Bonnen, 9 OCB2d 7 (BCB 2016)

(IP) (Docket No. BCB-4133-15)

Summary of Decision*:** Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by not adequately representing her, including failing to file a grievance on her behalf. Respondents argued that some of the claims are untimely, that the Union properly represented Petitioner, and that Petitioner did not have disciplinary grievance rights because she was a provisional employee. The Board found that Petitioner's allegations do not establish that the Union violated the NYCCBL. 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 Petition

-between-

PAULINE BONNEN,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and NYC HEALTH + HOSPITALS,

Respondents.

DECISION AND ORDER

On October 14, 2015, Pauline Bonnen, *pro se*, filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union") and the New York City Health and Hospitals Corporation ("HHC"). 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 not adequately representing her, including failing to file a grievance on her behalf, in her dispute with HHC over

its requirement that she wear a disposable lab coat, which led to her termination. Respondents argue that some of the claims are untimely, that the Union properly represented Petitioner, and that the Union could not file a disciplinary grievance on Petitioner's behalf because she was a provisional employee and, at the time of the disputed actions, provisional employees at HHC did not have disciplinary grievance rights. The Board finds that Petitioner has not established that the Union violated the NYCCBL. Accordingly, the improper practice petition is denied.

BACKGROUND

Petitioner was employed by HHC for 27 years and was terminated in August 2015. Since 1992, she was a provisional Clerical Associate II at HHC's Coney Island ("CI") Hospital. Petitioner did not have an underlying permanent civil service title and was not on the eligibility list for the Clerical Associate title. The Union represents the Clerical Associate title.

Disciplinary Due Process Provisions in the Applicable Collective Bargaining Agreements

In 2007, the Court of Appeals invalidated provisions in municipal collective bargaining agreements that provided disciplinary due process rights for provisional employees. *See City of Long Beach v. Civ. Serv. Empl. Assc.*, 8 N.Y.3d 465 (2007). In January 2008, the Civil Service Law ("CSL") was amended to permit the City of New York ("City") and its unions to bargain for limited disciplinary due process rights for provisional employees.

On April 13, 2012, the Union, HHC, and the City entered into the 2008-2010 Clerical and Related Titles Contract ("Agreement"), which, at all times pertinent to this petition, remained in effect pursuant to the *status quo* provisions of NYCCBL § 12-311(d). Article VI, § 1, of the Agreement, defines a grievance as including a "claimed wrongful disciplinary action taken against . . . [(g)] an eligible provisional employee . . .; [and (h)] an employee appointed pursuant

to Rule 3.2.11 of the Personnel Rules and Regulations of the [City] who has served continuously for two years." (HHC Ans., Ex. 2) Article VI, § 6, of the Agreement, entitled "Disciplinary Procedure for Provisional Employees," provides that: "In any case involving a grievance under Sections 1(g) or 1(h) of this Article, the 'Disciplinary Procedure for Provisional Employees', including side-letter, appended, shall govern." (*Id.*) The City and the Union, but not HHC, are parties to a side-letter agreement entitled "Disciplinary Procedure for Provisional Employees" ("City Side-Letter").

In September 2015, HHC and the Union entered into a side-letter agreement regarding "Due Process for HHC Provisional Employees" ("HHC Side-Letter"). (HHC Ans., Ex. 2) The HHC Side-Letter stated that "effective October 31, 2015 or upon the full execution of this agreement, whichever is later, HHC will provide disciplinary due process rights to Provisional employees represented by the [U]nion." (*Id.*) The HHC Side-Letter, like the City Side-Letter, provides that disciplinary due process rights "shall not be available to any employee appointed on a provisional basis to any position for which one or more appropriate eligible lists have been established." (*Id.*) (emphasis in original)

Petitioner's Allegations

Petitioner states that in July 2014, her department at CI Hospital instituted a requirement that all department employees wear disposable lab coats. Petitioner continued to wear a cotton lab coat, asserting that she could not wear the new disposable lab coats due to an allergic reaction. Her department had previously allowed employees to wear cotton lab coats, and Petitioner had worn a cotton lab coat for years.

