

Simon, 16 OCB2d 27 (BCB 2023)

(IP) (Docket No. BCB-4524-23)

Summary of Decision: Petitioner appealed the Executive Secretary’s determination dismissing her petition for untimeliness and failure to plead facts sufficient to establish a violation of the NYCCBL. Petitioner argued that her petition should be deemed timely and that she pled sufficient facts to establish that the Union breached the duty of fair representation. The Board found that the Executive Secretary properly deemed the petition untimely and insufficient. Accordingly, the appeal was denied. (*Official decision follows.*)

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

In the Matter of the Improper Practice Proceeding

-between-

NORMA SIMON,

Petitioner,

-and-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 420, and
NEW YORK CITY HEALTH + HOSPITALS,**

Respondents.

DECISION AND ORDER

On May 23, 2023, Petitioner Norma Simon filed a verified improper practice petition against District Council 37, AFSCME, AFL-CIO, Local 420 (“Union”) and New York City Health + Hospitals (“HHC”).¹ Petitioner alleges that the Union breached § 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 adequately represent her regarding various disciplinary charges.

¹ The petition named “Bellevue Hospital Office of Labor Relations” as a respondent, rather than HHC. However, as Bellevue Hospital is part of HHC, we have amended the caption *nunc pro tunc*.

Petitioner also alleges that HHC violated NYCCBL § 12-306(a)(1) and (3) by issuing erroneous step decisions regarding the disciplinary charges.² Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”), the Executive Secretary dismissed the petition on the grounds that certain claims were untimely and that the remaining timely allegations were insufficient to establish a breach of the duty of fair representation against the Union (“ES Determination”). Petitioner appealed the ES Determination (“Appeal”), arguing that her petition should be deemed timely and that she pled sufficient facts to establish that the Union violated the duty of fair representation. The Board finds that the Executive Secretary properly deemed the petition untimely and insufficient. Accordingly, the appeal is denied.

BACKGROUND

Petitioner was a Behavioral Health Associate employed by HHC in Bellevue Hospital’s Department of Child and Adolescent Psychiatry. The Union is the certified bargaining representative for employees in the Behavioral Health Associate title.

The Petition³

On August 16, 2022, HHC brought three disciplinary charges against Petitioner related to

² The only statutory provision cited in the petition was NYCCBL § 12-306(c), which does not support a cause of action in this instance. However, the Executive Secretary construed Petitioner’s claims against the Union as alleging violations of NYCCBL § 12-306(b)(3). The Executive Secretary did not address the sections of the NYCCBL underlying Petitioner’s claims against HHC, as she found that none of the facts relating to those claims were timely. However, for the purpose of referring to Petitioner’s claims here, we construe her claims against HHC as alleging violations of NYCCBL § 12-306(a)(1) and (3). *See Phelan*, 12 OCB2d 35, at 5 (BCB 2019) (explaining that we review a *pro se* petitioner’s allegations “with an eye to establishing whether the facts as [pled] support any cognizable claim for relief and [do] not define such claims only by the form of words used by [p]etitioner”) (quoting *Feder*, 1 OCB2d 23, at 13 (BCB 2008)).

³ All facts recounted here are taken from the petition and the attached exhibits.

a series of alleged incidents from May 2022. HHC alleged, among other things, that Petitioner treated patients unprofessionally and inappropriately, that she was insubordinate and argumentative with her supervisor, and that she was absent without leave (“AWOL”) from May 20, 2022, through the date of the issuance of charges. As a result, HHC alleged that Petitioner engaged in misconduct that violated various rules, regulations, policies, and operating procedures, including Rule 7, § 7.5 of HHC’s Personnel Rules and Regulations. Petitioner denies that the incidents and circumstances underlying the charges occurred as alleged. Moreover, Petitioner maintains that she requested that the Union fight the false allegations underlying the charges against her, but she avers that the Union stated that it could only “address the charges.” (Pet. at 7)

On August 29, 2022, HHC held a Step IA disciplinary conference regarding Petitioner’s charges. Rhonda Richardson, Director of Labor Relations, served as hearing officer. Petitioner was represented at the conference by Union Representative Carl Jones (“Union Representative”). Petitioner alleges that the Union Representative failed to adequately represent her prior to and during the disciplinary conference. Specifically, she asserts, among other things, that he failed to: investigate the alleged incidents; memorialize an alleged agreement regarding her work schedule in writing, which she avers would have prevented the AWOL charges; make appropriate strategic arguments at the conference; and introduce evidence that she alleges would have exonerated her on the charges. According to Petitioner, following the Step IA conference, the Director of Labor Relations issued a decision terminating her. Petitioner maintains that the Director was not objective during the conference, that she refused to listen to all the evidence, and that she made the decision to terminate despite acknowledging during the conference that the evidence presented “did not validate” one of the charges. (Pet. at 17)

In or around November 2022, the Union Professional and Healthcare Division Director Marianela Santana (“Union Director”) and the Union Representative called Petitioner to discuss

the Step IA decision. According to Petitioner, she asked them whether the Director of Labor Relations should have to recuse herself from further proceedings because she deliberately ignored evidence that would have cleared her on the charges. Petitioner maintains that the Union Director told her that she would forward the question to the Union's legal department and get back to her. In a subsequent call, Petitioner alleges that the Union Representative told her that the Union Director believed that there was no need to inquire with the legal department because Petitioner was going to be terminated anyway. Thereafter, Petitioner alleges that the Union Representative told her that the Union Director was being an "obstructionist" and suggested that Petitioner complain to higher-level Union officials about her. (Pet. at 13)

On December 29, 2022, a Step II hearing was held regarding Petitioner's disciplinary charges. Petitioner maintains that the Union Representative failed to raise appropriate arguments during the hearing. On January 13, 2023, HHC Hearing Officer Michael Perna issued a decision sustaining Petitioner's termination. According to Petitioner, the Hearing Officer erroneously considered evidence in his decision that he did not refer to during the hearing and selectively omitted the consideration of other evidence.

Petitioner alleges that the Union Director withheld the Step II decision from her until she requested it on February 3, 2023. She maintains that the Union is not transparent with her and that it is often reluctant to answer her questions. Specifically, Petitioner avers that she asked the Union Director how much time traditionally elapses between Step II and III proceedings. However, as of the date of her petition in this matter, Petitioner maintains that she has not received a "concrete answer." (Pet. at 14) She asserts that the Union can request to proceed to Step III if HHC "exceeds a certain amount of time," but alleges that this is not an option for her because the Union Director "[will not] answer [Petitioner's] concern directly" and only "tells [Petitioner] what [the Union Director] wants [Petitioner] to know." (*Id.*) Moreover, Petitioner contends that the Union has

decided that the Union Representative, with guidance from the Union Director, will ultimately represent her at the Step III hearing, despite her assertion that he has not fulfilled “his duty as a union officer.” (Pet. at 4) She avers that the Union’s poor representation of her regarding the disciplinary charges is retaliation for her complaining about “the quality and lack of representation when [Petitioner] was being bullied at work in 2020.”⁴ (*Id.*)

The Executive Secretary’s Determination

On June 8, 2023, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the petition. The Executive Secretary found that most of Petitioner’s allegations were untimely and that the remaining claim was insufficient to establish a violation of the NYCCBL.

With respect to timeliness, the Executive Secretary noted that because the petition was filed on May 23, 2023, any alleged violations that occurred prior to January 22, 2023, were untimely because they fell outside the NYCCBL’s four-month statute of limitations. Specifically, the Executive Secretary dismissed all claims against HHC, as she determined that the alleged facts underlying these claims arose prior to January 22, 2023. Moreover, she found that the petition’s only timely claim against the Union concerned Petitioner’s allegations regarding the Union Director’s failure to promptly forward the Step II decision to Petitioner and her alleged lack of transparency with respect to her reluctance to answer questions. Although Petitioner expressed dissatisfaction with the Union Director’s actions and the Union in general, the Executive Secretary found that Petitioner failed to plead facts showing that the Union engaged in arbitrary, discriminatory, or bad-faith conduct. Accordingly, the Executive Secretary determined that the petition was insufficient to show that the Union violated the duty of fair representation, and the

⁴ We note that the circumstances of the alleged bullying in 2020 are not clear from the record.

petition was dismissed in its entirety.

The Appeal

On June 21, 2023, Petitioner filed an appeal of the ES Determination. In her Appeal, Petitioner argues that despite her multiple inquiries, the Union Director failed to provide a clear answer to her question regarding the timeframe between Step II and III proceedings. Instead, Petitioner avers that the Union Director merely advised her to be patient due to the backlog of cases in the Office of Labor Relations (“OLR”) caused by the COVID-19 pandemic.⁵ Petitioner argues that this response “raises concerns about the [U]nion’s priorities and conduct.” (Appeal at 1) She asserts that if the Union “expects [Petitioner] to be patient due to the backlog of [OLR] . . . the same consideration [should] be extended to [Petitioner’s] complaint filed with the [Office of Collective Bargaining].” (*Id.*) Moreover, she contends that the Union’s “lack of transparency in providing information related to [Petitioner’s] options for filing a complaint with the [Office of Collective Bargaining] and the relevant timeframe must also be addressed.” (*Id.*) She avers that since she had to “seek advice from an outside attorney to understand [her] rights, it can be inferred that the [U]nion was not forthcoming with this essential information.” (*Id.*)

Further, Petitioner argues that the Union Representative’s suggestion that she file a complaint against the Union Director was intended for his personal gain and demonstrates bad-faith and arbitrary conduct. She asserts that the Union Representative’s “failure to put [her] tour negotiation in writing further supports this suspicion of bad faith. In light of his request that [Petitioner] file a complaint against his director for his own gain, it seems reasonable to suggest that his lack of action in documenting our negotiation was also arbitrary.” (Appeal at 2) Overall,

⁵ For the first time with her appeal, Petitioner submitted an April 27, 2023 email from the Union Director in which she explained that OLR “has a bit of a backlog and is currently processing [Step III] intakes in the order received. We will notify you once a hearing is scheduled. We appreciate your patience.” (Appeal, Ex. 1)

Petitioner contends that “[t]he lack of investigation and representation on [the Union Representative’s] part leads [Petitioner] to question whether he acted in [Petitioner’s] best interests at all.” (*Id.*)

In sum, Petitioner argues that the lack of transparency exhibited by the Union calls into question its tactical and strategic actions throughout the proceedings related to her disciplinary charges. Additionally, Petitioner avers that the selective application of timeliness rules “can only be viewed as unreasonable, unjust, and discriminatory.” (Appeal at 2)

DISCUSSION

As a preliminary matter, Petitioner alleges for the first time in her Appeal that the Union “lack[ed] transparency” with respect to “providing information related to [Petitioner’s] options for filing a complaint with the [Office of Collective Bargaining] and the relevant timeframe.” (Appeal at 1) However, the “purpose of an appeal is to determine the correctness of the Executive Secretary’s decision based upon the facts that were available . . . in the record as it existed at the time of [her] ruling.” *Buttaro*, 12 OCB2d 23, at 13 (BCB 2019) (internal quotation marks and citations omitted) (quoting *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008)), *affd.*, *Matter of Buttaro v. New York City Off. of Collective Bargaining*, Index No. 152489/2020 (Sup. Ct. N.Y. Co. Apr. 23, 2021) (Engoron, J.). “A petitioner may not add new facts at a later date to attack the basis of the Executive Secretary’s determination.” *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008); *see also Cooper, Jr.*, 69 OCB 4, at 5 (BCB 2002). Accordingly, we dismiss Petitioner’s newly raised allegation.⁶

⁶ Nevertheless, even if Petitioner’s new allegation was properly raised, the Union’s alleged failure to provide information related to filing a claim with the Office of Collective Bargaining does not state a violation of the duty of fair representation in the absence of evidence that Petitioner was

Next, we address the timeliness of Petitioner's properly raised claims.⁷ As noted in the ES Determination, 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) (internal quotation marks omitted) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)). 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 violation occurred.

The petition in this matter was filed on May 23, 2023. Based on this filing date, Petitioner's claims must have arisen on or after January 22, 2023, in order to be timely. Accordingly, all claims arising prior to January 22, 2023, are untimely and will not be addressed here, including the claims regarding the Union's representation of Petitioner prior to and during the Step IA disciplinary conference in August 2022 and the Step II hearing in December 2022, and the Director of Labor Relations' conduct prior to and during the Step IA disciplinary conference in August 2022 and the

treated differently than other bargaining unit members. *See Gill*, 16 OCB2d 21, at 6 (BCB 2023) (“the duty of fair representation does not extend to the provision of information unrelated to the negotiation, administration[,] and enforcement of a collective bargaining agreement”) (internal quotation marks and citations omitted) (quoting *Vasquez*, 75 OCB 36, at 10 (BCB 2005)).

⁷ In the analysis below, we “draw all permissible inferences in favor of [p]etitioner 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) (internal quotation marks omitted) (quoting *Dillon*, 9 OCB2d 28, at 12 (BCB 2016)).

substance of her Step IA decision.⁸ Therefore, we proceed to consider the merits of Petitioner's timely allegations against the Union arising on or after January 22, 2023.⁹

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 (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 of [a] disciplinary proceeding, or questioning the strategic or tactical decisions of the Union.” *Nealy*, 8

⁸ To the extent Petitioner avers that her allegations against HHC regarding the Hearing Officer's Step II decision from January 13, 2023, are timely because she did not learn of the decision until it was provided to her by the Union on February 3, 2023, she has nevertheless failed to allege an anti-union motivation for the Hearing Officer's decision. *See Noonan*, 16 OCB2d 3, at 10 (BCB 2023) (explaining that in order to establish a *prima facie* case of retaliation, a petitioner must demonstrate that “the employee's union activity was a motivating factor in the employer's decision”) (citing *City of Salamanca*, 18 PERB ¶ 3012 (1985)); *Walker*, 79 OCB 2, at 17 (BCB 2007) (dismissing the petitioner's retaliation claim where the petitioner presented “no facts to suggest that [the public employer's] refusal to transfer [the] [p]etitioner was motivated by her union activity”). Moreover, to the extent Petitioner believes the Step II decision was otherwise erroneous, the appropriate forum to challenge it is at Step III of the grievance process. Accordingly, we dismiss all claims regarding the Step II decision.

⁹ We note that there is no legal basis for Petitioner's suggestion on appeal that because the Union advised her to be patient with her Step III hearing date, the Board should similarly afford her broad flexibility by tolling the statute of limitations to enable her to proceed with untimely claims against the Union. Indeed, the Board's statute of limitations is prescribed by the NYCCBL, and we find that there is no basis upon which the statute of limitations should be equitably tolled in this instance. *See Phelan*, 12 OCB2d 35, at 7 (explaining that a “pre-requisite for equitabl[e] tolling” is an alleged “act or omission by the [respondent] upon which [the petitioner] relied [that] prevented [the petitioner] from filing sooner”) (internal quotation marks omitted) (quoting *Rondinella*, 5 OCB2d 13, at 15); *Pahlad v. Brustman*, 33 A.D.3d 518, 519 (1st Dept. 2006) (noting that equitable tolling is available where the “defendant's affirmative wrongdoing” produces a delay between “the accrual of the cause of action and the institution of the legal proceeding”) (internal citations omitted).

OCB2d 2, at 16 (internal quotation marks omitted) (quoting *Okorie-Ama*, 79 OCB 5, at 14); *see also Gertsakis*, 77 OCB 11, at 11 (BCB 2005). Further, “to meet this burden, a petitioner must allege more than negligence, mistake or incompetence.” *Bonnen*, 9 OCB2d 7, at 17 (internal quotation marks omitted) (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)). “Even errors in judgment do not rise to the level of a breach of this duty, unless it can be shown that the union’s actions were arbitrary, discriminatory, or in bad faith.” *Feder*, 9 OCB2d 33, at 34 (BCB 2016) (citations omitted). It is well-established that a union “enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty.” *Evans*, 6 OCB2d 37, at 8 (BCB 2013) (citations omitted).

In this case, Petitioner has failed to establish that the Union’s conduct following the Step II decision was arbitrary, discriminatory, or taken in bad faith. Specifically, Petitioner argues that the Union breached its duty of fair representation by failing to provide her with the Step II decision until she requested it on February 3, 2023. However, the Board has consistently held that a union does not breach its duty for the failure to communicate unless that alleged failure “prejudice[d] or injure[d] the petitioner.” *Fash*, 15 OCB2d 15, at 22 (BCB 2022) (internal quotation marks omitted) (quoting *Cook*, 7 OCB2d 24, at 9 (BCB 2014)). Here, the record indicates that the Union was awaiting a Step III hearing date from OLR and Petitioner has not otherwise shown that she was prejudiced or injured by the Union’s alleged failure to forward her the Step II decision prior to February 3.

Further, Petitioner asserts that the Union Director was reluctant to answer her questions, including with respect to the timeframe between Step II and III proceedings, to which she avers that she has not received a “concrete answer.” (Pet. at 14) However, the Union Director’s April 2023 email to Petitioner explained that OLR “has a bit of a backlog and is currently processing [Step III] intakes in the order received. We will notify you once a hearing is scheduled.” (Appeal,

Ex. 1) Although Petitioner may be dissatisfied with the Union Director’s response or pattern of representation more generally, the Board has long held that “dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.” *Ruiz*, 15 OCB2d 41, at 12 (BCB 2022) (quoting *Shymanski*, 5 OCB2d 20, at 11 (BCB 2012)); *see also West*, 14 OCB2d 12, at 16 n.20 (BCB 2021).

Additionally, to the extent Petitioner complains of the Union’s alleged decision to assign the Union Representative, with guidance from the Union Director, to represent her at the ultimate Step III hearing, this too does not breach the duty of fair representation. *See Richards*, 15 OCB2d 14, at 15 (BCB 2022) (“[w]e have consistently held that a union has the discretion to determine whether and how it will address a claim”) (citations omitted); *Walker*, 79 OCB 2, at 14 (“the Board will not substitute its judgment for that of a union or evaluate its strategic determinations”) (citation omitted); *see also Crescente*, 63 OCB 45, at 7 (BCB 1999) (finding that “the [u]nion’s choice of attorneys and representatives” is a “purely internal union matter” over which the Board has no jurisdiction).

Therefore, we find that the Union did not breach its duty of fair representation.¹⁰ Accordingly, we affirm the dismissal of the petition and deny the Appeal.

¹⁰ To the extent Petitioner alleges that the Union’s overall pattern of poor representation regarding her disciplinary charges constitutes retaliation for her prior complaint about the Union in 2020, she has offered no evidence to show that any timely action taken by the Union, or lack thereof, was discriminatory or motivated by bad faith.

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 Executive Secretary’s Determination dismissing the improper practice petition docketed as BCB-4524-23 is affirmed, and the Appeal is denied.

Dated: November 2, 2023
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O’BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER