OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

ROBERT J. D'ONOFRIO,

Petitioner,

1 OCB2d 19 (ES)
Docket No. BCB-2697-08

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

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DETERMINATION OF EXECUTIVE SECRETARY

On May 14, 2008, Robert J. D'Onofrio filed a *pro se* verified improper practice petition against the City of New York (the "City") and the New York City Police Department ("NYPD"). Petitioner claims that the City and NYPD have violated Sections 12-306(a)(1), (b)(1), (3) and (c) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The alleged violations stem from disciplinary arbitration proceedings under a collective bargaining agreement, in which, petitioner alleges, the City has sought to influence the outcome of the arbitrator's decision by offering to pay his full fee, in the event that the petitioner did not pay his half share. Petitioner also asserts that the previous arbitrator in this matter erred in not disclosing his one-time employment by the City from 1981 through 1984 to

[1] NYCCBL § 12-306(d) provides:
The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

petitioner, and that the arbitrator subsequently recused himself. Petitioner seeks as a remedy an order finding the City to be in default is the underlying dispute, and "that all matters pertaining to [the dispute being arbitrated] are vacated." (Pet. at 3-4).

BACKGROUND

Although the petition does not describe the underlying grievance, the Board of Collective Bargaining set forth the procedural context in *D'Onofrio*, 79 OCB 28, at 2-3 (BCB 2007):

> Between 2002 and 2005, several sets of disciplinary charges and specifications were served upon Petitioner by the NYPD.[2] As a result of these disciplinary charges and specifications, the NYPD imposed a thirty day suspension in 2004; a thirty day annual leave penalty in 2005; and, terminated Petitioner in November 2005. For these sets of charges and specifications, Informal Conferences were conducted, grievances were filed, and in some instances Step II and Step III grievance meetings were held. In effect, these disciplinary matters were treated by the City, the NYPD, the Union, and Petitioner, as though Petitioner had grievance rights. Though the Union did not attempt to proceed to arbitration, Petitioner, on his own initiative but with the Union's consent, filed three separate requests for arbitration challenging these allegedly wrongful disciplinary actions.

In the instant case, the dispute arises from the arbitration proceedings conducted, pursuant to Petitioner's request for arbitration, docketed as No. A-11294-05, of the 30 day suspension disciplinary penalty, which was the subject of *D'Onofrio*, 79 OCB 28. After the Board denied Petitioner's subsequent petition challenging the arbitrability of his own grievance, the arbitration proceedings began with a mutually agreed-upon arbitrator, who on or about November 19, 2007,

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[2] The disciplinary history is detailed in *D'Onofrio*, 79 OCB 3 (BCB 2007) (Petitioner alleged that the Union breached its duty of fair representation) and *D'Onofrio*, 79 OCB 4 (BCB2007) (City challenged arbitrability of D'Onofrio's grievance) and need not be repeated here.

granted Petitioner's request that he recuse himself. A second arbitrator was selected, and, at the request of the Petitioner, recused himself, on April 24, 2008.

Petitioner asserts that the first arbitrator did not provide adequate disclosure of his background, particularly that he worked for the New York City Office of Labor Relations from 1981 through 1984, and that the second arbitrator erred in having an *ex parte* communication with counsel for the City in which counsel offered to pay the arbitrator's full fee, if Petitioner did not pay his share. Petitioner characterizes counsel's statement to the second arbitrator as a guise "to coerce a favorable decision" and as "secret[] enticements." (Pet. ¶ 2). Petitioner claims that the proceedings in this case violate the NYCCBL, the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

DISCUSSION

Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and determined that it must be dismissed for failure to plead facts, which, if credited, could serve to establish a cause of action under the NYCCBL. and asserts certain claims outside of the scope of the Board's jurisdiction under § 12-306 of the NYCCBL.

The petition seeks, in essence, for the Board to review the decisions of two arbitrators to recuse themselves, to find that at least the later such decision constituted a violation of the NYCCBL, for which the City bears responsibility by improperly seeking to economically incentivize the arbitrator to rule in its favor. Petitioner cites no law, regulation or rule that would

create such a power or a duty in the Board to review arbitral decisions or the conduct of arbitration proceedings. Indeed, NYCCBL § 12-312(b) explicitly states that the City, or the City and the Unions, may create binding arbitration procedures, which "may provide that an arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with the law governing arbitration." No power is vested in the NYCCBL to alter the outcome of an arbitration. Likewise, the OCB Rules provide in §1-06(d) through (h) that the Office of Collective Bargaining is involved in the consolidation of related arbitrations, the administering of the parties' selection of an arbitrator, approving the parties' joint request to make arbitration hearings public, and filing with the OCB final awards received from the arbitrator. No power to intervene in arbitrations or affect their outcome is provided. Indeed, by specifying the OCB's role with respect to arbitrations and omitting such a review power, and in entrusting review of arbitration awards to the courts under Article 75, the NYCCBL and the OCB Rules have effectively denied the Board and the staff of the Office of Collective Bargaining any such power of the kind that petitioner asserts should be used on his behalf. *See McKinney's Consolidated Laws of New York Bk. I Statutes* § 240; *McGhee v. City of New York*, 2002 N.Y. Misc. LEXIS 1065, 2002 NY Slip Op. 50332U (Sup. Ct. N.Y. Co. August 5, 2002) (Stallman, J.).

Nor does the petition provide any decisional authority to allow for such grant of authority. Indeed, the Board has repeatedly held that "this Board has no jurisdiction or appellate review powers over an issue decided in arbitration." *Hodge*, 77 OCB 36, at 20-21 (BCB 2006), aff'd, *Hodge v. Office of Collective Bargaining*, Index No. 104531/07 (Sup. Ct. N.Y. Co. December 3, 2007)(York, J.); *see also Ziegler*, 59 OCB 13, at 4 (BCB 1997). Thus, because this Board cannot

exercise jurisdiction over matters submitted to arbitration, the petition fails to state a cause of action.

Similarly, it is well-established that "[a]ny claim under a statutory scheme other than the NYCCBL which Petitioner may have ... is also unavailing in this improper practice proceeding....[u]nless such a claim would also otherwise constitute an improper practice." *Edwards*, 65 OCB35 (BCB 2000), *citing*, *Pruitt*, 55 OCB 11, at n. 7 (BCB 1995); *see generally*, *SBA*, 79 OCB 8, at 9-10 (ES 2007) (citing cases). Where such is not the case, "the Board of Collective Bargaining is without jurisdiction to consider claims in an improper practice proceeding." *Id.*

Thus, petitioner's claims arising from statutes and constitutional provisions other than the NYCCBL are not properly pleaded in through the vehicle of an improper practice proceeding, and are dismissed without prejudice. *SBA, supra*; *Samuels*, 73 OCB1 (ES 2004). The petition is, accordingly, dismissed.

Dated: New York, New York
June 9, 2008

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John F. Wirenius
Executive Secretary

Section 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1):

Executive Secretary Review of Improper Practice Petitions.

(i) Within 10 business days after a petition alleging improper practice is filed, the Executive Secretary shall review the petition to determine whether the facts as alleged may constitute an improper practice as set forth in § 12-306 of the statute. If, upon such review, the Executive Secretary determines that the petition is not, on its face, untimely or insufficient, notice of such determination shall be served upon the parties by mail. Such determination shall not constitute a bar to defenses of untimeliness or insufficiency which are supported by probative evidence available to the respondent. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, the Executive Secretary may issue a decision dismissing the petition or send a deficiency letter. Copies of such decision or deficiency letter shall be served upon the parties by certified mail.

(ii) Within 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board an original and three copies of a written statement setting forth an appeal from the decision with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

(iii) Within 10 business days after service of a deficiency letter from the Executive Secretary as provided in this subdivision, the petitioner may serve an amended petition upon each respondent and file the original and three copies thereof, with proof of service, with the Board. The amended petition shall be deemed filed from the date of the original petition. The petitioner may also withdraw the charge. If the petitioner does not seek to amend or withdraw the charge, but instead wishes to file objections to the deficiency letter, the petitioner may file with the Executive Secretary an original and three copies of a written statement setting forth the basis for the objection with proof of service thereof upon all other parties. If the petitioner does not timely file an amendment or otherwise respond, the charge will be deemed withdrawn and the matter closed. Upon review of the amended petition or written objection filed by the petitioner, the Executive Secretary shall issue either a notice that the petition is not on its face untimely or insufficient or a written decision dismissing the improper practice petition.