Edwards, 14 OCB2d 17 (BCB 2021)

(IP) (Docket No. BCB-4426-21)

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation by refusing to process a grievance alleging she was paid incorrectly, treating her rudely and refusing to give her a written response to her grievance, misleading her about the processing of an earlier grievance concerning the same salary issue, and withdrawing its request for arbitration of that same grievance. The Union and the City separately argued that the Union did not breach its duty of fair representation. The Board held that the Union did not breach its duty of fair representation by withdrawing its request for arbitration, by its communication with Petitioner concerning her subsequent grievance, or by its refusal to provide her a written response and that Petitioner's other claims were time-barred. 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-

STEPHANIE EDWARDS,

Petitioner,

- and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
and NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.

DECISION AND ORDER

On April 14, 2021, Stephanie Edwards ("Petitioner") filed a verified improper practice petition against Social Service Employees Union, Local 371 ("Union") and the New York City Human Resources Administration ("HRA"). Petitioner, a former HRA employee, 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 process a grievance filed in February 2021 alleging she was paid incorrectly starting when she was hired in 2016, treating her rudely and refusing to give her a written response to her grievance, misleading her regarding the processing of an earlier grievance regarding the same salary issue, and withdrawing a request for arbitration of that same grievance.[1] The Union argues that its decision not to pursue Petitioner's grievance was neither arbitrary, discriminatory, nor made in bad faith and was based on the grievance being time-barred. It also argues that it owed no duty of fair representation to the Petitioner because at the time she submitted her grievance she was no longer employed by the City and no longer a member of the Union. The City argues that the petition must be dismissed because Petitioner's grievance was untimely and lacked merit. The Board finds that the Union did not breach its duty of fair representation to the Petitioner by withdrawing the request for arbitration of her earlier salary grievance, by its communication with her concerning her subsequent grievance, or by its refusal to provide a written response to her grievance and that her other claims are time-barred. Accordingly, the petition is dismissed.

[1] Petitioner did not specify any claims against HRA. Accordingly, we construe the petition as only asserting a claim against HRA 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.

BACKGROUND

Unless otherwise stated, all facts recited here are based on Petitioner's improper practice petition.[2] Petitioner was employed by HRA in the title of Caseworker from July 11, 2016, to October 16, 2019. Petitioner was hired at the new-hire salary rate of $37,492.00. The incumbent salary rate for the Caseworker title on July 11, 2016, was $43,116.00. Petitioner had worked for both the New York City Housing Authority ("NYCHA") and the New York City Administration for Children's Services ("ACS") prior to working for HRA. City payroll records indicate that she worked as a Housing Assistant for NYCHA from April 19, 2015, to February 6, 2016, and as a Child Protective Specialist for ACS from February 7, 2016, to April 5, 2016. Petitioner alleges that, due to this prior employment, she was entitled to the higher incumbent salary rate when she began working for HRA.

During her employment at HRA, Petitioner was covered by the Social Services and Related Titles Collective Bargaining Agreement ("Social Services Agreement") and the Citywide Agreement. Regarding grievances alleging a salary miscalculation, the Social Services Agreement provides, in relevant part, as follows:

> No monetary award for a grievance alleging a miscalculation of salary rate resulting in a payroll error of a continuing nature shall be issued unless such grievance has been filed within the time limitation set forth in Step I below for such grievances; if the grievance is so filed, any monetary award shall in any event cover only the period up to six years prior to the date of the filing of the grievance.
>
> STEP I . . . "[G]rievances alleging a miscalculation of salary rate resulting in a payroll error of a continuing nature shall be presented

[2] In addition to considering the pleadings and exhibits submitted by the parties in this case, the Board takes administrative notice of the pleadings and exhibits in a related matter filed by the same petitioner, docketed as BCB-4375-20, which was withdrawn by Petitioner pursuant to a settlement with the Union and HRA.

> no later than 120 days after the first date on which the grievant discovered the payroll error."