On March 16, 2015, Petitioner was sent to CI Hospital's Human Resources ("HR") Department where she met with the Director of Labor Relations ("Labor Relations Director"),

who instructed her to document her allergic reaction to the new disposable lab coats. Petitioner did not request Union representation at the meeting. That day, Petitioner went to the CI Hospital Dermatology Clinic with one of the new disposable lab coats and claimed that her contact with it caused an allergic reaction. The CI Hospital Dermatology Clinic medical report from March 16 ("March 2015 Medical Report") stated, in pertinent part, that Petitioner had an "[a]llergic urticarial, likely secondary to disposable lab coats." (Pet. Supplemental Submission) The doctor "[r]ecommended discontinuation" of Petitioner's use of the disposable lab coats and stated that, if Petitioner is "required to wear [a] lab coat, would recommend cotton only." (*Id.*)

Also on March 16, 2015, Petitioner called the Union, left messages for the Union representative assigned to cover CI Hospital, and, when no one promptly returned her calls, contacted Renee Gainer, the Director of the Union's Clerical Division. A few days later, Avery Seawright, the Union representative assigned to CI Hospital, contacted Petitioner.[1] Petitioner did not request that the Union file a grievance.

Petitioner continued to wear a cotton lab coat and, on April 8, 2015, HR sent her to CI Hospital's Equal Employment Opportunity ("EEO") office, where she met with the EEO Officer to discuss an accommodation for her allergic reaction to the disposable lab coats. Petitioner did not request Union representation at the meeting but immediately afterward called Seawright, who then contacted the EEO Officer. According to Petitioner, subsequently she "didn't hear from [Seawright]. It seemed that he didn't want to help me. He didn't even file a grievance." (October Pet. p. 1) At the conference in this matter, Petitioner acknowledged that she never

[1] In March 2015, responsibility for CI Hospital was being transferred from another Union representative to Seawright, and, at the conference in this matter, Petitioner acknowledged that the other Union representative also returned her calls.

requested that the Union file a grievance, but stated that she assumed that Seawright would do so on his own.

The Union states that the EEO Officer informed Seawright that Petitioner had refused to fill out the appropriate paperwork to request an accommodation. According to the Union, Seawright communicated this to Petitioner, who responded that she did not feel that it was necessary to fill out the paperwork because she had provided HHC with the March 2015 Medical Report. Seawright then reviewed the March 2015 Medical Report and explained to Petitioner that it was, in and of itself, insufficient.

Petitioner continued to refuse to wear the disposable lab coat. On May 14, 2015, Petitioner was suspended without pay indefinitely because she failed "to remain in compliance with the department's standards of wearing the appropriate lab coat suitable for the department." (HHC Ans., Ex. 3) Also on May 14, Petitioner went to CI Hospital's Employee Health Services ("EHS") to report an allergic reaction to the disposable lab coats. On May 18, Petitioner received a letter from HHC formally notifying her of her suspension.

On May 19, 2015, Petitioner went to her allergist (who works at CI Hospital) and was sent to the emergency room due to high blood pressure. Seawright called Petitioner while she was in the emergency room and informed her that he would contact HR.[2] Petitioner avers that she requested that the Union provide her with a lawyer and complains that Seawright "never mentioned [] filing a grievance." (November Pet. ¶ 5)

Petitioner's next contact with Seawright was on June 5, 2015, when she called him. Seawright informed her that her suspension would be lifted effective Monday, June 8. Petitioner met with HR on the morning of June 8. While Petitioner denies HHC's assertion that she was

[2] Petitioner avers, and the Union denies, that Seawright also called her on May 22, 2015, and yelled at her because she had gone to the EEO Office on April 8.

offered and declined Union representation at the June 8 morning meeting, she acknowledges that she did not request Union representation at that meeting.

In the afternoon of June 8, 2015, Petitioner was instructed to go to HR where she found Seawright meeting with the Labor Relations Director. Petitioner described Seawright as having "an attitude" and being "arrogant towards" her. (October Pet., p. 2) Petitioner requested a transfer, and the Union acknowledges that it did not pursue a transfer for Petitioner at that June 8 afternoon meeting. That day, upon her return to work, Petitioner informed her supervisor that she felt sick. Her supervisor sent her to EHS, which sent her home.

Petitioner called in sick on June 9, 10, and 11, 2015. On June 9, Petitioner also called Seawright and left him a voicemail message to inform him that she "didn't want to deal with him ever." (Reply to Union Ans. ¶ 6) Instead, Petitioner began dealing with Gainer, the Director of the Union's Clerical Division. On June 10, Petitioner went to CI Hospital for an appointment with her allergist. After the appointment, she dropped off a blood sample at the CI Hospital laboratory. HHC claims that on June 10, Petitioner "was observed speaking with, and interrupting the work of, coworkers" and, when instructed to leave, she "ignored this instruction" and remained. (HHC Ans. ¶ 47)

Petitioner returned to work on June 12, 2015, continued to refuse to wear the disposable lab coat, and was sent to HR where she was immediately suspended without pay for her "failure to wear the appropriate personal protective equipment while on duty." (HHC Ans., Ex 5) Petitioner was warned that, if "[u]pon your return to duty you fail[] to be in compliance with [the department's] standards, your issue will be addressed via the disciplinary process." (*Id.*) Petitioner did not request Union representation for the June 12 meeting.

On July 8, 2015, the Labor Relations Director issued a memorandum stating that Petitioner's suspension would be lifted effective Monday, July 13, 2015 ("July 2015 Memorandum"). Seawright was copied on the memorandum but not Petitioner.

On July 9, 2015, the EEO Officer sent Petitioner a letter ("EEO Letter") "to confirm that this office has granted your request for a reasonable accommodation" and "the steps taken and options offered to you to date to provide you with a reasonable accommodation." (HHC Ans., Ex. 7) The EEO Letter noted that one accommodation offered to Petitioner was to wear a cotton lab coat underneath a disposable lab coat. It is undisputed that Petitioner refused that accommodation, claiming that she informed HHC that she would be too hot if she wore two coats. The EEO Letter stated that HHC was also looking at disposable lab coats made out of different materials for Petitioner to try, that it had received one model that week, and that it expected to receive another model the week of July 13.

Petitioner received the July 2015 Memorandum on the afternoon of July 13, 2015, called the Labor Relations Director as soon as she received it, and informed her that she would return to work the following day.

On July 14, 2015, Petitioner met with the Labor Relations Director, who had a shopping bag with different types of disposable lab coats, to discuss accommodations. HHC and the Union aver, and Petitioner denies, that Seawright was present at the meeting. According to the Union, Petitioner refused to try on the different lab coats. Petitioner claims that the Labor Relations Director insisted that she wear the disposable lab coat over a cotton lab coat and that she informed the Labor Relations Director that "[w]earing two lab coats would've been too much for me. I would get very hot and then I would start stressing out and provoke my hives to come out." (Reply to HHC Ans., part II, ¶ 8) Petitioner suggested that she wear an apron over her

cotton lab coat as she did not deal with specimens and had witnessed HHC employees in similar positions just wearing aprons. Petitioner insists that the Labor Relations Director "didn't care what I had to say, it's her way and that's it." (October Pet., p. 3)

Petitioner states that when she returned to her department on July 14, 2015, and informed her supervisor that she could not wear two lab coats, she was sent home. Petitioner claims that she notified HR before she left that she had been sent home. HHC, while acknowledging that Petitioner met with the Labor Relations Director on July 14 at CI Hospital, states that its "records indicate that Petitioner did not report for duty on July 14, 2015." (HHC Ans. ¶ 52)

