Dillon, 9 OCB2d 28 (BCB 2016)

(IP) (Docket No. BCB-4173-16)

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 fairly represent him in a disciplinary proceeding. Respondents argued that many of the claims raised by Petitioner were untimely and that the Union properly represented Petitioner. The Board dismissed some of Petitioner's claims as untimely and found that Petitioner's timely claims did not establish that the Union breached its duty of fair representation. Accordingly, the improper practice petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

RONALD J. DILLON,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On June 17, 2016, Ronald J. Dillon, *pro* se, filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union") and the City of New York ("City"). Petitioner alleges that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to fairly represent him in a disciplinary proceeding, resulting in a 30-day suspension without pay. Respondents argue that many of the claims raised

by Petitioner are untimely and that the Union properly represented Petitioner. The Board dismisses some of Petitioner's claims as untimely and finds that Petitioner's timely claims do not establish that the Union breached its duty of fair representation. Accordingly, the improper practice petition is dismissed.

BACKGROUND

Petitioner has been employed at New York City Department of Health and Mental Hygiene ("DOHMH") for approximately 40 years. He has worked as a Computer Specialist (Level III) since August 23, 1987. The City and the Union are parties to a collective bargaining agreement covering the period March 3, 2010 to July 2, 2017 ("Agreement"). Article VI, §1, of the Agreement, in relevant part, defines a grievance as:

> c. A claimed assignment of employees to duties substantially different from those stated in the job specification;
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> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75 (1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.

(Union Ans., Ex. I) Article VI, § 5, of the Agreement sets forth the procedure that governs a grievance under Article VI, § 1(e), which culminates in a hearing before the New City Office of Administrative Trials and Hearings ("OATH"), in accordance with Section 75 of the New York Civil Service Law ("CSL"). Parties may appeal the OATH decision to the New York City Civil Service Commission ("CSC") in accordance with CSL § 76.

Prior to January 2010, Petitioner's responsibilities included implementing integrated financial systems to track agency expenditures. On January 4, 2010, Petitioner was assigned to the Information Technology Support Unit help desk. On or about April 12, 2010, Petitioner filed a grievance ("2010 Grievance") alleging that he was assigned out-of-title work. The Union represented Petitioner during the 2010 Grievance, which was processed through arbitration. On August 9, 2011, an arbitrator held that Petitioner was not performing out-of-title work and denied the 2010 Grievance.

In the winter of 2011, the Information Technology Support Unit help desk at which Petitioner worked was incorporated into the Administration Call Center. On December 5, 2011, Petitioner filed another out-of-title grievance ("2011 Grievance"). The Union represented the Petitioner during the 2011 Grievance, which was processed through Step III of the Agreement's grievance procedure. On March 9, 2012, the City denied the 2011 Grievance at Step III, finding that Petitioner's duties had not changed since the issuance of the August 9, 2011 arbitration decision. On March 28, 2012, the Union advised Petitioner that its legal department "review[ed his] case and recommended that it not proceed to arbitration." (Rep., Ex. 15)

2013 Disciplinary Charges

On April 16, 2013, DOHMH filed disciplinary charges ("2013 Charges") against Petitioner for "inefficient, negligent, or careless performance of duties" and "[c]onduct prejudicial to good order and discipline."[1] (City Ans., Ex. 9) On December 3, 2013, the Union represented Petitioner

[1] DOHMH alleged that:

> Petitioner answered the phone in an unprofessional robotic voice; created and abandoned service desk requests; failed to provide a supervisor with an explanation of why he transferred a ticket

at the disciplinary hearing before OATH ("2013 OATH Hearing") on the 2013 Charges. On February 14, 2014, an OATH administrative law judge ("ALJ") issued a report that found Petitioner guilty of multiple specifications of the 2013 Charges and recommended a 20-day suspension. On April 19, 2014, the DOHMH Commissioner adopted OATH's recommendations. On April 26, 2014, Petitioner appealed to the CSC and was represented by the Union at the October 2, 2014 appeal ("2014 CSC Appeal"). On October 7, 2014, the CSC affirmed DOHMH's decision to suspend Petitioner for 20 days.[2]

2015 Disciplinary Charges

On March 16, 2015, DOHMH again filed disciplinary charges ("2015 Charges") against Petitioner for "inefficient, negligent, or careless performance of duties" and "[c]onduct prejudicial to good order and discipline."[3] (City Ans., Ex. 14) On July 23, 2015, the Union represented

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> request; failed to timely resolve tickets; failed to provide complete ticket descriptions; and failed to assign tickets to a proper group.