(Union Ex. A, at Art. VI, § 2))

On or about February 11, 2019, the Union filed a grievance on behalf of Petitioner alleging that she had not received the incumbent Caseworker pay rate in violation of Article III of the Social Services Agreement and Article 9, § 8(c) of the Citywide Agreement.[3] The grievance requested that Petitioner be paid her correct salary retroactive to July 2016. Article III of the Social Services Agreement sets forth incumbent and new-hire pay rates. It provides that certain employees hired into a title will be paid the incumbent rate based on their prior employment with the City. This includes, in relevant part, employees who meet the following criteria:

> ii. Employees in active status (whether full or part-time) appointed to permanent status from a civil service list, or to a new title (regardless of jurisdictional class or civil service status) without a break in service of more than 31 days . . . .
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> ***
>
> v. Permanent employees who resign and are reinstated or who are appointed from a civil service list within one year of such resignation.

(Union Ex. A, at Art. III, § 4(c))

The grievance was advanced to Step III of the grievance procedure. The Step III Reply, issued on October 4, 2019, stated that the parties had agreed that "this matter is in the process of resolution" and that the case was closed, subject to reopening by either party within forty-five days if the matter had not been satisfactorily resolved. (City Ex. 7)

[3] Article 9, § 8(c) of the Citywide Agreement pertains to the recoupment of erroneous overpayments of wages. (Union Ex. B)

On March 3, 2020, Petitioner filed an improper practice petition alleging the Union had breached its duty of fair representation by failing to respond to her requests for information about the status of her grievance since October 2019. Petitioner asserted that, at the Step III conference held on October 2, 2019, "it was determined that I was owed monies not paid to me for my three year service to HRA . . . [and] [i]t was agreed that a process of resolution would be conducted to ascertain how much money was owed to me as a result of the grievance process." (BCB-4375-20 Pet.) In the answer it filed in BCB-4375-20, the Union admitted that the Step III conference was held, but denied that it was determined Petitioner was owed money. On May 7, 2020, the Union emailed the City's Office of Labor Relations ("OLR") to request that the Step III conference on petitioner's grievance be re-opened. The parties subsequently reached an agreement whereby Petitioner withdrew the petition in BCB-4375-20 and the City agreed to hold another Step III conference.

A second Step III conference was held on October 20, 2020. The Step III Reply states that the Union was seeking to have Petitioner retroactively paid the incumbent salary for the Caseworker title from September 26, 2018, through October 12, 2019. According to the Step III Reply, the Union asserted that this pay discrepancy was due to Petitioner having worked for HRA in the Eligibility Specialist title from August 5, 2018, until September 15, 2018, when she returned to the Caseworker title. On or about November 12, 2020, the Union filed a request for arbitration on behalf of grievant, which was docketed as OCB Case No. A-15764-20. The request for arbitration stated the grievance to be arbitrated as "Payment of Grievant at salary new hire rate rather than at correct incumbent rate from on or about 9/17/18 through on or about 10/11/19." (Union Ex. B) The request for arbitration was accompanied by a waiver signed by Petitioner dated November 12, 2020, describing the grievance to be arbitrated in these same terms.

The City subsequently provided the Union with payroll records, which the Union forwarded to Petitioner by email on February 20, 2021, indicating that she had been paid the incumbent Caseworker salary rate from August 17, 2018, to October 11, 2019. Union counsel requested that Petitioner review the records and contact him to discuss how to proceed. The record is silent as to whether Petitioner responded. On February 25, 2021, the Union withdrew the request for arbitration, stating, "The City having provided payroll records demonstrating that the Grievant was properly paid at the incumbent salary rate for the period on or about 9/17/18 through 10/11/19, the request for arbitration in the above matter and the grievance are hereby withdrawn." (Union Ex. F) Union counsel forwarded a copy of the withdrawal of the request for arbitration to Petitioner by email the same day.

On February 28, 2021, Petitioner filed a new grievance with the Union stating as follows:

> I was hired at the wrong rate of pay and the error was not corrected. I worked for the ACS agency within the same year I was hired to work for HRA and should have been given the incumbent salary instead of the new hire salary. I want the difference in salary paid in full.

(Pet., Ex. B)

Petitioner states that, when she called the Union in March 2021, a union representative told her that her grievance would not be processed because she did not currently work for HRA. According to Petitioner, the union representative refused her request for a written explanation by mail and hung up on her.

