

Simon, 18 OCB2d 4 (BCB 2025)

(IP) (Docket No. BCB-4571-24)

Summary of Decision: Petitioner, *pro se*, claimed that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by improperly deciding not to advance her disciplinary grievance to arbitration. The Union argued that it did not breach its duty of fair representation because it represented her as it would any bargaining unit member. HHC also argued that the Union did not breach its duty of fair representation. The Board found that the petition did not establish that the Union breached its duty of representation. Accordingly, the petition was dismissed. (***Official decision follows.***)

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

In the Matter of the Improper Practice Proceeding

-between-

NORMA SIMON,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On July 5, 2024, Norma Simon, a self-represented individual (“Petitioner”), filed an improper practice petition against Local 420, District Council 37, AFSCME, AFL-CIO (“Union”) and New York City Health + Hospitals (“HHC”). Petitioner asserts that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective

Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).¹ Petitioner claims the Union improperly decided not to advance her disciplinary grievance to arbitration. Specifically, Petitioner alleges that it conducted an internal merits-based review of her grievance without informing her and without considering evidence that she wished to submit in support of her case. The Union argues that it did not breach its duty of fair representation because it represented her as it would any bargaining unit member. HHC also argues that the Union did not breach its duty of fair representation. The Board finds that the petition does not establish that there has been a breach of the duty of fair representation. Accordingly, the petition is dismissed.

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.

Prior Petition

This is the second petition that Petitioner has filed alleging that the Union violated its duty of fair representation by failing to adequately investigate and represent her in connection with disciplinary charges brought by HHC on August 16, 2022. Petitioner filed a related petition on May 23, 2023, which was dismissed by the Executive Secretary due to untimeliness and

¹ The only statutory provision cited in the petition was NYCCBL § 12-306(c)(1). In this instance, the facts pled do not support a cause of action under that statutory provision. However, we construe Petitioner’s claims against the Union as alleged violations of NYCCBL § 12-306(b)(3) and against HHC as alleged violations of NYCCBL § 12-306(d). *See Phelan*, 12 OCB2d 35, at 5 (BCB 2019) (explaining that we review a self-represented 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)).

insufficiency. Petitioner later appealed the Executive Secretary's Determination. The Board dismissed that appeal and upheld the Executive Secretary's determination. *See Simon*, 16 OCB2d 27 (BCB 2023) ("*Simon I*").²

In *Simon I*, we considered the following factual allegations. On August 16, 2022, HHC brought three disciplinary charges against Petitioner related to 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 through August 16, 2022. HHC charged that Petitioner's actions constituted misconduct in violation of various rules, regulations, policies, and operating procedures and asserted that she was subject to discipline pursuant to Rule 7, § 7.5 of HHC's Personnel Rules and Regulations. Petitioner denied that the incidents and circumstances underlying the charges occurred as HHC represented.

Following a Step 1(a) disciplinary conference on August 29, 2022, HHC's Director of Labor Relations issued a decision terminating her. After the conference, Petitioner elected to appeal her termination through the Agreement's grievance and arbitration procedure. This grievance had been escalated by the Union to Step III at the time she filed her petition in *Simon I*.

Petitioner's claims in *Simon I* concerned the Union's actions in processing her grievance up to Step III including failing to investigate the alleged misconduct, failing to provide or articulate adequate defenses, and failing to introduce exonerating evidence. She also claimed that the City's representative in the grievance process was not objective or transparent, ignored evidence, should have recused, and withheld the Step II determination.

² Facts alleged in *Simon I* are recounted here for background purposes only.

Current Petition

In the petition currently before the Board, Petitioner claims the Union improperly decided not to advance her grievance to arbitration, purposefully failed to disclose to her that it was conducting a merits-based review of her grievance, and withheld pertinent information and documents from the case file submitted to the Union's Legal Department when it reviewed her case. On or about January 13, 2023, Petitioner's Step II determination was issued. Following this, Petitioner periodically contacted the Union to ask when her petition would advance to Step III. The Union submitted documentation that it consistently responded to Petitioner's inquiries by contacting the City to request that Petitioner's grievance be scheduled as soon as possible. (*See* Union Ex. D) After the issuance of the Board's Decision in *Simon I*, Petitioner continued to ask the Union why her case had not advanced to Step III. As of November 21, 2023, the City informed the Union that Petitioner's Step III hearing was still pending review due to a backlog. (*Id.*) It is not in dispute that the City had a large backlog of grievances waiting to be advanced to Step III at all times relevant to Petitioner's grievance.

On April 5, 2024, Petitioner received an email from the Union's Professional & Healthcare Division Director, Marialena Santana ("Union Director"). The email stated that the Union had conducted an internal merit-based review of Petitioner's disciplinary grievance and determined that it would not advance it to arbitration. The Union did not inform Petitioner prior to April 5, 2024, that it had decided to conduct an internal review of her grievance. The memorandum explained its findings concerning the charges that Petitioner had been insubordinate and that she had been AWOL. Concerning the insubordination charges, specifically that she failed to de-escalate with a patient, was argumentative with her supervisor, and berated nursing staff and a supervisor, the Union determined that there was "no evidence in the file" that supported her

defense. (Union Ex. E) Concerning the charges that Petitioner had been AWOL, the memorandum noted that Petitioner had failed to timely submit necessary medical documentation to the EEO in connection with her EEO claim for a reasonable accommodation to help mitigate her absenteeism.³ The Union explained that because of Petitioner's alleged insubordination and unauthorized extended absence from work between May and August 2022, the Union concluded an arbitrator would likely find that her termination was justified. Petitioner was provided with a copy of a memorandum, dated April 5, 2024, detailing the findings and reasoning of the Union's merit-based review. (*Id.*) Petitioner asserts that by notifying her in November 2023 that it was still waiting for HHC to schedule a hearing, rather than disclosing that the Union had already determined to conduct its own internal merits-based review of her case, the Union knowingly misled her.

On April 8, 2024, Petitioner followed up with the Union Director and requested more information. On April 10, 2024, Petitioner met with the Union Director and the Union's Associate General Counsel, Steven Sykes, to discuss her case. During the April 10 meeting, Petitioner asked the Union Director and the Associate General Counsel why they had neglected to include certain documents in her file and why they were not submitted as part of the merit-based review of her case.⁴ According to the Union, during the meeting the Union Director and Associate General Counsel explained to Petitioner why her grievance was unlikely to prevail and that because of this,

³ Petitioner claims that her insurance was prematurely cancelled on May 7, 2022, instead of on her May 18, 2022, termination date, and that this caused her to be unable to submit the medical documentation requested by the EEO. Petitioner further claims that her doctor was unable to provide her with the requested documentation because he was on vacation at the time.

⁴ Petitioner identifies the following documents that allegedly should have been in her case file but were not included in her merits-based review: a proposed work schedule to mitigate future absences which she had prepared and provided to her Union Representative in advance of her Step 1(a) conference; a letter she had sent to her Union Representative concerning the AWOL allegation; written notations from an audio file submitted to the Union; and an insurance certificate that Petitioner had emailed to the Union. Petitioner submitted a communication from her insurance provider stating that her health insurance coverage ended on May 7, 2022. (Pet. Ex. F)

the Union would not bring her disciplinary grievance to arbitration. The Union asserted that the Union Director then answered Petitioner's questions in order to help her understand the Union's reasoning.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that the Union breached its duty of fair representation by failing to notify her that it was conducting a merit-based review of her grievance, and by refusing to consider evidence that she submitted in support of her grievance when it improperly decided not to advance her grievance to arbitration. According to Petitioner, the Union forwarded her case file to its Legal Department for a merit-based review without important documents that she wished to be included in the file and without informing her of its decision to do so. Petitioner maintains that she was unaware that her case had been sent to the Union's Legal Department for review and that the Union only took this action because she had filed a prior improper practice petition with this Board.

Petitioner argues that after escalating her grievance to Step III, the Union consistently failed to provide her with timely updates on the status of her grievance. Petitioner alleges that based on the Union's failure to review the missing documents, certain conclusions in the Memorandum were not accurate. Specifically, she contends that her defenses to the insubordination and AWOL charges were hampered by the omission of a proposed work schedule from February 2022 that would have allowed Petitioner to remain on the tour of her choice, and evidence concerning her issues with insurance. Petitioner further alleges that the Union failed to investigate the alleged premature cancellation of her insurance. Petitioner maintains that due to the Union's failure to consider this documentation, the conclusions of its merit-based review were erroneous. As a result of the Union's failure to submit these documents, it mistakenly determined

that her grievance would likely be denied.

Finally, Petitioner alleges that the Union's failure to pursue her grievance after the Board's dismissal of her appeal in *Simon I*, was retaliatory. Petitioner maintains that the Union was obstructionist during its representation of her and that the extent of the Union's mismanagement of her grievance was concealed from her until the meeting on April 10. Petitioner claims that the Union's lack of transparency in handling her grievance is demonstrative of its breach of its duty of fair representation. Petitioner argues that all facts arising from the Union's failure to represent her during the course of her grievance should be considered timely because the Union intentionally withheld the extent of its improper handling of her grievance until April 5, 2024.

Union's Position

As a preliminary matter, the Union argues that all facts alleged by Petitioner that occurred prior to March 5, 2024, are untimely. The Union avers that the petition fails to state a claim under NYCCBL § 12-306(b)(3) because it does not allege facts to support the conclusion that the Union breached its duty of fair representation. It asserts that it did not act in an arbitrary, discriminatory, or bad faith manner. The Union avers that it adequately represented Petitioner at each step of the disciplinary process, including advancing the grievance to a Step III appeal and requesting status updates of its progress from HHC. The Union maintains that after the issuance of Petitioner's Step II determination, the grievance "languished" for over a year and that, due to the ongoing delay, the Union conducted a merit-based review of Petitioner's disciplinary matter to determine if it should be advanced to arbitration. (Union Ans. at ¶ 5)

The Union argues that it did not breach the duty of fair representation because it evaluated the merits of Petitioner's grievance in good faith and decided not to pursue arbitration because Petitioner's grievance lacked merit. This determination was neither arbitrary nor discriminatory.

The Union did not breach its duty by failing to communicate with Petitioner because it informed her that it would not continue to pursue the grievance on her behalf on April 5, 2024, and provided Petitioner with a memorandum explaining its decision. The Union Director and Associate General Counsel then met with Petitioner on April 10, 2024, to explain the Union's reasoning and answer her questions. The Union maintains that its transparency in handling Petitioner's grievance up to and including the April 10 meeting demonstrates that it did not violate its duty of fair representation to Petitioner. The Union argues that Petitioner's dissatisfaction with the representation provided is insufficient to demonstrate a breach of the duty of fair representation. Since Petitioner has alleged no facts that would establish that the Union's representation of Petitioner was arbitrary, discriminatory, or in bad faith, the Union requests that this petition be dismissed.

HHC's Position

HHC argues that the petition is precluded under the doctrines of *res judicata* and collateral estoppel because it is materially indistinguishable from Petitioner's prior petition stemming from the same set of facts. HHC also claims that because the petition is factually indistinguishable from the prior petition, it is time-barred.

Notwithstanding these defects, HHC maintains that the petition should be dismissed because it fails to present a case that the Union breached its duty of fair representation under NYCCBL § 12-306(b)(3) and that therefore any potential derivative claim against it pursuant to NYCCBL § 12-306(d) must also fail.⁵ Specifically, Petitioner has not alleged any facts that demonstrate that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. Accordingly, HHC argues that the petition must be dismissed in its entirety.

⁵ Under NYCCBL § 12-306(d), "[t]he public employer shall be made a party to any charge filed under [NYCCBL § 12-306(b)]."

DISCUSSION

As a preliminary matter, we do not find that this petition is barred by *res judicata*. See *Buttaro*, 14 OCB2d 14, at 7-8 (BCB 2021). In *Simon I*, Petitioner alleged that the Union failed to represent her properly, refused to advance specific arguments and documents in her defense, and withheld information from her about the status of her grievance. She further alleged in *Simon I* that HHC's Hearing Officers were not impartial and refused to consider relevant evidence. In *Simon I*, the facts underlying Petitioner's allegations occurred between January and May 2023. Here, the claims arise from facts beginning on or around April 5, 2024. While the facts in this petition stem from the processing of the same grievance as alleged in *Simon I*, this petition raises new factual allegations related to the Union's decision not to advance Petitioner's grievance to arbitration. However, we agree that Petitioner cannot relitigate the claims raised in *Simon I* or use the instant petition as a *de facto* appeal of *Simon I*. We therefore consider only these new claims alleged in this petition.

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.” *Johnson*, 17 OCB2d 3, at 6 (BCB 2024) (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 July 5, 2024. Based on this filing date, Petitioner's claims must have arisen on or after March 4, 2024, in order to be timely. Accordingly, all claims arising prior to March 4, 2024, are untimely and we decline to re-consider any claims occurring prior to that date.

We now turn to Petitioner's timely claims. "Recognizing that a [self-represented] Petitioner may not be familiar with legal procedure, the Board takes a liberal view in construing a [self-represented] Petitioner's pleadings." *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (internal quotation and editing marks omitted) (quoting *Rosioreanu*, 1 OCB2d 39, at 2 n.2 (BCB 2008), *affd.*, *Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept. 2010), *lv. denied*, 17 N.Y.3d 702 (2011)). Thus, "as long as the gravamen of the Petitioner's complaint may be ascertained by the Respondent, the pleading will be deemed acceptable." *Sciarillo*, 53 OCB 15, at 7 (BCB 1994) (citations omitted).

Here, Petitioner has alleged that the Union violated its duty of fair representation by not informing her that it had decided to conduct an internal merits-based review, failing to consider certain evidence during that merits-based review, and deciding not to proceed 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 (BCB 2007)). However, "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)

(citations omitted).

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 11-12 (BCB 2006). Further, “to meet this burden, a Petitioner must allege more than negligence, mistake or incompetence.” *Bonnen*, 9 OCB2d 7, at 17 (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)) (internal quotation marks omitted). “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.” *Morales*, 5 OCB2d 28, at 20 (BCB 2012), *affd.*, *Matter of City of New York v. Morales*, Index No. 103612/12 (Sup. Ct. N.Y. Co. Mar. 31, 2016) (Bluth, J.), *see also, 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. 2016), *affd.*, *Matter of United Fedn. of Teachers v. City of New York*, 154 A.D.3d 548 (1st Dept. 2017) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)). Moreover, “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).

Here, Petitioner has failed to establish that the Union’s conduct on or after March 4, 2024, was arbitrary, discriminatory, or taken in bad faith. The facts she alleges demonstrate that after a lengthy delay in the scheduling of a Step III hearing, the Union conducted a review of her claim and determined that it was unlikely to prevail at arbitration and would not proceed further. It advised her of this determination a short time later and met with her to explain the basis for that conclusion. The Board has consistently held that a union does not breach its duty by its 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)).

We do not find that Petitioner was prejudiced or injured by the Union's alleged failure to communicate its decision to conduct a merits-based review of her case while the grievance was pending at Step III, or its determination not to pursue her grievance to arbitration. There was no evidence that the Union's decision to evaluate the grievance prior to a Step III hearing was discriminatory or based on bad faith. Further, the evidence demonstrates that the Union did not delay the disclosure of the outcome of its review. The Union provided Petitioner with the legal memorandum explaining its decision on the same day the memorandum was finalized, April 5, 2024. Moreover, it met with her soon thereafter and explained the decision.

Similarly, we find no violation of the duty of fair representation simply because the Union decided not to pursue Petitioner's grievance to arbitration. Moreover, to the extent Petitioner claims that the Union's decision not to pursue her grievance to arbitration was in retaliation for filing the petition in *Simon I*, we find no evidence to support this conclusion. The Union articulated its reasoning for not pursuing the grievance to arbitration in its Memorandum and there is no evidence that this conclusion was discriminatory or made in bad faith. Finally, we note that Petitioner has failed to establish that any of the allegedly missing documents she produced would have changed the outcome of the Union's internal merit-based review.⁶ The record shows that she advised the Union of these documents at the April 10, 2024 meeting, and Union Counsel was not persuaded to change the Union's conclusion not to further pursue the grievance.

⁶ Even assuming that Petitioner informed the Union of the problems with her health insurance, the record is unclear as to whether Petitioner sought the Union's assistance with that issue.

Although Petitioner may be dissatisfied with the Union Director's responses at the meeting on April 10, or its overall representation during the grievance process, 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).

Accordingly, we find that the Union did not act in an arbitrary, discriminatory, bad faith manner. Inasmuch as we deny the claim against the Union, the claim against HHC pursuant to NYCCBL § 12-306(d) also fails. *See Lacey*, 14 OCB2d 18, at 12 (BCB 2021). We therefore dismiss the improper practice 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-4571-24, filed by Norma Simon against Local 420, District Council 37, AFSCME, AFL-CIO, and New York City Health and Hospitals Commission, is dismissed in its entirety.

Dated: March 6, 2025
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

ALAN M. KLINGER
MEMBER

JEFFREY L. KREISBERG
MEMBER