(City Ans., Ex. 10)

[2] On February 5, 2015, Petitioner filed an improper practice petition against the Union and DOHMH, alleging that the Union breached the duty of fair representation in violation of NYCCBL § 12-306(b)(3) for failing to fairly represent him at the 2013 OATH Hearing and the 2014 CSC Appeal. On May 12, 2015, OCB's Executive Secretary dismissed all but one of Petitioner's claims as untimely and dismissed the remaining claim as "mere dissatisfaction" with the Union's refusal to appeal the CSC determination which, without more, did not establish a cause of action under NYCCBL § 12-306(b)(3). *See Dillon*, 8 OCB2d 14, at 8 (ES 2015).

[3] DOHMH alleged in the 2015 Charges that between January 2014 and May 2015:

> Petitioner failed to timely service request tickets; created and abandoned service requests; failed to complete caller contact information on at least two occasions, transferr[ed] one caller to a wrong number, and ma[de] it impossible to assist other callers; purposefully misdirected a caller to the Deputy Commissioner of Information Technology; purposefully misdirected a caller to the Department of Information Technology and Telecommunications

Petitioner at the disciplinary hearing before OATH ("2015 OATH Hearing) on the 2015 Charges.[4] During the 2015 OATH Hearing, the Union attorney objected to the admission of an audio recording of Petitioner taking a call because its date was not discernible. He also requested the production of policies and procedures for handling calls raised during testimony, which the City had not provided in response to the Union's information request. The ALJ initially sustained the Union's objection with regard to the audio recording, but held the record open for the City to submit evidence that established the date of the recording and to produce the requested policies and procedures.[5] On July 24, 2015, DOHMH provided a copy of the audio recording that displayed a date and submitted the requested policies and procedures for admission. The ALJ subsequently admitted into evidence the recording and documents over the Union's objections.[6]

On September 15, 2015, the ALJ issued a report and recommendation that found Petitioner guilty of multiple specifications in the 2015 Charges. In reaching her conclusion, the ALJ did not credit Petitioner's testimony in several respects. As a penalty, the ALJ recommended a 30-day

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> ("DoITT"); answered the phone in an unprofessional, robotic voice; and on five separate occasions when asked, failed to provide [his] supervisor with an explanation of his actions.

(Union Ans., Ex. H)

[4] On or about July 24, 2015, Petitioner filed another out-of-title grievance ("2015 Grievance"), which is pending.

[5] The Union attorney did not cross-examine a DOHMH witness regarding the audio recording because it was not admitted into evidence at the hearing.

[6] By email dated July 27, 2015, the Union renewed its objection to the admission of the audio recording. The Union also objected to the admission of DOHMH's documents because they were not call center policies and procedures. On July 27, 2015, the ALJ admitted the audio recording, but sustained the Union's objection to the admission of the additional documents. In an email to the Union's attorney on September 3, 2015, the ALJ reversed her prior ruling and admitted DOHMH's documents as call center training documents.

suspension without pay. Shortly thereafter, Petitioner questioned the Union about the admission of the audio recording and call center training documents. On October 13, 2015, the Union emailed Petitioner the ALJ's rationale for their admission. Petitioner claims and the Union denies that it represented to Petitioner that the admission of the recording and documents "could be an issue [to] raise[] on appeal." (Pet. ¶ 11.c)

On October 16, 2015, the Union sent a letter to the DOHMH Commissioner objecting to the OATH report and recommendation and requesting dismissal of all charges against Petitioner, or a lesser penalty because "[m]any of [the ALJ's] conclusions were based on erroneous credibility determinations." (Union Ans., Ex. O) Nevertheless, on October 29, 2015, the DOHMH Commissioner adopted OATH's findings and recommendations. On November 9, 2015, the Union filed an appeal with the CSC ("2016 CSC Appeal"). Sometime after November 9, 2015, in response to Petitioner's request to obtain and review documents for the 2016 CSC appeal, the Union attorney advised Petitioner, "that there would be ample time between the time the notice of appeal is filed and the notification that a hearing [is] scheduled to request and review 'agency' documents in order to prepare for the [CSC] appeal."[7] (Pet. ¶ III.V.E.iv.a) Petitioner identifies the 2013 OATH Hearing transcript as the only document he requested from the Union to prepare for the 2016 CSC Appeal.

On February 18, 2016, the Union represented Petitioner at the 2016 CSC Appeal. At the conclusion of the 2016 CSC Appeal, the Union attorney advised Petitioner that he was leaving the Union's employ. On February 19, 2016, Petitioner requested that the Union allow him to submit a written statement to the CSC to address his concerns that DOHMH's attorney misquoted the 2015 OATH Hearing testimony and proffered testimony not contained in the transcript. Petitioner

[7] The record is unclear when Petitioner requested these documents.

also sought submission of the written statement to respond to questions posed by the CSC during the 2016 CSC Appeal regarding his supervision, the pending out-of-title grievance, and the principle of "obey now and grieve later," which, according to Petitioner, the Union attorney failed to directly address. (Union Ans., Ex. M) On February 23, 2016, the Union denied Petitioner's request for a written submission, explaining that:

> [CSL § 76] sets forth the procedure for appeal. Pursuant to this section, the [CSC] reviews the records of the disciplinary proceeding and the transcript of the hearing (i.e., disciplinary hearing) and makes a determination based on the record and transcript and such 'oral or written argument' as the [CSC] may determine. Your appearance with counsel at the Appeal Hearing for oral argument on February 18, 2016 constituted the "oral or written argument" contemplated by the statute. Moreover, notwithstanding the agency attorney's representations before the [CSC], the [CSC's] determination is limited to material in the record of the disciplinary proceeding . . . . As the [2016] Appeal Hearing has concluded, the proceeding before the [CSC] is now closed. As such, the [CSC] will render a final decision which will either[ ] affirm, reverse[,] or modify the agency's determination.

(Union Ans., Ex. N)

Sometime after the 2016 CSC Appeal, Petitioner inquired as to his right to appeal the CSC's decision. In response to Petitioner's inquiry, on March 11, 2016, the Union advised Petitioner that the CSC decision could not be appealed and provided him with the 2013 OATH Hearing transcript, the 2015 OATH Hearing transcript, the September 15, 2015 ALJ report and recommendations, the October 16, 2015 letter to the DOHMH Commissioner and a copy of materials received from DOHMH in response to its information request for the 2015 OATH Hearing. On March 24, 2016, the CSC affirmed DOHMH's decision to suspend Petitioner for 30 days, which the Union sent to Petitioner on March 30, 2016. On May 6, 2016, the Union responded to a letter from Petitioner dated April 22, 2016, requesting the "transcript of August 7, 2013" by

advising Petitioner that no such transcript exists and again providing a copy of the 2013 OATH Hearing transcript.[8] (Union Ans., Ex. Q)

POSITIONS OF THE PARTIES

Petitioner's Position

Initially, Petitioner raises objections to the Union's representation during the 2011 Grievance and the 2015 OATH Hearing, which he asserts are relevant and must be considered in determining whether the Union fulfilled its duty of fair representation during the 2016 CSC Appeal.[9]

Petitioner acknowledges that "no individual act on the part of [the Union] before [the 2016 CSC Appeal is] sufficient to meet the qualifying standard" to establish a violation of NYCCBL § 12-306(b)(3).[10] (Rep. ¶ I. 6) However, Petitioner argues that, taken as a whole, he has presented sufficient facts to establish that the Union has breached its duty of fair representation during the 2016 CSC Appeal.

First, Petitioner claims that the Union's representation during the 2016 CSC Appeal was deficient because, among other things, the Union attorney failed to (1) challenge the ALJ's evidentiary rulings, credibility findings, and her bias against Petitioner; (2) raise Petitioner's out-

[8] No OATH hearing was held on August 7, 2013.

[9] With respect to the 2011 Grievance, Petitioner asserts that the Union advised him of the Step III Grievance decision after the time to appeal had passed. As to the 2015 OATH Hearing, Petitioner claims that the Union failed to: (1) keep him adequately informed about the proceeding; (2) obtain and provide documents he requested; (3) prepare for the hearing; (4) argue effectively; (5) cross-examine a DOHMH witness; and (6) inform Petitioner that the ALJ had reconsidered her evidentiary rulings as to the recording and call center training documents.