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 refusing to process the grievance she filed on February 28, 2021.[4] She asserts that her grievance is meritorious because HRA incorrectly paid her at the new-hire rate instead of the incumbent rate. According to Petitioner, she was entitled to the incumbent rate because she worked at ACS prior to being hired at HRA and within the same calendar year in which she was hired at HRA. Petitioner asserts that when she phoned the Union to request her grievance be processed the Union representative was rude, told her that she could not file a grievance because she no longer worked for HRA, refused to place the response in writing and send it by mail, and hung up on her. She states that she "attempted to fight this grievance several times while I was employed at HRA and during my exit from the agency" and argues that she was misled by the Union during the processing of the earlier salary grievance that the Union withdrew from arbitration on February 25, 2021. (Petition)

Union's Position

The Union argues that the Petition must be dismissed because it does not allege facts which could establish that the determination not to pursue Petitioner's February 28, 2021 grievance was arbitrary, discriminatory, or made in bad faith. According to the Union, Petitioner's 2021 grievance was time-barred because the Social Services Agreement provides that any grievance alleging a miscalculation of salary rate must be presented no later than 120 days after the grievant

[4] 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."

discovered the payroll error. Petitioner's grievance was therefore more than five years untimely. The Union also argues that it owed no duty of fair representation to the Petitioner because at the time she submitted her grievance she was no longer employed by the City and no longer a member of the Union. In regard to the earlier salary grievance filed on behalf of Petitioner, the Union states that the time period covered by the grievance was narrowed in the request for arbitration to cover the period after Petitioner returned to the Caseworker title, which is represented by the Union, after temporarily working in a title not represented by the Union.

City's Position

The City argues that Petitioner's claims must be dismissed because she fails to allege any facts sufficient to amount to a breach of the duty of fair representation by the Union in refusing to process her grievance. It asserts that, per City rules, an individual is considered a new hire if their most recent City employment was more than 31 days prior to the start of their current City employment. Petitioner previously worked at ACS until April 6, 2016. She did not begin her employment with HRA until July 11, 2016, 96 days after her last day of prior City service. Therefore, the City asserts, Petitioner's claim that she should have been paid the incumbent rate when she began working for HRA in 2016 had no merit. Furthermore, the City argues, the grievance would have been dismissed as untimely because Petitioner was on notice of her claim long before the 120-day window provided in the contract to file a salary grievance. As Petitioner has not established that the Union breached its duty of fair representation, the City asserts that any derivative claim against HRA pursuant to NYCCBL § 12-306(d) must also be dismissed.

DISCUSSION

"Recognizing that a *pro se* Petitioner may not be familiar with legal procedure, the Board takes a liberal view in construing a *pro se* Petitioner's pleadings." *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (quoting *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)) (internal quotation and editing marks omitted). We construe the petition as alleging that the Union violated its duty of fair representation by misleading Petitioner into believing that the arbitration of her February 11, 2019 grievance would address her alleged underpayment going back to 2016, withdrawing the request for arbitration of that grievance on February 25, 2021, refusing to process the grievance she subsequently filed regarding the same issue, and treating her rudely and refusing to give her a written response.

As a threshold matter, we address the timeliness of Petitioner's claims. *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)).

The petition in this matter was filed on April 14, 2021. Based on this filing date, in order to be timely Petitioner's claims would have to have arisen on or after January 14, 2021. We first consider the timeliness of Petitioner's claim that the Union violated its duty of fair representation by misleading her into believing that the arbitration of her February 11, 2019 grievance would address her alleged underpayment going back to 2016. To determine whether this claim is timely, we must determine when Petitioner knew or should have known that this grievance would not address her claim for backpay retroactive to her start as a Caseworker on July 10, 2016. *See 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.) (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.")

The grievance filed on February 11, 2019, requested that Petitioner be paid her correct salary retroactive to July 2016. However, both the Step III Reply and the request for arbitration filed by the Union in November 2020 stated that the time period covered by the grievance was limited to September 17, 2018, to November 11, 2019. The City argues that Petitioner was not entitled to receive the incumbent pay rate when she began employment with HRA in 2016. The Union asserts that it narrowed the time period covered by the grievance to cover the period after Petitioner returned to the Caseworker title after temporarily working in another title. This does

not explain why the Union abandoned the claim that Petitioner should have been paid the incumbent salary rate as of the date she was hired. Nevertheless, on or about November 12, 2020, Petitioner signed an arbitration waiver that expressly described the grievance as being limited to September 17, 2018, to November 11, 2019. Therefore, at that time she knew or should have known that the period the Union was seeking to arbitrate was narrowed. Granting every reasonable inference to the Petitioner, we find that her claim that the Union misled her as to the time period covered by the grievance accrued, at the latest, on November 12, 2020, more than four months prior to the filing of this petition. *See Raby*, at 12. Accordingly, any claim concerning the limitation of the time period covered by the February 2019 grievance raised in the petition, which was filed on April 14, 2021, is untimely.

We next consider the timeliness of Petitioner's claims concerning the salary grievance she filed on February 28, 2021, shortly after the Union withdrew its request for arbitration of her earlier salary grievance. The Petition was filed within four months of Petitioner being told that the Union would not process this grievance. However, this grievance simply restates the allegation made in Petitioner's February 2019 grievance that she should have been paid the incumbent salary rate starting when she was hired by HRA in 2016. As discussed *supra*, Petitioner's claim that the Union violated its duty of fair representation by not demanding she be paid the incumbent salary rate going back to 2016 accrued, at the latest, on November 12, 2020, when she signed an arbitration waiver stating that the time period covered by the grievance to be arbitrated was limited to September 17, 2018, to November 11, 2019. The filing of a new grievance repeating the same claim as an earlier grievance or complaining that the earlier grievance has not been resolved does not extend the statute of limitations set forth in NYCCBL § 12-306(e). *See Minervini*, 71 OCB 29, at 13 (BCB 2003) (citing *Raby*, 71 OCB 14, at 12-13; *Miller*, 57 OCB 40, at 5 (BCB 1996))

("Petitioner's reassertion of the same issues in a new grievance cannot serve to extend the date upon which Petitioner should have known that the Union had failed to act."). Therefore, we find that Petitioner's claim concerning the Union's refusal to process her February 28, 2021 grievance, which raises the same allegation as her earlier grievance, is untimely.[5] However, Petitioner's related claim that the Union violated its duty of fair representation by treating her rudely over the phone and refusing to give her a written response stating why it would not process her grievance, which was filed within four months of the alleged conversation, is timely. *See* NYCCBL § 12-306(e); OCB Rules § 1-07(c)(2)(i).

Petitioner also claims that the Union violated its duty of fair representation to her when it withdrew the request for arbitration of her earlier salary grievance on February 25, 2021. This claim is timely under the NYCCBL because it was filed within four months of Petitioner learning that the request for arbitration was withdrawn. *See Collins*, 5 OCB2d 5, at 9 (BCB 2012) (duty of fair representation claim accrued when the petitioner was informed of the union's decision not to submit the matter to arbitration); *Page*, 53 OCB 31, at 10 (BCB 1994) (same).

[5] Even if we were to find this claim timely, we conclude that the Union did not violate its duty of fair representation to Petitioner when it refused to process her February 2021 grievance. The Union asserts that the grievance is time-barred under the Social Services Agreement. Article XI, § 2 of the Social Services Agreement provides that any grievance alleging a miscalculation of salary rate must be filed within 120 days of when the grievant discovered the payroll error. It is undisputed that Petitioner knew of the alleged payroll error as early as February 2019, when the Union filed a grievance on the same issue. Therefore, we find that the Union's refusal to process the February 2021 grievance because it judged the claim untimely does not violate the duty of fair representation. *See Harason*, 13 OCB2d 8, at 10 (BCB 2020) (finding union's decision not to advance standby pay grievance that it assessed as unmeritorious did not violate the duty of fair representation); *Garg*, 6 OCB2d 35, at 12 (BCB 2013) (finding no violation of the duty of fair representation where union informed petitioner that it would not advance grievance it considered untimely and without merit); *see also Walker*, 6 OCB2d 1, at 9 (BCB 2013) (finding no grounds to conclude that union's decision not to file a grievance was discriminatory or made in bad faith).

We now address Petitioner's timely 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." *Walker*, 6 OCB2d 1, at 7 (BCB 2013) (quoting *Okorie-Ama*, 79 OCB 5, at 14). It is well established that "a union is not obligated to advance every grievance." *West*, 14 OCB2d 12, at 13 (BCB 2021) (citing *Nardiello*, 2 OCB2d 5, at 40; *Del Rio*, 75 OCB 6, at 13 (BCB 2005)). Further, 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). However, "[a]rbitrarily ignoring a meritorious grievance constitutes a breach of the duty of fair representation." *Harason*, 13 OCB2d 8, at 9 (citations omitted).

Petitioner asserts that the Union violated its duty of fair representation to her by withdrawing its request for arbitration of her earlier salary grievance. As noted above, the request for arbitration stated that the dispute to be arbitrated was whether Petitioner had been paid the correct incumbent salary rate from September 17, 2018, to October 11, 2019. Prior to arbitration, the City provided the Union with payroll records indicating that Petitioner had been paid the incumbent Caseworker salary rate during this time period, which the Union then provided to Petitioner. In light of these records, the Union withdrew the request for arbitration. Petitioner has not presented any evidence that the Union's decision was motivated by any factor other than its judgment that, based on these payroll records, the claim did not have merit. Absent any evidence that the Union's decision was arbitrary, discriminatory, or made in bad faith, we dismiss this claim. *See Gonzalez*, 10 OCB2d 20, at 11 (BCB 2017) (finding no violation of the duty of fair representation where Petitioner offered no evidence that union's decision to not pursue arbitration

was based on motives other than its good-faith evaluation of the merits of the grievance); *Reid*, 65 OCB 21, at 8 (BCB 2000) ("The duty of fair representation requires only that the refusal to advance a claim be made in good faith and in a manner which is non-arbitrary and nondiscriminatory.")

Petitioner's remaining claim is that the Union violated its duty of fair representation when a Union representative treated her rudely over the phone, refused to send her a written response confirming that the Union would not process her February 28, 2021 grievance, and hung up on her. We have previously held that the duty of fair representation does not require that a union's communication with its members regarding grievances be in the format preferred by the grievant. *See Stathes*, 14 OCB2d 3, at 8-9 (BCB 2021) (citing *Porter*, 4 OCB2d 9, at 15 (BCB 1996); *Turner*, 3 OCB2d 48, at 16 (BCB 2010)) (union's communication with petitioner by phone, when she had requested a written update on the status of her grievances, did not constitute a violation of its duty of fair representation). Similarly, while the duty of fair representation requires that a union's conduct in handling members' grievances not be arbitrary, discriminatory, or taken in bad faith, it does not establish requirements regarding the tone of communication between a union and its members. *See Jiminez*, 61 OCB 25, at 8 (BCB 1998) (allegation that union representative treated petitioner rudely, even if true, does not constitute a violation of the duty of fair representation). Therefore, absent any evidence that the Union's response to Petitioner's grievance was arbitrary, discriminatory, or made in bad faith, we dismiss Petitioner's claims that the Union's

communication with her regarding her grievance and its refusal to send her a written response confirming it would not process the grievance violated its duty of fair representation.[6]

Accordingly, the petition is denied in its entirety.[7]

[6] Following the conference held in this matter, the Petitioner requested and was granted additional time to submit evidence in support of her petition. Petitioner subsequently provided evidence that she was hired by HRA from a civil service list within one year of leaving employment with ACS, which would arguably entitle her to receive the incumbent salary rate from the start or her employment with HRA under Art. III, § 4(c)(v) of the Social Services Agreement. This evidence, which goes to the merits of Petitioner's 2019 grievance, does not affect our determination dismissing the petition for the reasons cited herein.

[7] Having found that the Union did not breach its duty of fair representation by withdrawing its request for arbitration or by its communication with Petitioner concerning her subsequent grievance and that Petitioner's other claims are untimely, we need not address the City and Union's remaining arguments. *See, e.g., DC 37*, 14 OCB2d 16, at 12 n.8 (BCB 2021); *Local 376, DC 37*, 13 OCB2d 3, at 17 n.20 (BCB 2020); *PBA*, 12 OCB2d 22, at 14 n.8 (BCB 2019) (declining to address union's remaining arguments where the City's claims that the union violated its duty to bargain in good faith failed on the merits).

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 Stephanie Edwards against Social Service Employees Union, Local 371 and the New York City Human Resources Administration, docketed as BCB-4426-21, is hereby dismissed in its entirety.

Dated: August 3, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER