D'Onofrio, 1 OCB2d 38 (BCB 2008)

(IP) (Docket No. BCB-2697-08).

Summary of Decision: Petitioner appealed from decision dismissing the petition as insufficient issued by the Executive Secretary of the Board of Collective Bargaining, which determined that the petition did not state a cause of action within the jurisdiction of the Board under the NYCCBL and thus failed to meet minimum pleading requirements under the OCB Rules. Petitioner claimed that the conduct of the City and two arbitrators violated NYCCBL § 12-306(a)(1) and (3). The Board found that, because it has no power of plenary review of arbitral decisions or rulings, 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 Petition

-between-

ROBERT J. D'ONOFRIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On May 14, 2008, Robert J. D'Onofrio filed a *pro se* verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). Petitioner claims that the City and the NYPD violated §§ 12-306(a) (1), (b) (1) and (3), and (c)(1) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12,

Chapter 3) ("NYCCBL").[1] The alleged violations stemmed from disciplinary arbitration proceedings under a collective bargaining agreement in which, petitioner alleges, the City has sought to influence the outcome of the most recent of two arbitrators assigned to hear his case by offering in an *ex parte* conversation to pay the arbitrator's full fee in the event that the Petitioner did not pay his half share. After the conversation, the arbitrator disclosed the communication to Petitioner, offered to recuse himself, and Petitioner accepted his offer. Petitioner also asserted that the previous arbitrator in this matter erred in not disclosing to Petitioner his prior employment by the City from 1981 through 1984, and that this arbitrator subsequently recused himself. Petitioner seeks from this Board as a remedy an order finding the City to be in default in the underlying dispute, and "that all matters pertaining to [the dispute being arbitrated] are vacated." (Pet. at 3-4).

On June 9, 2008, the Executive Secretary issued a decision, *D'Onofrio*, 1 OCB2d 19 (ES 2008), dismissing the improper practice petition 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"), on the ground that the petition failed to plead facts, which, if credited, could serve to establish a cause of action under the NYCCBL, and that it asserted certain claims outside of the scope of the Board's jurisdiction under § 12-306 of the NYCCBL. On June 19, 2008, the petitioner appealed the Executive Secretary's decision. This Board finds that the Executive Secretary properly found that

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[1] NYCCBL § 12-306(a)(1) provides that it shall be an improper practice for a public employer or its agents to "interfere with, restrain or coerce public employees in the exercise of their rights granted" under the NYCCBL. NYCCBL§ 12-306(b) does not impose any obligation on the employer, but is limited to defining "[i]mproper public employee organization practices"; as no public employee organization is named as a party in this matter, this section is not germane. Section 12-306(c) of the NYCCBL imposes a "duty of a public employer and certified or designated employee organization to bargain collectively in good faith " and includes "(5) if an agreement is reached . . . to take such steps as are necessary to implement the agreement."

the allegations in the petition fail to state a cause of action under the NYCCBL, denies the appeal, and dismisses the petition.

BACKGROUND

The Petition

As the Executive Secretary correctly noted, the petition does not describe the underlying grievance. However, this Board has had occasion to 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, granted Petitioner's request that he recuse himself because his resume had not reflected his prior

[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 (BCB 2007) (City challenged arbitrability of Petitioner's grievance) and need not be repeated here.

employment, over 20 years prior to the arbitration, with the City. A second arbitrator was selected, and, at the request of the Petitioner, recused himself, on April 24, 2008.

The petition 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 ("OLR") from 1981 through 1984,[3] and that the second arbitrator and counsel for the City had an improper *ex parte* conversation 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). The petition asserts claims that the proceedings in this case violate the NYCCBL, the Fourteenth Amendment to the U.S. Constitution, and 42 U.S.C. § 1983.

The Executive Secretary's Decision

On June 9, 2008, the Executive Secretary issued a decision pursuant to § 1-07(c)(2) of the OCB Rules, dismissing the petition for failure to state a cause of action under the NYCCBL and for asserting claims outside of the jurisdiction of this Board. The Executive Secretary based his analysis on our past decisions in which we have disclaimed jurisdiction over arbitration awards and the conduct of arbitration hearings, and, additionally, on the statutory provisions of the NYCCBL that provide for appeal of arbitral awards and other determinations, such as recusal, to the Supreme Court of the State of New York pursuant Article 75 of the Civil Practice Law and Rules ("CPLR"). Additionally, the Executive Secretary concluded that claims arising under the United States

[3] The petition does not state the dates of the arbitrator's employment with OLR; however, we take, as did the Executive Secretary, administrative notice that the arbitrator's resume filed with the Office of Collective Bargaining prior to the time of his acceptance by both the City of New York and the Municipal Labor Council, representing the City's unions, provides this information, and remains on file with the Office of Collective Bargaining ("OCB").

Constitution and federal law are not properly brought before the Board, and dismissed such claims without prejudice.

The Appeal

On June 19, 2008, Petitioner filed the instant appeal. In the narrative document supporting this appeal ("Appeal"), Petitioner asserts that the Executive Secretary's reference to the time frame in which the initial arbitrator worked at OLR "is an admission of his pre-knowledge of the undisclosed facts," and claims that the Executive Secretary should have corrected the resume, claiming that "it is incumbent upon" the Executive Secretary "[t]o provide correct and factual material and information to all petitioners." (Appeal at ¶ 6) (emphasis in original). As to the second arbitrator, Petitioner reasserts that the OLR attorney in question improperly engaged him in *ex parte* communications regarding guaranteeing payment for the arbitration, and that the arbitrator offered to recuse himself.

Petitioner then asserts that this Board "does indeed have complete jurisdiction of [sic] the [NYCCBL §§] 12-305 and 12-306(a)" claims. Petitioner does not elaborate on how the conduct of an arbitration falls within these sections, but seeks sanctions against the attorney representing OLR, the City and the NYPD. Additionally, he seeks the removal of the initial arbitrator from the panel of arbitrators.[4]

[4] We do not include the positions of the City because the Executive Secretary's determination was made prior to the time when responsive pleadings would have been required.

DISCUSSION

In reviewing a determination by the Executive Secretary, this Board has recently reaffirmed that "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." *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008) (citing *Cooper*, 69 OCB 4, at 5 (BCB 2002); *White,* 53 OCB 20, at 8-9 (BCB 1994); *Marrow,* 45 OCB 54, at 4 (BCB 1990)). On that record, we find that the Executive Secretary correctly determined that the petition in this matter failed to state c claim under the NYCCBL. Petitioner asks this 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, and to find that the City violated the NYCCBL by improperly seeking to influence the arbitrator to rule in its favor. Petitioner has not, either in the initial petition or in his appeal of the Executive Secretary's decision, cited any law, regulation or rule that would create such a power or a duty in the Board to exercise plenary authority to review arbitral decisions or rulings by arbitrators. Indeed, both our prior decisions and the statutory language mandate the contrary conclusion.

This Board has "exclusive, non-delegable jurisdiction to hear improper labor practice claims" arising under the NYCCBL, as mandated by Civil Service Law § 205(5)(d). *Patrolmen's Benev. Ass'n. v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002); *Uniformed Firefighters Ass'n. v. City of New York*, 79 N.Y.2d 236, 239 (1992); *see* NYCCBL § 12-309(a)(4). For a petition to state a claim under the NYCCBL, however, the petitioner must, at a minimum, point to some interest protected under the statute, or some wrong proscribed by it that is implicated by the facts alleged in the petition.

Thus, it is, of course, well established that it is an improper practice to retaliate or

discriminate against an employee based upon participation in a grievance arbitration. *See, e.g., Collella*, 79 OCB 27, at 53-54 (BCB 2007) (citing cases). By contrast, although the Office of Collective Bargaining is, pursuant to OCB Rules §1-06(d) through (h), 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, we have held on more than one occasion 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. Dec. 3, 2007)(York, J.); *see also Ziegler*, 59 OCB 13, at 4 (BCB 1997). Petitioner has not even attempted to distinguish these decisions, relied upon by the Executive Secretary, from the claim presented in this petition, and we find no such distinction.

This is not to say that an improper practice claim cannot, by definition, be based on conduct relating to the conduct of a grievance arbitration. As we explained in *SSEU, Local 371*, 77 OCB 35, at 21 (BCB 2008), in which the employer violated stipulations entered in the course of an arbitration, and was otherwise guilty of wholesale subversion of the arbitration process, such behavior can constitute a breach of duties under the NYCCBL, for example, a failure to bargain in good faith in violation of § 12-306(a)(4):

> We have held that systematically disregarding a quintessential aspect of the parties' collective bargaining agreement, such as the grievance procedure, constitutes a deliberate interference with employees rights and amounts to a failure to bargain in good faith. *See District Council 37, Local 1508*, Decision No. B-11-2001 at 6, *citing Addison Central School District*, 17 PERB ¶ 3076 (1984) (repudiation of the grievance procedure, through a pattern of behavior, constitutes a breach of the duty to bargain). This holding does not, however, elevate to the level of a violation of NYCCBL § 12-306(a)(4) any mere isolated act of retaliation or discrimination; rather it is limited

> to an ongoing course of behavior that essentially *de facto* carves out a provision of a collective bargaining agreement for willful non-enforcement.

Id.

In the present case, the only claim asserted that involves the conduct of a party (as opposed to the arbitrator)–the alleged *ex parte* offer to pay the arbitrator's full fee if Petitioner did not pay his share–already has been litigated and remedied by the arbitrator, who disclosed the communication, and recused himself at petitioner's option. Unlike the systematic disregard of the collective bargaining agreement at issue in *SSEU, Local 371*, 77 OCB 35, this alleged conversation in the context of an ongoing arbitration does not rise to the level of such wholesale subversion of the process as to amount to a failure to bargain in good faith. *Id.* at 21.

In so deciding, we find that the petition fails to raise a claim involving rights that are sufficiently distinct from those submitted to the arbitrator, whose rulings are subject to judicial review in the Supreme Court of the State of New York under Article 75 of the Civil Practice Law and Rules ("CPLR"). This is demonstrated by the relief sought by the Petitioner: sanctions against the attorney representing the City, and a default judgment in the arbitration. In other words, Petitioner asks us to determine the issues submitted to the arbitrators and regulate the conduct of the case before them. Petitioner has, notably, cited no provision of the NYCCBL or OCB Rules empowering this Board to sanction an attorney appearing in front of an arbitrator, as opposed to appearing in hearings held by Trial Examiners in cases before this Board, in which the Board may impose sanctions where warranted pursuant to OCB Rules § 1-10(g)). Nor has Petitioner provided any basis allowing us to take jurisdiction of the issues presented before the arbitrator, forestall further proceedings, and enter a final award ourselves. Such relief does not address any improper

practice on the part of the employer committed in the context of an arbitration, but rather would constitute this Board's reviewing the arbitrator's rulings, a power which is entrusted not to this Board, but to the courts.

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." Likewise, as previously mentioned, the OCB Rules provide in §1-06(d) through (h) that the Office of Collective Bargaining has certain specific administrative functions with respect to arbitrations. However, 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 OCB any such power of the kind that petitioner asserts should be used on his behalf. *See Uribe v. Merchants Bank, Ltd,*, 91 N.Y.2d 336, 340 (1998); *see also McKinney's Consolidated Laws of New York Bk. I, Statutes* § 240; *McGhee v. City of New York*, 2002 N.Y. Misc. LEXIS 1065 (Sup. Ct. N.Y. Co. Aug. 5, 2002) (Stallman, J.).

By contrast, the state Supreme Court is empowered by Article 75 to determine whether to vacate an arbitration award where the specific issues posed by the petition, an allegedly inadequate disclosure by one arbitrator of his background, and an ex parte conversation on the part of another with counsel for the City, are at issue. In such cases, judicial review is warranted where "the rights of the complaining party were prejudiced by corruption, fraud, or misconduct in procuring the award." *Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1985) (quoting CPLR § 7511) (award vacated

where *ex parte* communication on substance could reasonably be deemed to have prejudiced adverse party); *Matter of Henneberry v. ING Capital Advisers, LLC*, 10 N.Y.3d 278, 284 (2008) (vacatur only appropriate where arbitrator "infect[s] the proceedings with the taint of fraud"); *see also Matter of Campbell v. New York City Transit Auth.*, 32 A.D.3d 350, 352 (1st Dept. 2006) (arbitrator's determinations conduct of proceedings subject to review for abuse under "misconduct" standard); *Matter of McLaughlin, Piven, Vogel Sec., Inc. v. Ferrucci*, 2008 N.Y. Misc. LEXIS 4048 (Sup. Ct. N.Y. Co. June 20, 2008) at *6-*7 (citing, *inter alia* CPLR 7511(ii), grounds for vacatur include "partiality"). In other words, to the extent that the petitioner feels that the arbitrators' recusals did not provide sufficient relief, the remedies he seeks could only be obtained from the courts.

In his appeal, petitioner alleges a procedural irregularity–a purported failure on the part of the Executive Secretary to provide him with the full resume for the initial arbitrator. However, this claimed irregularity cannot be used to expand our jurisdiction beyond the limits of the NYCCBL and therefore does not give rise to a claim. Moreover, Petitioner asserts a role for the Executive Secretary not contemplated by our rules. As defined in § 1-01 of the OCB Rules "the term Executive Secretary shall mean the person appointed by the Director to carry out the responsibilities defined by § 1-07 (c) (2) of these rules." *Id.* Section 1-07(c)(2) thus provides the exclusive source of duties for the Executive Secretary under our rules, and these duties do not in any way relate to the processing of arbitrations or to the selection of arbitrators. Rather, the Executive Secretary's duties relate to the threshold evaluation of improper practice petitions and to their initial processing. *Id.* The Board notes that it is the parties who approve the appointment of arbitrators to the panel, and that it is the arbitrators who provide their own biographical information. The staff of the OCB has no role in editing or compiling such information. OCB Rules §1-06(d) through (h).

Thus, Petitioner has failed to plead any error on the part of the Executive Secretary in his determination. Accordingly, and 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). 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 an improper practice proceeding, and are dismissed without prejudice. *SBA, supra*; *Samuels*, 73 OCB1 (ES 2004). The petition is, accordingly, dismissed.

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 Robert D'Onofrio in the matter docketed as BCB-2697-08 be, and the same hereby is, dismissed; and it is further

ORDERED, that the decision of the Executive Secretary in *D'Onofrio*, 1 OCB2d 19 (ES 2008), rendered June 9, 2008, is affirmed.

Dated: New York, New York
November 10, 2008

MARLENE A. GOLD
CHAIR

GEORGE A. NICOLAU
MEMBER

CAROL A WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER

M. DAVID ZURNDORFER
MEMBER