

Fischer v Melville Fire Dist.

2007 NY Slip Op 32668(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0011039/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3/8/07
ADJ. DATE 3/23/07
Mot. Seq. # 006 - MD

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PAUL FISCHER,	:	MICHAEL L. WEINSTEIN & ASSOCIATES
	:	Attorneys for Plaintiff
	:	445 Broad Hollow Road, Suite 204
Plaintiff,	:	Melville, New York 11747-4787
	:	
- against -	:	BOND, SCHOENECK & KING
	:	Attorneys for Deft. Melville Fire District
	:	1399 Franklin Avenue, Suite 200
MELVILLE FIRE DISTRICT and MELVILLE	:	Garden City, New York 11530
FIRE DISTRICT EMPLOYEES ASSOCIATION,	:	
INTERNATIONAL ASSOCIATION OF	:	COLLERAN, O'HARA & MILLS, LLP
FIREFIGHTERS LOCAL 2843, AFL-CIO,	:	Attorneys for Deft Melville F.D. Employees
	:	Association, Int'l Assoc of Firefighters
	:	1225 Franklin Avenue, Suite 450
Defendants.	:	Garden City, New York 11530
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Upon the following papers numbered 1 to 50 read on these motions by the defendant Melville Fire District Employees Association for summary judgment; Notice of Motion and supporting papers 1 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19 - 48; Replying Affidavits and supporting papers 49 - 50; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Melville Fire District Employees Association, International Association of Firefighters Local 2843, AFL-CIO, for summary judgment dismissing the fifth cause of action of the amended complaint is denied.

This action arises out of the defendants' alleged failure to obtain the disability insurance coverage required by their collective bargaining agreement. The defendant Melville Fire District Employees Association, International Association of Firefighters, Local 2843, AFL-CIO (Union) moves for dismissal of the fifth cause of action of the amended complaint pursuant to CPLR 3212.¹ The plaintiff alleges in the

¹ The Union previously moved for dismissal of fourth, fifth and sixth causes of action of the amended complaint pursuant to CPLR 3211. The remaining causes of action were asserted against the defendant, the Melville Fire District. This Court granted that motion as to fourth and sixth causes of actions and denied it as to the fifth cause of action (SFO, April 4, 2005, Hon. Robert Webster Oliver, J.S.C.)

fifth cause of action for declaratory relief that the Union acted in bad faith and breached its duty of fair representation in failing to represent him with regard to his claim. The plaintiff opposes the motion.

In its previous order of April 4, 2005 this Court stated “The plaintiff alleges in the amended complaint that the Union represented him in negotiating a collective bargaining agreement (CBA) with the District. The CBA covered the period from January 1, 2001 to December 31, 2003. At the time the CBA was executed, the plaintiff was employed by the District as a dispatcher and was a ‘dues paying’ member of the Union (Groarke affirmation, dated September 15, 2004, Exhibit A [Amended Verified Complaint, paragraph 6]). The CBA contained the terms of the plaintiff’s employment by the District. Article XV[A][3] of the CBA stated that District would provide its employees with a Special Disability Plan (SDP) which would cover them if they were unable to work at their current occupation because of a long term illness or injury, other than that covered by the Workmen’s Compensation Law. Under the terms of the SDP, as required by the CBA, a covered employee would receive his or her daily salary for each day absent from work at a rate of 100% for the first 30 days, 80% for the next five months and 60%, starting at the beginning of the seventh month of absence and continuing until the employee was 65. After the CBA was executed, the plaintiff and other members of the Union paid additional dues to help the District defray the cost of the upgraded SDP.

The plaintiff also alleges in the complaint that he was found unable to work as of August 13, 2001. During the next six months he received the 100% and 80% payments provided for under the terms of the SDP. On February 9, 2002 he started receiving monthly long term disability payments of \$2,281 which represented 60% of his salary pursuant to the SDP. Prior to this date, and while still an active member, the plaintiff expressed his concern to the Union that the disability insurance which was actually procured by the District provided benefits for only up to two years of disability unless at the end of that period he could demonstrate his inability to perform “‘Any Occupation’” (Groarke affirmation, dated September 15, 2004, Exhibit A [Amended Verified Complaint, paragraph 12]). This provision was inconsistent with the SDP required by the CBA which would have provided coverage to the plaintiff until the age of 65 if he was unable to perform the duties of a dispatcher. The Union, notwithstanding his communication of these concerns before and after his retirement on August 31, 2002, refused to meet with the him, to analyze the merits of his claim, to represent him and to otherwise assist him with his claim. Although the President of the Union, Anthony Nicholes (Nicholes), informed him that the Union had neither the standing nor obligation to represent him because of his retirement, the real reasons for the Union’s failure to act was attributable to the fact that he was the only member of the Union seeking long term disability benefits under the CBA and to its concern for public scrutiny for its mistake in not confirming that the District had purchased the proper insurance.

The plaintiff further alleges in the complaint that the District was aware that the Union had refused to represent him in this matter. On September 10, 2002, the plaintiff, his attorneys, the District’s attorneys, the District Chairman and Commissioner met, without a Union representative present, to discuss the merits of his claim. The District continued to try to resolve this dispute through subsequent correspondence with his attorneys. This conduct by the District waived any right on its part to insist that the plaintiff adhere to the grievance procedures set forth in the CBA in order to litigate its claim. He continued to receive the

monthly disability payment of \$2,281 for twenty four consecutive months with the last payment being made on February 8, 2004. Finally, the plaintiff avers in the complaint, that these payments stopped although he was still unable to work as a dispatcher because of long term illness” (S.F.O., April 4, 2005, Hon. Robert Webster Oliver, J.S.C.)²

The Union submits in support of its motion to dismiss, *inter alia*, the amended verified complaint and answer, the affidavit and the deposition transcript of Anthony Nicholes (Nicholes), the CBAs for the periods of January 1, 1993 to December 31, 1995 (93-95 CBA), January 1, 1999 to December 31, 2001 (99-01 CBA) and January 1, 2001 to December 31, 2003 (01-03 CBA), Stipulation of Settlement dated January 16, 1996 (Settlement), a group insurance policy issued by the Phoenix American Life Insurance Company (the Phoenix policy), the letters of Ellen Kiely (Kiely) dated June 3 and 7, 2004 and the deposition transcripts of Oscar Pacheco, Paul Fischer and Karen Beth Fischer.

Initially, the Union contends that it is entitled to summary judgment on the grounds that the plaintiff's complaints to the Union did not constitute a grievable dispute, that the plaintiff's purported grievance lacked merit and that, even assuming it was a meritorious grievable dispute, the Union did not owe a duty to the plaintiff because he failed to exhaust his contractual remedies by not filing a grievance and that, alternatively, because the plaintiff had retired the Union had no duty to process the plaintiff's grievance there being no nexus between the purported grievance and the plaintiff's employment. Finally, the Union contends that even if it did have a duty of fair representation to the plaintiff it did not act arbitrarily, in a discriminatory manner or in bad faith.