[10] NYCCBL § 12-306(b)(3) provides, in pertinent part, that "[i]t 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."

of-title grievance and § 5.1.1 of the Rules and Regulations of the City of New York as affirmative defenses;[11] (3) present deficiencies in DOHMH's witness testimony; and (4) respond to the CSC's questions. Second, Petitioner asserts that the Union's preparation for the 2016 CSC Appeal was deficient because it did not share its strategies and tactics with him, did not meet with him to prepare for the appeal sufficiently in advance of the appeal hearing, and failed to obtain and provide him with documents in preparation for the appeal. Third, Petitioner objects to the Union's denial of his request to submit a written statement to the CSC. Finally, Petitioner questions the Union attorney's "commitment and interest in the proceeding" because he notified Petitioner at the conclusion of the appeal that he was leaving the Union's employ. (Pet. ¶ 11.j)

Petitioner acknowledges his dissatisfaction with the outcome of the 2016 CSC Appeal, but disputes the City and Union's characterization that his claims are premised solely on his dissatisfaction with the outcome. Rather, he contends that the Union's actions or lack thereof at the 2015 OATH Hearing and the 2016 CSC Appeal, did not "rise[] to the level necessary [for him] to prevail." (Rep. ¶ III. 36) He claims that the Union did not share its strategy for the 2016 CSC Appeal with him because it did not have one, and that it failed to provide him with the 2013 OATH Hearing transcript prior to the 2016 CSC Appeal. Petitioner further asserts that the Union's

[11] Rule 5.1.1 of Title 55, Appendix A of the Personnel Rules and Regulations of the City of New York provides, in relevant part:

> No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless duly appointed, promoted, transferred or reinstated to such position in accordance with the law and rules prescribed therefor.

representative assigned to assist him at the 2015 OATH Hearing was aware that he was dissatisfied with the Union's representation and that Petitioner further expressed his dissatisfaction by filing the 2015 improper practice charge.[12] (Rep.¶ III. 14)

Accordingly, Petitioner requests that the Board grant the petition.

Union's Position

The Union argues that Petitioner's claims that arose on or before February 16, 2016, are untimely under NYCCBL § 12-306(e) and § 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") and should be dismissed.[13]

The Union further argues that Petitioner failed to allege that the Union acted arbitrarily, discriminatorily, or in bad faith in its representation of Petitioner at the 2015 OATH Hearing or the 2016 CSC Appeal. The Union asserts that Petitioner did not express any dissatisfaction with the Union attorney or his representation until after the 2016 CSC Appeal decision. Notwithstanding, the Union argues that Petitioner's complaints do not establish that it acted in an

[12] Petitioner also argues that the Union's e-mailed Answer on August 19, 2016 was untimely because the exhibits were not included in the e-mail. The Union also served its Answer with exhibits on Petitioner by mail within 10 days after service of the Petition. Petitioner acknowledged receipt of the Answer with exhibits by mail.

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

> A petition alleging that 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 the date the petitioner knew or should have known of said occurrence.

OCB Rule § 1-07(b)(4) provides, in relevant part: "A petition alleging that. . . a public employee organization. . . has engaged in or is engaging in an improper practice violation of [§] 12-306(e) of the statue may be filed with the Board within four (4) months thereof. . . ."

"arbitrary, discriminatory, negligent[ ] or [ ] bad faith" manner. (Union Ans. ¶ 192) Rather, the Union contends that Petitioner's complaints question the Union's legal and strategic decisions and reflect his dissatisfaction with the quality of the representation he received at the 2015 OATH Hearing and 2016 CSC Appeal and with their outcomes. Finally, the Union argues that it communicated with Petitioner throughout the disciplinary proceedings and responded to his requests for information in a timely manner.

Accordingly, the Union requests that the petition must be dismissed for failure to state a claim for which relief can be granted.