It is undisputed that Petitioner did not return to work after July 14, 2015. The parties, however, dispute whether Petitioner followed HHC policy in calling in sick. Petitioner produced copies of excerpts from a log book kept in her department ("log book") in which absences of members of her department were recorded. The log book records Petitioner as "sick" for all work days from July 15 through August 10, 2015, the day she was notified of her termination.[3]

On July 15, 2015, the Labor Relations Director sent Petitioner a letter that reads, in pertinent part: "as of July 13, 2015, you have been absent without leave (AWOL). . . . If you do not return to duty or submit documentation necessary to approve a leave of absence by close of business Wednesday, July 22, 2015, you may be subject to immediate disciplinary action up to and including termination of your services." (HHC Ans., Ex 8)

On July 16, 2015, Petitioner called Gainer, who set up a three-way conference call with the Labor Relations Director. Petitioner states that "[h]earing the lies" of the Labor Relations

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[3] Petitioner's shift starts at 9:00 a.m. and the log book indicates that on July 15, 2015, she called in sick at 11:55 a.m., which would have been in violation of the HHC policy that requires an employee to call in sick before the start of their shift. Petitioner insists that the log book entry is in error and that she called in around 7:00 a.m. HHC avers that at 10:26 a.m. on July 15, Petitioner's supervisor notified HR that Petitioner had not reported to work or called in sick.

Director so upset her that she "had to get off the line." (November Pet. ¶ 21) Gainer called Petitioner back, and Petitioner claims that Gainer said that "[n]othing was accomplished" and asked her why she would not wear two lab coats, to which she responded that "it would be too much for me." (November Pet. ¶ 22) According to the Union, in response to Gainer's suggestion that Petitioner try one of the new lab coats procured by the EEO Officer, Petitioner responded that she did not want to wear any of the lab coats.

On July 21, 2015, Petitioner again talked to Gainer, who suggested that she go to HR. Petitioner went to HR, where she met with the Labor Relations Director and the EEO Officer. Petitioner did not request Union representation for the meeting. Petitioner states that her alleged AWOL was not discussed but that she was told that she had to wear two lab coats. After leaving HR, Petitioner called Gainer who requested that Petitioner get some documents from HR, which Petitioner faxed to the Union on July 22. Petitioner avers, and the Union denies, that the documents were so that Petitioner could get a lawyer. According to Petitioner, Gainer "didn't bother to give it to a lawyer because I was not civil service. . . . I was getting the [run] around again and calling and leaving messages for [Gainer]." (October Pet., p. 3) The Union states that when Petitioner informed Gainer that she did not have civil service status, Gainer explained that "meant that she did not have due process rights" and "had very limited rights to challenge a termination decision." (Union Ans. ¶ 25)

On August 3, the Labor Relations Director sent Petitioner a letter ("Termination Letter") that reads, in pertinent part:

> you were notified by this office that you have been [AWOL] since July 13, 2015. You were advised of your responsibility to return to work and/or provide documentation necessary to approve a leave of absence. As of this date, you have not returned to work nor have you provided documentation necessary to approve a leave of absence. Accordingly, please be advised that your services as a

> Provisional Clerical Associate II are terminated effective close of business August 3, 2015.

(HHC Ans., Ex. 9) Seawright was copied on the Termination Letter.

Petitioner received the Termination Letter on August 10, 2015, and contacted Union representative Linda Bullock, who requested a copy of the Termination Letter and told Petitioner that she would bring the matter to Gainer's attention. Petitioner claims that she "never heard from [Bullock or Gainer] regarding my termination." (Reply to Union Ans. ¶ 13)

Petitioner contacted the Union in September and October seeking help regarding monies owed her by HHC and was connected to Union Representative Sheila Lewis. When Lewis told Petitioner that she would connect her with Seawright, Petitioner told Lewis that she "didn't want anything to do with him" and that, in response, Lewis "got a little angry." (Reply to Union Ans. ¶ 14) Lewis connected Petitioner with Gainer who, according to the Union, explained to Petitioner that the Union had done all that it could for her.

