panel, which reviews traffic accidents for disciplinary purposes, concluded that Petitioner was responsible.

Petitioner alleges he received three penalties for the July 2014 Accident. On August 8, 2014, Petitioner was assigned to intersection duty but was returned to tow duty following a complaint to the Union and to NYPD personnel. On August 21, Petitioner was again assigned to intersection duty but was returned to tow duty after complaining to the Union and to NYPD personnel. Petitioner alleges, and the City denies, that following this second reassignment, the Commanding Officer "warned me that since I got involved with Lt. Druckman, he will see me grounded . . . ."[5] (Pet. at 15) On September 4, Petitioner was assigned intersection duty for a

[3] This Article 78 proceeding was dismissed by the Supreme Court, New York County, on October 30, 2014.

[4] The City denies Petitioner's allegations, but does not present its own recitation of the events alleged.

[5] Lt. Druckman was one of the commanding officers to whom Petitioner complained regarding his intersection duty assignments.

third time. Petitioner thereafter served intersection duty for 22 days. The Union alleges, and Petitioner does not deny, that Petitioner did not grieve the third reassignment.

Throughout September 2014, Petitioner sought relief from intersection duty from several different NYPD personnel and entities. In a letter dated September 4, 2014, Petitioner complained about the reassignment to the Deputy Director of Traffic, but received no response. On September 5, 2014, Petitioner filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), charging that the reassignment was discriminatory.[6] On September 7, 2014, Petitioner wrote a letter to the Chief of the NYPD Community Affairs Bureau, seeking relief from intersection duty.[7] On September 13, 2014, Petitioner wrote a similar letter to the NYPD Police Commissioner. Petitioner sought further assistance in an undated letter to the Deputy Director of Traffic and in an undated complaint to the City's Office of Labor Relations ("OLR").[8]

The City's Answer set forth the NYPD's general practice following tow accidents.[9] The City alleges that penalties for a tow accident rely upon the determination of an Accident Review Panel and are not determined solely by the Commanding Officer. When a TED tow truck is involved in a traffic accident, the command Traffic Manager reviews the accident report issued by the Commanding or Executive Officer in the precinct where the accident occurred. If the

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[6] The EEOC dismissed Petitioner's complaint on November 28, 2014.

[7] We take administrative notice that the letter was addressed to the officer who was, at the time, Chief of the Community Affairs Bureau.

[8] In the undated letter to the NYPD Deputy Director of Traffic, Petitioner additionally alleged that the Commanding Officer verbally reprimanded Petitioner for failing to adhere to tow quotas, and threatened to retaliate against Petitioner for complaining to NYPD personnel about the Commanding Officer.

[9] The City's explanation of the NYPD's accident policy is consistent with our findings concerning the same accident review policy, in *DC 37*, 6 OCB 2d 10, at 4-10 (BCB 2013).

report indicates that the TED driver was at fault, the accident will be reviewed by an Accident Review Panel to make an independent determination of fault. If the Accident Review Panel finds the TED driver at fault, it will assess a penalty, which usually is a foot patrol assignment such as intersection duty. Petitioner did not deny these allegations.

The Union alleges that Petitioner lost no salary during the reassignment to intersection duty. More broadly, it also alleged that it challenged the application of the accident policy to TEAs in December 2010, and that it continues to discuss the issue with the City.[10]

October 2014 Allegations – Denial of Overtime[11]

Petitioner also alleges that he was improperly denied overtime in October 2014 in retaliation for his involvement in the Article 78 Action, a complaint to the OLR Commissioner regarding the Commanding Officer, and his subsequent complaints regarding the overtime assignment policy in the Brooklyn Tow Pound.

On October 6, 2014, Petitioner alleges he was denied an overtime request for the highway detail, despite being the only TEA who had requested overtime for that assignment. Supervisor Codero, who posts and assigns overtime, instead assigned the detail to TEA Potter. However, because TEA Potter was absent that day, the Commanding Officer reassigned the overtime detail to another TEA. Although Petitioner admits he was told that he was denied the assignment because he had more overtime than the other TEA IIIs during the month of October, he alleges

[10] In a Step III Reply dated April 18, 2011, OLR considered a Union grievance alleging that the NYPD had violated an internal policy concerning the penalties imposed upon TEAs who are involved in motor vehicle accidents. OLR made no determination on the merits, concluding that "the matter is deemed to be in the process of resolution." (Union Ans., Ex. D)

[11] The City denies Petitioner's allegations, but does not put forth its own recitation of the events alleged.

he was denied the overtime shift in retaliation for complaining to the OLR Commissioner about the Commanding Officer in August 2014.[12]

Petitioner alleges that on October 9, 2014, a TEA III who had more overtime than most other agents signed up for and received an overtime detail. Petitioner does not contend that he volunteered for this overtime assignment. However, he charges that he was treated unfairly relative to this TEA III, because the overtime detail was not reassigned to a TEA with less overtime.

In a letter dated October 13, 2014, Petitioner complained to the Union and to the NYPD about the allocation of overtime. In that letter, he alleged that he has raised similar issues in the past, but that Union Representative Clarice Wilson had been dismissive of his concerns. Additionally, he "strongly suspects" that she "leaked" his complaints to the Commanding Officer. (Pet. at 26) Petitioner does not allege that he filed a formal grievance concerning the incidents on October 6 or 9.

On October 16, 2014, Union personnel had several meetings with TEAs, their immediate supervisors, and the Executive Officer to discuss members' concerns regarding overtime. Petitioner does not deny that these meetings occurred.

On or around October 17, 2014, Petitioner allegedly sent a petition to the Union requesting redress for the "arbitrary" selection of overtime assignments, among other issues ("October Petition"). (Pet. at 9) The October Petition contains the signatures of 14 TEAs. With respect to the assignment of overtime, the October Petition charges that "[t]he volunteers signing up for the OT detail are ignored and the assignment is forcefully pushed to [a TEA] who has not

[12] Petitioner alleges that in or around August 2014, the Commanding Officer refused to allow Petitioner to staff a highway detail. Petitioner asserts that he complained to the Commissioner concerning this episode.

volunteered for the (specific) OT detail." (*Id.*) It further charges that some overtime assignments are not posted, but rather are "secretly given to selective agents." (*Id.*) The Union admits that Petitioner had mentioned the October Petition, but denies ever receiving it.

Petitioner asserts that the Executive Officer manipulated his overtime hours in retaliation for the October Petition. Specifically, on October 30, 2014, Petitioner alleges he volunteered for an overtime detail for October 31, but was denied the assignment. Petitioner requested an explanation, and was told that his request was denied because he purportedly worked 7.5 hours of overtime on October 1, and therefore had more hours during the month of October than other TEAs. However, following a complaint to the Union, Petitioner confirmed that the 7.5 hour overtime shift occurred on September 30, not October 1. Petitioner believes that his October overtime hours were falsely increased in order to justify denying him future overtime assignments. Petitioner does not allege that he ever filed a formal grievance concerning this episode. The City denies these allegations, but does not offer its own recitation of this episode.

The City explained that overtime assignments are generally made on a volunteer basis, but that lower overtime earners are favored for assignments when there are more volunteers than needed. The City additionally noted that Petitioner was among the top one-third of overtime earners in 2012, 2013, and 2014, and is projected to reach a similar ranking in 2015. Similarly, the Union alleges that Petitioner was the third-highest overtime earner in October 2014. Although Petitioner alleges that the Executive Officer deliberately miscalculates his overtime hours, he does not deny that he remains among the top one-third of overtime earners or that he was the third-highest earner in October.

On November 3, 2014, the Union emailed a memorandum to Petitioner in response to his concerns that the NYPD was retaliating against him ("Union Memorandum"). Addressing both

the penalty for the July 2014 Accident and the denial of overtime on October 6, the Union Memorandum stated that the Union would be unable to establish antiunion animus and declined to file an improper practice petition on Petitioner's behalf. With respect to the July 2014 Accident, the Union Memorandum explained:

> It is the Legal Department's understanding that the Accident Review Board often finds fault with members even when the evidence does not support such a finding. As such, the Union will not be able to establish that the Accident Review Board's finding that Mr. Fernandes was at fault, or his subsequent assignment to intersection duty, were acts in retaliation for his Union activity.

(Pet. at 43). Addressing the denial of overtime, the Union Memorandum assessed:

> Traffic Supervisor Level 1 Cordero assigns the O/T based on how many hours the employee already has that month and then Executive Officer Longwaith approves it. TS Cordero told Mr. Fernandes that it was given to someone else because he had more O/T than other TEA III's for the month. Since the denial of O/T on Oct. 6, 2014, Mr. Fernandes has signed up for and received 7-8 tours of highway detail O/T. Prior to October 2014, he received about 20 tours of O/T. Since the TEA III that received the O/T had less O/T than Mr. Fernandes, which is a legitimate business reason, the Union could not prove antiunion animus.

(*Id.*). Petitioner alleges that the Union Memorandum mischaracterized both the NYPD's disciplinary policy and overtime policy, and that it failed to explain why, on October 9, a TEA with high overtime hours received overtime over a TEA with fewer overtime hours. (Pet. at 15)

The record demonstrates that there was a unit-wide dispute concerning the allocation of overtime in the Brooklyn Tow Pound. Petitioner's pleadings include letters written and signed by other TEAs who allege that the Executive Officer tries to assign overtime to a few selected

individuals.[13] Moreover, it is undisputed that the Union has met with NYPD personnel concerning the allocation of overtime. On November 5, 2014, Union President Joe Puelo and the Union Representative met with a TED commanding officer regarding the cap on overtime hours. After that meeting, the cap was increased from 69 hours per month to 77 hours per month. On November 20, 2014, Union officers went to the tow pound and discussed with members, among other topics, contractual issues relating to involuntary overtime, overtime distribution rules, and after-meal towing responsibilities.

January 2015 Allegations[14]

Petitioner alleges that on January 23, 2015, during a City-declared snow emergency, the Commanding Officer instructed tow operators to tow cars in contravention of a Citywide rule modifying tow service for the evening. Later, at the tow pound roll call, the Commanding Officer refused to respond to the TEAs' safety concerns about this instruction. The City denies these allegations.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the NYPD violated NYCCBL § 12-306(a)(1) and (3).[15] Petitioner contends that the NYPD retaliated against him for his involvement in the Article 78 Action by

[13] These letters also include allegations that the Commanding Officer has attempted to discipline TEAs for falling below departmental quotas, and that the Executive Officer denied a TEA their floating holiday. At the conference in this matter, Petitioner explained that he included these letters only to corroborate his own allegations, but not to raise any claims on behalf of his colleagues.

[14] These allegations appear only in Petitioner's original petition, and were omitted from Petitioner's amended pleadings.

imposing an excessive punishment following the July 2014 Accident, and argues that the City has continued to violate Labor Law § 215-a.[16] Petitioner also asserts that the NYPD retaliated against him for protesting the allocation of overtime assignments by failing to assign him to his desired overtime shifts. Additionally, Petitioner argues that the NYPD violated the NYCCBL when, in January 2015, the Commanding Officer disregarded a Citywide rule and compromised the TEAs' safety on or around January 23, 2015.

Moreover, Petitioner asserts that the Union has breached its duty of fair representation in violation NYCCBL § 12-306(b)(3).[17] Petitioner contends that the Union did not adequately respond to his requests for assistance concerning Petitioner's alleged retaliation. Petitioner argues that the Union has instead "leaked" his complaints to his NYPD supervisors, which has led to further retaliation. (Pet. at 2) He also alleges generally that that Union conspires with the NYPD and "indulges in lies and distortion." (Pet. at 15) Petitioner additionally asserts that the

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[15] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents: (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted by section 12-305 of this chapter.
>
> * * *
>
> (2) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

[16] Petitioner's allegations concerning the continued violation of the Labor Law are outside of our jurisdiction, which is limited to claims accruing under the NYCCBL.

[17] NYCCBL § 12-306(b)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter."

Union refuses to negotiate or bargain on behalf of its members, and that it only rarely files grievances or challenges the NYPD's issuance of command discipline.

Petitioner seeks compensatory and punitive damages.

Union's Position

The Union argues that Petitioner's claims are untimely. The amended petition was filed on March 16, 2015. Thus, the Union contends, any claims accruing prior to November 16, 2014 are outside the statute of limitations.

Additionally, the Union asserts that Petitioner has failed to allege probative facts in support of his allegations and fails to show that it has acted in an "arbitrary, capricious or discriminatory manner." (Union Ans. at ¶ 31) Moreover, it argues that Petitioner's own allegations undermine any contention that "his issues were ignored or that his rights were neglected." (Union Br. at 5) Petitioner has not provided any facts that controvert the Union Memorandum, but "simply disagrees with the Legal Department's good faith analysis." (Union Ans. at ¶ 25) The Union additionally argues that it has consistently attempted to vindicate its members' rights under the Agreement, including by filing group claims concerning both the alleged tow quota and the accident policy. Finally, it contends that Petitioner has not filed a formal grievance.

City's Position

The City first argues that the majority of Petitioner's claims are untimely. It contends that since Petitioner served the petition on February 18, 2015, any allegations concerning acts or omissions occurring prior to October 18, 2014 are outside of the statute of limitations.

The City also contends that Petitioner has failed to allege any facts showing that the Union has acted in an arbitrary, discriminatory, or bad faith manner. It asserts that Petitioner's

claims primarily concern the outcomes of grievances filed and the frequency with which the Union has filed grievances. However, the City asserts, Petitioner does not provide specific evidence detailing when the Union declined to present a meritorious grievance for improper or discriminatory reasons. The City further argues that the Union has pursued all of Petitioner's grievances through the contractual grievance procedure as well as in court, which Petitioner acknowledges.

The City further asserts that any additional improper practice claims against the City are not properly before the Board. It contends that Petitioner's claims regarding both the allocation of overtime and discipline following a traffic accident are subject to the grievance procedures in the Agreement and thus fail to give rise to a claim under the NYCCBL. The City also alleges that Petitioner's claims concerning violations of Labor Law § 215-a are not within the Board's jurisdiction. Moreover, it contends that Petitioner has not presented evidence of protected activity that would support a retaliation claim. Finally, the City argues that Petitioner lacks standing to make allegations against the City on behalf of other bargaining unit members.

DISCUSSION

As a threshold matter, we consider the timeliness of Petitioner's claims. An improper practice petition must be filed within four months of the occurrence of the disputed action. *See Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.); Section 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). The four-month period is measured from the time the petitioner knew or should have known of the breach. *See Minervini*, 71 OCB 29, at 12 (BCB 2003). Failure to file a petition

within this period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *Local* 2627, 3 OCB2d 37, at 15 (BCB 2010); *Morris,* 3 OCB2d 19, at 13 (BCB 2010).

Since the petition was initially filed on February 20, 2015, the only allegations that we will consider as timely filed are those occurring on or after October 20, 2014.[18] As against the City, the only timely claims are (i) that the NYPD retaliated against Petitioner by denying him overtime for the October 31, 2014 shift; and (ii) that the NYPD committed an improper practice when the Commanding Officer disregarded a Citywide order and compromised the TEAs' safety on or around January 23, 2015. As against the Union, Petitioner's timely claims are (i) that the Union breached its duty of fair representation by refusing to file an improper practice charge on his behalf, as stated in the Union Memorandum, which is dated November 3, 2014; and (ii) that the Union breached its duty of fair representation by failing to address the overtime denial on October 30. We will consider the other allegations only as background to these claims.[19] *Morris*, 3 OCB2d 19, at 13.

Claims Against the City

Petitioner's timely claims concern the alleged retaliatory denial of overtime and the Commanding Officer's instructions in January 2015. In resolving discrimination and retaliation

[18] We reject both the Union's argument that we should measure timeliness from the date that the Amended Petition was filed and the City's argument that we should measure timeliness from the date that the original Petition was served. Where the Executive Secretary determines that the original petition is insufficient, the Board deems a timely-served amended petition as filed from the date of the original petition was filed at OCB. *See* OCB Rule § 1-07(c)(2)(iii) ("The amended petition shall be deemed filed from the date of the original petition.").

[19] Petitioner alleges generally that the Union conspires with the NYPD and "indulges in lies and distortion." (Pet. at 15). These allegations are undated and conclusory. We will confine our analysis of alleged NYCCBL violations only to probative facts. *See Local 30, IOUE*, 8 OCB2d 5 (BCB 2015) ("[C]laims of improper motivation must be based on statements of probative facts, rather than speculative or conclusory allegations.").

claims under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, and requires that a petitioner demonstrate:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Edwards*, 1 OCB2d 22, at 16 (BCB 2008).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* showing, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Petitioner does not set out a *prima facie* case of retaliation as to the timely claims against the City. With regard to the claimed denial of overtime on October 31, he fails to allege that the NYPD had knowledge of any union activity. He asserts that the Executive Officer manipulated his overtime hours, causing Supervisor Codero to deny his October 31 overtime request because he circulated and filed the October Petition. However, Petitioner does not allege that the Supervisor or the Executive Officer, or indeed anyone at the NYPD, had any knowledge of the October Petition prior to the denial of the overtime request. Petitioner only says that the October Petition was circulated among his TEA colleagues and given to the Union. Therefore, we cannot conclude that the City had knowledge that Petitioner circulated the October Petition.

Moreover, Petitioner does not demonstrate that any union activity was a motivating factor for the denial of overtime.[20] Typically, "this element is proven through the use of circumstantial evidence, absent an outright omission." *Lewis*, 4 OCB2d 24, at 14 (BCB 2011); *Local 2627*, 3 OCB2d 37, at 16. Additionally, we have expressed our "willingness to accept indirect evidence of wrongful intent," while requiring more than "mere assertion." *Feder*, 1 OCB2d 27, at 16 (BCB 2008); *SSEU*, 77 OCB 35, at 15 (BCB 2006). A petitioner must sufficiently ground his or her allegations of retaliation in specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion. *Lieutenants Benevolent Ass'n*, 61 OCB 49, at 6 (BCB 1998).

The allegations, taken as true, do not establish that the denial of overtime was due to anti-union animus. Although Petitioner was denied overtime approximately two weeks following his circulation of the October Petition, "mere proximity in time between two events, without other supporting evidence, is insufficient to support a conclusion that the [employer] harbored anti-union animus." (*Id.* at 7) Here, Petitioner does not allege facts showing that his involvement in the October Petition was a motivating factor in the denial of overtime. We note that Petitioner repeatedly alleges that his supervisors were assigning overtime "arbitrarily" as a matter of practice, a concern shared by the 14 other TEAs in the Brooklyn Tow Pound who signed the October Petition. (Pet. at 9) Indeed, the October Petition charges that "[t]he volunteers signing up for the OT detail are ignored and the assignment is forcefully pushed to [a TEA] who has not volunteered for the (specific) OT detail." (Pet. at 45) At the same time, Petitioner acknowledges that he received at least seven to eight tours of overtime during October 2014, placing him among the top one-third of overtime earners. Upon these allegations, we cannot conclude that

[20] The below analysis is the same whether Petitioner's union activity is the circulation and filing of the October Petition, as Petitioner alleges, Petitioner's protests concerning the denial of his overtime requests, or his involvement in the Article 78 Action.

Petitioner has stated a *prima facie* case of retaliation. *See Feder*, 1 OCB2d 27, at 16 (finding no *prima facie* showing of retaliation because, in part, Petitioner failed to demonstrate that his grievances were resolved any slower than other grievances).

Petitioner's claims that the Commanding Officer violated the NYCCBL by disregarding a Citywide rule and compromising officer safety also lack merit. This alleged conduct does not raise any claims under the NYCCBL because Petitioner does not contend that the Commanding Officer took this action to retaliate or discriminate against Petitioner for his union activity. *See, e.g.*, *Lewis*, 4 OCB2d 24, at 14 (BCB 2011) (finding that the petitioner did not establish retaliation because she did not allege that she was engaged in union activity). Moreover, Petitioner claims that the Commanding Officer's instruction was issued to all tow pound operators and not solely to him. Accordingly, we cannot find that Petitioner has stated a claim against the City.

Claims Against the Union

Petitioner's claim that the Union breached its duty of fair representation similarly fails. The duty of fair representation "requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 17 (2015); *see also Walker*, 6 OCB2d 1, at 7 (BCB 2013). The duty of fair representation is not breached "simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (2007); *see also Gertskis*, 77 OCB 11, at 11 (BCB 2006) ("A grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."). Accordingly, "a wide range of reasonableness is granted to a union in serving the unit it represents, subject always to complete

good faith and honesty of purpose in the exercise of discretion." *Wooten*, 53 OCB 23, at 15 (BCB 1994). The Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *Edwards*, 1 OCB2d 22, at 21 (BCB 2008); *see also Smith*, 3 OCB2d 17 (BCB 2010).

Petitioner's timely allegations concern the Union's refusal to file an improper practice charge on his retaliation claims and its failure to advance a grievance concerning the denial of an October 31 overtime shift. Neither allegation is sufficient to establish a breach of the duty of fair representation. *See Okorie-Ama*, 79 OCB 5, at 14. Turning first to its response to Petitioner's retaliation claims, we find that the Union has the discretion to determine that it will not file an improper practice charge. *See Edwards*, 1 OCB2d 22, at 21. Indeed, the Union Memorandum provides a reasoned legal analysis for declining to proceed with Petitioner's concerns. A union is not required to advance a claim that it has concluded is without merit. *See James-Reid*, 1 OCB2d 26 (BCB 2008) ("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.") (internal citations omitted).

Petitioner argues that the Union Memorandum is mistaken as to the NYPD's accident and overtime policies and that it failed to address an episode where the NYPD declined to replace a high-overtime earner with a lower-earning TEA. However, absent an allegation that the mistakes or omissions within the Union Memorandum were made in bad faith, these claims do not establish a breach of the duty of fair representation. *See Evans*, 6 OCB2d 37, at 8 (BCB 2013) ("A petitioner must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of the Union's breach."). We have previously held that the Board will not second-guess the Union's judgment "[e]ven if the Union's legal assessment was erroneous" in the

absence of the allegations showing arbitrary or bad faith conduct. *Gertskis*, 77 OCB 11, at 11. Accordingly, we find that Petitioner has not stated a breach of the duty of fair representation as to his first claim against the Union.

We also reject Petitioner's second claim against the Union. The record demonstrates that in direct response to the denial of Petitioner's request for overtime, the Union helped Petitioner verify his October overtime hours and, later, met with the NYPD and TEAs during November 2014 in order to discuss and clarify the overtime-allocation process. The Union also worked to increase the overtime hours available to unit members, including the Petitioner. The Union's decision to resolve Petitioner's concerns through labor-management discussions rather than by commencing a grievance or litigation on Petitioner's behalf is within its discretion and does not constitute a breach of the duty of fair representation. *See Smith*, 3 OCB2d 17, at 9 (BCB 2010) (explaining that a mere dissatisfaction with the outcome, or questioning the strategic decisions of the union, is insufficient to establish a breach of the duty of fair representation); *Edwards*, 1 OCB2d 22, at 21. Petitioner has not alleged that the Union's decision was made arbitrarily or in bad faith. Therefore, he has not stated a *prima facie* case as to his second claim against the Union.

We find that the allegations do not state facts which would, if proven, establish that the NYPD improperly retaliated against Petitioner, or that the Union breached its duty of fair representation. Petitioner's claims against both parties are dismissed.

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 verified improper practice petition filed by Joel Fernandes, docketed as BCB-4095-15, against District Council 37, Local 983, AFSCME, AFL-CIO, the City of New York, and the New York City Police Department, hereby is dismissed in its entirety.

Dated: July 23, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

CAROL A. WITTENBERG
MEMBER

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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PETER PEPPER
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GWYNNE A. WILCOX
MEMBER