

**Boonmalert, 12 OCB2d 36 (BCB 2019)**  
(IP) (Docket No. BCB-4339-19)

**Summary of Decision:** Petitioner claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) when it failed to properly represent him regarding two grievances alleging that he was performing out-of-title work. The Union and the City separately argued that one of Petitioner's claims is time-barred and that the Union did not breach its duty of fair representation in regard to either grievance. The Board found that Petitioner's allegation regarding the first grievance was untimely and that his timely allegation regarding the second grievance did not establish that the Union breached its duty of fair representation. Accordingly, the petition was denied. (*Official decision follows*).

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**BOONSAKDI BOONMALERT,**

*Petitioner,*

*- and-*

**SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371,**

*- and-*

**THE NEW YORK CITY DEPARTMENT OF SMALL BUSINESS SERVICES and  
THE NEW YORK CITY OFFICE OF LABOR RELATIONS,**

*Respondents.*

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**DECISION AND ORDER**

On June 24, 2019, Boonsakdi Boonmalert ("Petitioner") filed a *pro se* verified improper practice petition against Social Services Employees Union, Local 371 ("Union"), the New York City Department of Small Business Services ("SBS"), and the New York City Office of Labor

Relations (“OLR” or “City”). Petitioner asserts 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 properly represent him regarding two grievances alleging that he was performing out-of-title work.<sup>1</sup> The Union and the City separately argue that Petitioner’s claim regarding his first grievance is time-barred and that the Union did not breach its duty of fair representation in regard to either grievance. The Board finds that Petitioner’s allegation regarding the first grievance is untimely and that his allegation regarding the second grievance does not establish that the Union breached its duty of fair representation. Accordingly, the petition is denied.

## **BACKGROUND**

### **Petitioner’s 2013 Out-of-Title Grievance**

Petitioner is employed by SBS as an Associate Contract Specialist.<sup>2</sup> The Union is the certified bargaining representative for SBS employees in that job title. On or about July 9, 2013, Petitioner filed an out-of-title grievance alleging that he was performing the job duties of an Administrative Contract Specialist in violation of Article VI, § 1(c), of the collective bargaining agreement (“Agreement”). On or about the same day, Petitioner’s coworker Kevin Ying (“Ying”), also an Associate Contract Specialist, filed an out-of-title grievance making the same allegations

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<sup>1</sup> In a July 8, 2019 letter, OCB’s Executive Secretary dismissed Petitioner’s claim against OLR and/or SBS pursuant to NYCCBL § 12-306(a)(3) because the petition did not set forth facts to support a claim that any alleged action taken against Petitioner by his employer resulted from or was related to his union activity (“ES Letter”). The ES letter also advised Petitioner that, inasmuch as the petition intended to raise claims under NYCCBL § 12-306(a)(4), (b)(2), and (c)(1), it failed to state a claim cognizable under the NYCCBL. Accordingly, OLR and SBS remain respondents in this matter only to the extent required by NYCCBL § 12-306(d).

<sup>2</sup> Unless otherwise stated, all facts recited are based on Petitioner’s improper practice petition and assertions he made at the conference held before the Trial Examiner on September 11, 2019.

as Petitioner regarding his own duties. The grievances filed by Petitioner and Ying were processed through the first three steps of the grievance procedure and, on or about April 22, 2014, the Union filed for arbitration of both grievances. (*See* Union Ans., Exs. A, B) The two grievances were consolidated, and an arbitration hearing was scheduled.

As part of the preparation for the arbitration, Union counsel met with Petitioner and Ying and asked them to review the job descriptions for the titles of Associate Contract Specialist and Administrative Contract Specialist and to note the tasks they performed. Petitioner acknowledges that, based on this review, they concluded that most of the tasks Petitioner performed were characteristic of the Associate Contract Specialist title. Union counsel's contemporaneous notes indicate that Petitioner performed 9 of 19 tasks listed in the job description for Associate Contract Specialist and that these tasks comprised approximately 90% of his work. (Union Ans., Ex. C) In contrast, Petitioner performed 4 of 20 tasks listed in the job description for the higher-level Administrative Contract Specialist, and these tasks comprised less than 20% of his work. (Union Ans., Ex. F)<sup>3</sup> The Union asserts that it concluded that, although the grievants were managing excessive caseloads, they did not have meritorious out-of-title claims and that it therefore initiated settlement discussions with the City.

On or about March 11, 2015, Union counsel gave Petitioner a proposed stipulation of settlement whereby SBS would raise his salary by 8% from July 9, 2013, to December 31, 2015. The stipulation stated that Petitioner intended to retire by December 31, 2015, and that the 8% salary increase would be rescinded if he continued to work for SBS after 2015. Ying received a proposed stipulation of settlement that also provided for an 8% salary increase through December

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<sup>3</sup> Petitioner's coworker Ying indicated that he performed 10 of 19 tasks listed in the job description of Associate Contract Specialist and that he performed 4 of 20 tasks listed for the higher-level Administrative Contract Specialist position.

31, 2015. However, Ying's stipulation did not include any provisions regarding his retirement and stated that, starting in 2016, he would receive an additional 4% salary increase.

Petitioner and the Union offer conflicting accounts of the events that followed. According to Petitioner, he became upset when he learned of the terms of Ying's proposed stipulation of settlement. Petitioner states that Union counsel had asked him on multiple occasions if he planned on resigning at some time, but that he had consistently responded that he had no idea when he would retire. Petitioner asserts that he never consented to the Union offering to settle the two grievances on terms more favorable to Ying than to him. The Union, on the other hand, asserts that Petitioner provided the impetus for the settlement proposals. It claims that Petitioner stated that he planned to retire by the end of 2015 and insisted that his retirement should be used as leverage in negotiations.

The proposed stipulations of settlement were never executed by the Union and the City. The Union contends that, after sending the stipulations of settlement to Petitioner and Ying, it decided to reject the proposed settlements because Petitioner was being treated differently than Ying.

On or about June 8, 2015, Petitioner filed a charge of discrimination against SBS with the New York State Division of Human Rights and the Equal Employment Opportunity Commission ("EEOC Charge") alleging that the differing terms in the proposed stipulations of settlement concerning him and Ying constituted age discrimination and that SBS was trying to force him to retire.

On June 26, 2015, Ying forwarded Petitioner an e-mail thread between Union counsel and OLR counsel regarding Petitioner's and Ying's out-of-title grievances. (Pet. Supplemental Ex.)<sup>4</sup> The emails indicated that the City had offered, and the Union had accepted, settlements of Petitioner's and Ying's grievances whereby both men would receive a lump sum, pensionable payment representing a 12% raise for the period from when their grievances were filed to December 31, 2015. On or about September 21, 2015, the City, the Union, and Ying executed a settlement agreement resolving his out-of-title grievance on the terms described in the June 26, 2015 email thread. The Union claims that Petitioner refused to settle his grievance on identical terms. Petitioner asserts that the Union never communicated directly with him regarding this settlement offer and that he never rejected it.

On June 3, 2016, Petitioner filed an age discrimination suit against the City, SBS, the Union, and individual defendants in the United States District Court for the Southern District of New York.<sup>5</sup> He claimed, in relevant part, that the Union had conspired with SBS to discriminate against him by preparing the initial proposed stipulations of settlement which included a greater pay increase for Ying than for Petitioner, that the Union had breached its duty of fair representation to him, and that the Union had retaliated against him for filing his EEOC charge by failing to

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<sup>4</sup> Petitioner produced this email correspondence, which was not included with his pleadings, at the conference in this matter. The Trial Examiner accepted the email correspondence as Petitioner's Supplemental Exhibit and gave the parties the opportunity to submit any additional evidence or briefing. Following the conference, no additional evidence or briefing was submitted. The Union objects to the consideration of the Supplemental Exhibit as evidence in this matter because it was not included in Petitioner's pleadings. We affirm the Trial Examiner's receipt of Petitioner's Supplemental Exhibit into the record. Neither the City nor the Union disputed the authenticity of the emails, and under the circumstances, neither was prejudiced by the Board's consideration of this evidence.

<sup>5</sup> See *Boonmalert v. City of New York*, No. 16 Civ. 4171 (SDNY), Compl. (Doc. No. 1). We take administrative notice of the pleadings and orders in this proceeding.

continue pursuing his out-of-title grievance.<sup>6</sup> On April 12, 2017, the Court granted the City's motion to dismiss all claims against the City defendants.<sup>7</sup> On May 30, 2017, the Court dismissed without prejudice all claims against the Union, which had not appeared in the matter, for failure by the plaintiff to prosecute his action and to comply with the Court's orders concerning requesting a default judgment.<sup>8</sup> Plaintiff appealed the dismissal of his claims against the City defendants to the Second Circuit Court of Appeals. His appeal was dismissed on January 22, 2018, and his subsequent petition for rehearing was denied on March 23, 2018.<sup>9</sup> During the period from when he filed his complaint until his petition for rehearing was denied, Petitioner did not communicate with the Union concerning his out-of-title grievance.

On May 11, 2018, Petitioner wrote the President of the Union regarding his 2013 out-of-title grievance. Petitioner noted that Ying's out-of-title grievance had been settled in 2015 and alleged that, by obtaining different results for Petitioner and Ying, Union counsel had failed to represent him adequately. Petitioner requested that the Union President take action to settle his out-of-title grievance. The Union never responded to Petitioner's letter.

On or about June 14, 2018, two representatives of the Union visited Petitioner's workplace to speak with members there. Petitioner asked them what had happened with his 2013 grievance. One of the Union representatives told Petitioner that "it was done." (Pet. at 3) According to Petitioner, the Union representative told him that, since he had previously been offered a settlement

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<sup>6</sup> See *Boonmalert v. City of New York*, No. 16 Civ. 4171 (SDNY), Am. Compl. (Doc. No. 6).

<sup>7</sup> See *Boonmalert v. City of New York*, No. 16 Civ. 4171, 2017 WL 1378274 (SDNY Apr. 12, 2017).

<sup>8</sup> See *Boonmalert v. City of New York*, No. 16 Civ. 4171 (SDNY May 30, 2017).

<sup>9</sup> See *Boonmalert v. City of New York*, No. 17-1465, 721 Fed. Appx. 29 (2<sup>nd</sup> Cir. Jan. 22, 2018), *reh'g denied*, No. 17-1465 (2<sup>nd</sup> Cir. Mar 23, 2018).

and had then lost his court case, he could no longer obtain compensation through the 2013 grievance. Petitioner responded that his complaint in civil court had alleged age discrimination and had nothing to do with his out-of-title grievance.

On or about March 7, 2019, Petitioner wrote the Executive Director of AFSCME District Council 37 (“DC 37”), with which the Union is affiliated, regarding his out-of-title claims. He stated, in part, that he had written the Union in May 2018 concerning this matter but never received a response. He alleged that the Union had violated its duty to represent him by demonstrating prejudice and treating Ying more favorably than him.

According to the Union, on or about May 22, 2019, it withdrew its request for arbitration of Petitioner’s 2013 out-of-title grievance. The Union asserts that it made the decision not to proceed with arbitration of Petitioner’s grievance earlier but did not formally withdraw the request for arbitration until it received an inquiry from the Office of Collective Bargaining regarding the status of the grievance in early 2019. Petitioner asserts that he was never informed that the request for arbitration was being withdrawn, and the Union states that it does not know whether Petitioner was informed.

### **Petitioner’s 2018 Out-of-Title Grievance**

On or about July 12, 2018, Petitioner and a coworker went to the Union’s office to file grievances. Petitioner filed an out-of-title grievance that day alleging that he had been performing the duties of an Administrative Contract Specialist since 2012. However, Petitioner acknowledges that, when he filed this grievance, he was told by the Union that it would not reach back to include the period of time covered by his 2013 out-of-title grievance.

Having received no response to this grievance from the City, on or about October 19, 2018, the Union appealed to Step 2. When the Union received no response to the Step 2 appeal, on

November 20, 2018, it appealed to Step 3. A Step 3 conference regarding Petitioner's 2018 out-of-title grievance was held on September 24, 2019. The City has not yet issued a Step 3 determination.

### **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), by failing to properly represent him regarding his 2013 and 2018 out-of-title grievances.<sup>10</sup> Petitioner asserts that the Union engaged in discriminatory conduct by negotiating a stipulation of settlement that provided him with an 8% salary increase through the end of 2015 when it obtained a salary increase of 12% for his colleague Ying. He alleges that Union counsel conspired with the City to try to force him to retire. Petitioner maintains that he should be compensated for the out-of-title work he has performed since 2012. He asserts that the Union never responded to his May 11, 2018 letter to the Union President concerning his 2013 grievance and never informed him that it was withdrawing the request for arbitration of this grievance. Petitioner further argues that his 2018 out-of-title grievance should reach back to include the time period covered by his 2013 grievance and that the Union has failed to promptly advance this grievance.

#### **Union's Position**

The Union argues that Petitioner's claim concerning his 2013 grievance is untimely and that the Union has at all times represented Petitioner in a good faith, non-arbitrary, and non-

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<sup>10</sup> 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."



discriminatory manner. The Union asserts that it processed Petitioner's 2013 out-of-title grievance and that, even though he did not have a meritorious out-of-title claim, the Union nevertheless sought and obtained a settlement offer whereby he would be compensated for his allegedly excessive workload. The Union asserts that it has represented Petitioner in good faith regarding his 2018 out-of-title grievance, which is now at Step 3 of the grievance procedure.

### **City's Position**

The City argues that Petitioner's claim regarding his 2013 grievance must be dismissed as untimely and that none of the facts he has alleged regarding the processing of that grievance demonstrate a breach of the duty of fair representation. In regard to Petitioner's 2018 grievance, the City asserts that it is currently being processed according to the usual and customary procedure governing such grievances and that Petitioner has alleged no facts that demonstrate a violation of NYCCBL § 12-306(b)(3).

## **DISCUSSION**

The statute of limitations for filing an improper practice petition is set forth in § 12-306(e) of the NYCCBL, which provides, in relevant part, as follows:

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. . . .*

(Emphasis added) *See also* OCB Rules § 1-07(c)(2)(i). "It is well established that an improper practice charge '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.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009) (citations omitted), *affd.*, *Matter of Mahinda v. City of New York*,

Index No. 117487/2009 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d 564 (1<sup>st</sup> Dept. 2012). Consequently, “claims antedating 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) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)).

We have held that a claim that a union violated NYCCBL § 12-306(b)(3) by refusing to process or advance a grievance may accrue on the date on which the union informed the employee that it would not pursue the grievance. *See, e.g., Lutz*, 4 OCB2d 13, at 9-10 (BCB 2011) (petition found untimely when filed more than four months after petitioner received a letter from the union stating that her “termination cannot be challenged”); *Page*, 53 OCB 31, at 10 (BCB 1994) (time to file improper practice petition began to run when the petitioner was informed of the union’s decision not to submit the matter to arbitration); *cf. Raby*, 71 OCB 14, at 12 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.) (petitioner should have known that union was not proceeding with her grievances when it had not taken action for over a year).

In the present case, the petition was filed on June 24, 2019. Based on this filing date, Petitioner’s claims would have to have arisen on or after February 24, 2019. We find that, on the facts as pleaded, Petitioner’s claim concerning his 2013 out-of-title grievance arose, at the very latest, on June 14, 2018, when, according to the Petitioner, a Union representative told him that his grievance “was done.” That Petitioner understood the Union was no longer pursuing his 2013 out-of-title grievance is evidenced by the fact that, on or about July 12, 2018, he filed a new out-of-title grievance that he argued should reach back to the period covered by his earlier grievance.

Because Petitioner's claim regarding his 2013 out-of-title grievance arose more than four months before the petition was filed, it is time-barred pursuant to NYCCBL § 12-306(e).<sup>11</sup>

Petitioner's claim regarding his 2018 out-of-title grievance is timely. However, Petitioner has not pled any facts that would support a finding that the Union violated its duty of fair representation. In order to establish a breach of the duty of fair representation, the petitioner must demonstrate that the union has engaged in "arbitrary, discriminatory, or bad faith conduct in negotiating, administering and enforcing collective bargaining agreements." *See Walker*, 6 OCB2d 1, at 7 (BCB 2013) (citing *Okorie-Ama*, 79 OCB 5, at 14 (BCB 2007)). 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) (citing *Smith*, 3 OCB2d 17, at 8 (BCB 2010)). Petitioner acknowledges that the Union has represented him through Step 3 of the grievance procedure and that his grievance is still being processed. While Petitioner believes that his 2018 out-of-title grievance should have been resolved by now, he has not alleged any facts demonstrating that the time it has taken to advance his grievance is due to arbitrary, discriminatory, or bad faith conduct by the Union. *See Hassay v. DC 37*, 71 OCB 2, at 11-12 (BCB 2003) (where the union had represented petitioner in connection with his grievance and was still pursuing it, petitioner had not plead facts demonstrating that six-month delay violated the duty of fair representation). Absent any specific facts pleaded other than the alleged delay in resolving his grievance, Petitioner's claim does not rise to a violation of the duty of fair representation.

Accordingly, the petition is denied in its entirety.

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<sup>11</sup> We also note that the complaint that Petitioner filed in the Southern District of New York on June 3, 2016, alleged in part that the Union violated its duty of fair representation to Petitioner in its handling of his 2013 out-of-title grievance. Assuming that Petitioner's claim accrued either when he filed this lawsuit or on June 14, 2018, when the Union advised him that the grievance "was done," the claim is in any case time-barred.

**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 Boonsakdi Boonmalert against Social Services Employees Union, Local 371, the New York City Department of Small Business Services, the New York City Office of Labor Relations, and the City of New York, docketed as BCB-4339-19, is hereby dismissed in its entirety.

Dated: December 3, 2019  
New York, New York

SUSAN J. PANEPENTO

CHAIR

ALAN R. VIANI

MEMBER

M. DAVID ZURNDORFER

MEMBER

PAMELA S. SILVERBLATT

MEMBER

CHARLES G. MOERDLER

MEMBER

GWYNNE A. WILCOX

MEMBER