Sometime prior to October 22, 2015, Seawright requested that the Union's Legal Department review Petitioner's case. On October 22, the Legal Department sent Seawright a memorandum summarizing its legal analysis ("October Memorandum"). In the October Memorandum, the Union concluded that "[s]ince [Petitioner] was a provisional employee, she could be terminated for any reason or no reason at all so long as it was not for an illegal reason. As such the Union cannot challenge her dismissal as a violation of the [Agreement]." (*Id.*) The October Memorandum notes that Petitioner "has the option of filing a discrimination complaint." (*Id.*) While noting that, "[a]s a matter of policy, the Union does not provide legal representation in individual discrimination matters," the October Memorandum describes Petitioner's options to file a discrimination complaint with the federal, state, and city governments, and also sets forth the applicable statute of limitations. (*Id.*) The October Memorandum also provides the contact

information for filing an employment discrimination claim, including that of the United States Equal Employment Opportunity Commission ("EEOC"), and an attorney referral service.

In the October Memorandum, the Union instructed Seawright to share a copy of the memorandum with Petitioner. The Union avers, and Petitioner denies, that Seawright called Petitioner to discuss the October Memorandum, "emphasizing the conclusion that her termination could not be challenged by the Union, but that she could pursue a discrimination claim on an individual basis." (Union Ans. ¶ 44) According to the Union, in response, Petitioner only raised her concern that HHC owed her pay. Petitioner, who subsequently filed a complaint with the EEOC, denies that Seawright ever discussed the October Memorandum with her, or provided her a copy.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3).[4] She contends that since the Union collected dues from her, it owes her the same representation as other members. Petitioner further notes that the Agreement does not state that provisional employees do not possess due process rights or that those rights do not go into effect until October of 2015. Petitioner argues that, while she never explicitly requested that the Union file a grievance on her behalf, she presumed Seawright would file one and notes that the Union repeatedly refused her request for a lawyer. Petitioner acknowledges that she never requested Union representation for any of her meetings with management but argues that a

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

Union representative should be present whenever a member has to deal with HR and that the Union representatives were "never around" when she needed them. (Reply to Union Ans. ¶ 8)

Petitioner argues that she did not refuse to wear the disposable lab coat but rather was unable to wear it. She wore a cotton lab coat for years, was allowed to wear a cotton lab coat for seven months after the disposable lab coats were introduced, and provided a doctor's note from CI Hospital documenting her allergic reaction to the new disposable lab coats. Nevertheless, Petitioner argues, her "department was trying to force [her] to wear a disposable lab coat even after getting a doctor's note that [she had] to wear cotton only." (October Pet., p. 2) She notes that her proposed solutions—using an apron over her cotton lab coat or a transfer—were not advocated by the Union and concludes that "[o]bviously nobody cared about my health." (Reply to Union Ans. ¶ 2) Petitioner states that Seawright was not helpful, that "[n]o matter what I said my union rep [] didn't care to help me. I felt he was behind [the Labor Relations Director] all the way and not for me." (October Pet., p. 2) According to Petitioner, the Union provided no real assistance when she was suspended twice and ultimately fired. Petitioner insists that she was never AWOL and that other employees who were out sick were not disciplined.

Petitioner also complains of the Union's failure to properly communicate with her in that the Union officials were difficult to reach and went weeks without contacting her. Petitioner notes that if she had not called Seawright on June 5, 2015, she never would have learned that her suspension was lifted. Petitioner argues that rather than represent her, Seawright was "smug and arrogant" towards her. (Reply to Union Ans. ¶ 7) Petitioner also claims that Seawright yelled at her on May 22, 2015, when he learned that she went to the EEO Office. Petitioner describes other Union officials as being unresponsive, avers that the Union did not get back to her after she

faxed them a copy of the Termination Letter, and states that Gainer "had an attitude towards me" and the "audacity to say to me that she helped me." (Reply to Union Ans. ¶ 14)

Union's Position

The Union argues that Petitioner has failed to allege that it acted arbitrarily, discriminatorily, or in bad faith. The Union argues that Petitioner was not entitled to Union representation at every meeting she had with management and that Petitioner has not alleged any facts to suggest that any of these meetings triggered a *Weingarten* right or posed questions that could result in discipline. Petitioner also has not alleged an instance where she requested, and the Union refused, to provide representation.

The Union acknowledges that it did not seek a transfer for Petitioner on June 8, 2015, explaining that requesting a transfer would have been premature on Petitioner's first day back to work as there was no provision in the Agreement granting the right to transfer. The Union argues that the Agreement only provides employees with the right to be considered for a transfer and that Petitioner has not alleged that there were any available vacancies or that she had applied for but was wrongfully denied a transfer.

The Union argues that it correctly determined that it could not file a grievance on Petitioner's behalf because she was a provisional employee and, therefore, not entitled to disciplinary grievance rights. The October Memorandum summarizes the Union's reasoning and, according to the Union, demonstrates that the Union's actions were not discriminatory, arbitrary, or in bad faith. The Union argues that the HHC Side-Letter does not apply to Petitioner as she was terminated before it came into effect and it was not retroactive. Accordingly, the Union argues that this matter must be dismissed for failure to state a claim for which relief can be granted.

HHC's Position

HHC argues that any claims dating prior to four months from the filing of the petition are untimely and must be dismissed. The petition was filed in October 2015.[5] Thus, HHC argues that any claim pre-dating June 2015 is untimely and can be considered solely as background information. According to HHC, the only timely claims are that the Union failed to grieve Petitioner's June 2015 suspension and her August 2015 termination. HHC also argues that Petitioner has not explicitly or implicitly pled that HHC violated the NYCCBL and that, should such a claim be found by the Board, it would be untimely.[6]

HHC argues that the petition is devoid of any facts that show that the Union acted in a manner that was arbitrary, discriminatory, or founded in bad faith. As for Petitioner's complaints that the Union did not advance a grievance on her behalf, HHC argues that a Union does not breach its duty of fair representation merely by not advancing a grievance and enjoys wide latitude in the handling of grievances. Further, HHC argues that the Union could not file disciplinary grievances on Petitioner's behalf as she was a provisional employee and that the Agreement did not provide disciplinary rights for provisional employees at the time of Petitioner's termination. According to HHC, the HHC Side-Letter became effective on October 31, 2015, at the earliest, and does not apply retroactively. Even if it did, by its terms it excludes any provisional employee in a title for which an eligibility list exists, such as the Clerical Associate title. HHC argues that, since Petitioner had no disciplinary grievance rights, the Union's reasoned refusal to pursue a meritless course of action cannot be found to be a breach of the duty of fair representation and that any derivative claim against HHC must also be dismissed.

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[5] HHC erroneously states that the Petition was filed on October 5, 2015, and that any claim prior to June 4 was untimely. The Petition was filed with the Board on October 14, 2015.

[6] HHC furthers argues that Petitioner cannot establish a *prima facie* case that it violated the NYCCBL and that HHC has established legitimate business reasons for its actions.

DISCUSSION

We find that Petitioner has not established that the Union breached its duty of fair representation in violation of NYCCBL. We therefore dismiss the petition.

Recognizing that a "*pro se* Petitioner may not be familiar with legal procedure," the Board "take[s] a liberal view in construing" a *pro se* Petitioner's 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. New York Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept. 2010), *lv. denied*, 17 N.Y.3d 702 (2011). The Board exercises its 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). "[W]e 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); *see also Nardiello*, 2 OCB2d 5, at 27 (BCB 2009). We find that Petitioner does not state facts which, if proven, establish that the Union breached its duty of fair representation. *See Shymanski*, 5 OCB2d 20, at 9 (BCB 2012).

Timeliness

As "timeliness is a threshold question," we first address HHC's argument that some of Petitioner's claims are untimely. *Nardiello*, 2 OCB2d 5, at 28. The statute of limitations for an improper practice claim under the NYCCBL is four months; thus, 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) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)).[7] The instant petition was filed on October 14, 2015. Therefore, only Petitioner's claims arising after June 14, 2015, are timely. This includes the allegations regarding the Union's handling of Petitioner's return from her second suspension, the accommodation discussions in July 2015, and her termination in August 2015. While claims regarding Petitioner's initial contact with the Union in March 2015 and her first suspension in May 2015 are untimely, we note that facts related to these earlier events are "admissible as background information." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *see also Nealy*, 8 OCB2d 2, at 15 (BCB 2015).[8]

Alleged Breach of the Duty of Fair Representation

It is an improper practice under NYCCBL § 12-306(b)(3) "for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." 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 16; *see also Parker*, 31 OCB 16, at 8-9 (BCB 1983). The "burden of pleading and proving a breach of this duty lies with the petitioner and

[7] 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 of the date the petitioner knew or should have known of said occurrence.

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

[8] As Petitioner has not alleged that any of the disputed acts by HHC were either motivated by, or are inherently destructive of, union activity, we need not reach HHC's arguments regarding NYCCBL § 12-306(a)(1) and (3) claims. *See Sims*, 8 OCB2d 23, at 15, n. 11 (BCB 2015) (citing *OSA*, 2 OCB2d 42, at 33 (BCB 2009); *Shapiro*, 37 OCB 9, at 8 (BCB 1986)).

cannot be carried simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (quoting *Okorie-Ama*, 79 OCB 5, at 14) (quotation marks omitted); *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005). Thus, "to meet this burden, a petitioner must 'allege more than negligence, mistake or incompetence.'" *Sims*, 8 OCB2d 23, at 15 (quoting *Evans*, 6 OCB2d 37, at 8 (BCB 2013)).

Regarding the Union's decision not to file a grievance on Petitioner's behalf, "it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance each and every grievance." *Cooke*, 57 OCB 46, at 9 (BCB 1996); *see also Garg*, 6 OCB2d 35, at 11 (BCB 2013). Rather, a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Nardiello*, 2 OCB2d 5, at 40 (quoting *Edwards*, 1 OCB2d 22, at 21(BCB 2008)) (quotation marks omitted). Indeed, "the Board does not have the authority to 'substitute its judgment for that of a union or evaluate its strategic determinations.'" *Garg*, 6 OCB2d 35, at 11 (quoting *Edwards*, 1 OCB2d 2, at 21); *see also Kassim*, 8 OCB2d 8, at 14 (BCB 2015).

The undisputed facts demonstrate that the Union considered Petitioner's request and "set forth a thoughtful and reasonable explanation as to why it believed" it could not process a disciplinary grievance on Petitioner's behalf. *Garg*, 6 OCB2d 35, at 12. This rationale was communicated to Petitioner by Gainer on July 22, 2015. While Petitioner denies that she spoke to Seawright sometime after October 22, 2015, Gainer's July explanation of the Union's basis for not contesting HHC's disciplinary actions are consistent with those set forth in the October Memorandum. Specifically, the Union concluded that, as a provisional employee, Petitioner was not entitled to disciplinary grievance rights under the Agreement. *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 4-5 (BCB 1982) (union's decision that proceeding with a grievance would be fruitless was not a breach of the duty of fair representation). The Union based its conclusion upon the fact that it did not reach an agreement on disciplinary grievance rights for provisional employees with HHC until the HHC Side-Letter in October 2015, and this agreement did not apply retroactively. While Petitioner argues that the Agreement does not state that provisional employees do not possess disciplinary due process rights, a petitioner's belief that its union's conclusion was erroneous is insufficient to establish a breach of the duty of fair representation. *See Sims*, 8 OCB2d 23 at 16, n. 12; *Evans*, 6 OCB2d 37, at 8. Accordingly, Petitioner's pleadings do not establish that the Union's exercise of its legal and strategic judgment violated its duty of fair representation. *See James Reid*, 1 OCB2d 26, at 26 (BCB 2008); *see also Banerjee*, 3 OCB2d 15, at 19-20 (BCB 2010); *Wooten*, 53 OCB 23, at 14 (BCB 1994).

For similar reasons, we do not find that the Union violated the duty of fair representation by not pursuing a transfer for Petitioner. The Union explained that it did not pursue a transfer when Petitioner requested one on her first day back to work in June 2015 because it believed that it would be premature. The Union's conclusion was based upon the fact that the Agreement did not contain a provision granting employees the right to transfer, but only provides employees with the right to be considered for a transfer. Here, Petitioner did not allege that she had applied for any vacancies and was refused a transfer. Accordingly, the allegations do not show that the Union's exercise of its judgment violated its duty of fair representation. *See Garg*, 6 OCB2d 35, at 12; *James Reid*, 1 OCB2d 26, at 25.

Petitioner also complains about the promptness and frequency of her communications with the Union. A union has "a responsibility to communicate" with its members, and, here, the

record establishes that the Union has done so. *Morales*, 5 OCB2d 28, at 26 (BCB 2012), *affd*, *United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective Bargaining*, Index No. 103612/12 (Sup. Ct. New York Co. March 31, 2016) (Bluth, J.) (citing *Krumholz*, 51 OCB 21, at 12 (BCB 1993)). We note that Petitioner never requested Union representation at any of her meetings with management. Further, Petitioner acknowledges that when she first contacted the Union in March 2015, she was able to reach Gainer and that her calls were returned by two different Union representatives. Although unsatisfied with how Seawright handled her concerns, Petitioner acknowledges that he had addressed them, communicated with her regarding them, and met with the Labor Relations Director and the EEO Officer on her behalf. Petitioner's claims that she was offended by Seawright are supported by her refusal to work with him after June 9, 2015. However, thereafter, Gainer represented Petitioner and contacted the Labor Relations Director on her behalf on July 16. Petitioner also acknowledges discussing with Gainer her civil service status on July 22 and, sometime in September or October, her termination. Thus, while Petitioner may have desired "more prompt and respectful communications," Petitioner was represented by the Union, who communicated with her regarding her concerns and kept her informed. *See Kassim*, 8 OCB2d 8, at 15-16; *see also Turner*, 3 OCB2d 48, at 16 (BCB 2010).

To the extent that Petitioner is dissatisfied with the Union's conclusions, tactics, or outcomes, such claims are "insufficient to demonstrate a violation of the Union's duty of fair representation." *Shymanski*, 5 OCB2d 20, at 9; *see also Walker*, 79 OCB 2, at 15 (BCB 2007); *Rivera-Bey*, 73 OCB 20, at 11 (BCB 2004). Similarly, Petitioner's complaints that Seawright yelled at her and that the Union representatives were disrespectful reflect a dissatisfaction with the quality or extent of representation and do not constitute a breach of the duty of fair

representation. *See Kassim*, 8 OCB2d 8, at 16; *Shymanski*, 5 OCB2d 20, at 11; *Gertskis*, 77 OCB 11, at 11.

Petitioner complains that, as a provisional employee, she paid the same dues as Union members who had civil service status and, therefore, should have received the same representation. However, there is no evidence that the Union discriminated against Petitioner because she was a provisional employee. Instead, the Union based its representation of Petitioner upon its conclusion that the disciplinary grievance rights of provisional employees differed from those of permanent employees. *See Cooke*, 57 OCB 46, at 10; *Finer*, 1 OCB2d 13, at 13 (BCB 2008). Moreover, we note that Petitioner has not alleged that she was treated differently by the Union from other provisional employee members. Accordingly, we dismiss the petition as we find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and thus did not breach its duty of fair representation.

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 Pauline Bonnen, docketed as BCB-4133-15, against District Council 37, AFSCME, AFL-CIO, and the New York City Health and Hospitals Corporation hereby is dismissed in its entirety.

Dated: April 7, 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

PETER PEPPER
MEMBER