The Settlement, dated January 16, 1996 indicates that it was executed by the Board and the Union in order to settle an improper practice charge filed with the Public Employment Relations Board (PERB) on behalf of the plaintiff and Laura Bianca. The Settlement provided, in pertinent part, that, effective on the date of its execution, the SDP in the existing CBA would pay to employees disabled with a long term injury or illness 100% of their daily salary from the first day through the thirtieth day of absence. From the 31st day through six months of absence 80% of daily salary would be paid. From the start of the seventh month of absence through the end of a fifth year of absence, 60% of daily salary would be paid. The Phoenix policy provides for disability coverage for up to age 65. Under the terms of this policy coverage did not extend past the Elimination Period and the following 24 months unless the employee “was unable to perform all the material and substantial duties of Any Occupation” (Union's Motion, Exhibit C, page 430). “Any Occupation” is defined under the policy as “Any gainful occupation that you are qualified for or may reasonably become qualified for by education, training or experience” (Ibid. page 425). By letter dated June 3, 2004, Kiely, acting in her capacity as the LTD Consultant for GE Group Life Assurance Co., advised the plaintiff that since he was not totally disabled as this term was defined in the policy, benefits would not be paid past February 8, 2004. This letter was accompanied by a document entitled “Information and Appeals Rights” which set forth information regarding the right to and procedure for the review of the insurer's claim decision. Kiely also advised the District, by letter dated June 7, 2004, that the plaintiff's claim for disability benefits would not continue past February 8, 2004.

The 93-95 CBA provides for insurance coverage including a “Special Disability Plan with an

² In the present motion, the Amended Verified Complaint is in Exhibit H.

additional stipend equal to full pay for the first thirty (30) days of disability with no additional payment thereafter” (Union’s Motion, Exhibit A, page 11). The 99-01 CBA and the 01-03 CBA both contain an SDP. Both of the SDPs provide that an employee disabled with a long-term injury or illness would receive 100% of his or her daily salary from the first day through the thirtieth day of absence. From the 31st day through six months of absence 80% of daily salary would be paid. From the start of the seventh month of absence to age 65, 60% of daily salary would be paid. Both of these SDPs also provide “The incremental premium cost incurred by converting the group Special Disability Plan coverage from the maximum of five years of coverage previously provided to employees to coverage until age 65 will be paid by all bargaining unit employees. The cost will be determined when the policy is due by attaining the premium cost for the five-year policy and the premium for the policy to age 65. The difference in premium cost for the bargaining unit employees will be paid in a lump sum by the Union in January of each year” (Union’s Motion, Exhibits D and E, page 10 [emphasis added]). The 99-01 CBA and the 01-03 CBA also contain a grievance procedure which provides that where a dispute arises relative to the interpretation of the CBA, the Union’s Grievance Committee, upon receiving a written and signed petition, shall determine whether a grievance exists. If no grievance exists, the Committee is not required to take further action.

Nicholes avers in this affidavit that he is the president of the Union which is the collective bargaining representative for employees of the District in certain titles such as dispatcher. His duties include negotiating CBAs and handling problems between the District and the Union. Although the 93-95 CBA provided for an SDP, the specific terms of that coverage were contained in the Guardian disability policy obtained by the District. After the 93-95 CBA was signed the District decided to self-insure the SDP benefits and cancelled the Guardian disability policy. During this period of self-insurance two Union members, the plaintiff and Laura Bianca, suffered short term disabilities. A grievance was filed regarding the payment of their disability payments. The Union hired an attorney to negotiate on its behalf and to file an improper practice charge with PERB. The Union and the District entered into the Settlement, dated January 16, 1996, which resolved the grievance. The Settlement provided that an SDP would be created where, for the first six months, 100% and 80% of daily salary would be paid for disability benefits and from the beginning of the seventh month of disability through the end of the fifth year 60% of daily salary would be paid. The Union became dissatisfied with the District’s self-insurance and both the Union and the District tried to find a five-year disability policy. When it became apparent that a five-year policy could not be obtained the Union and District agreed to the procurement of a two-year policy with the District self-insuring as to the other three years. The new two-year policy, called the Phoenix policy, provided disability coverage for up to two years if the employee was unable to perform his or her current job and then up to age 65 if the employee was totally disabled. The Union and District incorporated this new disability policy into the 99-01 and 01-03 CBAs so that the SDPs of those CBAs provided for payment of disability benefits at 100% daily salary from the first day through the thirtieth day, 80% from the 31st day through six months and 60% from the start of the seventh month up to age 65. Under prior CBAs Union members did not receive disability benefits up to age 65. The Phoenix policy implements and conforms to the terms of the SDPs in these two CBAs. He explained at a Union meeting that the new SDP provided two years of coverage if they were disabled and coverage up to age 65 if the member could not work anymore and was totally disabled. Each Union member was given a copy of the Phoenix policy.

Nicholes further averred that on August 13, 2001 the plaintiff, who was a dispatcher for the District, suffered a heart attack. As a result of this heart attack the plaintiff was unable to return to work. The plaintiff received disability checks from February 2002 to February 2004 at which time the disability carrier

notified him that he was no longer eligible for these benefits since he was not totally disabled. Approximately one or two months after the plaintiff's heart attack he spoke with the plaintiff's wife, Karen Fischer, at the firehouse. In response to her questions about disability coverage, he informed her that an employee would be covered under the SDP up to the age of 65 if totally disabled. Karen Fischer did not express any concern about the disability coverage and did not state that she perceived a conflict between the CBAs and the Phoenix policy.

It was not until January or February of 2004 that he and Karen Fischer discussed whether the plaintiff's disability payments would stop after two years. When she stated that these payments should continue until age 65 and requested assistance from the Union, he responded that he would look into the matter. He investigated this claim by reviewing the CBAs and the Phoenix policy. His research revealed that if the plaintiff was totally disabled he could receive disability benefits until the age of 65. However, since the disability carrier had deemed the plaintiff not to be totally disabled, he was not entitled to receive disability benefits up to the age of 65. Nicholes also decided to discuss this matter with the "International Union" since he was concerned with the Union's role as to an individual who was no longer employed and not in the bargaining unit. He was told by the International Union representative that the Union could not file a grievance because the plaintiff was no longer employed in the bargaining unit. Nicholes concluded that the grievance arbitration provisions of the CBA did not apply to non-bargaining unit members. At no time did the plaintiff file a grievance or request to file a grievance under the CBA with respect to the SDP benefits while he was employed in the bargaining unit. Finally, Nicholes avers that since there was no action that the Union could have taken to assist the plaintiff with regard to the disability carrier's denial of benefits, there was no breach of its duty of fair representation.

Nicholes testified in his deposition that he has been the president of the Union since 1999 and employed by the District as a senior firehouse attendant. Richard Light (Light) is the current Vice President. Prior to 1997 he was the vice president and Oscar Pacheco (Pacheco) was president of the Union. His duties as president involve negotiating CBAs and handling problems between Union members and management. He would try to resolve the problems or use the grievance procedure.³ The Union negotiated the CBAs with the Board of Fire Commissioners (Board), but the state regional organization, the New York State Professional Firefighters Association (PFA), was not involved in CBA negotiations. Between 1997 and 2006 membership meetings of the Union were not recorded and no minutes were taken. The only record books kept consisted of a checkbook. All Union members paid dues, except that the plaintiff stopped

³ Nicholes testified in his deposition that the grievance procedure is initiated when a signed written grievance is submitted by the person filing. The grievance procedure is an informal process and even a letter listing the complaint may suffice. Nicholes stated that he then determines if the grievance constitutes a violation of the CBA. If there is merit to the grievance, the Union president signs it and it then goes to the District Manager. If the District Manager is unable to resolve it, it then is submitted to the Board. If the Board cannot resolve it, it then proceeds to PERB which is similar to arbitration. The services of an attorney are not always necessary for a grievance. If an attorney is not hired than a Union officer would represent the member. He had never seen a Union member pursue a grievance without assistance from the Union and it would be unusual for a Union member who had not filed a grievance to meet with the Board to resolve the dispute alleged under the CBA. A retired member cannot file a grievance because that member no longer pays dues and is no longer a member of the collective bargaining unit. Because a retired Union member is no longer a member of the collective bargaining unit, the Union has no standing to file a grievance on his or her behalf. A Union member who is retired on disability and whose benefits were cut off would not have to follow a grievance procedure.

paying dues when he started to collect disability payments. The Union's dues were used to pay the state and international unions' dues, to pay in 1999 for the rider extending the disability coverage to age 65 and to pay for an attorney in an earlier disability dispute involving the plaintiff and another Union member.

Nicholes, looking at what appeared to be the 93-95 CBA, testified that the disability policy provided by Guardian at that time provided that if a Union member was disabled from his present occupation he or she would receive payments for partial disability for up to five years. He acknowledged that the section of the CBA setting forth the terms of the SDP did not provide this coverage. He did not have a copy of the Guardian policy or any other disability policy. The Union did not keep copies of the disability policies once they were handed out to members since the District maintains them. Sometime after the 93-95 CBA was signed in 1993, the Board cancelled the Guardian policy and became self-insured. He was not clear what the terms of the self-insurance were and the District never provided the "real terms" (Motion, Exhibit K, page 73). The Board was still self-insured in 1996. Since the Union was not aware of what disability coverage existed under self-insurance, it hired an attorney to represent two Union members who had filed a grievance.

Nicholes testified that in 1994 and 1995 the Union had retained the services of an attorney and requested the assistance of the PFA in resolving a dispute between the two Union members, the plaintiff and Laura LaBianca (Laura), and the District. He believed that the plaintiff's name was added to the existing grievance filed by Laura. At the time the plaintiff and Laura filed their grievances the 93-95 CBA was in effect. This dispute involved plaintiff and Laura's failure to receive disability payments for short term disability following their surgeries. This failure prompted Union involvement on behalf of the plaintiff and Laura. In a letter February 17, 1993, relating to the Board's attempt to become self-insured, the PFA stated that a unilateral change in contractual benefits "whether expressly provided or implied and enjoyed over several years, is a violation of contract and may, in fact, be violation of the Taylor Law" (Motion, Exhibit K, page 34). In a letter dated March 30, 1993 by Nicholes and Pacheco with reference to a dispute involving the period of January 1993 to December 31, 1995 and disability coverage under the Board's self-insurance plan, they stated "There seems to be an ongoing problem in clarifying the language and coverage" (Motion, Exhibit K, page 36). Through the negotiations of the Union attorney this dispute was resolved prior to December 31, 1995 in the Settlement in which the District agreed to "reinstate a new disability policy" (Motion, Exhibit K, page 74).

According to the Settlement, if a Union member was, for example, disabled on March 1, 1996 and could not perform the duties of his or her occupation, the disability benefits set forth in the Settlement would govern. Those benefits were the same as existed in the 93-95 CBA which meant that if a Union member was partially disabled as a result of not being able to perform his or her occupation, he or she would receive up to five years of disability payments. However, there was no disability policy in effect providing this coverage since the Board was still under self-insurance. The terms of the Settlement were explained to the Union membership at a meeting. There was no roster for this meeting nor were minutes, notes or recordings taken. The plaintiff was not present at this meeting.

The Phoenix policy was procured by the Board in 1997 and took effect on March 24, 1997 during the negotiations for the 99-01 CBA. In 1997 there was a meeting to discuss this policy and every member was given a copy of the Phoenix policy. Union members were also informed that their partial disability benefits were reduced from five to two years under this policy because a five-year disability policy could

not be obtained. This reduction in partial disability coverage was not negotiated since it was the only policy the Board could buy. Prior to the Phoenix policy the Board had self-insured five-year coverage⁴ which the Union did not like because the Board continued to make determinations as to members' eligibility for disability. The Union wanted independent authority to make those determinations even if it meant less coverage. Although the Phoenix policy had taken effect, the terms of the existing 96-98 CBA were not changed or modified.

Nicholes further testified that in 1999 an additional disability coverage was obtained which provided coverage for up to the age of 65 if the Union member was totally disabled.⁵ Nicholes believed that the 99-01 CBA covering the period January 1, 1999 to December 31, 2001⁶ was better than its predecessor, the CBA covering the period January 1, 1996 to December 31, 1998 (the 96-98 CBA), in that at the end of the seventh month of disability, coverage was extended to age 65 instead of five years provided the Union member was totally disabled, which meant that he or she could not work any more. Under the 96-98 CBA if Union members could not perform the duties of their occupation, but could perform the duties of another occupation, they would receive partial disability benefits for five years, whereas under the 99-01 CBA they would have benefits up to 65 if they were unable to perform the duties of any occupation. However, Nicholes also testified that the 99-01 CBA provided that the member would have up to two years of coverage for partial disability which applied when the member was unable to perform his or her current occupation. This two-year coverage was not set forth in the 99-01 CBA but rather only in the Phoenix disability policy. The Board was unable to procure a disability policy that extended two-year coverage to five years. The new coverage under the 99-01 CBA was explained to Union members in that under the Phoenix policy members would have two years of coverage if disabled and coverage up to age 65 if totally disabled. Although the rider to the Phoenix policy, which extended coverage from two years to age 65, was not distributed to Union members, it was discussed at a meeting held in connection with the negotiations for the 99-01 CBA. He did not know why there was no language in the 99-01 CBA stating that the five-year coverage for partial disability had been reduced to two years. He also admitted that the SDP language of this CBA was incorrect in that the incremental premium cost and additional dues provision improperly referred to five-year coverage, which no longer existed. The Phoenix policy also provided disability coverage under the 01-03 and 04-06 CBAs.

After the plaintiff had a heart attack in August 2001, Nicholes spoke with Karen Fischer, the plaintiff's wife, about her husband's disability insurance.⁷ At this time Karen Fischer was informed that

⁴ However, Nicholes also testified that the change in partial disability benefits from five years to two years occurred for the first time during the 96-98 CBA at the time of the Settlement on January 16, 1996.

⁵ Nicholes believed that total disability meant that the member was permanently disabled and could not perform any occupation.

⁶ There is an overlap between the 99-01 CBA and the 01-03 CBA. It appears from Nicholes' testimony that toward the end of the 99-01 CBA the negotiating parties agreed to extend the terms of the 99-01 CBA for another two years up to December 31, 2003. This latter CBA was nevertheless denoted as the 01-03 CBA.

⁷ Nicholes testified that he was not sure whether Karen Fischer's husband (the plaintiff) was still a dues-paying member at this time since he would have been paying his dues for the first 30 days of disability.

her husband would have disability coverage up to the age of 65 if he was totally disabled. She did not state that there was a conflict between this disability policy obtained by the District and the benefits of the CBA. Karen Fischer was concerned about how the disability insurance “worked.” Once she was informed of the age 65 provision she had no other concerns since her husband was already on disability. When he explained total disability to her he did not discuss what occupations her husband could perform.

He had heard about the meetings which occurred in 2002 among the Fischers, their attorney, two Board members, Mr Koch and Mr. Silvestri, and “Mr. Stolzer” and that these meetings concerned issues that had arisen regarding the length of the plaintiff’s disability policy. He did not believe that these meetings were of interest to the Union since no one complained to the Union about a dispute over the disability policy, although it was unusual for the Board to meet with a Union member without a Union representative present.

The next time he spoke with Karen Fischer was in February of 2004 when she had called him to let him know that her husband’s disability benefits were about to stop although he was supposed to be covered to age 65. She asked for the Union’s help and Nicholes said that he would look into the matter. He then called the PFA and was told that, because the plaintiff was retired and no longer a dues paying member, the Union had no standing to file a grievance. He also reviewed the CBA and the disability policy and determined that coverage extended to age 65 in the case of total disability. He then called Karen Fischer and told her that he had consulted with “the union” and that there was nothing the Union could do. He believed that the Union had no duty to Paul Fischer because he had retired.

Nicholes testified that although the language in the SDP in the 04-06 CBA was different from the SDP language in the prior 01-03 CBA, the disability benefits were the same in both CBAs. The language was different because there was an uncorrected error in the SDP portion of the 04-06 CBA which stated that the disability coverage at 60% started at the seventh month of disability and continued through five years. This coverage was different from the actual coverage in the Phoenix policy which provided that 60% partial disability payments lasted only for two years. Nicholes did not know why the 04-06 CBA was not corrected. The SDP’s provision for disability benefit extending to age 65 was not based on the Phoenix policy coverage but rather on the rider obtained in 1999.

Nicholes further testified that the disability policy acquired would not necessarily match the terms of the SDP in the CBA because acquisition of the policy was based on the benefits which could actually be purchased. However, if questions arise as to what a CBA means they are not resolved by reviewing the disability policy and if there is a conflict between the coverage in the CBA and coverage in an insurance policy, the language in the CBA controls. He explained that “everything” was included in the CBA, but because an insurance “issue” could arise members would receive a copy of the disability policy.

Pacheco testified at his deposition that he was president of the Union until 1996 and Anthony Nicholes was the vice president. As president his main duty was to negotiate contracts. Membership meetings were usually held at “contract time” (Motion, Exhibit L, page 8). Notice of these meetings would be by “mouth to mouth” at the fire district (Ibid.).

The SDP in the 93-95 CBA provided that the disabled employee would receive a certain amount for five years if totally disabled. After that the rate was at full pay and then partial pay until you were 65. The

terms and conditions of the SDP contained in the 93-95 CBA carried over to the SDP in the 96-98 CBA. However, Pacheco also testified that when the 93-95 CBA came up for a vote he did not know the terms of the SDP and no one explained the terms of the SDP. He also testified that he was not aware of the terms and conditions contained in SDP in the 96-98 CBA and they were not explained to the Union membership prior to the vote on the 96-98 CBA. He further testified, upon being shown copies of the Settlement and the 96-98 CBA, that the Settlement was intended to amend the 96-98 CBA since the Settlement contained specific terms of disability coverage and the 96-98 CBA contained only a reference to an SDP.

There was a disability policy in effect during both the 93-95 and 96-98 CBAs, but he did not know who issued the policy because he never received a copy. However, Pacheco also testified that soon after the 93-95 CBA was negotiated the Union was informed that the Board had cancelled the disability policy because it was going to self-insure this coverage. On January 26, 1993 he wrote a letter after he found out that the "insurance" had been cancelled. He believed that the disability coverage after the Board self-insured was that members would receive a certain amount of money for five years. If totally disabled they would get benefits at a reduced rate up to age 65. Members were not told that they had disability coverage up to age 65. Self-insurance was continued into 1996, but on January 16, 1996 a disability policy was obtained. He believed that this policy was issued by Guardian and it was issued during the 96-98 CBA which was the last CBA that he negotiated. Although the Union was not comfortable with self-insurance, it was unable to procure a disability policy for five-year coverage. The policy which was finally obtained provided for partial disability for a period of two years with the District making up the three year difference. There was no agreement made to reduce the benefits in the 96-98 CBA from five years down to two years.

Under the 01-03 CBA if an employee was disabled and could not perform his or her occupation, the employee would receive 100% of his or her salary for the first 30 days; from the 31st day to six months, 80% of his or her salary; from the start of the seventh month to age 65, 60% of salary. He did not know what his disability benefits were under the current CBA and did not know whether partial disability benefits would extend to age 65.

Pacheco testified that a grievance is filed by the Union when an employee feels that something is not right, that some part of the contract was not upheld or that there was some wrongdoing. Although the Union did not supply grievance forms, the grievance must be in writing. Finally Pacheco testified that generally, if an employee was injured he or she would not refer to the CBA but rather would refer to the policy. However, while the District was self-insured, there was nothing in writing to describe the disability insurance coverage because there was no policy to look at.

The plaintiff testified at his deposition that his wife's name is Karen Fischer and that he was employed by the District as a dispatcher. His duties as a dispatcher included washing and waxing trucks, dispatching alarms and cleaning and maintaining the firehouse. In 1994 he was out of work for 30 days because of a shoulder injury. He stopped working on August 13, 2001 because he had a heart attack. Following his heart attack he had surgery, did not return to work and was not allowed to do anything. He did not seek other employment because he was so limited in what he could do. However, no physician told him that he was physically unable to perform a job which did not involve lifting or rotating shifts or physically unable to perform office work from 9AM to 5PM on a five-day-a-week basis. He has not discussed with any of his physicians what other physical work he was capable of doing.

In 2001 his wife requested and he received a copy of the Phoenix policy. His wife requested the policy immediately after his heart attack because an issue arose as to the date of his heart attack. Although he did not talk to anyone in the Union after receiving this policy, his wife raised certain concerns about it with the Union. He did not know if his wife sent a letter in 2001 to the Union expressing these concerns, but she did meet with Nicholes. He never spoke with Nicholes regarding his concerns about the disability policy because he was not allowed to be stressed and he was not present when his wife spoke to Nicholes. From 1996 to the time of the deposition he did not speak with any other union representative regarding the language in the CBA governing the special disability plan. His primary concern was that the Union had failed to obtain the disability coverage called for in the SDP of the CBA. He believed that although the SDP of the 01-03 CBA specifically provided that an employee who was unable to perform his or her job as a result of long term illness would have 60% salary coverage from the start of the seventh month of disability to age 65, the disability policy actually procured provided for only two years of coverage. Although his wife handled the matters concerning the special disability policy at his direction, he did not send a letter to the Union stating that his wife was handling these matters on his behalf. At some point his wife had informed him that there was only a two-year policy. He asked his wife to call Nicholes after they found this out from GE Financial because he was still in rehabilitation.

In June of 2004 he received a letter from the disability carrier that he was no longer eligible for disability payments. There was an attachment to the letter stating that he could appeal that determination. He did not appeal this determination because he believed that, being unable to do his job, he was covered under the CBA up to age 65. For the first six months of disability he received his regular paycheck from the District. In February 2002, after the first six months of disability, his disability payments came from GE Financial. The disability checks stopped in January or February of 2004.

During his employment with the District he was a member of the Union. He did not recall attending a Union meeting in either 2001 or 2002, but he did receive a copy of the 01-03 CBA from the Union while he was employed at the District. He had no conversations with Union officers prior to August 13, 2001 about the terms and conditions of, or the grievance procedures in this CBA. His understanding of the term grievance was that it consisted of a written complaint that something was not done according to the contract. He has never filed a grievance concerning the interpretation of the CBA nor has he ever submitted a written or signed petition to the Union or the Union Grievance Committee regarding a dispute over the interpretation of the 01-03 CBA⁸ or his concerns about the special disability policy. Finally, the plaintiff testified that upon being shown a copy of the 01-03 CBA at the deposition, he acknowledged that it stated that the Union Grievance Committee, upon receiving a written and signed petition, was required to determine if a grievance existed.

Karen Fischer testified at her deposition that in August of 2001 her husband, the plaintiff, had his first heart attack and also had bypass surgery that month. She had provided information to the District from one of her husband's treating physicians which indicated he could no longer work rotating shifts, be outside in extreme weather conditions, shovel snow or lift more than a certain amount of weight. He also could not sit for extended periods or have a lot of stress. Because he was unable to perform any job related to training

⁸ Although reference was made to a CBA from 2000 to 2003, the Court construed this to be a reference to the 01-03 CBA.

as a dispatcher, he did not look for other employment. Although no doctor had told her husband that he could not work at all, his cardiologist said that he could not perform the work of a dispatcher. Starting on September 1, 2001 her husband verbally authorized her to handle all of his affairs with the District.

Karen Fischer also testified that she has not seen any disability insurance policies applicable to this action and was unaware that there was a separate disability policy until around the time of her husband's heart attack. Her husband did not receive any other documents which explained the special age 65 disability language in the 01-03 CBA. In October of 2001 she spoke with Janine Eckstein (Eckstein) who worked for the District as its secretary or in some administrative capacity. Eckstein gave her the telephone number of the insurance carrier in order to clarify the date when the first day of the initial six month period of the SDP began. Upon calling the carrier she ascertained from Ellen Kiely (Kiely) that the disability policy was for only two years and not up to age 65. Kiely also told her that her husband would receive benefits up to age 65 only if he was totally disabled and that totally disabled was defined as being unable to perform any job financially comparable to his previous job. It was Karen Fischer's understanding that these provisions were not stated in the CBA and did not conform to the language in the CBA which required the District to obtain a disability insurance policy which provided for payment of 60% of her husband's salary until the age of 65 if he could not perform the duties of a dispatcher. Following her conversation with Kiely she called Eckstein again and informed her of her concerns about the disability policy. Eckstein told Karen Fischer that she would get back to her and upon calling back she put Mr. Silvestri (Silvestri), a Fire Commissioner, on the phone. Karen Fischer informed Silvestri about what she had learned about the disability policy and he responded that it was not the correct policy and would look into it by contacting the Board. Silvestri also told her that the disability policy was supposed to cover an employee up to age 65 if that employee could not perform his or her duties and that he would take care of everything.

She also learned that Nicholes was president of the Union and she tried to get in touch with him in the Fall of 2001 which was probably mid-October of 2001. Sometime after her conversation with Silvestri and in the Fall of 2001, she had a chance meeting at the firehouse with Nicholes and Light. She told Nicholes that she had unsuccessfully tried to reach him by telephone. She had made two to three calls to Nicholes once she had learned of the discrepancy in the SDP. She requested Nicholes for help, but he appeared to be unaware that there was a problem in that there was only a two-year policy which did not conform to the CBA. Light responded to her by telling her that there was nothing to worry about since her husband would receive money until he was 65 years old. She then told Light that the policy was not what they thought it was because it was only a two-year policy for partial disability and that she was concerned that her husband would not receive his proper disability payments. Light responded that she was wrong because he knew that it went up to age 65. Light also indicated that the Union helped pay for the policy, that he drafted the Union checks which paid for the additional coverage extending the disability policy from five years to age 65 and that the checks would then be delivered to Eckstein. Nicholes responded that she knew more than he did and would not know what to do or where to start. Although she reiterated her concern about the policy, Light again informed her that she had nothing to worry about. She did not ask Nicholes to contact the District on behalf of her husband.

Karen Fischer further testified that within a few weeks she again spoke with Silvestri who had found out that she was correct. Silvestri had determined that the provision in the previous CBAs, which provided that partial disability coverage extended to five years, was now reduced to two years under the policy and not up to age 65 which it was supposed to be. He obtained this information by calling the insurance

company. Karen Fischer again spoke with Eckstein who confirmed that the additional dues were used to pay for extended disability coverage. She was not aware if her husband had received something in writing from the Union stating that there would be an additional deduction from his paycheck to pay for the disability policy. As of January 2002 her husband was still paying his dues to the Union.

After her first chance meeting with Nicholes and Light at the firehouse, she again happened to meet Nicholes at the firehouse in January or February of 2002. She again asked for his assistance because of her concern that the special disability policy was different from the special disability coverage in the CBA. Nicholes responded that she knew more about this issue than he did and that he did not know what she wanted him to do. She had at least two more chance meetings and discussions with Nicholes and one of the meetings involved her husband's retirement. At one of these meetings she informed Nicholes of her husband's condition. Nicholes had not returned her telephone calls and she believed that he did not know what was going on because he had not done any research. She met Nicholes again by chance in June of 2002. She asked him about retirement for her husband. Nicholes responded that he had never "retired" anyone before. At the time of this meeting her husband had not retired and was still a member of the Union. After this meeting she did not speak with Nicholes again about the disability coverage.

Her husband became concerned about the disability insurance coverage after she let him know what she had found out. Starting in the middle of January 2002, after she let her husband know of her concerns over the SDP, she began to handle everything for him and in effect became his "mouthpiece." She did not completely inform her husband about what Light and Nicholes had said until the end of January or beginning of February since Silvestri had assured her that the problem would be taken care of. At no time did her husband seek assistance from the Union concerning the dispute over the special disability policy.

On February 11, 2002 her husband's attorney sent a letter to Silvestri concerning the SDP. Her husband's attorney also sent copies of the Silvestri letter together with a copy of the CBA to Nicholes. She did not know if her husband's attorney also sent a letter specifically addressed to the Union on February 11, 2002 seeking the Union's assistance with the issues arising out of the SDP.⁹ In the Spring of 2002 she met with Dave Hobart of the District and Nicholes at which time she was told that her husband had to retire. Her husband was subsequently granted his disability retirement in August of 2002. In mid-February of 2004 her husband received his last disability check.

She also testified that under the 01-03 CBA, while the Union played no role in determining who was eligible for disability, it was the role of the Union to implement the SDP in the negotiated CBA extending the five years of partial disability coverage to age 65 with the additional cost to be paid by Union members. She was not aware of how to file a dispute concerning the interpretation of the CBA nor did she ever discuss doing so with her husband. She was not aware that a grievance could be filed because she assumed that the necessary assistance could be obtained by asking for help from the Union representative. Since she did not know how to request a grievance, she neither filed a grievance with the Union concerning the SDP nor asked

⁹ This Court in its previous decision of April 4, 2005 noted "It is further corroborated by the letter of plaintiff's attorney, Douglas S. Thaler, dated February 11, 2002, a copy of which was sent to Nicholes. Thaler states in this letter "The Union contract which is the result of arms's length collective bargaining between the Union and the District is at variance with the Phoenix policy through which the District apparently sought to insure a part of its liability" (Affidavit in Opposition, Exhibit A, page 1).

the Union to file one on her behalf. She was not aware of any grievance filed by her husband or his attorney. Finally, Karen Fischer testified that while the Union had no role in her husband's being denied eligibility for further benefits, it did not help when she asked for assistance.

As this Court stated in its previous short form order “‘The duty of fair representation had its genesis under Federal law in the Supreme Court's opinions in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 and *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187. In those cases, the court held that a union is obligated to act ‘fairly’ toward all employees it represents stemming from its statutory authority and responsibility as their exclusive bargaining representative. In *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, the court established the standard for determining when the duty of fair representation is violated. According to the court, such a breach ‘occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith’ (citations omitted). Although the State and its political subdivisions are excluded from the definition of ‘employer’ contained in subdivision (2) of section 2 of the National Labor Relations Act (29 U.S.C. § 152[2]), the courts in New York have recognized a similar duty of fair representation on the part of public sector unions predicated on their role as exclusive bargaining representatives (citations omitted)’ (*Civil Service Bar Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York*, 64 N.Y.2d 188, 195, 485 N.Y.S.2d 227, 230 - 231 [1984]). Generally, the *ad hoc* determination of whether this duty has been breached is a factual one (*Civil Service Bar Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York, supra*) and the union's conduct will not be considered arbitrary unless ‘in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a “wide range of reasonableness,” *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953), as to be irrational’ (*Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 67, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 [1991]).

In this context, a union has broad discretion as to whether and the manner in which it will pursue a grievance against an employer (*Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 US 558, 110 S. Ct. 1339, 108 L. Ed.2d 519 [1990]). Mere negligent conduct by the Union does not constitute a breach of the duty of fair representation (*Smith v Sipe*, 67 NY2d 928, 502 NYS2d 134 [1986]). However, ‘a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion....’ (*Vaca v Sipes*, 386 US 171, 191, 87 S.Ct. 903, 917, 17 L Ed.2d 842 [1967])” (SFO, April 4, 2005, Hon. Robert Webster Oliver, J.S.C.).

The Union contends that the plaintiff's complaints to it did not constitute a grievable dispute. Specifically, the Union contends that the grievance procedures under the applicable CBA relate only to disputes which arise regarding the interpretation of the CBA. It further argues that the issues raised by the plaintiff relate merely to her misinterpretation of the disability insurance policy in the context of the language of the CBA.

Both the 99-01 and the 01-03 CBA limit the applicability of the grievance procedure to those disputes involving interpretation of the CBA. Pacheco, a former president of the Union testified at his deposition that, generally, if an employee was injured he or she would not refer to the language of the CBA, but rather would refer to the disability policy. However, Pacheco and Nicholes also testified that during the period when the District was self-insured there was no disability policy which could be reviewed. Nicholes testified at his deposition that the terms of the disability policy would not always match the terms in the SDP

of the CBA and that if there was a conflict between the coverage provided in the CBA and the coverage in the disability policy, then the language of the CBA controlled. Nicholes added that “everything” was included in the CBA. Nicholes testified about a letter dated March 30, 1993 sent by him and Pacheco during the period of the District’s self-insurance plan in which they noted ongoing problems of clarifying language and coverage. Nicholes also testified about the existence of errors in the language of SDPs regarding coverage in the both the 99-01 and 04-06 CBAs. This evidence adduced by the Union raises triable issues of fact with respect to whether the plaintiff’s claim involved an interpretation of the CBA.

The Union also contends that even if it is assumed, *ad arguendo*, that the plaintiff’s claim presents a grievable dispute, the plaintiff’s purported grievance lacks merit. The Union specifically contends that since the plaintiff’s grievance lacks merit, the plaintiff cannot sustain his cause of action for breach of the duty of fair representation. The Union further asserts that the plaintiff’s purported grievance lacks merit because the evidence demonstrates as a matter of law that the disability policy procured complied with the terms of the SDP required by the existing CBA.

It is axiomatic that, “in order to recover damages from a union pursuant to a cause of action alleging a breach of the duty of fair representation, the employee must prove the merits of the underlying grievance against the employer, the proper prosecution of which the union is alleged, by its misconduct, to have foreclosed. (*Sinicropi v New York State Public Employment Relations Bd.*, 125 AD2d 386, 388-389, 509 NYS2d 357, 360 [1986], *app dis* 69 NY2d 822, 513 NYS2d 1027, *app den* 70 NY2d 606, 519 NYS2d 1029).

Nicholes avers that Phoenix disability insurance policy procured by the District conformed to the requirements of the SDPs in the 99-01 and 01-03 CBAs and that, in any event, any conflict regarding the extent of the disability coverage was not brought to his attention until January or February of 2004, after the plaintiff’s retirement. However, the evidence adduced by the Union raises triable issues of fact as to whether such conformance exists and as to whether Nicholes or other Union officials became aware of this potential problem while the plaintiff was still an active member of the Union.

The 99-01 and the 01-03 CBAs contain SDPs which provide that an employee who is disabled by a long term injury or illness will receive 60% of his or her daily salary from the seventh month of absence to the age of 65. The CBAs do not expressly limit this provision to Union members who are totally disabled. Although Nicholes testified they are erroneous, both SDPs contain statements that the incremental premium costs paid by members was to convert SDP coverage from the maximum of five years to coverage until age 65. Nicholes had also testified with regard to the 93-95 and 96-98 CBAs that this previous five-year coverage referred to partial-not total-disability coverage. Conversely, Nicholes testified that the Phoenix policy was limited to two years for partial disability. He also testified that the two-year coverage for partial disability was not set forth in the 99-01 CBA but rather only in the Phoenix disability policy, that he was not aware why there was no language in the 99-01 CBA stating that the five-year coverage for partial disability had been reduced to two years and that the disability policy acquired would not necessarily match the terms of the SDP in the CBA. Pacheco testified that under the 01-03 CBA a member who was partially disabled would receive 60% of his or her salary from the start of the seventh month of absence to age 65.

Moreover, the convoluted history of prior contract negotiations demonstrates a pattern of significant variances between the terms of the CBAs and the disability policies procured. Pacheco testified and

Nicholes averred that even when the two-year policy was obtained in 1996, it was the intent that the District would supplement the two years of partial disability coverage with an additional three years of coverage. However, Nicholes testified that the Union was willing to accept less coverage in exchange for more authority to make eligibility determinations. Karen Fischer testified that in the latter part of 2001 she spoke with Silvestri, who recognized the disparity in disability coverage. Nicholes testified that, although the SDP in the 04-06 CBA provided for partial disability coverage for up to five years, the Phoenix policy provided for only two years of coverage. This two-year partial disability coverage also appears to conflict with the Settlement. The Settlement, which was intended to be incorporated into the existing 96-98 CBA, indicated that 60% of daily salary would be paid from the seventh month of absence to the end of the fifth year. This provision for payments up to five years raises an inference that this benefit applied to members who were partially disabled.

With regard to the issue of the Union's awareness, Nicholes testified that he met with Karen Fischer, the plaintiff's wife, sometime after the plaintiff had his heart attack in August 2001 and then again in February of 2004. Nicholes further testified that when he met Karen Fischer in 2001, she expressed concern how the disability insurance "worked" and that she appeared to be satisfied with his explanation that the plaintiff would have disability coverage up to the age of 65 if he was totally disabled.

However, Karen Fischer testified that she met Nicholes at least three times by chance at the firehouse between mid-October 2001 and June of 2002. When she met Nicholes in mid-October 2001, he was accompanied by Light. She informed them that there was only a two-year policy which did not conform to the CBA. Light responded by indicating there was no problem and Nicholes responded by indicating his unfamiliarity with the issue. She again met Nicholes in February of 2002. At this meeting she again asked for his assistance with regard to her concern that the special disability policy was different from the disability coverage in the CBA. Nicholes again indicated his unfamiliarity with the issue and stated that he did not know what action to take. She met Nicholes again in June of 2002, and they discussed the plaintiff's retirement. Karen Fischer further testified that at this time her husband had not retired and was still a member of the Union.

The Union also contends that since the plaintiff did not file a grievance with the Union in accordance with the provisions of the CBA, he failed to exhaust his contractual remedies. Specifically, the Union contends that since the plaintiff failed to exhaust his contractual remedies he cannot sustain a claim that the Union breached its duty of fair representation.

The failure to exhaust contractual grievance remedies is not, ipso facto, fatal to the member's assertion of a claim that the union breached its duty of fair representation (*Baker v Board of Educ. of West Irondequoit Cent. School Dist.*, 70 NY2d 314, 520 NYS2d 538 [1987]). Nevertheless, in the case at bar, the Union's submissions raise a triable issue of fact as to whether a grievance was filed by the plaintiff. While both the plaintiff and his wife testified that they did not file a grievance, Nicholes testified that the grievance process was informal and that even a letter listing the complaint would suffice. Pacheco testified that the Union did not have grievance forms. Nicholes also testified that on a previous occasion involving the failure of the District to pay short-term disability payments to the plaintiff and another union member, the plaintiff's name was merely added to an existing grievance. Contrary to Nicholes' averments in his affidavit and deposition, Karen Fischer testified that on at least three occasions before her husband retired she spoke with Nicholes and informed him of her concerns that the existing disability insurance policy did

not conform to the SDP. She further testified that prior to her husband's retirement his attorney had sent a letter to Silvestri outlining the concerns over the coverage in the SDP and that his attorney sent Nicholes a copy of this letter together with a copy of the CBA. The plaintiff's attorney also sent a letter to Nicholes stating his concern that the CBA was at variance with the Phoenix policy.

The Union also contends that it did not breach its duty of fair representation because there was no nexus between the plaintiff's purported grievance and his previous employment. Specifically, the Union contends, alternatively, that the Union does not owe a statutory duty to an employee who was retired at the time he brought the grievance. The Union maintains that a nexus can exist "between the former employees grievance and his employment relationship when the employee was constructively discharged, wrongfully terminated, *when the employee files the grievance prior to his retirement*, or when the Union is currently negotiating a contract to cover the time period during which the retired member was employed (citation omitted)" (Union's MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, page 20 [emphasis added]).

In response to the same contention raised by the Union in a prior motion, this Court held "The Union's further contention that it had no duty to represent the plaintiff once he was retired is also without merit since there remained a sufficient nexus to a claim which arose while he was still an active member (*Baker v Board of Education of the West Irondequoit Central School District*, 70 NY2d 314, 520 NYS2d 538 [1987]; *Baker v Board of Education, Hoosik Falls Central School District*, *supra*¹⁰; see, *Anderson v AMBAC Industries, Inc.*, 40 NY2d 865, 387 NYS2d 1006 [1976]). The 'PERB' cases cited by the Union do not require a different result. In those cases, while it was acknowledged that the general rule was that a union's duty to a member employee ends when the employment terminates, it was also observed that the rule does not apply in 'circumstances in which the severance from employment is being contested or *there is some other basis upon which to conclude that there is a continuing nexus to employment notwithstanding the individual's relinquishment or loss of employment*' (31 PERB 1998, paragraph 31-3068, *Heady v County of Dutchess*, citing 30 PERB, paragraph 3075 [italics added])" (SFO, April 4, 2005, Hon. Robert Webster Oliver, J.S.C.). In any event, this Court has already determined herein that there is a triable issue of fact as to whether the plaintiff filed a grievance prior to his retirement.

Finally, the Union contends that even if it did owe a duty of fair representation to the plaintiff, it did not breach that duty. It asserts that a union breaches its duty of fair representation only when its conduct toward a member is arbitrary, discriminatory or in bad faith. Generally, the Union contends that its conduct was not arbitrary, discriminatory or taken in bad faith. Specifically, it asserts that its conduct toward the plaintiff and his wife was neither arbitrary nor irrational.