City's Position

The City argues that Petitioner's claims that arose prior to February 18, 2016, are untimely under NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4). The City also argues that Petitioner has not pled facts that establish that the Union "deliberately acted in an arbitrary, discriminatory, or bad faith manner." (City Ans. ¶ 183) The City asserts that the Union's failure to appeal Petitioner's 2011 Grievance and the ALJ's rulings on the admissibility of the recording and call center training documents after the conclusion of the 2015 OATH Hearing do not constitute arbitrary, discriminatory, or bad faith conduct by the Union. The City contends that Petitioner did not present any evidence of improper motivation by the Union, such as malice, hostility, or discrimination toward him. According to the City, Petitioner presents only conclusory statements and dissatisfaction with the outcome of the 2015 Charges. The City further argues that the Union's pursuit of the 2016 CSC Appeal is evidence that it pursued every available route to challenge Petitioner's discipline and that it was not acting with malice, hostility, or discrimination toward Petitioner. Finally, the Union argues that Petitioner's claims are substantively similar to the claims previously dismissed in his 2015 improper practice petition.

Accordingly, the City requests that the Board dismiss the petition for failing to state a claim for which relief can be granted.

DISCUSSION

We find that Petitioner has not established that the Union violated NYCCBL § 12-306(b)(3).[14] Therefore, we dismiss the petition.

"We are mindful that a *pro se* Petitioner may not be familiar with legal procedure, and we therefore take a liberal view in construing such pleadings." *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). The Union and the City dispute many of the Petitioner's allegations regarding the Union's representation of Petitioner at the disciplinary proceedings. However, the factual disputes here are not material to the legal issues claimed. As such, "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); *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009) (finding a hearing is not necessary where the factual disputes are not material to the legal claims raised). In addition, we construe the petition to allege violations of the duty of fair representation under NYCCBL § 12-306(b)(3) and (d).[15] *See Seale*, 79 OCB 30, at 7 (BCB 2007). After a thorough review of the

[14] We also find that the Union's Answer was timely because it was served in accordance with OCB Rule § 1-07(c)(3)(ii).

[15] NYCCBL § 12-306(d) provides that "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

record, we find that Petitioner's factual allegations do not support finding a violation of the NYCCBL.

As a preliminary matter, we address the timeliness of Petitioner's allegations. *See* NYCCBL § 12-306(e); OCB Rules § 1-07(b)(4) (stating that a petition must be filed within four months of an alleged violation); *see also Nardiello*, 2 OCB2d 5, at 28 (timeliness is a threshold question). The statute of limitations regarding an alleged breach of a duty of representation runs from the date the employee knew or should have known that the Union "allegedly acted or failed to act on the petitioner's behalf." *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.). 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). However, even though such claims are not remediable, "factual statements comprising untimely claims may be admissible as background information," and are considered as such here. *Id*.

Since the petition was filed on June 16, 2016, all claims arising more than four months prior to that date are untimely. Thus, to the extent Petitioner seeks to raise claims including, but not limited to actions or omissions in the Union's representation of Petitioner during the 2011 Grievance and the 2015 OATH Hearing, such claims are time-barred.[16] We find timely Petitioner's claims against the Union in connection with the 2016 CSC appeal that occurred after February 16, 2016.[17]

[16] Some of Petitioner's allegations regarding the Union's representation at the 2013 OATH Hearing and 2015 CSC Appeal were also adjudicated in *Dillon*, 8 OCB2d 14. The allegations pertaining to those events are also precluded by *res judicata*. *See UMD, L. 333, ILA,* 4 OCB2d 37, at 13 (BCB 2011).

Pursuant to NYCCBL § 12-306(b)(3), "[i]t 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." This duty requires that a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement. *See Walker*, 6 OCB2d 1 (BCB 2013) *Okorie-Ama*, 79 OCB 5. The burden of pleading and proving a breach of this duty lies with the petitioner and "cannot be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, 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). Indeed, to meet this initial burden, a petitioner must "allege more than negligence, mistake or incompetence" because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Evans*, 6 OCB2d 37, at 8 (BCB 2013); *see also Smith*, 3 OCB2d 17 (BCB 2010).

The record establishes that the Union represented and advocated for Petitioner prior to and during the 2016 CSC Appeal and was responsive to his requests for information. We do not find that the Union's actions or omissions in connection with the 2016 CSC Appeal, as alleged by Petitioner, breached its duty of fair representation. Rather, the Union's alleged failure to inform Petitioner of its strategies and tactics prior to the 2016 CSC Appeal and its alleged failure to meet with Petitioner to prepare sufficiently in advance of the appeal hearing, even if true, speak only to his dissatisfaction with the quality of the representation and the outcome of the 2016 CSC Appeal. *See Gertskis*, 77 OCB 11, at 11. Petitioner expresses this dissatisfaction by claiming that the

[17] We also find timely Petitioner's claim that the Union failed to obtain and provide him with documents for the 2016 CSC Appeal. Although it is unclear when Petitioner requested these documents, we find that Petitioner was not aware of the alleged failure to provide the documents until February 18, 2016, the date of the 2016 CSC Appeal.

Union's representation at the 2016 CSC Appeal did not "rise[] to the level necessary [for him] to prevail." (Rep. ¶ III. 36) Such dissatisfaction, without more, does not rise to the level of a breach of the Union's duty of fair representation. *See Gertskis*, 77 OCB 11, at 11 (citing *Whaley*, 59 OCB 41 (BCB 1997); *White*, 57 OCB 37 (BCB 1996)) (finding petitioner's "dissatisfaction with the quality or extent of the representation does not constitute a breach of the duty of fair representation").[18]

We also find that the Union's alleged failures during the 2016 CSC Appeal to challenge the ALJ's evidentiary rulings, credibility findings, and bias against Petitioner; to raise certain affirmative defenses or highlight discrepancies in witness testimony; to respond to questions raised by the CSC, and to refuse Petitioner's February 19, 2016 request to supplement the CSC record do not amount to a breach of the Union's duty of fair representation. Even if these assertions are true, they only demonstrate that the Union decided not to submit Petitioner's arguments to the CSC. We have long held that a petitioner's "dissatisfaction with Counsel's tactics is insufficient to demonstrate a violation of the Union's duty of fair representation." *Shymanski*, 5 OCB2d 20, at 10 (BCB 2012). Moreover, 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) (citations and editing marks omitted). Consequently, the Union's alleged conduct during the 2016 CSC Appeal does not establish a violation of the duty of fair representation.[19]

[18] We also find that Petitioner's assertion, that the attorney's notification that he was leaving the Union's employ evinces his "lack of commitment or interest in the 2016 CSC Appeal," is purely speculative and merely conveys his dissatisfaction with his representation and the outcome of the 2016 CSC Appeal. (Pet. ¶ 11.j)

[19] We also note that the Union promptly responded to Petitioner's February 19, 2016 request to supplement the CSC record. The Union advised Petitioner four days later that the record in the

Finally, in regard to Petitioner's claim that the Union failed to obtain and provide him with documents, we find no violation of the Union's duty of fair representation. Petitioner identifies the 2013 OATH Hearing transcript as the only document he requested from the Union to prepare for the 2016 CSC Appeal. The record demonstrates that the Union responded to this request by providing Petitioner with the 2013 OATH Hearing transcript on March 11, 2016 and again on May 6, 2016. Further, in the absence of bad faith, the fact that the Union provided the transcript after the CSC appeal is insufficient to establish a violation of NYCCBL § 12-306(b)(3).[20] *See Smith*, 3 OCB2d 17, at 8 (BCB 2010) (finding no violation of duty of fair representation during a disciplinary proceeding where there was no evidence of bad faith); *see also Gertskis*, 77 OCB 11, at 11 (finding no violation of the union's duty of fair representation when petitioner alleged that a union did not acquire documents in preparation for a disciplinary proceeding).

Consequently, we find that the Union's alleged actions or inactions on behalf of Petitioner in preparation for and during the 2016 CSC Appeal were not arbitrary, discriminatory, or in bad faith and dismiss the instant improper practice petition in its entirety.[21]

2016 CSC Appeal was closed and explained in detail how the CSC appeal process precludes the submission of the written statement he was requesting. *See Shymanski*, 5 OCB2d 20, at 7.

[20] In connection with this claim, Petitioner's allegations refer to "documents" at times, although only the 2013 OATH Hearing transcript was specifically identified. To the extent the record may be read to suggest that Petitioner requested and was not provided additional documents, our conclusion is the same.

[21] Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Raby*, 71 OCB 14, at 13.

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-4173-16, filed by Ronald J. Dillon against District Council 37, AFSCME, AFL-CIO and the City of New York is hereby dismissed in its entirety.

Dated: December 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER