Jones, 11 OCB2d 3 (BCB 2018)

(IP) (Docket No. BCB-4260-17)

Summary of Decision*:** Petitioner appealed the Executive Secretary's dismissal of her petition because it did not allege facts sufficient to establish a cause of action under the NYCCBL. Petitioner argued that she pleaded facts establishing violations of the NYCCBL. The Board found that the Executive Secretary properly deemed the allegations in the petition insufficient to establish a cause of action. Accordingly, it affirmed the dismissal of the petition and denied the appeal. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

CHERYL JONES,

Petitioner,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent.

DECISION AND ORDER

On December 11, 2017, Cheryl Jones ("Petitioner") filed a verified improper practice petition alleging that New York City Health + Hospitals[1] violated § 12-306(a) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to comply with contractual grievance procedures and refusing to produce information and witnesses requested by her attorney to assist in representing her during the

[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

grievance process. 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 December 22, 2017, the Executive Secretary of the Board of Collective Bargaining dismissed the petition on the ground that Petitioner did not plead facts sufficient to establish a claim under the NYCCBL. *See Jones*, 10 OCB2d 22 (ES 2017) ("ES Determination"). On January 9, 2018, Petitioner appealed the ES Determination, arguing that she pleaded facts establishing violations of the NYCCBL. The Board finds that the Executive Secretary properly deemed the charges in the petition insufficient to establish a cause of action. Accordingly, it affirms the dismissal of the petition and denies the appeal.

BACKGROUND

Improper Practice Petition

All facts recited herein are based entirely on Petitioner's pleadings. Petitioner worked as a Service Aide in the Food & Nutrition Department at Coney Island Hospital ("CIH") from July 1, 2015 until her termination on June 9, 2017.[2] At all times relevant to this matter, Petitioner was a member of DC 37, Local 420 ("Union"), which is a party to the 2008-10 Institutional Services Agreement ("Agreement") with HHC.

By notice dated April 21, 2017, CIH Director of Labor Relations Audrey Russell notified Petitioner that HHC had issued disciplinary charges against her and that a conference would take place on May 22, 2017. The notice indicated that a courtesy copy was sent to the Union.[3]

[2] Petitioner asserts that she worked for HHC beginning in 2006. However, she had only worked as a Service Aide at CIH since July 1, 2015.

[3] For reasons that are not in the record, the May 22, 2017 conference did not take place.

On May 17, 2017, the Union filed a grievance on Petitioner's behalf and requested that HHC schedule a Step I(A) conference. It also requested that HHC provide the Union, pursuant to NYCCBL § 12-306(c)(4), with "statements, charges and other penitent [sic] information" necessary and relevant to its representation of Petitioner.[4] (Pet., p. 20 of "Book of Exhibits").[5] By notice dated May 25, 2017, CIH's Labor Relations Director again notified Petitioner that HHC had issued disciplinary charges against her and that a Step I(A) conference would take place on June 5, 2017. While the petition includes a notice of the June 5, 2017 conference, Petitioner alleged that she was "never served with notice of the Step 1(A)."[6] (Pet. ¶ 6)

On June 7, 2017, HHC issued a decision terminating Petitioner. The decision provides that Petitioner failed to appear for a Step I(A) disciplinary conference on June 5 but that her Union representative was present. The decision states:

> Conference Officer inquired as to whether the union had contacted [Petitioner]. Since the union failed to provide any substantial reason [for Petitioner's] non-appearance, the Conference Officer elected to proceed with the conference in absentia. The union absented themselves from the conference.

(Pet., p. 3) Petitioner was terminated effective June 9, 2017.

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[4] NYCCBL § 12-306(c)(4) provides:

> Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;

[5] All page numbers referencing the petition are citations to the page in the Book of Exhibits attached to the petition.

[6] The notice lists Petitioner's current mailing address, but it is not clear from the petition or the notice itself whether or how the notice was served on her.

The Union requested a Step II hearing, which was held on July 27, 2017. Petitioner retained private counsel, Albert Van-Lare, to represent her at the Step II hearing. She contends that Van-Lare filed a notice of appearance prior to the Step II hearing and requested information "necessary to process the grievance," including witness names and statements. (Pet. ¶ 8) According to Petitioner, HHC refused to provide this information but alleges that Van-Lare was provided "some of the documents" at the Step II hearing. (Pet. ¶ 11) Petitioner further contends that her attorney requested that HHC produce her supervisor and other HHC employees as witnesses at the Step II hearing. She asserts that the Step II hearing officer advised Petitioner and her attorney that "witnesses would be produced at Step 3" following her attorney's request for a ruling on the matter. (*Id.*)

HHC denied the Step II appeal. In an August 14, 2017 decision, the HHC review officer responded to Petitioner's "complaints about the disciplinary process," which were raised during the hearing. (Pet., p. 2) In response to Petitioner's claim that she was not afforded a Step I(A) conference, the decision provides that HHC "explained that [Petitioner] was aware of the date of the conference and left work early on that day claiming she was ill. Prior to this . . . [Petitioner] refused to report to Labor Relations to retrieve the disciplinary charges." (*Id.*) Regarding Petitioner's claim that the Step I(A) decision should only have been a recommendation and not "a determination", the review officer explained that, as a part-time employee with less than two years of service as of the date of the charges, Petitioner may be terminated after a Step I(A) conference.[7] (Pet., p. 2) Additionally, the review officer rejected as lacking merit the claim that Petitioner's earlier service as an agency employee should be added to her service as a CIH employee. Finally,

[7] The Agreement also provides that the person conducting the Step I(A) conference "shall issue a decision in writing." (Pet. p. 8)

in response to the claim that *Matter of City of New York v. New York State Nurses Assn.*, 29 NY3d 546 (2017), obligates the employer to provide witnesses when requested, the hearing officer wrote that the relied-upon case "(a) addresses the obligations of a public employer to a union and not to individual members and (b) does not require that the employer present witnesses at disciplinary hearings." (Pet., p. 2)

A Step III hearing was subsequently scheduled. Petitioner reiterated her request that HHC release certain employees to testify as witnesses at the hearing as well as "any and all documents that were not previously provided." (Pet., p. 13) CIH's Labor Relations Director responded that the Step III hearing is an informal procedure and not a full trial and, therefore, there is no need for witnesses to be present. She further informed Petitioner that at the Step II hearing, her attorney was afforded copies of the documents that were presented to the Step II hearing officer. According to Petitioner, HHC argued at the Step III hearing that Petitioner was not entitled to a hearing at Step III because she did not have two years of service as a Service Aide. The Step III hearing officer agreed with HHC that a Step III hearing was not necessary.

In the improper practice petition, Petitioner alleged that, in addition to its failure to notify her of the Step I(A) conference, HHC failed to comply with the Agreement when it terminated her after the Step I(A) conference instead of issuing a "recommendation." (Pet. ¶ 17) She contended that HHC's "open refusal" to comply with the Agreement constitutes a violation of NYCCBL § 12-306(a), but did not specify the subsection(s) of that provision that HHC violated. (Pet. ¶ 19) Petitioner further contended that HHC's refusal to provide her attorney with the requested information and witnesses also constitutes an improper practice.

Executive Secretary's Determination

On December 22, 2107, the Executive Secretary issued the ES Determination dismissing the petition for failure to state a cause of action under the NYCCBL. *See Jones*, 10 OCB2d 22. The Executive Secretary found that Petitioner failed to allege that HHC's conduct was related to any protected union activity under the NYCCBL. The ES Determination explained that Petitioner's claim that HHC did not comply with the contractual grievance procedures in evaluating her disciplinary charges did not set forth facts to support an allegation that HHC's actions fall within any of the provisions of NYCCBL § 12-306(a).[8]

The Executive Secretary also determined that Petitioner's claim that HHC violated the NYCCBL by failing to provide her attorney with all the requested information and witnesses to assist in representing her during the grievance process lacked merit. Citing Board precedent, the Executive Secretary found that the duty to bargain in good faith under NYCCBL § 12-306(c),

[8] NYCCBL § 12-306(a) provides, in pertinent part:

> 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;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

including the obligation to "furnish to the other party, upon request, data . . . ." runs between the public employer and the certified bargaining representative of its employees. Therefore, Petitioner had no standing to allege a claim against her employer for failure to provide her or her attorney with information under NYCCBL § 12-306(c)(4).

The Appeal

Petitioner, through her attorney, appealed the ES Determination on January 9, 2018 ("Appeal"). Petitioner now asserts that HHC discriminated against her because she used a private attorney to represent her during the grievance process as permitted by the Agreement, in violation of NYCCBL § 12-306(a)(1) and/or (3).[9] (Appeal, p. 4) She contends that HHC refused to provide the requested information and witnesses to her and her attorney for use during the grievance process because she was represented during that process by private counsel and not by the Union.[10]

Petitioner argues that all three steps of the grievance process were filed by the Union and that the Union was the only party to whom the Step II decision was addressed, although copies were sent to others. Notwithstanding this fact, Petitioner contends that the ES Determination "appears to support the determination" of HHC's Step II review officer that "HHC's obligation is to provide information needed to process grievances to the Union and not to a member." (Appeal, p. 3) Petitioner asserts that HHC treated her requests for information and witnesses differently than it would have had the Union represented her during the grievance process. In doing so, she argues, HHC violated NYCCBL § 12-306(a)(3).

[9] Petitioner maintains that the Agreement "allows members to use [a] privately retained attorney." (Appeal, p. 4)

[10] The Appeal states that HHC committed an improper practice in violation of "NYCCBL Sec 12-306 (a)(1)(3)". (Appeal, pp. 2-4)

Petitioner also contends that by failing to provide the information and witnesses, HHC treated her as "exempt from the rights afforded every union member" under *New York State Nurses Assn.*, 29 NY3d 546, simply because she was represented by a privately-retained attorney. (Appeal, p. 3) She disputes the Executive Secretary's conclusion that individual union members have "no right" to obtain information pursuant to NYCCBL § 12-306(c)(4) and states that she was not seeking information for the purpose of collective bargaining. (Appeal, p. 4) Accordingly, Petitioner requests that the Board overrule the ES Determination.

DISCUSSION

We affirm the ES Determination because we find that the Executive Secretary properly dismissed the petition for failure to state a cause of action under the NYCCBL. The Executive Secretary correctly ruled that Petitioner did not allege facts to show that HHC's violation of her refusal to provide information and witnesses or comply with the Agreement's grievance procedures was related to any protected union activity covered by the NYCCBL. The ES Determination stated that unless the acts constituting a contractual violation otherwise state a claim of an improper practice under NYCCBL § 12-306(a), the Board is without authority to enforce the terms of a collective bargaining agreement, and may not exercise jurisdiction over an alleged violation of the Agreement.

The Executive Secretary also properly found that Petitioner's claim must fail under NYCCBL § 12-306(c)(4). As the ES Determination explained, the duty to bargain in good faith under NYCCBL § 12-306(c) runs between the public employer and the certified bargaining representative of its employees. *See Jones*, 10 OCB2d 22, at 7 (citing *New York State Nurses Assn.*, 29 NY3d 546). Therefore, individual bargaining unit members lack standing to assert

claims under this statutory provision. *See id.* (citing *Witek,* 7 OCB2d 10 (BCB 2014) (holding that petitioner, as an individual, lacked standing to allege claims against the employer, HHC, relating to a failure to bargain in good faith pursuant to NYCCBL § 12-306(c)); *Laing,* 49 OCB 42, at 3 (ES 1992) ("It is well-settled that individual members of a bargaining unit lack standing to raise a claim pursuant to NYCCBL § 12-306(c))).[11]

On appeal, Petitioner elaborates on her initial claims by alleging that HHC's refusal to provide her with all the requested information and witnesses was discrimination, in violation of § 12-306(a)(1) and/or (3), because she used a private attorney during the grievance process. Even after consideration of these additional arguments, the Board finds that the Executive Secretary's dismissal of the petition because it failed to state any claim under the NYCCBL was proper.

NYCCBL § 12-306(a)(3) provides that "it shall be an improper practice for a public employer or its agents . . . to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." To determine whether an alleged action constitutes impermissible discrimination or retaliation based on anti-union animus, the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca,* 18 PERB ¶ 3012 (1985), and its progeny. The test provides that, to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, the petitioner must demonstrate that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. The employee's union activity was a motivating factor in the employer's decision.

[11] As the Court of Appeals confirmed in *New York State Nurses Assn*, 29 NY3d 546, the duty of public employers and designated public employee representatives to provide information under NYCCBL § 12-306(c)(4) is not restricted to collective bargaining. Rather, it broadly applies to contract administration, which includes processing grievances. *See id.* at 553.

Bowman, 39 OCB 51, at 18-19*; see also DC 37, L.376*, 6 OCB2d 39 (BCB 2013).

Petitioner alleges that she engaged in union activity by participating in the grievance process. It is well-settled that pursuing a grievance is a protected union right. *See, e.g., Local 376, DC 37*, 5 OCB2d 31, at 18 (BCB 2012) (Board found member engaged in protected union activity when she sought the union's assistance in appealing disciplinary charges); *Washington*, 71 OCB 1, at 13 (BCB 2003) (proof of the filing of grievances or of an employer's knowledge of complaints to a union is sufficient to show protected union activity); *see also CWA, L. 1182,* 8 OCB2d 18, at 11-12 (BCB 2015) (protected employee rights under NYCCBL § 12-305 includes participation in union activity such as holding a union position, acting at the union's request, filing a grievance, or advocacy on behalf of other union members) (citing cases). There is no dispute that HHC had knowledge of this union activity. Accordingly, Petitioner pleaded facts that satisfy the first prong of the *Bowman* test.

However, Petitioner has not pleaded facts that could establish the second prong of the *Bowman* test. As discussed above and in the ES Determination, HHC had no obligation under NYCCBL § 12-306(c)(4) to provide Petitioner or her attorney with the requested information because the duty to provide information runs between the employer and the certified employee bargaining representative. Since HHC was not required to provide Petitioner with the requested information, she cannot demonstrate that HHC committed a discriminatory or retaliatory act by failing or refusing to do so. Similarly, Petitioner has asserted no basis for the claim that HHC was required, under the NYCCBL or the Agreement, to make the requested witnesses available for the Step II and III hearings. Therefore, Petitioner has not made out a *prima facie* case of discrimination

or retaliation under NYCCBL § 12-306(a)(3) and dismissal of the claim was proper.[12]

In light of the above, we find that the Executive Secretary properly determined that Petitioner failed to state a claim under the NYCCBL including, but not limited to, § 12-306(a)(1) and (3), and (c)(4). We therefore deny the appeal and dismiss the petition.

[12] As Petitioner has not alleged that any of HHC's actions were inherently destructive union activity, we need not address the claim that HHC violated NYCCBL § 12-306(a)(1). *See Bonnen*, 9 OCB2d 7, at 16, n. 8 (BCB 2016).

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 Determination of Executive Secretary, *Jones*, 10 OCB2d 22 (ES 2017), is affirmed and the appeal is denied.

Dated: February 15, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER