Harason, 13 OCB2d 8 (BCB 2020)

(IP) (Docket No. BCB-4330-19)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation by failing to notify him of the status of his grievance and failing to advance the grievance. The Union argued that Petitioner's claims were untimely, that it decided not to further pursue the grievance because it was not meritorious, and that its failure to communicate with Petitioner was, at most, mere negligence. The Board held that the Union did not breach its duty of fair representation. Accordingly, the petition was dismissed. ***(Official decision follows).***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ERIC HARASON,

Petitioner,

- and-

COMMUNICATION WORKERS OF AMERICA, LOCAL 1180, and NEW YORK CITY HEALTH + HOSPITALS,

Respondents.

DECISION AND ORDER

On May 13, 2019, Eric Harason ("Petitioner") filed a verified improper practice petition against Communication Workers of America, Local 1180 ("Union") and New York City Health + Hospitals ("HHC").[1] 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 notify him of the status of

[1] We refer to the New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

his grievance regarding overtime pay for on-call time and failing to advance the grievance.[2] The Union argues that Petitioner's claims were untimely, that it decided not to further pursue the grievance because it was not meritorious, and that its failure to communicate with Petitioner was, at most, mere negligence. The Board finds that the Union did not breach its duty of fair representation to the Petitioner. Accordingly, the petition is dismissed.

BACKGROUND

Unless otherwise stated, all facts recited here are based on Petitioner's improper practice petition.[3] Petitioner is employed by HHC in the title of Coordinating Manager. From April 27, 2016, to approximately May 16, 2017, Petitioner was assigned to the Enterprise Information Technology Services Business Applications Unit. During this time, HHC was integrating a new electronic record storage system and application. Petitioner alleges that HHC required him to stand by at home, subject to recall, in order to troubleshoot errors and address issues that arose

[2] Petitioner did not specify any claims against HHC. Accordingly, we construe the petition as only asserting a claim against HHC under NYCCBL § 12-306(d), which provides:

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

[3] On May 24, 2019, the Executive Secretary issued a Determination ("ES Determination") pursuant to § 1-07(c)(2)(i) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), declining to reach the merits of the petition and dismissing it as untimely. *See Harason*, 12 OCB2d 12 (ES 2019). Petitioner appealed the ES Determination, and on July 30, 2019, we issued an interim decision determining that additional facts were needed and directing the Union and HHC to answer the petition. *See Harason*, 12 OCB2d 19 (BCB 2019). The Union and HHC each filed an answer to the petition, and Petitioner submitted a reply.

during integration of the new application. Petitioner asserts that during this period he was not compensated for 3,711 hours of standby time.

Sometime in 2017, Petitioner spoke with both the Union and HHC regarding compensation that he believed he was due for his on-call time. Petitioner contends that the Union directed him to a list of attorneys to contact regarding a potential claim under the Fair Labor Standards Act ("FLSA"). He subsequently notified the Union that he was unsuccessful in retaining counsel. Thereafter, the Union informed Petitioner that it would file a grievance on his behalf.

On or about May 16, 2017, the Union filed a grievance alleging that Petitioner had been required to standby at home on an involuntary basis in violation of Article IV, §§ 2(b) and 11(b), of the 1995-2001 Citywide Agreement ("Agreement"), which remains in effect pursuant to the *status quo* provision of the NYCCBL.[4] The requirement in Article IV, § 11(b), that an employee must be "subject to recall" in order to obtain standby pay is explained in Office of Labor Relations Interpretive Memorandum No. 101 ("Memorandum No. 101"), which provides that an

[4] We take administrative notice of the Agreement, which was not included with the pleadings. Article IV, § 2(b), of the Agreement provides as follows:

> "Ordered involuntary overtime" and "ordered involuntary standby time" shall be defined as overtime or standby time which the employee is directed in writing to work and which the employee is therefore required to work. Such overtime or standby time may only be authorized by the agency head or representative of the agency head who is delegated such authority in writing.

Article IV, § 11(b), of the Agreement provides, in pertinent part, as follows:

> "Employees who are required, ordered and/or scheduled on an involuntary basis to stand by in their homes subject to recall, as authorized by the agency head or the agency head's designated representative shall receive overtime payment in cash for such time on the basis of one half (1/2) hour paid overtime for each hour of standby time."

employee is subject to recall if he or she may be ordered to "report from home to perform overtime outside the employee's normally scheduled hours." (HHC Ex. 6)

A Step I hearing was held on or about August 28, 2017. HHC subsequently held a Step II hearing and issued a decision denying the grievance. The Union requested a Step III hearing, which was held on or about May 15, 2018.

On August 22, 2018, Petitioner emailed his Union staff representative, Olivia Lyde, to inquire about the status of his grievance but did not receive a response. On September 12, 2018, Petitioner again emailed Lyde, as well as Union Vice President Gina Strickland, regarding the status of the grievance, and again he received no response. Petitioner contends that sometime thereafter he became concerned regarding the status of his grievance and, on February 12, 2019, he emailed the Union Vice President asking whether a Step III decision had been issued, whether HHC was offering a settlement, and whether the Union would continue to pursue the grievance. He did not receive a response. Petitioner followed up on his prior correspondence with emails to the Union Vice President on February 19 and 26, 2019, but received no response to either email.

On or about January 2, 2019, HHC issued a Step III reply denying Petitioner's grievance. Petitioner learned that a Step III reply was issued only after filing the instant petition, when it was included with HHC's answer.

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 pursue his grievance and failing to notify him of the status

of the grievance.[5] Petitioner contends that the petition is timely because he was not placed on notice that the Union would not proceed with his grievance until after the Union's Vice President failed to respond to the email he sent her on February 16, 2019, inquiring whether the Union would pursue arbitration. He argues that the grievance is meritorious because HHC failed to compensate him for his standby time in accordance with the Agreement. Petitioner contends that "[a]lthough [he] was never directly told to remain at home, the combination of [the] importance of Petitioner's duties relating to the maintenance [of HHC's] database and the restrictive nature of the tasks assigned to complete those duties is tantamount to a direction to remain at home and be available at all times." (Rep. ¶ 11) Citing Board precedent, Petitioner asserts that arbitrarily ignoring a meritorious grievance violates the duty of fair representation. He contends that the Union's decision to not pursue the grievance to arbitration before the Step III decision was issued "is *de facto* arbitrary and seethes of bad faith." (Rep. ¶ 4) He also argues that the Union violated its duty of fair representation by failing to respond to any of his emails inquiring about the status of his grievance.[6]

Union's Position

The Union argues that Petitioner does not allege sufficient facts to support a claim for breach of the duty of fair representation. According to the Union, Petitioner "at most alleges mere negligence on the part of the Union with respect to communicating with Petitioner concerning the status of his grievance." (Un. Ans. ¶ 40) The Union contends that, after the Step

[5] 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."

[6] Petitioner states that the Union failed to respond to "all six (6) of Petitioner's email correspondences." (Pet. ¶ 42). However, the petition only recounts five email messages sent by the Petitioner to the Union between August 22, 2018, and February 26, 2019.

III grievance meeting, it determined that it would not pursue the grievance to arbitration because it was not meritorious. However, the staff representative who represented Petitioner in the grievance process ceased employment with the Union in or around July 2018, and the Union does not know whether she informed Petitioner of its decision not to process the grievance beyond Step III. The Union asserts that it decided not to arbitrate the standby time grievance because the Petitioner was unable to show that he was ever directed to standby in his home or that his ability to travel was restricted by his employer in any way. The Union also contends that the petition is untimely because Petitioner should have known of any alleged failure by the Union well before January 13, 2019, four months prior to the date his petition was filed.

HHC's Position

HHC argues that Petitioner's claims must be dismissed as untimely because he should have known of the alleged breach of the Union's duty of fair representation before January 13, 2019, by which point he had not heard from the Union regarding his grievance for nearly seven months. According to HHC, the facts that Petitioner has alleged regarding the processing of his grievance do not demonstrate that the Union acted in a manner that was arbitrary, discriminatory, or founded in bad faith. HHC argues that the Petitioner's standby time grievance was not meritorious because Petitioner did not meet the requirements for standby pay set forth in the Agreement or Memorandum No. 101, which interprets the "recall" requirement in Article IV, § 11(b), of the Agreement. According to HHC, Petitioner was not ordered to standby in his home, his movements were not restricted by HHC, and he was not subject to recall requiring him to report to his work location. HHC also contends that Petitioner fails to state a claim against HHC under the NYCCBL.

DISCUSSION

As a threshold matter, we address the arguments made by the Union and HHC that the petition is time-barred. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). The statute of limitations for filing an improper practice petition is set forth in NYCCBL § 12-306(e), 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 (1st 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)).

If, as in the present case, a union has not explicitly told the grievant that it will not pursue his or her grievance, a claim under NYCCBL § 12-306(b)(3) accrues when "Petitioner knew or should have known that the Union would not be processing her claims." *Raby*, 71 OCB 14, at 12 (BCB 2003), *affd., Matter of Raby v. Off. of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.). In determining when a claim accrues, the Board has considered whether a union's failure to respond to questions regarding a grievance puts a

petitioner on notice that it will not be proceeding with the matter. *See Gonzalez,* 8 OCB2d 10, at 8 (BCB 2015) (petitioner should have known that the union was not going to arbitrate her grievance when the union did not respond to her repeated requests for assistance); *Dixon*, 8 OCB2d 9, at 12 (BCB 2015) (petitioner should have known that the union was not pursuing his grievance "[a]t the point where the [u]nion had not responded within a reasonable time")

The petition in this matter was filed on May 13, 2019. Based on this filing date, Petitioner's claims would have to have arisen on or after January 13, 2019. Petitioner asserts that, though the Union did not respond to the email inquiries he made regarding the status of his grievance between August 22, 2018, and February 26, 2019, he believed it was still pursuing the grievance because, to his knowledge, a Step III decision had not yet issued. The answers filed by HHC and the Union show that, in fact, the Step III decision did not issue until on or about January 2, 2019. Furthermore, it is undisputed that Petitioner did not learn that the Step III decision was issued until after the filing of the present petition. Given these circumstances, we cannot conclude that Petitioner knew or reasonably should have known prior to January 13, 2019, that the Union was no longer pursuing his grievance.

Having found the petition timely, we now consider the merits of Petitioner's claims. To establish a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3), a 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). "The burden of pleading and proving that the Union has breached its duty of fair representation lies with the Petitioner." *See Nardiello*, 2 OCB2d 5, at 39. To establish a *prima facie* showing of a breach of the duty of fair representation, a petitioner must allege "'more than negligence, mistake or

incompetence.'" *Evans*, 6 OCB2d 37, at 8 (BCB 2013) (*quoting Turner*, 3 OCB2d 48, at 15 (BCB 2010)); *see also Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991) (under the National Labor Relations Act, to be found arbitrary a union's actions must be "so far outside a 'wide range of reasonableness,' as to be irrational.") (citations omitted).

Arbitrarily ignoring a meritorious grievance constitutes a breach of the duty of fair representation. *See Morales*, 5 OCB2d 28, at 23 (BCB 2012), *affd., Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. NYC Bd. of Collective Bargaining*, 51 Misc. 3d 817 (Sup. Ct. N.Y. Co. March 31, 2016), *affd., Matter of United Fedn. Of Teachers v. City of New York*, 154 AD3d 548 (1st Dept. 2017) (citing *Mora-McLaughlin*, 3 OCB2d 24, at 14 (BCB 2010); *Whaley*, 59 OCB 41, at 14 (BCB 1997); *Krumholz*, 51 OCB 21, at 12 (BCB 1993); *Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 23 PERB ¶ 3042 (1990); *Letter Carriers Branch 529 (Postal Serv.)*, 319 NLRB 879, 881 (1995)); *see also Young v. U.S. Postal Service*, 907 F.2d 305, 308 (2d Cir. 1990) (under the National Labor Relations Act, "a union may breach its duty when it fails to process a meritorious grievance in a timely fashion with the consequence that arbitration on the merits is precluded") (citations omitted). However, a union "'enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations.'" *Turner*, 3 OCB2d 48, at 15 (*quoting Edwards*, 1 OCB2d 22, at 21 (2008) (citations and editing marks omitted), *quoting Sicular*, 79 OCB 33, at 13 (BCB 2007) (citations omitted)). We therefore consider the Union's stated reason for not pursuing arbitration of the grievance and make a limited inquiry into the merits of the grievance. *See Whaley*, 59 OCB 41, at 15 (BCB 1997) ("[W]here a grievance does not proceed to arbitration, the Board may

evaluate the arguable merit of the claim, in a limited fashion, to determine whether a union's failure to pursue the grievance was arbitrary.")

We find sufficient support in the record that Petitioner's grievance lacked merit. Petitioner alleged in his grievance that he was entitled to standby pay under Article IV, § 11(b), of the Agreement, which applies to employees who are "required, ordered and/or scheduled on an involuntary basis to stand by in their homes subject to recall, as authorized by the agency head or the agency head's designated representative . . . ." Memorandum No. 101 provides that an employee is subject to recall if he or she must "report from home to perform overtime outside the employee's normally scheduled hours." (HHC Ex. 6) The Union asserts that, since HHC never directed Petitioner to standby in his home or restricted his ability to travel, his grievance was not meritorious.

The Union's assessment of the grievance is supported by the language of the Agreement, the relevant Interpretive Memorandum, and Petitioner's admission that he "was never directly told to remain at home." (Reply ¶ 11) Petitioner argues that the Union was obligated to arbitrate his grievance because "the combination of [the] importance of [his] duties . . . and the restrictive nature of the tasks assigned to complete those duties [was] tantamount to a direction to remain at home and be available at all times." *Id.* However, as this Board has stated, "[a] union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled." *Sicular*, 79 OCB 33, at 13 (citing *Hug*, 45 OCB 51, at 16 (BCB 1990)). We find that the Union's decision not to pursue Petitioner's standby pay grievance to arbitration based on its assessment that the grievance was not meritorious falls within its "wide latitude in the handling

of grievances" and does not constitute a violation of its duty of fair representation.[7] *Evans*, 6 OCB2d 37, at 8.

Petitioner further alleges that the Union's failure to respond to his emails requesting information concerning the status of his grievance constitutes an additional violation of its duty of fair representation. We have held that a union's unexplained failure to respond to a grievant's requests for information concerning a meritorious grievance may violate its duty of fair representation. *See Morales*, 5 OCB2d 28, at 25-26. In contrast to the present case, in *Morales* we found that there was "no support for a conclusion that Petitioner's grievance lacked merit" and "sound evidence to support his claim . . . ." *Morales*, 5 OCB2d 28, at 4. Here, we have found that it was reasonable for the Union to conclude that Petitioner's standby pay grievance was not meritorious. While we do not condone the Union's unexplained failure to communicate to Petitioner its decision not to arbitrate his grievance, we find that, under the circumstances, this inaction does not rise to a violation of its duty of fair representation. *See Morales*, 5 OCB2d 28, at 23 ("[I]gnoring a grievance that has possible merit . . . in an arbitrary fashion may constitute a breach of the fair representation duty."); *Cook*, 7 OCB2d 24, at 9 (BCB 2014) ("[T]his Board will not find a breach of the duty of fair representation based on a union's alleged failure to communicate where that alleged failure did not prejudice or injure the petitioner.") (citing *Walker*, 6 OCB2d 1 (2013); *Lein*, 63 OCB 27 (BCB 1999); *Shenendehowa Central School*

[7] We reject Petitioner's argument that the Union's decision not to pursue the grievance to arbitration before the issuance of the Step III reply demonstrates that the decision was arbitrary or made in bad faith. Such an inference would intrude on the "wide range of discretion afforded [u]nions in carrying out the duty of fair representation." *Evans,* 6 OCB2d 37, at 9; *see also Garces*, 9 OCB2d 8, at 9 (BCB 2016) ("The inference Petitioner asks the Board to adopt [that withdrawal of a demand for arbitration demonstrates bad faith] would strip the union of the ability to exercise its discretion to pursue, or not pursue, grievances throughout the grievance process . . . .").

District, 29 PERB ¶ 4607 (1996); *Bd. of Ed. of the City School Dist. of the City of N.Y.*, 33 PERB ¶ 3062 (2000)).[8]

Accordingly, the petition is denied in its entirety.

[8] Petitioner alleges that, in reliance on his belief that the Union was pursuing his grievance, he allowed the statute of limitations in which he could file a claim under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA") to expire. However, Petitioner's assertion that the Union is responsible for his not pursuing FLSA litigation is belied by the facts set forth in the petition. Prior to filing the grievance, "[the] Union directed [P]etitioner to a list of legal counsel to research and contact to pursue his [FLSA] claims." (Pet. ¶ 12) The Union filed the grievance only "[a]fter [P]etitioner notified the Union that he was unsuccessful in his attempts to retain counsel." (Pet. ¶ 14) It is not alleged that the Union instructed or advised Petitioner not to pursue a FLSA complaint, and the filing of the grievance did not impede him from doing so.

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 Eric Harason against Communication Workers of America, Local 1180, and New York City Health + Hospitals, docketed as BCB-4330-19, is hereby dismissed in its entirety.

Dated: April 2, 2020
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