Dixon, 8 OCB2d 9 (BCB 2015)

(IP) (Docket No. BCB-4082-14)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to process a grievance concerning maximum salaries and by failing to inform Petitioner that it would not pursue the grievance. Respondents asserted that the petition was untimely. Additionally, Respondents argued that Petitioner failed to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board found that the petition was untimely. Therefore, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

BENONI DIXON,

Petitioner,

-and-

TEAMSTERS LOCAL 237, the CITY OF NEW YORK
and the NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.

DECISION AND ORDER

On October 2, 2014, Benoni Dixon, *pro se*, filed a verified improper practice petition against the International Brotherhood of Teamsters, Local 237 ("Union"), the City of New York ("City") and the New York City Department of Correction ("DOC").[1] Petitioner alleges that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York

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[1] We amend the caption *nunc pro tunc* to include the City, which was not named in the petition but is a necessary party to, and has participated, in these proceedings. *See James-Reid*, 77 OCB 16 (BCB 2006).

City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to process a grievance concerning maximum salaries and by failing to inform Petitioner or any of the affected employees that it would not pursue the grievance.[2] Respondents assert that the petition is untimely. Additionally, Respondents argue that Petitioner fails to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The Board finds that the petition is untimely. Therefore, the petition is dismissed.

BACKGROUND

Petitioner has been employed by DOC since May 19, 1986. Petitioner is a Senior Cook assigned to the Robert N. Davoren Center ("RNDC"), a DOC facility located on Rikers Island, and a shop steward. The Union is the certified bargaining representative for employees in the title Senior Cook at DOC. The Union and the City are parties to a collective bargaining agreement covering Senior Cooks, Cooks, Food Service Managers (DOC), Food Service Administrators, and other titles ("Agreement").[3] The Agreement contains minimum and maximum salaries for the bargaining unit titles.

Events Prior to 2010

At some time prior to 2008, DOC merged multiple kitchens on Rikers Island and some kitchen staff were transferred or laid off. The Petitioner and the Union state that this

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[2] Petitioner asserts that he "brings this petition on his own behalf and on behalf of all similarly situated DOC Rikers Island kitchen employees." (Pet. ¶ 11)

[3] The pleadings include copies of the parties Institutional Titles Contract, dated September 13, 2008, through September 27, 2010, as well as the parties 2010 to 2018 Memorandum of Agreement. The 2010 to 2018 Memorandum of Agreement includes general wage increases.

reorganization occurred in 2007; the City maintains that this reorganization occurred in or around 2003.[4]

On April 20, 2007, Petitioner submitted a Union "Grievance Form" to the Union ("2007 Grievance") in which he describes himself as a shop steward and complains on behalf of members of DOC's Nutritional Services Division ("NSD"). The 2007 Grievance provides, in pertinent part:

> It is with great concern that we the members of [DOC's NSD] assigned to RNDC find the working conditions deplorable coupled with the constant degrading and belittling treatment meted out to us by the Food Service Administrator William Krenn and [NSD] Deputy Director [] Richard Buthorn appalling.
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> It has become very stressful and laborious on the cooks to prepare 12,000 meals on a daily basis with a limited amount of staff and sometimes a few inmates to assist with the prepping of food. Attached are copies of the work assignment sheets showing the allotment and volume of work that has to be done by the cooks. Please note, there is no coverage when a cook is on vacation, sick leave or on holiday comp. When this happens, one cook is generally assigned and required to perform the duties of two or more persons and still expected by management to complete their task in a timely manner. This is a manual job and, as a result of all the extra work assigned, all of the cooks are overworked, injured or sick.
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> The above problems were brought to the attention of the FSA Mr. Krenn. In addressing these problems, Mr. Krenn informed us that Mr. Richard Buthorn instructed him not to cover body for body but, he should only allow one body to cover in the absence of four or more bodies.
>
> To compound these problems, on 04/03/07, at approximately 11:30hrs, Mr. Buthorn along with Ms. Cora Ross met with the cooks and Sr. cooks. During this meeting, Mr. Buthorn stated that

[4] We note that a 2004 Board decision refers to a 2003 restructuring of DOC facilities on Rikers Island that resulted in the elimination of some food service positions. *See Antoine*, 73 OCB 8, at 3 (BCB 2004) ("in early 2003, DOC . . . consolidated its operations . . . on Rikers Island. The restructuring . . . resulted in the elimination of . . . 100 civilian staff positions, including food service personnel.").

> there were too many cooks out sick and Doctors' notes are no longer acceptable. To this end, he stressed that with immediate effect any cook who calls in sick will be subjected to departmental charges leading up to being fired. In his opinion, the cooks should report to work regardless of their health status. Mr. Dixon, the shop steward at RNDC attempted to clear the air and discuss these unconfounded threats with Mr. Buthorn. However, Mr. Buthorn refused to listen or reason with Mr. Dixon and to show his authority he immediately vacated the area.
>
> Your timely intervention in this situation would be greatly appreciated so that the work place can once become a place of pride and enjoyment

(Pet., Ex. B) The City asserts that the 2007 Grievance does not constitute an official grievance filed with DOC, as required by the Agreement.

Although the 2007 Grievance form does not appear to clearly address maximum salaries and/or Food Service Administrators, Petitioner asserts that, as a result of his 2007 Grievance, the Food Service Administrators were placed at the maximum salary for that position. Respondents deny this claim. Indeed, the City avers that a search of grievances filed with either DOC or the New York City Office of Labor Relations "uncovered no grievances filed by Petitioner with respect to the salary issues raised in the instant matter." (City Ans. ¶24)

Petitioner alleges that he complained to the Union because he believed that, like the Food Service Administrators, other kitchen employees should be placed at maximum salary.[5] In response, Petitioner alleges that he was repeatedly told by Union Business Agent Felicia Cannon ("Union Business Agent") and Union Citywide Director Donald Arnold ("Union Citywide Director") that the grievance was being processed. The Union denies this allegation except to aver that Petitioner raised the pay issue with the Union Citywide Director. The Union asserts

[5] Petitioner asserts that, as of the filing of this petition, no employees in kitchen titles, other than Food Service Administrators, had been placed at maximum salary.

that the Union Citywide Director told Petitioner that these issues would be addressed through Labor-Management meetings.

Events in 2010

On July 2, 2010, Petitioner wrote a letter to Union President Gregory Floyd ("Union President"), which he titled "Grievance" ("Petitioner's July 2010 Letter"). (Pet., Ex. C) Petitioner's July 2010 Letter states, in pertinent part:

> On 07/01/2010, a meeting as requested by Mr. Dixon was held between Senior Cooks Mr. Dixon, Mr. Hunte, Food Service Manager Mr. Rampaul, Food Service Administrator Mr. Campbell, Business Agent Ms. Cannon, Assistant Commissioner Ms. Johnson, Executive Director Mr. Buthorn, Mr. Santangelo and a representative from The Labor Relations Office. The core of this meeting was to discuss the maximum salary obtainable for Cooks, Senior Cooks and Food Service Managers of the [DOC] as stipulated within the union contract.
>
> During this meeting, we were informed by Mr. Santangelo that the Food Service Administrators had filed a grievance approximately 2 years ago reiterating the fact that four (4) facilities had been merged into one and thus, their responsibilities had increased immensely. Therefore in fairness to the Food Service Administrators, the union and the [DOC] agreed to this request and thus, the maximum salary was awarded to them. Since the same responsibilities were bestowed upon the Cooks, Senior Cooks and Food Service Managers, it is only fair that the same offer be granted across the board, dating retroactively to the same date as received by the Food Service Administrators especially since we are all collectively governed by the same union contract.
>
> On 04/20/2007 the attached grievance was sent to the union informing them of the plight of the employees, but no response was ever received. Over the years, we have emphatically stated our problems and concerns about our deteriorating work conditions and steadily increasing workload.
>
> Based on the facts presented, we are respectfully requesting your timely intervention into this ongoing horrendous situation. As union members, we know that the union body have our best interest at heart, justice and fairness will prevail in solving our problems amicably.

> Please forward all correspondence regarding this grievance to: Benoni Dixon Shop Steward, [DOC RNDC] 11-11 Hazen ST East Elmhurst, New York 11369.

(Pet., Ex. C)[6] Petitioner asserts that he never received a response from the Union President, but he claims that the Union Business Agent and the Union Citywide Director "told him over and over again that the grievance was being processed." (Pet. ¶ 6) Petitioner provides no dates as to when these alleged conversations occurred and alleges no other contact with the Union until September 2014.

The Union contends that it replied to Petitioner's July 2010 Letter in writing on July 29, 2010 ("Union's July 2010 Letter").[7] The Union's July 2010 Letter stated, in pertinent part: "I am in receipt of your grievance. Please be advised some of these issues have been addressed and the outstanding issues are being resolve[d] through Labor Management. If you need further assistance, please feel free to contact my office . . . ."[8] (Union Ans., Ex. A)

Events in 2014

In 2014, the Union achieved a general wage increase for the job titles at issue when it signed the 2010 to 2018 Memorandum of Agreement. On or about September 5, 2014, Petitioner asserts that he again asked the Union Citywide Director about the status of the "maximum pay

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[6] The City asserts that Petitioner's July 2010 Letter does not constitute an official grievance filed with the DOC, as required by the Agreement.

[7] The Union's July 2010 Letter was addressed to the address that Petitioner provided in his July 2010 Letter.

[8] The Union's July 2010 Letter was appended to its answer. OCB Rule § 1-07(c)(4) provides that "within 10 business days after service of respondent's answer, petitioner may serve and file a verified reply which shall contain admissions and denials of any facts alleged in the answer. Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply." As Petitioner did not file a reply, the Board deems the Union's July 2010 Letter to be admitted.

grievance" and was again told that it was being pursued. (Pet. ¶ 7) The Union acknowledges that Petitioner discussed the matter with the Union Citywide Director, denies that the Union Citywide Director made the alleged statement, and contends that the Union Citywide Director once again told Petitioner that the issue was being pursued through Labor-Management meetings.

Petitioner alleges that on or about September 12, 2014, the Union terminated the Union Business Agent and that, after her termination, the Union Business Agent told Petitioner that the Union has no intention of pursuing the grievance regarding the maximum pay for employees in the Rikers Island kitchen titles. The Union contends that the Union Business Agent was terminated on August 8, 2014, and asserts that it lacks knowledge or information sufficient to admit or deny Petitioner's allegations about her statements.

On October 2, 2014, Petitioner filed the instant improper practice petition requesting that the Board order the Union to process, through arbitration, the grievance demanding that the Rikers Island kitchen employees be placed at the maximum salary and order the City to waive any applicable timeliness defenses. Petitioner requests that, if the Board determines pursuing such a grievance is no longer feasible, the Board order the Union to compensate the affected employees for wages lost as a result of its failure to properly process the grievance.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union breached its duty of fair representation by failing to process a grievance concerning maximum salaries and by failing to inform him that it would not pursue the grievance.[9]

Petitioner asserts that the Union failed to process a meritorious grievance without a rational basis, which he argues constitutes a breach of the duty of fair representation.[10] Petitioner argues that since the Agreement "contains maximum salaries for the kitchen titles, it must be deemed to intend that someone in those titles would be placed in that salary notwithstanding that the placement by the DOC is discretionary." (Pet. ¶ 10) Thus, Petitioner argues that an arbitrator could find that "the failure of [] DOC to place any employees in the three effected titles as an abuse [of] discretion and grant the grievance." (Pet. ¶ 10) Petitioner further asserts that the challenges "resulting from the merger could also justify an arbitrator [to] order all employees in the kitchen titles to be paid at maximum salary." (Pet. ¶ 10) Thus, according to Petitioner, the grievance was meritorious, and the Union's failure to pursue it breached its duty of fair representation.

Petitioner also asserts that representatives of the Union repeatedly told him that the grievance was being processed. Petitioner argues that by failing to inform any of the affected employees, including Petitioner, that it would not pursue the grievance and by failing to explain

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[9] Under NYCCBL § 12-306(b)(3), "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."

[10] Petitioner appears to consider the 2007 Grievance, Petitioner's July 2010 Letter and related events, and his 2014 inquiry to the Union to be interrelated events and refers to them as the "grievance."

its decision, the Union acted arbitrarily, and thereby breached its duty of fair representation. (Pet. ¶ 9)

Union's Position

The Union asserts that this petition is untimely, as the alleged facts that form the basis for the petition occurred in 2010, well outside of the statute of limitations period.

Additionally, the Union argues that it did not breach its duty of fair representation as alleged by Petitioner. It avers that an alleged failure of DOC to pay its employees at the maximum rate is a matter best addressed through the collective bargaining process, including Labor-Management meetings, not through the grievance process. Indeed, the Union avers that it achieved a wage increase for the titles at issue through bargaining, as evidenced by the 2010 to 2018 Memorandum of Agreement between the Union and the City.

Moreover, the Union avers that Petitioner was kept informed as the Union Citywide Director sent a letter to Petitioner in 2010, advising Petitioner that some of the issues had been addressed and that the outstanding issues would be resolved through Labor-Management meetings. It asserts that the Union Citywide Director again told Petitioner that the issue was being pursued through Labor-Management meetings when they spoke in September 2014. Accordingly, the Union argues that it did not breach its duty of fair representation and that the petition should be dismissed in its entirety.

City's Position

The City argues that the petition is time-barred because Petitioner's claims all flow from events that occurred more than four months prior to the filing of this petition. Indeed, the petition indicates that in or around 2007 Petitioner was aware of the issues stemming from the merger of DOC's kitchens. Around that time, or at the very latest, in July 2010, Petitioner was

aware of the Union's alleged failure to advocate on his behalf with respect to those issues. Thus, Petitioner should have filed any claims stemming from those alleged incidents many years ago.

The City also argues that Petitioner has failed to allege any specific facts indicating that the Union breached its duty of fair representation, and nothing in the petition demonstrates that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Indeed, the documents presented in the petition indicate that the Union advocated on behalf of its members. For instance, the Petitioner's July 2010 Letter describes a 2010 meeting between members of the kitchen staff, DOC management, and the Union. Petitioner's dissatisfaction with the result of the Union's advocacy does not in and of itself establish a breach of the duty of fair representation. The City contends that Petitioner's allegations demonstrate that he disagrees with or was displeased with the Union's strategic decisions; however, such claims are insufficient to establish a breach of the duty of fair representation.

Accordingly, the City requests that the claim against the Union be dismissed. Further, it argues that because Petitioner has not established that the Union breached its duty of fair representation, any derivative claim against the City and DOC must also be dismissed.[11]

[11] NYCCBL § 12-306(d) provides, in pertinent part, that:

> The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

DISCUSSION

The Board recognizes that a "*pro se* Petitioner may not be familiar with legal procedure, and we therefore take a liberal view in construing" a *pro se's* petition. *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd.*, *Matter of Rosioreanu v. NYC Office 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). Furthermore, since no hearing was held in the instant matter, "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) (citations omitted).

As a threshold matter, the Board addresses the timeliness of the instant petition. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) provides, in relevant part:

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

See also OCB Rule § 1-07(b)(4) (stating that a petition must be filed within four months of an alleged violation).[12] The statute of limitations regarding a claimed breach of the duty of fair

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[12] 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") provides, in relevant part:

> One or more public employees or any public employee organization acting on their behalf . . . may file a petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of § 12-306 of the

representation "runs from the date the employee organization allegedly acted or failed to act on the petitioner's behalf." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.). Any claims prior to "the four month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007). As this petition was filed on October 2, 2014, and concerns decisions made by the Union from 2007 to 2010, we find it untimely.

We find that Petitioner knew or should have known that the Union was not pursuing his grievance in the manner that he desired by sometime earlier than 2014. Here, the 2007 Grievance was submitted to the Union on April 20, 2007. Over three years later, in his July 2010 Letter, Petitioner complained that "no response was ever received" to his 2007 Grievance.[13] (Pet., Ex. C) At the point where the Union had not responded within a reasonable time, Petitioner knew or should have known that the Union was not pursuing his 2007 Grievance as he desired. *See Raby*, 71 OCB at 12. Thus, we find that any claims against the Union regarding the 2007 Grievance are untimely as the accrual date was well before 2014.

To the extent Petitioner's July 2010 Letter was essentially a complaint that the 2007 Grievance had not been resolved, the Board has held that the "reassertion of the same issues in a

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> statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation . . .

[13] While Petitioner's July 2010 Letter indicates that he did not receive a response to his 2007 Grievance, the petition appears to assert, without providing any specific dates, that Union representatives repeatedly told Petitioner that the grievance was being processed. Even if we were to assume that this assertion is true and Union representatives did tell Petitioner that the 2007 Grievance was being processed, we would still find that Petitioner, a shop steward, should have known that the Union was not assisting him to his satisfaction well before seven years had passed.

new grievance cannot serve to extend the date upon which Petitioner should have known that the Union failed to act." *Minervini*, 71 OCB 29, at 13 (BCB 2003); *see also Raby*, 71 OCB 14, at 12-13. For the same reasons, Petitioner's 2014 discussions with Union representatives regarding his grievance do not make the instant petition timely. *Id*. Moreover, the Union responded to Petitioner's July 2010 Letter within a month, stating that "some of these issues have been addressed and the outstanding issues are being resolve[d] through Labor Management" meetings. (Union Ans., Ex. A)

To the extent Petitioner's July 2010 Letter raises a new and separate grievance regarding maximum salary, the petition is still untimely.[14] We again note that the Union responded to Petitioner's July 2010 Letter within a month, clearly stating that "outstanding issues are being resolve[d] through Labor Management" meetings. (Union Ans., Ex. A) Therefore, Petitioner was on notice in July 2010 that the Union was not going to pursue the grievance as he desired. Nonetheless, petitioner waited over four years to file the petition.[15] Accordingly, we find that any claims against the Union regarding the 2007 Grievance or Petitioner's July 2010 Letter are untimely and we do not reach the merits of the case.[16]

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[14] While Petitioner's July 2010 Letter refers to the "ongoing horrendous situation," it also references the failure to award the maximum salary to employees in titles other than Food Service Administrator. (Pet., Ex. C) The 2007 Grievance addresses working conditions in general without specific reference to maximum salary.

[15] As stated earlier, even if we were to assume that Petitioner's assertion is true and Union officials "told him over and over again that the grievance was being processed," we find that a shop steward should have known that the Union was not assisting him to his satisfaction before four years had passed. We also note that no dates for these alleged statements were provided nor did Petitioner allege any specific contact with the Union regarding his grievance from August 2010 through August 2014. (Pet. ¶ 6)

[16] We note that "[a] Union is not obligated to advance every grievance." *Nardiello*, 2 OCB2d 5, at 40. Indeed, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Id*. (quoting *Edwards*, 1 OCB2d 22, at 21 (BCB 2008)).

Finally, Petitioner has not raised an independent claim against the City or DOC. Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Nardiello*, 2 OCB2d 5, at 42.

Accordingly, this petition is dismissed in its entirety.

ORDER

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

ORDERED, that the verified improper practice petition filed by Benoni Dixon, docketed as BCB-4082-14, hereby is dismissed in its entirety.

Dated: March 26, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER