Fash, 15 OCB2d 15 (BCB 2022)

(IP) (Docket No. BCB-4429-21)

Summary of Decision*:** Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to adequately represent her during the grievance process regarding a denied detail request, failing to bring her grievance to arbitration, and failing to communicate that it was not bringing her grievance to arbitration. Petitioner also alleged that the Union violated NYCCBL § 12-306(b)(1) by obstructing the grievance process and colluding with DPR to deny her a fair hearing, in addition to denying her access to union meetings and elections. Further, Petitioner alleged that DPR violated § 12-306(a)(1) and (3) by failing to grant her detail request, failing to furnish information, obstructing her grievance process, and colluding with the Union. The Union and the City separately argued that the Union did not breach its duty of fair representation, that some of the actions did not occur as alleged, and that none of their actions violated the NYCCBL. The Board found that Petitioner failed to establish that the Union or DPR violated the NYCCBL with respect to a number of her allegations. Accordingly, the Board dismissed the petition, in part. ***(Official decision follows).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JANET FASH,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 508, THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

INTERIM DECISION AND ORDER

On May 12, 2021, Janet Fash ("Petitioner") filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 508

(collectively, the "Union"), asserting violations of § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), and the City of New York ("City") and New York City Department of Parks and Recreation ("DPR"), alleging retaliation claims under NYCCBL § 12-306(a)(1) and (3). On June 2, 2021, Petitioner filed an amended petition and an appeal of the dismissal of certain claims in her initial petition.[1] Specifically, Petitioner alleges that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to adequately represent her during the grievance process regarding a denied detail request, failing to bring her grievance to arbitration, and failing to communicate that it was not bringing her grievance to arbitration. She also alleges that the Union interfered with her rights under NYCCBL § 12-306(b)(1) by obstructing the grievance process and colluding with DPR to deny her a fair hearing, in addition to denying her access to union meetings and elections. Further, Petitioner alleges that DPR violated § 12-306(a)(1) and (3) by failing to grant her detail request, failing to furnish information, obstructing her grievance process, and colluding with the Union. The Union and the City separately argue that the Union did not breach its duty of fair representation, that some of the actions did not occur as alleged, and that none of their actions violated the NYCCBL. The Board finds that Petitioner did

[1] On May 19, 2021, the Board's Executive Secretary deemed the claims against the Union deficient because necessary information was missing including the names of persons involved, and dates, times, and places of alleged incidents. As to Petitioner's claims against DPR, the Executive Secretary dismissed them stating that "the petition does not set forth facts to support a claim that any alleged action taken against you by your employer resulted from or was related to your union activity . . . ." (ES Deficiency Letter at 2) On June 2, 2021, Petitioner filed both an appeal of the dismissal of the retaliation claims and an amended petition. Thereafter, the Executive Secretary deemed the amended petition sufficient against both the Union and DPR. Because both the appeal and the amended petition raise new facts and address claims against the Union and DPR, we construe both documents to be amendments to the petition, address the merits of all Petitioner's claims, and do not separately review the Executive Secretary's dismissal.

not establish that the Union or DPR violated the NYCCBL with respect to a number of her allegations. Accordingly, the Board dismisses the petition, in part.[2]

BACKGROUND

DPR maintains the City's lifeguard program. It is largely a seasonal operation, with between 900 and 1,400 seasonal lifeguards who are assigned to the City's pools and beaches. There is also a smaller number of year-round lifeguards employed at the City's pools, as instructors at the municipal lifeguard school, and as supervisors of the lifeguard program.

DC 37 represents employees employed by the City in the Lifeguard and Chief Lifeguard titles in the Seasonals bargaining unit. DC 37 and the City are parties to a collective bargaining agreement covering the Seasonals bargaining unit ("Agreement") for the period of March 3, 2008, to March 2, 2010.[3] The Agreement's economic terms were modified by the 2017-2021 memorandum of agreement covering all employees represented by DC 37, and it remains in effect pursuant to the *status quo* provision of the NYCCBL. Local 461 represents employees in the Lifeguard title. Local 508 represents employees in the Lifeguard Supervisor titles, including those assigned as Chief Lifeguard and details within that title, including Borough Coordinator, Assistant Coordinator, and Lifeguard Coordinator. Most Chief Lifeguard details are year-round positions.

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[2] As explained in OCB's February 23, 2022 letter to the parties, there remain factual disputes related to four claims made by Petitioner in her amended petition that are not addressed here, and which will be the subject of a future hearing. These claims generally arose in or around Summer 2021 and concern DPR's alleged failure to promptly rehire seasonal lifeguards, selectively failing lifeguards on swim tests, changing the time of swim tests to disadvantage certain lifeguards, and failing to maintain proper staffing levels at beaches overseen by Petitioner because of her union activity.

[3] As noted above, some lifeguards are employed year-round but are nonetheless covered by the Agreement.

