# *Sims*, 8 OCB2d 23 (BCB 2015)

(IP) (Docket No. BCB-4098-15)

***Summary of Decision***: Petitioner alleged that the City's inspection and review of his home septic system and its failure to address his request for a pay differential violated NYCCBL § 12-306(a)(1) and (4). Petitioner also alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by treating members who work outside of the City limits differently than those who work within the City and by not adequately representing him in securing a pay differential and in a grievance. The Board found that Petitioner's timely allegations did not establish a violation of the NYCCBL. Therefore, the improper practice petition was denied. ***(Official decision follows.)***

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

**In the Matter of the Improper Practice Petition**

***-between-***

**BRYAN SIMS,**

***Petitioner,***

***-and-***

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, its affiliate, CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

***Respondents.***

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## DECISION AND ORDER

On March 3, 2015, Bryan Sims, *pro se*, filed an improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37"), its affiliate, Civil Service Technical Guild, Local 375 ("Local 375") (collectively, the "Union"), the City of New York ("City"), and the City's Department of Environmental Protection ("DEP"). Petitioner alleges that the City's inspection and review of his home septic system and its failure to address his request for a pay differential

violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner also alleges that the Union breached its duty of fair representation in violation of § 12-306(b)(3) by treating members who work outside of the City limits differently than those who work within the City and by not adequately representing him in securing a pay differential and in an out-of-title grievance. The Board finds that Petitioner's timely allegations do not establish that the Union or the City violated the NYCCBL. We therefore dismiss the petition.

## BACKGROUND

Petitioner has been employed by DEP for 18 years and, in June 2013, became an Associate Project Manager ("APM"), Level 1. Local 375 has approximately 1,200 members and Petitioner is one of approximately 280 Local 375 members who work outside of the City limits. Petitioner works out of DEP's Grahamsville, New York, facility, which is approximately two hours outside of the City. The Union and the City are parties to a collective bargaining agreement ("Agreement"). The Union asserts that Petitioner is aware that the Agreement's grievance procedures authorizes an employee to file a grievance without the Union. (*See* Union Ans., Ex. A, Article VI, §2)

**Approval Process for Petitioner's Home Septic System**

Petitioner upgraded his home septic system in 2011, the plans for which were reviewed by, and its installation inspected by, DEP between April and December 2011.[1] Petitioner alleges that the process took longer than necessary, that DEP required many things of him not required

[1] We note that Petitioner has provided extensive documentation of both DEP's standard practice regarding septic systems and the steps taken regarding his home septic system. While all of that material is taken into consideration, we briefly summarize the issue here.

of other applicants, and that the delay in the approval process was never explained to him. On August 28, 2012, Petitioner was transferred without any prior notice from DEP's Regulatory and Engineering Programs division to its Waste Water Operations division. Petitioner asserts, and the City denies, that the transfer was in retaliation for the conflicts that arose regarding the approval process for his home septic system. Petitioner was promoted to APM, Level I, within a year of his transfer.

**Pay Differential Request**

In early 2014, Petitioner noticed that one of the five pay differentials provided for by Article XVI of the Agreement was for "Plan Review," a task he asserts he performs ("Plan Review Differential"). (Pet., Ex. A2, Article XVI(b)) On February 10, 2014, Petitioner wrote a letter to his supervisors requesting a pay differential ("February 10 Letter"). Petitioner also informed another APM, Michael Allen, the Deputy Regional Manager for DEP's Grahamsville Region of Western Operations, that he may also be eligible for a pay differential.

On February 13, 2014, Petitioner emailed Local 375 Grievance Representative Uma Kutwal asking for guidance in applying for the pay differential, noting that "[a]s an upstate worker (about 100 miles from [the City]) we don't have much in the way of communications with the Union."[2] (Pet., Ex. A1) Kutwal represents Local 375 members who are employed by DEP and has served as Local 375's President, Vice President, and Grievance Coordinator. On February 18, Kutwal emailed Petitioner the eligibility requirements for the Plan Review Differential and instructed Petitioner to request the pay differential in writing. It is undisputed

[2] In a December 2012 email to a Union official, Michael Rosenberg, Petitioner previously complained about the Union's responsiveness to upstate members, asserting that: "The fact that you are not hearing from others upstate only means that you are not listening." (Pet., Ex. C1) Rosenberg advised Petitioner to raise his concerns at a Union meeting and that, if he did, he would "shortly receive an education from [his] fellow members." (*Id.*)

that Petitioner's February 10 Letter satisfied that requirement and that Petitioner's supervisor submitted the required paperwork for his request for a pay differential. Petitioner asserts that, on July 24, 2014, he contacted Robert Groppe, the DEP official responsible for determining eligibility for pay differentials, and received no response. Petitioner further asserts that one of his supervisors also contacted Groppe regarding his request for a pay differential.

On August 15, 2014, Petitioner emailed Kutwal regarding the pay differential. Kutwal responded that day that the Agreement provides that the Plan Review Differential is only available to those who work in the Department of Buildings and is not available for Petitioner's position. On November 5, 2014, Petitioner again reached out to Groppe regarding his request for a pay differential and received no response.

Petitioner again raised the pay differential issue with Kutwal at a meeting on December 3, 2014. Petitioner asserts, and the Union denies, that Kutwal stated that he would contact Petitioner in regard to filing a grievance over the pay differential.

On December 16, 2014, Petitioner attended an open door meeting with DEP's Director of the Bureau of Water Supply Operations ("Director"), at which he raised the issue of his request for a pay differential and his belief that Allen received a Plan Review Differential. The Director informed Petitioner that Allen's pay differential was due to his supervisory responsibilities. It is undisputed that Allen's in-house title, his duties and responsibilities, and his reporting lines all differ from Petitioner's. On December 17, 2014, Petitioner sent the Director a copy of the pertinent sections of the Agreement.

As of the date of the conference in this matter, May 15, 2015, DEP has not responded to Petitioner's request for a pay differential. At the conference, the City asserted that the review of Petitioner's request for a pay differential is on-going and has been delayed by personnel changes

at DEP. The Union asserted that its practice is to not file a grievance regarding a request for a pay differential until the request is formally rejected.

**Out-of-Title Grievance**

On June 25, 2014, the Union filed an out-of-title grievance on Petitioner's behalf, which was denied on June 27. The Union filed at Step II on July 7, 2014, and that day Kutwal emailed Petitioner that once a date for the Step II hearing was set, he would "contact [him] to prepare our case for presentation to DEP." (Pet., Ex. B1) On July 22, 2014, Kutwal emailed Petitioner that they would "need to sit together prior to the hearing date to go over documents that need to be presented in support of your case." (Pet., Ex. B2) The next day, Petitioner asked Kutwal "[w]hen would you be coming up here to meet with me to go over what needs to be presented." (Pet., Ex. B3) Petitioner asserts, and the Union denies, that Kutwal did not respond to that inquiry. On July 30, 2014, Kutwal informed Petitioner that the Step II hearing would be held at DEP's facility in Valhalla, New York, which is approximately two hours from Grahamsville. The next day, Petitioner requested to meet with Kutwal before the Step II hearing. Petitioner asserts, and the Union denies, that he received no response to this request. Petitioner and Kutwal did not meet in person regarding his grievance until the day of the Step II hearing.

It is undisputed that Petitioner had requested to meet with Kutwal in Grahamsville. Petitioner named three Union representatives that he alleges have traveled to Grahamsville regarding grievances, including one who met with Petitioner at his home. The Union asserts that no Local 375 representatives have met with members in Grahamsville to prepare for a Step II or Step III proceeding. The Union further asserts that it informed Petitioner that Local 375 members who work outside of the City could meet in person with grievance representatives at DEP's Valhalla facility, which is 15 minutes from the City's border.

On August 14, 2014, the Step II hearing was held in Valhalla by DEP's Deputy Director of Labor Relations. Petitioner asserts, and the Union denies, that he only learned at the Step II hearing that the work he performed prior to the filing of his out-of-title grievance would be not be considered. The Union asserts that Kutwal had informed Petitioner prior to the Step II hearing that the focus would be on the duties he performed after the grievance was filed.[3]

DEP denied Petitioner's Step II grievance on August 22, 2014, finding that "the projects on which [Petitioner] worked [were] of moderate size and complexity and that they do not rise to the level of complexity contemplated by the job specification for APM, Level II." (City Ans., Ex. 2) That same day, Petitioner authorized the Union to submit the grievance to Step III. On August 25, 2014, the Union to submitted the Step III grievance form to the City's Office of Labor Relations ("OLR"). On September 25, 2014, Petitioner emailed DEP an Engineer Project Manager, Level II, job description used by Port of Portland, Oregon, that he claimed better reflected the work he was performing at DEP.

On October 1, 2014, Petitioner asked Kutwal why he had not heard from him. That same day, Kutwal responded that the Union had not heard anything regarding Petitioner's out-of-title grievance and that he would be contacted immediately when the Step III hearing was scheduled. Kutwal also advised Petitioner that he would "schedule [a] sit down meeting with [him] to go over our strategy to present your claim prior to the hearing." (Pet., Ex. B12) Petitioner asked Kutwal if he had discussed the Oregon Engineer Project Manager title with anyone, and asserts that Kutwal did not respond. On October 15, 2014, Kutwal contacted Petitioner to inform him that the Step III hearing was scheduled for November 6, 2014. Kutwal stated that "[w]e will talk

[3] Article VI, § 2, of the Agreement explicitly states that, for out-of-title grievances, "no monetary award shall in any event cover any period prior to the date of the filing of the STEP I grievance unless such grievance has been filed within thirty (30) days of the assignment to alleged out-of-title work." Union Ans., Ex. A, Article VI, §2.

in the coming days to develop strategy to present your out of title claim to the OLR." (Pet., Ex. B13)

On October 16, 2014, Petitioner emailed Kutwal about why he had not heard anything regarding his proposed use of the Oregon Engineer Project Manager title. That day, Kutwal responded that "[w]e are limited to titles listed under Local 375 titles in our contract with the City. We can not go beyond listed titles to make arguments for out of title claims."[4] (Pet., Ex. B14) Petitioner responded that he wanted the Union to look into adding the Oregon Engineer Project Manager title to future contracts as he is "performing a tremendous amount of work that needs to have a title that I can argue about." (Pet., Ex. B15)

The next day, October 17, 2014, Kutwal asked Petitioner if they could meet at DEP's Valhalla facility on October 22. Petitioner responded on October 17 that he could not because he was working approximately three hours from Valhalla on October 22 and asked Kutwal if they could meet in Grahamsville instead. On October 22, Kutwal responded that "it will be very difficult for me to come to your work site" but that he would "discuss your claim on telephone in coming days." (Pet., Ex. B16) Petitioner responded that: "I guess I am not getting the support that I have been promised. . . . Like I have said before, upstate workers are the forgotten ones." (Pet., Ex. B17) Petitioner asserts that he had hundreds of pages of engineering plans for which he performed the field work, designed, and drafted which were too extensive to discuss over the phone. The Union acknowledges Petitioner's email to Kutwal but denies the accuracy of its contents.

[4] Petitioner notes that, after he filed his improper practice petition, he became aware that the City's Department of Parks and Recreation has a position with the business title Engineer Project Manager.

On October 29, 2014, Kutwal emailed Petitioner that he should bring three sets of the documents supporting his out-of-title claim to the November 6 Step III hearing and asked Petitioner to email him copies of the documents. That day, Petitioner responded to Kutwal that "[s]eeing as how you refused to meet with me, I really have no idea what to bring to the Step III meeting, just like the Step II meeting. I will just do my best. I will be forwarding this on to DC 37 and asking why I am not getting the attention that I was guaranteed by [Local 375 President Claude] Fort." (Pet., Ex. B19) That day, Fort responded and advised Petitioner that the Union is "providing you with the service and attention you deserve, but you need to work with [Kutwal]. He is trying his best for you. Please cooperate. Thank you." (Pet., Ex. B20)

On October 30, Petitioner responded to Fort that:

> I am beginning to feel that those of us upstate are not being attended to. All the attention that I have received from Mr. Kutwal so far has been meeting me 1 minute prior to my Step II hearing. At the meeting he was totally lost. No, I have not been provided with the service and attention I deserve. I guess I will have to do the best I can to prepare for the Step III on my own. It is a shame when DC 37 talks the talk but does not walk the walk. I remember working closely with [Union official]. Now there was someone who was involved.

(Pet., Ex. B20) (name of Union official omitted)

On October 31, 2014, Petitioner requested, and OLR granted, an adjournment of the Step III hearing. The adjourned Step III hearing was rescheduled for December 3, 2014. Petitioner asserts that he sought the adjournment because he was not prepared for the Step III hearing due to the lack of support from the Union.

On November 26, 2014, Kutwal emailed Petitioner, noting that they "did not have a chance to talk," stating that he hoped Petitioner had reviewed the Grievance Handling Memo he had sent him, and describing the strategy for the upcoming Step III hearing. (Pet., Ex. B22) On

December 1, 2014, Petitioner responded to Kutwal that "you and our local have left me feeling abandoned." (Pet., Ex. B23) That same day, Kutwal responded by repeating his instruction to Petitioner that he should bring three copies of the documents supporting his out of title claim to the Step III hearing.

The Step III hearing was held on December 3, 2014, at OLR's offices in the City. At the Step III hearing, Petitioner presented, among other documents, a copy of the job description for the Port of Portland, Oregon, Engineer Project Manager title. On December 8, 2014, the Step III out-of-title grievance was denied. The Step III Hearing Officer found that "all of [Petitioner's] duties are consistent with the typical tasks listed in the APM job specifications" and that "the Union failed to demonstrate that Grievant is responsible for large and/or complex capital projects as contemplated by the APM Level II job specifications." (City Ans., Ex. 9) The Union filed a request for arbitration on December 23, 2014, and the arbitration was held on June 2, 2015.

## POSITIONS OF THE PARTIES

### Petitioner's Position

Petitioner argues that his petition is timely and that the statute of limitation period should be calculated from when he first contacted the New York City Office of Collective Bargaining ("OCB") and not the date the petition was filed. Petitioner argues that his filing was delayed due to an address change and asserts that OCB informed him that any delay related to the address change would not be a problem.

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3).[5] Petitioner characterizes Rosenberg's email stating that he "will shortly receive an education from your fellow members" as "uncomfortable." (Pet. ¶¶ C; C(1)) Petitioner also takes issue with Fort's email statement that the Union is "providing [him] with the service and attention you deserve." (Pet. ¶ B(19))

Petitioner argues that, even though Union dues are taken out equally from those who work in the City and those who work upstate, the Union does more for the former because it is willing to meet with City members where they work. Petitioner argues that the Union failed to adequately represent him because Kutwal failed to meet with him at his work location and, as a result, the Union's handling of his request for a pay differential and his out-of-title grievance was inadequate. Consequently, Petitioner asserts he had to prepare his own case without the benefit of face-to-face meetings with his Union representative, notes that he is not an attorney, and argues that the Union should not require him to function as one on his own behalf.

Further, Petitioner argues that the City's handling of the approval process for his home septic system violated NYCCBL § 12-306(a)(1).[6] Petitioner asserts that without this approval, a potential buyer may not be able to secure a mortgage, seriously impairing his ability to sell the property in which he has invested $300,000. Petitioner argues that the slow approval progress

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[5] 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."

[6] NYCCBL § 12-306(a)(1) provides, in pertinent part, that: "It shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter."

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have 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 shall have the right to refrain from any or all of such activities."

shows that the City purposely made it difficult for him to upgrade his home septic system and that this constitutes supervisor misconduct and harassment that DEP unlawfully failed to correct. Petitioner further argues that his transfer in August 2012, without any prior notice, was in retaliation for the conflicts that arose with his supervisors over the approval process for his home septic system.[7] Finally, Petitioner asserts that the City's failure to respond to his request for a pay differential violated NYCCBL § 12-306(a)(4).[8] Petitioner notes that he and his supervisors have repeatedly inquired of DEP as to the status of that request and have received no response.

As relief, Petitioner asks that the Union and the City address his out-of-title grievance, approval of his home septic system, and issue a letter of apology.

**Union's Position**

The Union argues that an improper practice petition must be filed within four months of the date that Petitioner knew or should have known of the occurrence of the acts alleged to constitute the improper practice. The Union argues that since the petition was filed on March 3, 2015, any allegations with respect to the Union dating prior to November 3, 2014, are untimely and must be dismissed.

The Union also argues that the petition should be dismissed for failing to state a cause of action upon which relief may be granted. To establish a breach of the duty of fair representation,

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[7] Petitioner has also alleged that the City's conduct violated the New York City Human Rights Law (New York City Administrative Code, Title 8) ("Human Rights Law'). The Board does not have jurisdiction over such a claim and, accordingly, dismisses it. *See Holmes*, 4 OCB2d 14, at 14 (BCB 2011) (dismissing claim under Human Rights Law due to Board's limited jurisdiction). We note, however, that our dismissal is without prejudice to the claim being brought before an appropriate forum. *See Babayeva*, 1 OCB2d 15, at 8-9 (BCB 2008).

[8] NYCCBL § 12-306(a)(4) provides, in pertinent part, that: "It shall be an improper practice for a public employer or its agents . . . to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

Petitioner must show that the Union's actions, or non-actions, were arbitrary, discriminatory, or in bad faith. The Union argues that the petition does not allege that the Union acted deliberately in an invidious manner, arbitrarily, or in bad faith or that the Union did more for others in the same situation than it did for the Petitioner.

The Union argues that it has represented Petitioner and continues to do so in a diligent and professional manner. The Union argues that the crux of Petitioner's claims is that, in his view, it has failed to sufficiently meet with and prepare him for the out-of-title hearings. Petitioner, however, acknowledges that he was offered the chance to meet with Kutwal in Valhalla and that Kutwal offered to consult with him over the telephone. The Union argues that any Local 375 member can meet with a Local 375 representative to prepare for a Step II or Step III proceeding in Valhalla. Regarding the pay differential, the Union asserts that its practice is not to file a grievance until after a request for a differential has been formally rejected, which has not yet occurred in this case, and notes that Petitioner is free under the Agreement to pursue the grievance on his own. Thus, the Union argues, even if the Board accepts as true everything alleged by the Petitioner, the Petition fails to allege facts upon which any relief may be granted.

**City's Position**

The City argues that any allegations dating prior to four months from the filing of the petition are untimely and must be dismissed. The City argues that Petitioner's claims related to the approval process for his home septic system and his transfer are based on events that allegedly occurred in 2011 and 2012 and are untimely.

The City further argues that any claim regarding the issuance of an approval for construction of a private residential septic system on Petitioner's property is outside the Board's jurisdiction. In addition, the City argues that Petitioner has alleged no facts to show that DEP

improperly withheld approval of his home septic system. Regarding Petitioner's request for a pay differential, the City argues that his allegations are entirely unsupported and would, even if true, be insufficient to support a violation of the NYCCBL.

Finally, the City argues that Petitioner fails to allege any facts sufficient to establish a breach of a duty of fair representation by the Union, which has processed his grievance through arbitration. The City asserts that, since Petitioner has not established that the Union breached its duty of fair representation, any derivative claim against the City must also be dismissed.

## DISCUSSION

We find that, to the extent that Petitioner's claims are timely, he has not established that the Union or the City has violated the NYCCBL. We therefore dismiss the petition.

The Board has recognized that a "*pro se* Petitioner may not be familiar with legal procedure" and, accordingly, "take[s] a liberal view in construing" pleadings submitted by an unrepresented party. *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd., Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401(1st Dept 2010), *lv. denied*, 17 N.Y.3d 702 (2011); *see also Abdal-Rahim*, 59 OCB 19, at 3 (BCB 1997). Thus, we exercise our review "with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and [we do] not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 13 (BCB 2008). As Petitioner is appearing *pro se*, "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) (citations omitted).

**Timeliness**

Respondents dispute the timeliness of Petitioner's claims, which span from 2011 through the present. Since "timeliness is a threshold question," we first address whether Petitioner's claims are time-barred. *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009). The NYCCBL sets the statute of limitations for an improper practice claim and requires that an improper practice petition "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." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Sept. 12, 2003); *see also* NYCCBL § 12-306(e).[9] We use the date a petition is filed to calculate the statute of limitations and cannot, as Petitioner requests, use the date when Petitioner first contacted the OCB.[10] *See* § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) The instant petition was filed on March 3, 2015. Therefore, only claims arising after November 3, 2014, are timely.

Accordingly, we find timely Petitioner's claims against the Union that after November 3, 2014, it did not adequately respond to his request for assistance in obtaining a pay differential and has not adequately represented him in his out-of-title grievance. We note that, while Petitioner's allegations regarding the Union's handling of these matters that pre-date November

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

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

[10] We note that, even if we were to accept Petitioner's argument, it would not impact our finding on timeliness as the claims that we found untimely originated more than four months prior to Petitioner first contacting the OCB on October 30, 2014.

3, 2014, are not themselves remediable, they are "admissible as background information." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *see also Nealy*, 8 OCB2d 2, at 15 (BCB 2015).

We find untimely Petitioner's claims against the City regarding the approval process for his home septic system, as the latest allegation related thereto, his transfer, occurred in August 2012.[11] We find timely Petitioner's claim that the City failed to respond to his November 5 and December 16, 2014, requests for a pay differential.

**Alleged Breach of the Duty of Fair Representation**

NYCCBL § 12-306(b)(3) provides that it is "an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." We have found that 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; *see also Walker*, 6 OCB2d 1 (BCB 2013). The "burden of pleading and proving a breach of this duty lies with the petitioner" and, to meet this burden, a petitioner must "allege more than negligence, mistake or incompetence." *Evans*, 6 OCB2d 37, at 8 (BCB 2013). A union is not obligated to advance every grievance. *See Nardiello*, 2 OCB2d 5, at 45. Moreover, the "Board will not substitute its judgment for that of a union or evaluate its strategic determinations" because a "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); *see also Edwards*, 1 OCB2d 22, at 21 (BCB 2008); *Smith*, 3 OCB2d 17 (BCB

[11] We further note that Petitioner has not alleged that any union activity prior to 2011 or that the disputed acts by the City related to his home septic system were either motivated by, or are inherently destructive of, union activity, required elements of either a violation of NYCCBL § 12-306(a)(1) or (3). *See OSA*, 2 OCB2d 42, at 33 (BCB 2009). Thus, if these claims were timely filed, we would be constrained to dismiss them for the failure to state a violation of the NYCCBL. *See Shapiro*, 37 OCB 9, at 8 (BCB 1986).

2010). Further, 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; *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005).

We do not find that Petitioner has established that the Union acted in an arbitrary, bad faith, or discriminatory manner. Here, Petitioner's allegations establish that in February and August 2014, Union representative Kutwal promptly responded to his inquiries, explained to Petitioner why he was not eligible for the Plan Review Differential, and referred Petitioner the specific sections of the Agreement to support his explanation.[12] Thereafter, in December 2014, Petitioner alleges that he again asked the Union for assistance and was told that the Union representative would contact him about filing a grievance, but received no response. In the factual context presented, the alleged failure of the Union to respond to Petitioner's December 2014 inquiry does not establish a breach of the duty of fair representation. The Union explained that it does not ordinarily file grievances concerning pay differentials until the request is denied. Here, it is undisputed that DEP has not yet denied or granted Petitioner's differential request. *See Morris*, 3 OCB2d 19, at 11-12 (no breach of the duty of fair representation where union has a reasonable basis for not filing a grievance); *Gibson*, 29 OCB 13, at 4 (BCB 1982) (union's reasoned decision that proceeding with a grievance would be fruitless could not constitute a breach of the duty of fair representation). Moreover, we note that to the extent Petitioner was unwilling to wait for DEP to respond, the Agreement permits Petitioner to file a grievance at Step I without the Union. *See Morris*, 3 OCB2d 19, at 11-12 (where "the Union does not solely

[12] While any claim with respect to the Union representative's February and August 2014 statements are untimely, we also note that Petitioner's belief that Kutwal's conclusion was erroneous does not establish a breach of the duty of fair representation. *See Evans*, 6 OCB2d 37, at 8 (negligence, mistake or incompetence alone insufficient to establish a breach of the duty of fair representation).

control access to the remedial forum," there is no breach of the duty of fair representation unless shown that petitioner was treated differently than similar situated members) (citations omitted).[13]

Similarly, regarding Petitioner's out-of-title grievance, the facts presented clearly establish that the Union has represented him throughout the process, up to and including arbitration. Petitioner's complaints derive from the Union representative's refusal to meet Petitioner at his place of work and/or limiting discussions of his grievance to telephone conversations. As a result, Petitioner felt he had to prepare his out-of-title grievance by himself. However, extensive emails document Kutwal's prompt responses to Petitioner's inquires, that he was available for telephone meetings, and his willingness to meet in person with Petitioner in Valhalla. The fact that the Union was unwilling to meet with Petitioner at his work location does not negate the Union's willingness to meet with him or otherwise prepare him for the out-of-title grievance. As stated earlier, it is well-settled that a union enjoys wide latitude in processing grievances, "as long as it exercises discretion with good faith and honesty." *Sicular*, 79 OCB 33, at 13 (BCB 2007); *Wooten*, 53 OCB 23, at 15. Based on the facts alleged, Petitioner's dissatisfaction and disagreement with the Union's failure or refusal to meet with him in Grahamsville does not establish a breach of the duty of fair representation. *See Evans*, 6 OCB2d 37, at 8; *Okorie-Ama*, 79 OCB 5, at 14.

Further, we find no merit in Petitioner's claim that the Union discriminates against its upstate members, like him, because it allocates fewer resources to them than it allocates to members who work within the City limits. While it may be true that the majority of the Union's staff is based in the City and that Union grievance representatives do not frequent the work

[13] Petitioner's claim that Allen, an employee in a different in-house title who requested and received a pay differential, does not establish a breach of the duty of fair representation. Petitioner does not assert facts that would show that the Union had hostility toward Petitioner and provided Allen with representation different from that provided to Petitioner.

locations of the bargaining unit members assigned outside the City, Petitioner's claims do not establish that the Union acted in a hostile or bad faith manner toward the non-City located members of its bargaining unit.[14] In this regard, Petitioner does not allege members who worked outside of the City were not represented; rather, Petitioner complains about how they were represented. The facts alleged show that the Union was responsive to non-City located bargaining unit members, filed grievances on their behalf, and represented them in their grievances. *See Evans*, 6 OCB2d 37, at 8 (petitioner's dissatisfaction and disagreement with the Union's tactics does not establish a breach of the duty of fair representation); *Edwards*, 1 OCB2d 22, at 21 (union "enjoys wide latitude in the handling of grievances").

Accordingly, Petitioner's allegations do not establish that the Union acted with hostility or bad faith and therefore, we cannot conclude that the Union breached its duty of fair representation.

**Claims Against the City**

Petitioner's sole timely claim against the City is that it failed to respond to Petitioner's inquiries regarding his request for a pay differential in violation of NYCCBL § 12-306(a)(4). Petitioner, however, lacks standing to bring a claim under NYCCBL § 12-306(a)(4) because "the duty to bargain runs only between the public employer and the designated bargaining representative." *Feder*, 1 OCB2d 41, at 6 (BCB 2008); *see also Benjamin*, 4 OCB2d 6, at 17.

[14] We do not find that Rosenberg's December 2012 statement that Petitioner "will shortly receive an education from [his] fellow members" and Fort's October 2014 statement that the Union is "providing [him] with the service and attention [he] deserve[s]" establish hostility or bad faith. (Pet., Exs. C1; B20) Taken in context, neither statement is threatening or hostile. Overall, Rosenberg's statements were polite and responsive to Petitioner's concerns and encouraged him to attend union meetings. Fort's statement was made during the Union's processing of Petitioner's out-of-title grievance and merely reiterated that the Union was representing him and encouraged him to cooperate with the Union representative.

However, as Petitioner is *pro se*, we do not limit our analysis to the specific section cited and consider whether Petitioner has pled a claim of retaliation under NYCCBL § 12-306(a)(1) and (3).[15] *See Feder*, 1 OCB2d 23, at 13 (BCB 2008). In *Bowman*, 39 OCB 51 (BCB 1987), the Board held that to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, the petitioner must demonstrate that:

> 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 Local 376, DC 37*, 6 OCB2d 39, at 19.

It is undisputed that when Petitioner inquired as to the status of his request for a pay differential on November 5 and December 16, 2014, the City was aware that he was also pursuing the out-of-title grievance. Accordingly, the first prong is satisfied. However, Petitioner has not alleged that his Union activity was a motivating factor in the City's failure to respond to his request for a pay differential and we cannot construe the facts alleged as establishing that his pursuit of the out-of-title grievance was a motivating factor in the City's actions. Thus Petitioner has not established the second prong and, accordingly, we dismiss any claim under NYCCBL § 12-306(a)(1) and (3). *See Shapiro*, 37 OCB 9, at 8.

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[15] NYCCBL § 12-306(a)(3) provides, in pertinent part, that: "It shall be an improper practice for a public employer or its agents . . . to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization."

**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 Bryan Sims, docketed as BCB-4098-15, against District Council 37, AFSCME, AFL-CIO, its affiliate, Civil Service Technical Guild, Local 375, the City of New York, and its Department of Environmental Protection 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
MEMBER

PETER PEPPER
MEMBER