

Irrera, 17 OCB2d 9 (BCB 2024)
(IP) (Docket No. BCB-4543-24)

Summary of Decision: Petitioner filed an improper practice petition alleging that she did not receive correct holiday pay and that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by its handling of the complaint. Respondents claimed that the petition was untimely filed. The Union also argued that it promptly answered Petitioner’s inquiries about the grievance and has properly exercised its discretion in handling its group grievance over holiday pay. The City also argued that the Board should defer this matter to the arbitration procedure. The Board found that the petition was untimely, that the Union did not breach its duty of fair representation, and that deferral was inappropriate. 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-

SANDY IRRERA,

Petitioner,

- and-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 372,
and
CITY OF NEW YORK and THE NEW YORK CITY POLICE
DEPARTMENT,**

Respondents.

DECISION AND ORDER

On January 5, 2024, Sandy Irrera (“Petitioner”) filed an improper practice petition, *pro se*, against District Council 37, AFSCME, AFL-CIO, Local 372 (“Union”), the City of New York (“City”), and the New York City Police Department (“NYPD”). Petitioner alleges that the Union violated New York City Collective Bargaining Law (New York City Administrative Code, Title

12, Chapter 3) (“NYCCBL”) § 12-306(b)(3) by breaching its duty of fair representation. Specifically, Petitioner alleges that for several years she has received incorrect holiday pay from the NYPD and asked the Union to file a grievance over the issue. Petitioner alleges that the Union has breached its duty of fair representation by its failure to file and process the grievance properly and by failing to truthfully inform her of the status of the grievance. The Union argues that it has properly filed and advanced Petitioner’s holiday pay issue as a group grievance, including conducting settlement discussions and filing for arbitration, and that it has kept Petitioner informed about the status of the grievance. The Union and the City both contend that the petition is untimely. The City also maintains that the Board should defer this matter to arbitration for a ruling on the holiday pay issue. The Board found that the petition was untimely, and that, even if timely filed, the Union did not breach its duty of fair representation, and that deferral to arbitration was inappropriate. Accordingly, the petition was dismissed.

BACKGROUND

Petitioner is a School Crossing Guard employed by the City at NYPD and represented by the Union. On February 28, 2022, Petitioner contacted the Union to report that she was receiving only 4.5 hours of pay for holidays even though she is assigned to 5-hour shifts and therefore should be receiving 5 hours of holiday pay under the 2017-2021 School Crossing Guard Collective Bargaining Agreement (“Agreement”) between the Union and the City. Petitioner spoke to the Union that day and sent a follow-up email that afternoon. The Union filed its group grievance at Step II on May 10, 2022, and advanced it to Step III on July 7, 2022.

Petitioner had several further communications with the Union about the issue between March and July 2022, in which she expressed her desire that the issue be resolved. On July 11, 2022, Petitioner wrote to the Union asking for an update on her claim that her holiday pay was

being paid incorrectly. The Union responded the same day informing Petitioner that it had filed a grievance over the issue. Between September and November 2022, Petitioner continued to communicate with the Union about the status of the grievance, and the Union informed her that the grievance was proceeding. During this same time, Petitioner again expressed her concern over the speed with which the Union was processing the grievance. The Union informed Petitioner that because the grievance affected not only her, but almost all School Crossing Guards covered by the Agreement, the process would take time.

On November 2, 2022, Petitioner sent an email to the Union complaining again about the pace of the grievance process and asserting her intention to file a complaint with the New York State Public Employment Relations Board if the issue of holiday pay was not resolved quickly. The Union responded by telling Petitioner that the matter was under legal review and asking her to provide recent paystubs showing the errors in holiday pay. Petitioner sent paystubs to the Union in response.

On November 7, 2022, prior to a Step III hearing, the Union filed a request for arbitration over the holiday pay issue with the Office of Collective Bargaining (“OCB”) which was assigned docket number A-15963-22. The request for arbitration summarizes the grievance issue as whether the NYPD has violated the Agreement by its failure to pay the grievants for holidays. The remedy sought includes backpay and make whole relief. The request for arbitration form also lists the dates the grievance was submitted to Step II as May 10, 2022, and to Step III as July 7, 2022. The request for arbitration does not state that a Step II or Step III hearing had been held. On November 14, 2022, the Union sent Petitioner a copy of the Union’s request for arbitration along with the waiver required by the Rules of the Office of Collective Bargaining (Rules of the City of New

York, Title 61, Chapter 1) (“OCB Rules”) § 1-06(b)(3). Petitioner returned the signed waiver that day and also questioned the Union’s phrasing of the grievance issue.

After the Union had filed its request for arbitration, the Union and the City agreed to send the matter back to Step III of the grievance procedure prior to continuing to arbitration. The Union and the City held an initial Step III hearing on January 10, 2023, but the issue was not resolved. The City and the Union continued to discuss settlement of the grievance, while holding the matter at Step III.

After November 2022, Petitioner continued to communicate with the Union about the grievance, and her desire to see it resolved quickly, and the Union continued to respond that it was trying to resolve the matter. On June 12, 2023, the Union specifically informed Petitioner that the matter was at Step III of the grievance procedure. Petitioner then asked if there was a date scheduled for the Step III hearing and for the reason the grievance was at Step III when a request for arbitration had been filed. In response, the Union told her that, because there had been no Step III hearing, the parties had agreed to hold Step III meetings prior to proceeding to arbitration.¹ On August 22, 2023, in response to Petitioner’s inquiries, the Union told her that they were still trying to settle the grievance. Petitioner next contacted the Union’s Executive Director on September 11, 2023, to complain about the Union’s handling of the grievance and to inform the Executive Director that she would file a complaint with federal and state agencies if the matter was not resolved. Sometime thereafter, the Union’s Executive Director held a conference call with Petitioner to discuss her concerns. On October 12, 2023, Petitioner again reached out to the Union to ask for an update on the grievance and asked that the matter be sent to arbitration. The Union

¹ The Union told Petitioner that there was a Step III hearing scheduled for July 7, 2023, and that they were trying to settle the case without arbitration. That hearing did not go forward, but the Union and the City continued to have settlement discussions.

responded the same day, informing her that it was still negotiating the grievance and asked for patience.

On January 4, 2024, the City issued its Step III decision dismissing the grievance as untimely. The grievance is still pending arbitration.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union has breached its duty of fair representation to her and to similarly situated School Crossing Guards by failing to promptly grieve and arbitrate the alleged violation of the Agreement's holiday pay provisions. Petitioner asserts that the City's violation of the Agreement is clear on its face and therefore the grievance should have been resolved quickly, through arbitration if necessary. Moreover, Petitioner claims that the Union has misrepresented the status of the grievance because, while the request for arbitration lists the Step III date as July 7, 2022, the Union told her in June 2023 that there had been no Step III hearing held prior to the request for arbitration. In addition, Petitioner asserts that the Union has improperly filed the request for arbitration because the wording of the request for arbitration does not accurately set forth the holiday pay violation. Petitioner maintains that her claim is timely because it is a continuing violation involving pay and therefore each alleged failure of the City to pay correct holiday pay constitutes a new violation.

Union's Position

The Union contends that Petitioner's improper practice claim is time-barred because she knew that the Union had filed the request for arbitration no later than November 14, 2022, when she returned a signed statutory waiver to allow the Union to proceed to arbitration. Therefore, the

Union contends, Petitioner's claims that the Union did not file for arbitration or that the filing was defective arose no later than November 14, 2022.

The Union also argues that the petition fails to state a claim for a violation of NYCCBL § 12-306(b)(3). It asserts that it did not act in an arbitrary, discriminatory, or bad faith manner. The Union maintains that it has pursued the alleged violation identified by Petitioner, up to and including filing for arbitration with OCB, and has engaged in serious efforts to settle the dispute with the NYPD short of arbitration. The Union argues that the arbitration filings are not defective in any way and that the regular updates it provided to Petitioner about the status of the grievance were accurate. The Union also confirmed that the dates of submission to Step II and Step III on its request for arbitration were the dates the Union filed the grievance at each step, not the date of any Step II or Step III hearing.

City's Position

The City argues that Petitioner's claim is time-barred because the petition was filed on January 5, 2024, and relates to conduct by the Union that occurred prior to September 5, 2023, and are thus outside the statute of limitations set forth in NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4). In addition, the City argues that the petition failed to state a cause of action under NYCCBL § 12-306(b)(3) and that therefore any potential derivative claim against it pursuant to NYCCBL § 12-306(d) must also fail. The City further argues that the Board should defer this case to arbitration because the issue turns on the application and interpretation of the parties' Agreement, and the Union has already filed a request for arbitration over the matter of holiday pay.

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. sub nom. 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 note that although Petitioner did not cite to a specific provision of the NYCCBL, her petition clearly alleges a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3), and a derivative claim against the City under NYCCBL § 12-306(d).² Furthermore, in reviewing the sufficiency of the pleadings in cases where a hearing was not held “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.” *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citations omitted).

We have previously held that “timeliness is a threshold question.” *Bonnen*, 9 OCB2d 7, at 15. Therefore, we first address Respondents’ position that Petitioner’s claims are time-barred. The statute of limitations for filing an improper practice petition is set forth in NYCCBL § 12-306(e), which provides, in relevant part:

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 . . .

² Under NYCCBL § 12-306(d), “[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)].”

See also OCB Rule § 1-07(b)(4)³; *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (holding that “[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”); *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd. sub nom. Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (same). Pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-12(f), the four-month period begins the day after the alleged violation occurred. *See Ozcan*, 15 OCB2d 16 at 11 (BCB 2022). The petition in this matter was filed on January 5, 2024. Based on this filing date, Petitioner’s claims must have arisen on or after September 4, 2023, to be timely.

In this case, the conduct Petitioner complains of occurred prior to September 4, 2023, and therefore her claim is untimely. The Union sent Petitioner a copy of its request for arbitration and the required waiver for her to sign on November 14, 2022. Consequently, Petitioner knew by November 14, 2022, that the Union had filed a grievance over the holiday pay issue and had submitted a request for arbitration of that grievance. The documents Petitioner received from the Union had the wording of the arbitration submission and the date on which the grievance had been submitted to Step II and to Step III. To the extent that Petitioner had any concerns about either the timing or the content of the Union’s request for arbitration, the facts and circumstances of those claims were known to Petitioner on November 14, 2022, well outside of the four-month period covered by the Petition filed on January 5, 2024.

³ “One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 12-306 of the statute and request that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and must be on a form prescribed by the Office of Collective Bargaining.” OCB Rule § 1-07(b)(4).

Petitioner's allegation that the Union breached its duty of fair representation by refusing to move the arbitration forward after filing its request for arbitration is also untimely. Petitioner did not file any claim alleging an improper delay in pursuing the arbitration in the four months after she knew the Union had filed its request for arbitration. Petitioner, however, contends that the Union misled her about the status of the arbitration and that she was unaware that the case was not proceeding to arbitration right away. Even drawing all permissible inferences in favor of Petitioner, it is clear from the record that she was advised on more than one occasion during the first six months of 2023 that the Union was trying to resolve the grievance and was not seeking arbitration with the speed she believed appropriate. Significantly, on June 5, 2023, the Union specifically told Petitioner that it had agreed to remand the holiday pay grievance to Step III of the grievance procedure despite having previously filed a request for arbitration. Therefore, by no later than June 5, 2023, Petitioner was in possession of all relevant facts she relies upon to make her claim that the Union breached its duty of fair representation by agreeing to send the grievance back to Step III rather than seeking immediate arbitration. Petitioner therefore knew, or should have known, of the facts upon which she relies more than four months prior to her filing of the petition. *See* NYCCBL § 12-306(e) (statute of limitations runs from "the date the petitioner knew or should have known of said occurrence"); *Sweeney*, 73 OCB 9, at 4 (BCB 2004) (citing *Raby*, 71 OCB 14, at 9 (petition "must be filed no later than four months from the time the disputed action occurred").

Under the circumstances presented here, the fact that Petitioner continued to demand that the Union move the grievance more quickly does not serve to extend the statute of limitations. "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 *Edwards*, 14 OCB2d 17 at 11-12 (BCB 2021); *Minervini*, 71 OCB 29, at 13 (BCB 2003) (“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.”) (citing *Raby*, 71 OCB 14, at 12-13; *Miller*, 57 OCB 40, at 5 (BCB 1996)).

Finally, we reject Petitioner’s claim that her improper practice charge constitutes a continuing violation and that her claim against the Union renews each time she receives incorrect holiday pay from the City. The alleged continued violation of the Agreement by the City does not serve to restart the limitations period as to the Union’s alleged improper acts. See *Phelan*, 12 OCB 2d 35, at 8 (BCB 2019) (holding that the ongoing impact on Petitioner’s paycheck from a union’s alleged breach of the duty of fair representation is not a continuing violation for purposes of the union’s duty of fair representation). See also, *Local 2028, Intl. Longshoreman’s Assn.*, 32 PERB ¶ 3038 (1999). The facts do not show that the Union has failed to process her claim, only that the Petitioner continued to express dissatisfaction with the speed at which the grievance proceeded.⁴

Even if the petition had been timely filed, it would not state a claim for the Union’s breach of its duty of fair representation. 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.” 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 (BCB 2007). 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

⁴ In reaching this conclusion we do not foreclose the possibility other circumstances could demonstrate that prolonged or unexplained delay may lead to a different conclusion as to when the claim arose.

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 2006). We have held that “a union is entitled to broad discretion . . . [and] the Board will not substitute its judgment for that of a union or evaluate its strategic determinations.” *Sicular*, 79 OCB 33, at 13 (BCB 2007).

In this case, Petitioner has detailed her dissatisfaction with the Union’s handling of the holiday pay grievance. Petitioner has alleged no facts, however, to demonstrate that the Union was motivated by bad faith, acted arbitrarily, or treated her any differently than any similarly situated member of the Union. This Board has long held that, “dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.” *Shymanski*, 5 OCB2d 20, at 11 (BCB 2012) (quoting *Gertskis*, 77 OCB 11, at 11) (citations omitted); *see Nealy*, 8 OCB2d 2, at 17. The speed with which the Union has processed the grievance and its decision to return the grievance to Step III and to try to settle the grievance are decisions within its discretion. Absent any evidence that the Union’s decisions were improperly motivated, we will not second-guess its tactical decisions. In addition, while Petitioner also complains about the content of the Union’s status reports and its failure to update her without her soliciting a response, we have long held that dissatisfaction with the manner of communication by a union does not state a claim for a breach of the duty of fair representation absent evidence that the union acted arbitrarily, discriminatorily or in bad faith. *See Edwards*, 14 OCB2d 17 at 14-15 (citing *Stathes*, 14 OCB2d 3, at 8-9 (BCB 2021) (citations omitted); *Jiminez*, 61 OCB 25, at 8 (BCB 1998).

We also reject the City’s argument that the Board should defer this case to arbitration. Deferral to arbitration is not appropriate where, as here, the Board could find that a union breached its duty of fair representation irrespective of the outcome of the underlying arbitration. *See, e.g.*

Barillaro, 12 OCB2d 4, at 8 n. 6 (BCB 2019) (citing *Cunningham*, 51 OCB 15, at 28-29 (BCB 1993)).

We find that the Union did not act in a discriminatory, arbitrary, or bad faith manner and therefore did not breach its duty of fair representation. Since we dismiss the petition against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail. *See Samuels*, 77 OCB 17, at 16 (BCB 2006). Accordingly, we dismiss the petition in its entirety.

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-4543-243, be and the same hereby is, dismissed in its entirety.

Dated: May 9, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA SILVERBLATT
MEMBER

CAROLE O'BLINES
MEMBER

PETER PEPPER
MEMBER