Petitioner is employed as a seasonal Chief Lifeguard for DPR and is a member of Local 508. She has been active in internal union affairs for many years "seeking union democracy and transparency" and has frequently criticized and publicly opposed the conduct and actions of current Local 508 President Peter Stein and former Treasurer Richard Sher in their capacities as union officials and DPR supervisors.[4] (Amended Pet. ¶ 11) More recently, Petitioner filed a grievance in July 2019 contesting DPR's denial of her request to fill a Borough Coordinator detail. In or around August 2020, she participated as a witness in an internal union trial concerning charges against then-President of Local 461, Franklyn Paige.[5] At all times relevant here, President Stein and former Treasurer Sher held the Chief Lifeguard title but were detailed to permanent Lifeguard Coordinator and Assistant Coordinator positions, respectively.[6]

Petitioner's factual claims are numerous but center around the fact that Stein and Sher were not only DPR supervisors but also held union leadership positions and established certain employment practices that favor year-round lifeguards over seasonal lifeguards. Petitioner claims

[4] Petitioner's opposition to Stein and Sher has been documented in various news publications over the years, including the New York Times and New York Magazine.
See e.g., https://www.nytimes.com/2008/08/03/nyregion/03lifeguards.html; https://nymag.com/intelligencer/2020/06/peter-stein-nyc-lifeguards.html.

[5] The trial against former President Paige concerned allegations that he deprived seasonal lifeguards of the opportunity to participate in Local 461 meetings and elections. Petitioner served as a witness in the trial because she was a former Local 461 member and "never received notices of [Local 461] meetings and elections." (Amended Pet. ¶ 18) Following the trial, Paige was removed as President in October 2020.

[6] Sher resigned from DPR on August 25, 2021.

that in their dual capacities, Stein and Sher or other DPR representatives took certain actions to retaliate against her and discourage her union activity.[7]

On or around June 27, 2019, Petitioner requested a transfer to a vacant Borough Coordinator detail pursuant to Article XIX, § 4 of the Agreement, and her request was denied by DPR Chief of Personnel David Terhune on or around July 8, 2019.[8] Petitioner asserts that Chief Terhune's denial stated that under Article XIX, § 4, "[a] transfer can only occur in the same title and detail as the vacancy." (Amended Pet., Ex. 10)[9] On July 11, 2019, Petitioner requested the Chief Lifeguard seniority list from Chief Terhune, in addition to rules, policies, and/or procedures governing promotions, transfers and details, copies of all job announcements and vacancy notices for Chief Lifeguard and Chief Lifeguard details, and job descriptions for the Chief Lifeguard detail and Lifeguard Training Instructor position. Further, Petitioner alleges that DPR's Office of Labor

[7] The facts described here focus on the alleged actions that can be fairly construed as retaliation under the NYCCBL by DPR or the Union, and/or breaches of the Union's duty of fair representation. Although all facts pled by Petitioner were considered, only those facts that have been deemed relevant to the conclusions reached herein are included.

[8] Article XIX, § 4 of the Agreement, "Transfers," provides that, "[a] request to transfer to a vacancy resulting from resignation, dismissal, promotion, or death, may be made by written request to DPR. Such request shall be acted upon in order of seniority. Transfers shall be made at the discretion of the DPR, after notice to and discussion with the Union except in cases of emergency. Transfers because of lack of personnel shall be made on the basis of inverse seniority, except in cases of emergency." (City Ans., Ex. 2)

[9] The petition and amended petition refer to attached exhibits that are not clearly numbered or referenced. As a result, the trial examiner renumbered the exhibits in one complete list and provided the renumbered list to the parties. References to Petitioner's exhibits herein are based on the renumbered list.

Relations represented that it would "help the [U]nion obtain the seniority list," but one was never produced.[10] (Amended Pet. ¶ 10)

On July 16, 2019, Petitioner filed a grievance at Step I alleging that DPR failed to grant her the Borough Coordinator detail based on seniority in violation of Article XIX, § 4 and Article XXIII, §§ 1, 2, and 6 of the Agreement.[11] DPR denied the grievance at Step II on September 10, 2019, finding no violation of the Agreement because Borough Coordinator is a detail within the Chief Lifeguard title and is not subject to Article XIX, § 4. Specifically, the Step II denial noted that, "Article XIX, Section 4 only applies to transfers, not promotions," and "transfers to and from different locations are only considered for employees within the same title and detail." (City Ans., Ex. 4) Moreover, the denial explained that Article XXIII, § 1 "only speaks to how Chief Lifeguards become eligible for details to the title of Borough Coordinator, with no mention of seniority."[12] (*Id.*)

Petitioner appealed to Step III, asserting that because DPR "has no policy, written or otherwise, addressing the procedure for being promoted or [d]etailed, the only language outlining the process is the [t]ransfers section of the contractual agreement [Article XIX, § 4] . . . Article

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[10] An August 27, 2020 email from Petitioner to former DC 37 Blue Collar Division Director David Catala indicates that she had been seeking the seniority list for approximately one year and had discussions with Director Catala about the list during that time.

[11] Article XXIII, § 1 of the Agreement provides that, "[a] Chief Lifeguard must have two seasons of satisfactory service as a Chief Lifeguard to be eligible to be detailed as a Borough Coordinator. A Chief Lifeguard detailed as Borough Coordinator must have two seasons of satisfactory service to be eligible for Assistant Coordinator or Lifeguard Coordinator." (City Ans., Ex. 2) Article XXIII, § 2 provides that, "[t]he DPR will take immediate steps to fill job quotas." (*Id.*) Article XXIII, § 6 provides that, "[t]here shall be no discrimination against any employee because the employee has exercised the right of collective bargaining or because the employee has presented a grievance in any hearing or conference related to such matter . . . ." (*Id.*)

[12] There is no evidence that Petitioner's grievance was heard or that a determination was made at Step I.

XIX, § 4 outlines the sole procedure available to an employee who requests to fill a vacancy in a position that he or she is qualified to fill, regardless of whether it is considered to be a promotion or [d]etail, and 'such request shall be acted upon in order of seniority.'" (Amended Pet., Ex. 5) A Step III hearing was held in September 2020, and an OLR review officer denied her grievance on March 1, 2021. The Step III denial found that Article XIX, § 4 does not mention a change in detail and no authority was produced to support the claim that the provision applies to employees seeking to move "into a new title." (City Ans., Ex. 3) Moreover, the denial explained that although Article XXIII, § 1 sets forth minimum eligibility requirements for a Borough Coordinator detail, it "creates no duty on [DPR] to detail a particular employee to a position." (*Id.*) The Step III denial also noted that no evidence was provided to show that DPR failed to immediately fill any position in violation of Article XXIII, § 2, or that Petitioner had been discriminated against in violation of Article XXIII, § 6.

Petitioner alleges facts relating to the Union's handling of her grievance prior to and during the Step III process. These facts consist of alleged "antagonistic" behavior "[t]hroughout the grievance process" from Director Catala, who served as the union representative and attended the Step II and III hearings, and the Union's overall failure to support her position on the grievance. (Amended Pet. ¶ 10) Specifically, Petitioner alleges that Director Catala erroneously claimed that the Union had no input into assignments and details and thereby "confused [the] assignments and transfer clauses of the [Agreement]."[13] (*Id.*) In an affirmation submitted with the Union's answer, Director Catala alleges that he informed Petitioner at least three times during the grievance process

[13] Article XIX, § 3 of the Agreement, "Assignments," provides that, "[a]ll lifeguard personnel rehired shall have the right to return to their previous assignment, subject to sufficient appropriation therefore. Lifeguard personnel shall be assigned to facilities on the basis of seniority and date of availability . . . ." (City Ans., Ex. 2)

that he did not believe her grievance was viable: first, at the Step II hearing; second, after Petitioner asked him to advance the grievance to Step III; and third, at the Step III hearing, at which time he alleges that he told Petitioner that the Union would not proceed to arbitration. Petitioner denies Director Catala's assertions.

Petitioner also alleges that on March 2, 2021, she inadvertently received an August 15, 2019 internal Union memorandum ("Internal Union Memo") from DC 37 Field Supervisor Barbara Terrelonge which showed that the Union was not in support of her grievance at Step II and that subsequently the Union failed to adequately prepare for and represent her at the Step III hearing.[14] Petitioner alleges that the Internal Union Memo stated that her grievance "had no merit because the retiree was on the next detail up from the Chief detail to the Borough Coordinator that [Petitioner] was seeking."[15] (Amended Pet. ¶ 10) In addition, Petitioner claims that the Union and DPR "collu[ded]" to deny her a "fair hearing" and unduly delayed the processing of her grievance in violation of the Agreement.[16] (*Id.* at ¶ 16) The Union and the City both deny any collusion or obstruction in the processing or handling of Petitioner's grievance.[17]

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[14] The Internal Union Memo was not submitted in evidence, although the Union did not deny that it exists.

[15] The Union avers that there have been no Borough Coordinator vacancies since 2018 and Petitioner was in fact seeking a vacant Assistant Coordinator position opened by a retirement that she did not have the requisite experience to fill. Petitioner acknowledges that she "was not aware of . . . [the retiree's] specific title or detail," but believed that the retiree "held the title of Chief Lifeguard." (Pet. Rep. to Union ¶ 46)

[16] Article VI, § 2 of the Agreement provides that Step III decisions "shall" issue within 15 business days following the date on which the appeal was filed. (City Ans., Ex. 2)

[17] Director Catala averred in his affirmation that "due to the volume of cases and the complexities of some of the grievances, it is not feasible for the typical grievance to adhere to the strict time limits of the contract[,]" and that "during the pendency of Petitioner's grievance, New York City was forced to alter its operations because of the COVID-19 [pandemic]." (Union Ans., Ex. B)

Further, Petitioner alleges that the Union failed to inform her that it was not bringing the grievance to arbitration after the Step III decision on March 1, 2021. On March 9, 2021, Petitioner requested that the Union arbitrate her grievance, but she contends that she did not receive a reply other than a March 10, 2021 email from Field Supervisor Terrelonge acknowledging that the Union was in receipt of her request. However, Petitioner also asserts that a colleague, Lifeguard Omer Ozcan, whose grievance was denied on the same day as hers, was told in late March and April 2021 that "legal" was still reviewing his grievance.[18] (Amended Pet. ¶ 16)

Petitioner also claims that the Union took certain actions to deprive her and other seasonal lifeguards and/or bargaining unit members of their right to participate in internal union activities. Specifically, she alleges that a 1996 agreement resolving a grievance between the Union and DPR "manipulate[s] who can participate" in Union elections and meetings; in or around April 2021, the Union held a Zoom meeting "without inviting or notifying [Petitioner]; on May 20, 2021, the Union "held an election without inviting [Petitioner] and other seasonal Chiefs;" and on February 26, 2021, Petitioner was "singled out" and "targeted for removal" from a Union meeting because she tried to "stay" a Union election. (Amended Pet. ¶ 11) In addition, Petitioner claims that "Local 461 ha[d] an election without inviting the 1100 seasonal lifeguards." (*Id.* at ¶ 14)

Moreover, Petitioner alleges that DPR retaliated against her by failing to send her 2021 seasonal employment availability notice in a timely manner pursuant to the Agreement.[19]

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[18] Lifeguard Ozcan filed an improper practice petition asserting similar claims as Petitioner. *See O*zcan, 15 OCB2d 16 (BCB 2022).

[19] Article XIX, § 2 of the Agreement provides that, "[a] communication shall be mailed by the DPR no later than March 15 of each year to each candidate on the seniority list established for the forthcoming employment season . . . inquiring as to the availability of each such candidate for employment during such forthcoming season . . . In order to preserve their seniority, each such candidate must notify DPR in writing no later than April 15 of their availability . . . . (City Ans., Ex. 2)

Petitioner acknowledges that DPR ultimately sent the notice on April 22, 2021, and she received the notice on April 30, 2021. The City asserts that although seasonal availability notices were mailed late due to the COVID-19 pandemic, return submissions from employees were accepted late as well. It denies that the delayed mailing was retaliation for Petitioner's union activity. Petitioner also claims that DPR "target[ed]" seasonal lifeguards who work for another City agency by failing to produce "dual [employment] waiver form[s]" and that some of these lifeguards were docked pay at their other City jobs. (Pet. Appeal ¶ 4) Additionally, Petitioner alleges that she received a letter on May 7, 2021, from the Teachers' Retirement System stating there was an inquiry into her account from a "concerned citizen." (*Id.* at ¶ 5) She alleges that it was President Stein who made the inquiry regarding her "212 form for 2020." (*Id.*)

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 adequately represent her during the grievance process regarding her denied Borough Coordinator detail request, failing to bring her grievance to arbitration, and failing to communicate that it was not bringing her grievance to arbitration.[20] Petitioner asserts that Director Catala was "antagonistic" throughout the grievance process, that he "interchanged and conflated" the assignment and transfer provisions of the Agreement, and that the Union overall failed to "support" her position on the grievance. (Amended Pet. ¶ 3, 10) She contends that the Internal Union Memo showed that the Union believed her grievance had no merit

[20] NYCCBL § 12-306(b)(3) provides, in pertinent part: "[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."

and that this led the Union to inadequately prepare for and represent her at the Step III hearing. Petitioner avers that there is nothing in the Agreement stating how to apply for a detail/promotion and therefore she believes it is reasonable to interpret the transfer provision as governing the detail/promotional process. Accordingly, Petitioner asserts that because the transfer provision states that transfers "'shall' be [made] by seniority," she was entitled to the Borough Coordinator detail and her grievance was potentially meritorious. (*Id.* at ¶ 9)

Moreover, Petitioner contends that the Union never told her that it was not going to proceed to arbitration. To the contrary, she alleges that she was misled into believing that the Union was considering arbitration and that the only correspondence she received after the Step III denial was a March 10, 2021 email from Field Supervisor Terrelonge acknowledging that the Union was in receipt of her request to arbitrate. Although she admits that the Union has sole discretion with respect to whether to arbitrate grievances, she avers that the Union's decision not to arbitrate in this case was made in bad faith. Indeed, Petitioner also argues that the Union violated NYCCBL § 12-306(b)(1) by "obstructing" the grievance process and "collud[ing]" with DPR to deny her a "fair hearing."[21] (Amended Pet. ¶ 15-16) As evidence, Petitioner asserts that she was eligible and qualified for the Borough Coordinator detail, and that 19 months elapsed between her filing at Step I on July 16, 2019, and the Step III denial on March 2, 2021, despite the grievance procedure's strict time constraints.

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[21] NYCCBL § 12-306(b)(1) provides, in pertinent part: [i]t shall be an improper practice for a public employee organization or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so . . . .

NYCCBL § 12-305 provides, in pertinent part: [p]ublic employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

Further, Petitioner contends that the Union violated NYCCBL § 12-306(b)(1) by denying her and other seasonal lifeguards access to internal union activities including meetings and elections that took place in February, April, and May 2021. Petitioner avers these actions prevented her and other seasonal lifeguards from "exercising even their most basic rights of union participation," and that the Board has jurisdiction to "address the [U]nion's failures." (Pet. Rep. Memo at 9)

Petitioner argues that DPR violated NYCCBL § 12-306(a)(1) and (3) by failing to grant her Borough Coordinator detail request in July 2019; failing to provide copies of the seniority list and other documents, such as rules, policies, and/or procedures governing promotions, transfers, and details, upon her request in July 2019; failing to timely mail her 2021 seasonal employment availability notice; "obstructing" her grievance process and "collud[ing]" with the Union to deny her a "fair hearing;" "targeting" other seasonal lifeguards who work for other City agencies by failing to produce "dual [employment] waiver form[s]" and docking pay at their other City jobs; and submitting an unauthorized inquiry into her account at the Teachers' Retirement System.[22] (Amended Pet. ¶ 15-16; Pet. Appeal ¶ 4) Petitioner asserts that the actions taken against her by both the Union, in violation of NYCCBL § 12-306(b)(1), and DPR, in violation of § 12-306(a)(1)

[22] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

and (3), were retaliation for her attempt to seek the Borough Coordinator detail, in addition to her history of union activism, opposition to President Stein and Treasurer Sher, and overall efforts to promote union democracy and transparency in the policies and procedures that govern seasonal lifeguards.

As a remedy, Petitioner requests that the City be ordered to "reclassify Lifeguard Coordinator positions as managerial and preclude their eligibility to participate in [the Union];" "develop job descriptions for each title within the [C]itywide lifeguard program;" "post job vacancy announcements for both permanent and seasonal supervisory lifeguard positions and post them online;" and make Petitioner whole and free from future retaliation. (Amended Pet. ¶ 20) Petitioner also seeks answers to various questions about the Union's internal operations and the City's lifeguard program. (*See* Pet. Rep. Memo at 5)

Union's Position

The Union argues that Petitioner fails to state a claim under NYCCBL § 12-306(b)(3) because it did not act in an arbitrary, discriminatory, or bad faith manner. The Union avers that Director Catala informed Petitioner at every step of the grievance proceedings throughout 2019 and 2020 that the Union did not believe she had a viable grievance, including at the Step III hearing in September 2020 when he told her that the Union would not be pursuing arbitration. Accordingly, the Union asserts that the petition is untimely because it was filed well after the expiration of the four-month statute of limitations when Petitioner knew or should have known that the Union didn't believe her grievance was viable. The Union contends that although Petitioner believed she was seeking a Borough Coordinator detail, the vacancy that she was pursuing was an Assistant Coordinator position for which she did not have the requisite experience under Article XXIII, § 1 of the Agreement. Therefore, the Union avers that it did not believe

Petitioner's grievance was meritorious and, given the wide latitude unions have in the handling of grievances, it was not obligated to pursue arbitration. The Union argues that even if Director Catala confused the transfer and assignment provisions of the Agreement as alleged, Petitioner must show more than negligence, mistake, or incompetence to establish a breach of the duty of fair representation.

The Union asserts that it did not interfere with Petitioner's rights in violation of NYCCBL § 12-306(b)(1). Indeed, the Union denies colluding with DPR to obstruct Petitioner's grievance process or otherwise retaliating against her for seeking a higher detail or engaging in union activity. The Union argues that although there was a 19-month period between when Petitioner filed her Step I grievance on July 16, 2019, and the Step III denial on March 1, 2021, such processing time is not evidence of collusion. Instead, the Union contends that the City was forced to alter its operations because of the COVID-19 pandemic while her grievance was pending. In addition, the Union asserts that it is not feasible for the typical grievance to adhere to the strict time limits of the Agreement due to the volume of cases and the complexities of issues presented.

Moreover, to the extent Petitioner alleges that she was denied the opportunity to attend Union meetings and elections, the Union avers that the Board has no jurisdiction over internal union operations unless it can be shown that they affect the nature of representation accorded to employees with respect to negotiating and maintaining terms and conditions of employment. To the extent Petitioner raises similar allegations regarding Local 461, the Union argues that Petitioner has no standing to challenge internal union procedures of a local union of which she is not a member.

The Union also asserts that "all or some" of the remedies requested by Petitioner are not properly before the Board. (Union Ans. ¶ 20)

City's Position

The City argues that Petitioner has failed to establish a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3). It asserts that although Petitioner takes issue with the fact that the Union had a differing interpretation of the Agreement and the merits of her grievance in deciding not to proceed to arbitration, such judgments do not constitute a breach of the duty of fair representation where, as here, Petitioner has failed to demonstrate that the Union acted arbitrarily, discriminatorily, or in bad faith. The City also denies colluding with the Union to obstruct Petitioner's grievance process.

The City admits that it denied Petitioner's Borough Coordinator transfer request "because it was not in her line of positions." (City Ans. ¶ 59) However, it contends that the decision to deny her transfer request was a proper exercise of its statutorily granted right to determine personnel, and that it did not deny her access to the seniority list in the process. It avers that the transfer denial occurred prior to Petitioner's grievance filing and that the grievance was her "only identifiable" protected union activity." (*Id.* at ¶ 56) Accordingly, it argues that the "rightful" denial of a grievance cannot serve as an adverse employment action and therefore Petitioner has failed to establish a violation of NYCCBL § 12-306(a)(1) and (3). (*Id.*) Further, the City denies that the delayed mailing of seasonal employment availability notices was retaliation for Petitioner's union activity. Instead, it asserts that the delay resulted from uncertainty related to the COVID-19 pandemic and that return responses were accepted late to account for the delay.

The City also contends that "most of" Petitioner's requested remedies are not "susceptible to remediation" by the Board. (City Ans. ¶ 73)

DISCUSSION

As a preliminary matter, we address whether certain claims were sufficiently pled under the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). Petitioner alleged that DPR "target[ed]" seasonal lifeguards who work for another City agency by failing to produce "dual [employment] waiver form[s]" and docking pay at their other City jobs. (Pet. Appeal ¶ 4) Additionally, Petitioner alleged that an inquiry was made into her Teachers' Retirement System account by a "concerned citizen," who she speculates was President Stein. (*Id.* at ¶ 5) We find that these allegations lack the requisite specificity to state a violation of the NYCCBL. *See* OCB Rule § 1-07(c); *Finer*, 1 OCB2d 13, at 15 (BCB 2008) ("conclusory, vague pleading[s] [are] insufficient to state a cause of action under the NYCCBL.") (citing *DEA*, 79 OCB 40, at 23 (BCB 2007)). Accordingly, we dismiss these claims.

Next, we address the timeliness of Petitioner's claims. *See Nardiello*, 2 OCB2d 5, at 27-28 (BCB 2009) (timeliness is a threshold question) (citation omitted). 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 . . . .

See also OCB Rule § 1-07(b)(4).

Consequently, "[a]ny claims antedating the four-month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)) (internal quotation marks

omitted). Pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-12(f), the four-month period begins to accrue on the day after the alleged violations occurred.

The initial petition in this matter was filed on May 12, 2021. Based on this filing date, Petitioner's claims must have arisen on or after January 11, 2021, in order to be timely. Accordingly, to the extent Petitioner alleges claims arose prior to January 11, 2021, such claims are untimely. Therefore, Petitioner's claims related to the following untimely allegations will not be addressed: the Union and DPR's "manipulat[ion] [of] who can participate" in union meetings and elections via a 1996 grievance agreement; DPR's failure to grant Petitioner the Borough Coordinator detail and furnish the seniority list and other documents in July 2019; and the Union's failure to adequately handle her grievance prior to and during the Step III process in September 2020, including allegations against Director Catala and the overall quality of the Union's representation.

Moreover, the Union argues that Petitioner knew or should have known that it was not going to arbitrate her grievance prior to January 11, 2021, because Director Catala asserted that he told Petitioner multiple times earlier in the grievance process that it was not meritorious. However, Petitioner denies Director Catala's factual assertions and there are no other facts upon which to conclude that Petitioner knew or should have known that the Union would not arbitrate her grievance earlier than January 11, 2021.[23] Therefore, we proceed to consider the merits of Petitioner's claims regarding the Union's failure to arbitrate and all other timely claims arising on or after January 11, 2021.

[23] In the analysis below, we "draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *McNeil*, 10 OCB2d 8, at 8 (BCB 2017) (quoting *Dillon*, 9 OCB2d 28, at 14 (BCB 2016)) (quotation marks omitted).

First, Petitioner argues that DPR violated NYCCBL § 12-306(a)(1) and (3) by failing to mail her 2021 seasonal employment availability notice within the time constraints provided for in Article XIX, § 2 of the Agreement. Although Petitioner asserts that her notice was mailed late on April 22, 2021, and she received it late as a result, she alleges no adverse impact on her employment resulting from the delayed issuance of the notice. Indeed, her pleadings appear to establish that she was rehired and worked that summer. Accordingly, we cannot construe the delayed mailing as an adverse employment action, and we dismiss all related claims. *See DC 37, L. 983*, 6 OCB2d 10, at 31 (BCB 2013); *Andreani*, 2 OCB2d 40, at 28 (2009) ("crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer"); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *affd., Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (failure to allege adverse employment action fatal to NYCCBL § 12-306(a)(3) claim); *compare*, *DC 37, L. 2507*, 11 OCB2d 18, at 22 (BCB 2018) (finding that the removal of a desirable assignment is an adverse employment action); *OSA*, 7 OCB2d 20, at 27 (BCB 2014) (finding that an undesirable transfer is an adverse employment action).

Claims regarding Interference with Internal Union Activities

Petitioner argues that the Union violated NYCCBL § 12-306(b)(1) by denying her and other seasonal lifeguards access to internal union activities including meetings and elections because she was critical of the officers and/or their actions. Specifically, she avers that in or around April 2021, the Union held a Zoom meeting "without inviting or notifying [Petitioner]; on May 20, 2021, the Union "held an election without inviting [Petitioner] and other seasonal Chiefs;" and on February 26, 2021, Petitioner was "singled out" and "targeted for removal" from a Union meeting because she tried to "stay" a Union election. (Amended Pet. ¶ 11) Additionally, Petitioner

claims that "Local 461 ha[d] an election without inviting the 1100 seasonal lifeguards."[24] (*Id.* at ¶ 14)

NYCCBL § 12-306(b)(1) provides that it is "an improper practice for a public employee organization or its agents to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so." However, the Board generally does not have jurisdiction over the conduct of internal union affairs. *See Seabron*, 15 OCB2d 17, at 8 (BCB 2022); *Richards*, 15 OCB2d 14, at 13 (BCB 2022); *Lawtone-Bowles*, 15 OCB2d 4, at 10 (BCB 2022) (explaining that claims under NYCCBL § 12-306(b)(1) involving union conduct are subject to our jurisdiction only when the union's actions affect an employee's terms and conditions of employment or the nature of the representation the union provides). Indeed, the Board has held that "[u]nlike federal labor laws protecting the rights of union members in the private sector, the NYCCBL does not regulate internal union affairs." *Archibald*, 57 OCB 38, at 27 (BCB 1996) (citation omitted).

In this case, Petitioner's claims concern her rights as a union member to participate in internal union meetings and elections. The rights of union members within the organization are not within our jurisdiction under NYCCBL § 12-306(b)(1). *See Lawtone-Bowles*, 15 OCB2d 4, at 10; *McAllen*, 31 OCB 15, at 24-25 (BCB 1983) (dismissing for lack of jurisdiction petitioner's claim that the union's failure to hold monthly membership meetings violated the union's constitution and the NYCCBL); *Velez*, 23 OCB 1, at 9 (BCB 1979) (dismissing for lack of jurisdiction petitioner's claim that the conduct of an internal union election violated the NYCCBL); *Sharon*, 27 OCB 1, at 6 (BCB 1981) (finding no jurisdiction over petitioner's claim that he was harassed, abused, prevented from speaking, and threatened with reprisals at a union

[24] We note that Petitioner is not a member of, or otherwise represented by, Local 461.

meeting because he was critical of recent official union activities); *Fabbricante*, 61 OCB 46, at 7-8 (BCB 1998) (dismissing for lack of jurisdiction petitioner's claim that union officers prevented him from speaking with other members about a prior improper petition during a union meeting). Therefore, because Petitioner's claims do not fall within this Board's jurisdiction, we dismiss them accordingly.

Claims regarding Petitioner's Grievance

Petitioner argues that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to bring her grievance to arbitration. NYCCBL § 12-306(b)(3) makes it "an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." This duty requires that "a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (BCB 2015) (citing *Walker*, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5). The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be carried simply by expressing dissatisfaction with the outcome . . . 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).

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. Mar. 31, 2016), *affd., Matter of United Fedn. of Teachers v. City of New York*, 154 A.D.3d 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)). 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 (BCB 2010) (quoting *Edwards*, 1 OCB2d 22, at 21 (2008) (additional citations and editing marks omitted)). Thus, a union is not obligated to advance every grievance, and a union does not breach the duty of fair representation merely because a member disagrees with the union's tactics or strategic decisions. *See Nardiello*, 2 OCB2d 5, at 40; *Del Rio*, 75 OCB 6, at 13 (BCB 2005). Indeed, "[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 (BCB 2007) (citation omitted).

