

Babayeva, 1 OCB2d 15 (BCB 2008)

(IP) (Docket No. BCB-2676-07).

Summary of Decision: Petitioner appealed from a deficiency letter, sent by the Executive Secretary of the Board of Collective Bargaining, which determined that her improper practice petition did not meet minimum pleading requirements under the OCB Rules. Petitioner claimed that she was discriminated against based upon her sex, religion, national origin, and gender, in violation of NYCCBL § 12-306(a)(1) and (3), and claimed a breach of the duty of fair representation in violation of § 12-306(b)(3). The Board found that the Executive Secretary properly deemed the charges in the petition deficient, denied the appeal, and dismissed the petition. ***(Official decision follows.)***

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

In the Matter of the Improper Practice Proceeding

-between-

MARINA BABAYEVA,

Petitioner,

-and-

**LOCAL 1549, DISTRICT COUNCIL 37 and
EDDIE DEMMINGS; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION
OFFICE OF LABOR RELATIONS
and ANN ROZAKIS,**

Respondents.

DECISION AND ORDER

On December 7, 2007, Marina Babayeva filed a verified improper practice petition against Local 1549, District Council 37 (“DC 37” or “Union”), Eddie Demmings, as General Counsel of DC 37, the New York City Health and Hospitals Corporation (“HHC”) Office of Labor Relations, and Ann Rozakis, as Assistant Vice President of HHC (collectively “Respondents”). Petitioner claimed

that she was discriminated against based upon her sex, religion, national origin, and gender, in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). She also claimed a breach of the duty of fair representation, in violation of § 12-306(b)(3). Pursuant to § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”), on December 31, 2007, the Executive Secretary for the Board of Collective Bargaining (“Executive Secretary”) sent a letter to Petitioner that stated that her petition had been reviewed, but that it did not meet the minimum pleading requirements set forth in the OCB Rules. Petitioner’s attorney filed an appeal of the deficiency letter on January 25, 2008. The Board finds that the Executive Secretary properly deemed the charges in the petition deficient, denies the appeal, and dismisses the petition.

BACKGROUND

The Petition

All of the allegations that follow are as recited by the petitioner in her verified improper practice petition. Petitioner worked for several years as a part-time Clerical Associate at Queens Hospital Center.¹ On February 18, 2003, Petitioner became a full-time Clerical Associate Level III in the Maintenance Department at the Queens Hospital Center Facility. Before she was placed into this position, Petitioner claims that she was repeatedly told by her future supervisor that she would be re-evaluated in six months and given a promotion. She maintains that the evaluation was never

¹ Petitioner mentions that, when she was a part-time employee in 2001, she went to the Union to seek assistance because, although she had been given good performance evaluations and performed her tasks well, she was not able to secure a full-time job. She contends that on July 6, 2001, she met with a Union representative and completed a grievance form, but she never submitted it because she feared that her supervisors would harass her.

performed and that the supervisor forgot all of the promises of a raise and a promotion.

Petitioner asserts that, after she became pregnant in April 2004, she was transferred to the Patient Relations Department and given only two-weeks notice of that transfer. Her old position was filled by two employees even though the supervisor who transferred her told her that she was being transferred because the department was overstaffed and someone needed to be moved. Following her transfer, her former supervisor gave her former co-workers a raise even though, in the past, she had been told that there was a budget freeze. At one point, she complained to Human Resources and asked for an investigation, but they told her that they could not assist her.

At an unspecified time while she was at the Patient Relations Department, Petitioner met with the Director of the Patient Relations Department, who told Petitioner that she was merely filling in for an employee who was on sick leave and that her employment would eventually be terminated. She was also told that she would have to buy a uniform at her own expense. Petitioner contends that she was subjected to “cold treatment” and isolated and that she was denied training when she requested it. Shortly after the transfer, she had a miscarriage, which she claims was a result of the unjustified and unfair treatment.

While on sick leave, she received a letter stating that she was reassigned to the Admitting Department and that she had to report to the new position the following Monday. According to Petitioner, she was moved to the Admitting Department so that the son of the Executive Director of Budget could take her Patient Relations position. Petitioner asserts that he was unqualified for the position and that this action constituted nepotism and violated HHC’s Code of Ethics.

Petitioner’s supervisor in the Admitting Department again refused to train her for her new duties and subjected her to disturbing comments when she asked for training. She was forced to

work without time for lunch or breaks, and her schedule was changed. She also asserts that her new duties were well below her capabilities.

In October 2004, she contacted HHC's Human Resources Department to express her concern about the manner in which she was being treated and to inquire about why she was assigned to menial tasks, but she was told that she had poor communication skills and was considered an English-language deficient employee. She asserts that she was shocked to hear that statement because she had worked at the hospital for many years, is well educated, and speaks English fluently even though she is a native Russian speaker. The unnamed Human Resources employee allegedly promised her that she would do her best to find a more suitable position, in which Petitioner could better utilize her skills and knowledge. Petitioner claims that, thereafter, the Human Resources employee never contacted her.

On April 23, 2006, Petitioner took medical leave that was granted in accordance with the Family Medical Leave Act ("FMLA"). She asserts that she took the leave because of the emotional and psychological pressure to which she was subjected at the hospital. Petitioner concluded by writing in the petition that "I believe that I was and continue to be discriminated against by the Hospital Administration on the basis of my sex, religion, national origin and gender."

Executive Secretary's Deficiency Letter

On December 31, 2007, the Executive Secretary sent Petitioner a letter that stated that the charges in her improper practice petition were deficient because they did not meet the minimum pleading requirements set forth in § 1-07(c)(1)(i)(D) of the OCB Rules.² The Executive Secretary

² Section 1-07(c)(i)(D) of the OCB Rules, titled "Petition – contents; service and filing" states that a petition shall contain:

wrote that Petitioner had not pleaded any act alleged to be discriminatory or retaliatory based upon union membership or activity and had not provided any allegations specifying the manner in which the acts violated the NYCCBL. He added that “[a]llegations of discrimination based on race, gender, or national origin, without more, do not constitute violations of the NYCCBL.”

Further, the Executive Secretary stated that since Petitioner named the Union as one of the Respondents, it appeared that she sought to bring a claim of the breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3), but she did not allege any act or omission on the part of the Union that was arbitrary, discriminatory, or in bad faith. Finally, the Executive Secretary wrote that Petitioner did not plead any act alleged to be in violation of the NYCCBL that took place within the four month statute of limitations provided by NYCCBL § 12-306(e) and that OCB Rules § 1-07(c)(1)(i)(D) expressly require that the statement of facts include the date, time, and place of each particular act alleged. The Executive Secretary’s letter had instructions attached that indicated that she could resubmit an amended petition curing the deficiencies.

The Appeal

On January 28, 2008, Petitioner’s attorney submitted an affidavit from Petitioner in

A clear and concise statement, in numbered paragraphs, of the facts constituting the claim under § 1-07(b) of these rules. The statement shall include the nature of the controversy and specify any provisions of the contract, executive order, or collective bargaining agreement involved; a copy of such provisions should be provided. If the controversy involves an alleged improper practice, the statement shall include but not be limited to the names of the individuals involved in the particular act specifically alleged and the date, time, and place of occurrence of each particular act alleged. Such statement may be supported by affidavits, documents, and other evidence that may be relevant and material but may not consist solely of such attachments, and any attachments or exhibits shall be specifically identified and referred to in the petition . . .

opposition to the notice of deficiency. In the affidavit, Petitioner claimed that her petition was not deficient and should be processed in accordance with OCB Rules. Regarding her claims under NYCCBL § 12-306(a)(1) and (3), Petitioner states that she filed a charge alleging that employees at the Queens Hospital Center had discriminated against her with the New York City Human Rights Commission in Manhattan on May 31, 2005. Three days after she took her approved FMLA Leave in April 2006, she filed another charge, in which she alleged further discriminatory action, with the Human Rights Commission in Queens. When she returned to work in October 2006, her shift had been changed. On November 17, 2006, her employment was terminated “solely in retaliation for the EEOC complaints lodged with the Division of Human Rights and for taking extensive medical leaves of absence.”

Petitioner asserted that the reasons for her termination—her failure to cooperate with her employer’s requests for information and her continuing absences—were merely subterfuge designed to mask the sole reason for their decision to terminate her. She claims that the actual reason for her termination was for her whistleblower activities, as defined in § 75-b of the New York State Civil Service Law, and for taking a medical leave of absence.

Regarding the breach of the duty of fair representation claim, she asserts that she appealed the decision to terminate her employment to the Personnel Review Board for HHC. On August 23, 2007, the Personnel Review Board denied her request for reinstatement. She claims that, without holding a hearing, the Personnel Review Board made the determination that, as a provisional employee, she was not entitled to additional medical leave and, thus, not entitled to reinstatement. The Personnel Review Board did not make any finding or determination with respect to the retaliatory motives or discriminatory intent of her former employer. Petitioner argues that because

she received this determination on August 23, 2007, and filed her improper practice petition on December 7, 2007, her breach of the duty of fair representation claim pursuant to NYCCBL § 12-306(b)(3) was brought within the applicable four-month statute of limitations.³

DISCUSSION

We find that the Executive Secretary properly deemed the charges in this matter deficient. Although the Executive Secretary's attached instructions indicating that Petitioner would be allowed to resubmit an amended petition curing the deficiencies, Petitioner decided to appeal.⁴

Under NYCCBL §12-309, this Board has the exclusive power to remedy improper practices by both an employer and an employee organization. NYCCBL § 12-309(a) provides, in pertinent part:

The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:

* * *

(4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter

See Local 1157, DC 37, 1 OCB2d 7, at 10 (BCB 2008); LEEBA, 63 OCB 18, at 16 (BCB 2007).

Petitioner's primary assertion is that HHC discriminated against her based upon her sex, religion, national origin, and gender. This Board only has jurisdiction to address those issues that

³ We do not include the positions of HHC or the Union because the Executive Secretary's determination was made prior to the time when responsive pleadings would have been required.

⁴ Although the issue of an appeal of the Executive Secretary's letter determination that a petition is deficient without an issued decision is a novel one for this Board, we shall treat this matter as an appeal of a decision issued by the Executive Secretary.

are explicitly enumerated in the NYCCBL. Accordingly, we can address issues of alleged discrimination if those claims were based upon union activity. However, this Board lacks jurisdiction to review claims of race-, color-, religion-, national origin-, or gender-based discrimination. Moreover, Petitioner has asserted that such claims have previously been filed and are presently pending at the New York City Human Rights Commission and/or the New York State Division of Human Rights. This Board does not rule on the merits of claims outside of its jurisdiction and which are under consideration before the appropriate body for resolution.

Petitioner asks this Board to invoke its powers to remedy an improper public employer practice in violation of NYCCBL § 12-306(a)(1) and (3). These provisions read:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization . . .

NYCCBL § 12-305 states, in pertinent part:

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

Though our statute mentions discrimination, it explicitly requires that the alleged discrimination be based upon union membership or activity. In fact, the first prong of the standard used by this Board to determine whether a claim of retaliation or discrimination under our jurisdiction can be established requires that Petitioner show that “the employer’s agent responsible for the alleged discriminatory action had knowledge of the employee’s union activity.” *DEA*, 79 OCB 40, at 21-22

(BCB 2007); *Howe*, 79 OCB 19, at 11-12 (BCB 2007); *Local 1182, CWA*, 57 OCB 26, at 19-20 (BCB 1996); *Bowman*, 39 OCB 51 (BCB 1987). Petitioner recited a list of her employer's alleged discriminatory actions and retaliatory behavior, which she maintains were based upon her sex, religion, national origin, and gender. However, at no time, as the Executive Secretary correctly noted, did she plead any discriminatory or retaliatory act alleged to be based upon union membership or activity or provide any allegations specifying in what manner the acts complained of violated the NYCCBL. The Executive Secretary was correct in stating that "[a]llegations of discrimination based on race, gender or national origin, without more, do not constitute violations of the NYCCBL."

Indeed, Petitioner failed to specify any union activity in which she engaged, let alone an action by the employer that might be construed as motivated by union activity. What Petitioner alleges as improper actions by HHC may be remedied under another statute but cannot be remedied under the NYCCBL. Thus, her petition fails to state a claim against the Employer under our statute. This ruling is, of course, without prejudice to Petitioner's claims pending before the Human Rights Commission.

The petition also fails to state a claim of a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3).⁵ The duty of fair representation requires a union to "refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Sicular*, 79 OCB 33, at 12 (BCB 2007); see *James-Reid*, 77 OCB 29, at 16-17 (BCB 2006); *Whaley*, 59 OCB 41, at 12 (BCB 1997).

Although Petitioner named the Union as the primary Respondent in her petition, the only

⁵ NYCCBL § 12-306(b)(3) provides that it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter."

mention of the Union appears where she asserts that in 2001 she sought Union assistance to help her secure a full-time position, met with a Union representative, and completed grievance forms but never submitted them. Issues of timeliness aside, those assertions do not even arguably state an act or omission on the part of the Union that was allegedly done in a manner that is arbitrary, discriminatory, or in bad faith.

Finally, in her appeal, Petitioner attempted to add allegations and specific dates that were not asserted in the petition. The purpose of an appeal is to determine the correctness of the Executive Secretary's decision based upon the facts that were available to him in the record as it existed at the time of his ruling. *Cooper*, 69 OCB 4, at 5 (BCB 2002); *see White*, 53 OCB 20, at 8-9 (BCB 1994); *Marrow*, 45 OCB 54, at 4 (BCB 1990). A petitioner may not add new facts at a later date to attack the basis of the Executive Secretary's determination. In any event, even if we were to consider the appeal to be an amended petition, the new facts as asserted did not cure the deficiencies of the petition, in that Petitioner alleged no employer action that was motivated by anti-union animus and no wrongful Union action. Thus, we find that the Executive Secretary's letter determination of December 31, 2007, which found the improper practice petition deficient, was correct. Accordingly, we dismiss the petition.

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 filed by Marina Babayeva in the matter docketed as BCB-2676-07 be, and the same hereby is, dismissed; and it is further

ORDERED, that the determinations in the Executive Secretary's deficiency letter of December 31, 2007, are affirmed.

Dated: New York, New York
April 29, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

PETER PEPPER
MEMBER