This Court in its previous decision determined that the complaint did state a cause of action against the Union for breach of its duty of fair representation (S.F.O., April 4, 2005, Hon. Robert Webster Oliver, J.S.C.). The gravamen of that cause of action is that the Union did not address or assist the plaintiff with his claim that the proper disability insurance policy was not obtained which inaction resulted in the ultimate denial of disability benefits in 2004 following the plaintiff's retirement.

¹⁰ The citation for this case is 3 AD3d 678, 770 NYS2d 782 [2004]

As this Court has already noted herein, a union's conduct may be considered arbitrary if it fails to address or investigate the merits of its member's claim or addresses the claim in a perfunctory manner (*Vaca v Sipes*, *supra*; *Jackson v Regional Transit Service*, 54 AD2d 305, 388 NYS2d 441 [1976]; *DiMola v Local Union 808, Intern. Broth. of Teamsters, Chauffeurs and Warehousemen of America*, 95 Misc2d 910, 408 NYS2d 731 [1978]; *see, Wingenbach v Mushroom Transportation Co., Inc.*, 51 AD2d 855, 379 NYS2d 567 [1976]). "Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of...inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation" (*Griffin v International Union, UAAAIWA/WA*, 469 F2d 181, 183 [1972]).

Nicholes averred that although the Settlement had provided for five years of partial disability coverage, the Union was unable to obtain partial disability coverage for more than two years. The Phoenix policy provided for partial disability coverage for two years and also provided for coverage up to age 65 if the member was totally disabled. He explained at a Union meeting that the new SDP provided for this coverage, and he distributed a copy of the Phoenix policy to the members. He believed that the terms of the Phoenix policy conformed to the terms of the SDPs in the 99-01 and 01-03 CBAs. One to two months after the plaintiff had his heart attack, he explained this coverage to the plaintiff's wife, who seemed satisfied with the explanation. It was not until January or February of 2004 that Karen Fischer requested his assistance because she was concerned that the plaintiff's disability payments would cease at the end of two years. He investigated her claim by reviewing the CBAs and the Phoenix policy. However, since the disability carrier had already deemed the plaintiff not to be totally disabled, he determined that the plaintiff was not entitled to disability benefits up to the age of 65. He also received advice from his International Union that since the plaintiff was no longer part of the bargaining unit, he could not file a grievance. Nicholes further averred that the plaintiff did not file a grievance while he was employed in the bargaining unit.

Nicholes testified that between 1997 and 2006 membership meetings were not recorded and no minutes were taken. The Settlement conformed to the 93-95 CBA in that they both provided for five years of coverage for partial disability. The terms of the Settlement were explained at a Union membership meeting, but the plaintiff was not present. The Phoenix policy was procured in 1997 and went into effect on March 24, 1997 during the 99-01 negotiations. At a Union meeting held to discuss this policy, copies of the policy were distributed to the members and they were informed that the partial disability coverage was being reduced from five years to two years. This policy was obtained, even if it meant less insurance, because the Union did not want the Board to continue self-insurance. Neither the Board nor the Union were able to purchase a five-year policy for partial disability. Although the Phoenix policy had taken effect, the terms of the 96-98 CBA were not changed. In 1999 the Union obtained a rider for the Phoenix policy which provided for disability coverage up to age 65 if the member was totally disabled. This rider was not distributed to Union members, but was discussed at a meeting regarding the negotiations for the 99-01 CBA. The 99-01 CBA did not contain an explanation that the partial disability coverage was being reduced from five years to two years under the Phoenix policy. The Phoenix policy also provided the disability coverage for the 01-03 CBA.

Nicholes further testified that, after the plaintiff had his heart attack in August of 2001, he spoke with Karen Fischer about her husband's disability insurance. Since she was concerned how the disability insurance "worked," he told her that her husband would have disability coverage up to the age of 65 if he

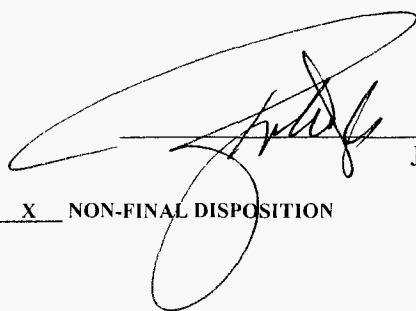
was totally disabled. Once she was informed of this, she expressed no further concerns. During this discussion Karen Fischer did not inform him that she perceived a conflict between the disability policy and the CBA. The next time he spoke with Karen Fischer was in February of 2004, when she called him to express her concern that her husband's disability benefits were about to terminate notwithstanding that he was supposed to be covered up to age 65. He investigated the matter by reviewing the CBA and the disability policy¹¹ and contacting the PFA. He verified that the disability coverage extended to age 65 only in the case of total disability and informed Karen Fischer that the Union had no duty to the plaintiff because he had retired.

Karen Fischer testified at her deposition that after she had procured a copy of the disability policy and determined that its coverage varied from what she understood to be the coverage in the CBA, she called Nicholes in the Fall of 2001. He did not return her telephone calls, but on at least two of the three or four occasions when she subsequently met him by chance at the firehouse, she expressed her concern that about the variation in coverage between the disability insurance policy and the CBA. At the first of these chance meetings Nicholes was accompanied by Light who informed the plaintiff that she was wrong and that she had nothing to worry about. On both of these occasions Nicholes indicated to her that he was not sure what action to take on her complaint. She also testified that her husband had not received any documents which explained the special age 65 disability language in the 01-03 CBA. In sum, the Union was of no assistance to her in this matter. Karen Fischer further testified that while she was not aware of any grievance filed by her or her husband's attorney, she knew that her husband's attorney had sent Nicholes a copy of the Silvestri letter relative to concerns over the terms of the SDP and a copy of the CBA.

As this Court as already noted, the Union's submissions have raised triable issues of fact as to whether a grievance regarding this issue was filed by the plaintiff in 2001 and whether that grievance was meritorious. Assuming, ad arguendo, that the plaintiff had filed a meritorious grievance, the Union's submissions also raise a triable issue of fact as to whether Union officials, knowing or having reason to know that the terms of the Phoenix policy did not conform to the terms of the SDP, neglected or refused to investigate the merits of the plaintiff's grievance. This purported failure raises a triable issue of fact as to whether the Union breached its duty of fair representation (*Smith v Hussman Refrig. Co.*, 619 F2d 1229, 1243 [1980], *cert den* 449 US 839, 101 S.Ct. 116, 66 L.Ed.2d 46).

Since the Union's submission have raised triable issues of fact with respect to all of its contentions, the Court does not have to consider the plaintiff's opposition papers. Accordingly, the Union's motion for summary judgment dismissing the fifth cause of action of the amended complaint is denied.

Dated: AUG 23 2007



 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION

¹¹ Nicholes also testified that the Union did not keep copies of the disability insurance policies.