In this case, the Union asserts that Petitioner's grievance did not have merit because rather than a Borough Coordinator detail, Petitioner was seeking to fill an Assistant Coordinator vacancy that she did not have the requisite experience to fill under Article XXIII, § 1 of the Agreement. Petitioner did not argue that this assertion was incorrect. To the contrary, she acknowledged that she "was not aware of . . . [the] specific title or detail" that she was applying to fill. (Pet. Rep. to Union ¶ 46) However, even if the Union was wrong about the nature of the vacant position or Petitioner's eligibility for it, such a mistake is insufficient to establish a breach of the duty of fair representation. *See Bonnen*, 9 OCB2d 7, at 17 (BCB 2016) ("to meet [the] burden [of pleading and proving a breach of the duty of fair representation] a petitioner must allege more than negligence, mistake, or incompetence") (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)). Petitioner concedes that DPR has no policy governing details or promotions, and instead she asserts that in the absence of an express governing contract provision, she was entitled to the Borough

Coordinator detail pursuant to Article XIX, § 4 of the Agreement, the transfer provision, because it "outlines the sole procedure available to an employee who requests to fill a vacancy in a position that he or she is qualified to fill, regardless of whether it is considered to be a promotion or [d]etail." (Amended Pet., Ex. 5) Neither the Union nor the City agrees with Petitioner's interpretation of the scope of Article XIX, § 4. However, assuming *arguendo* that Article XIX, § 4's transfer language could be construed to encompass details as Petitioner contends, it is clear that "[t]ransfers shall be made at the discretion of the DPR," and seniority only determines the order in which transfer requests are "acted upon." (City Ans., Ex. 2) Petitioner has identified no other contractual provision or policy that would entitle her to the Borough Coordinator detail. Therefore, we find that the Union's decision not to pursue arbitration did not violate the duty of fair representation.[25] *See Turner*, 3 OCB2d 48, at 15; *Sicular*, 79 OCB 33, at 13.

Further, Petitioner argues that the Union breached its duty of fair representation by failing to communicate that it was not bringing her grievance to arbitration. She asserts that after requesting that the Union arbitrate her grievance on March 9, 2021, she merely received one reply email from the Union noting that it was in receipt of her request. Moreover, Petitioner asserts that she was never conclusively informed that the Union would not be proceeding to arbitration. The Board has held that a union's unexplained failure to update a grievant with the status of a meritorious grievance may violate its duty of fair representation. *See Morales*, 5 OCB2d 28, at 25-26. However, such conduct does not rise to a breach of the duty of fair representation unless the failure to communicate "prejudice[d] or injure[d] the petitioner." *Cook*, 7 OCB2d 24, at 9 (BCB 2014) (citing *Walker*, 6 OCB2d 1; *Lein*, 63 OCB 27 (BCB 1999)). In this case, because we

[25] We note that although Petitioner is a vocal critic of Union leadership, there is no evidence in the record to establish that the Union's decision not to pursue arbitration was discriminatory or made in bad faith.

have determined that the Union reasonably concluded that Petitioner's grievance was not meritorious, we cannot find that Petitioner was prejudiced or injured by its failure to communicate regarding the decision not to arbitrate. *See Harason*, 13 OCB2d 8, at 11 (BCB 2020) (finding that the union's failure to respond to petitioner's emails about the status of his grievance did not violate the duty of fair representation when the union reasonably concluded that the grievance was not meritorious) (citing *Cook*, 7 OCB2d 24, at 9).

Petitioner also argues that the Union and DPR "obstruct[ed]" the grievance process and "collu[ded]" to deny her a "fair hearing" in violation of NYCCBL § 12-306(b)(1) and § 12-306(a)(1) and (3) respectively. We find that there is no evidence to conclude that the Union and DPR colluded to obstruct Petitioner's grievance process as alleged. Petitioner asserts that the slow processing of her grievance, 19 months from the Step I filing in July 2019 to the Step III denial in March 2021, is evidence of collusion. However, there is no evidence that the Union and DPR conspired in any way to slow the processing of her grievance. To the contrary, Director Catala averred in his affirmation that to the extent there was any delay in the processing of Petitioner's grievance, it resulted from the COVID-19 pandemic.[26] Accordingly, Petitioner's conclusion that the Union and DPR conspired to slow the processing of her grievance or otherwise colluded to obstruct the grievance process is mere speculation. Therefore, we dismiss this claim.

[26] We also note that Petitioner has offered no facts showing that the Union or DPR processed her grievance slower than grievances brought by other bargaining unit employees during the relevant period.

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-4429-21, filed by Janet Fash, against District Council 37, AFSCME, AFL-CIO, and its affiliated Local 508, and the City of New York and New York City Department of Parks and Recreation, is hereby dismissed except as to the four remaining claims described in OCB's February 23, 2022 letter, which will be the subject of a future hearing.

Dated: June 1, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER