Mahinda, 2 OCB2d 38 (BCB 2009)

(IP)(Docket No. BCB-2759-09).

Summary of Decision: Petitioner, formerly a provisional employee, alleged that the Union breached its duty of fair representation under the NYCCBL by failing to move her grievance arising out of her termination to arbitration. The Union contended that no other employees in Petitioner's position have proceeded to arbitration because of a Court of Appeals decision holding that provisional employees have no disciplinary grievance rights. The City asserted that Petitioner failed to allege sufficient facts to demonstrate that the Union breached its duty of fair representation, and that any independent claims against the City were untimely and, even if such were timely, Petitioner did not plead sufficient facts to establish retaliation. The Board found that the petition was untimely and dismissed the claims in their entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JOSEPHINE MAHINDA,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,
Respondent,

-and-

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

Respondents.

DECISION AND ORDER

On April 17, 2009, Josephine Mahinda ("Petitioner") filed a verified improper practice petition alleging that the Organization of Staff Analysts ("Union" or "OSA") violated New York

City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b)(1) and (3). Petitioner, formerly a provisional employee, alleges that the Union breached its duty of fair representation under the NYCCBL by failing to move her grievance to arbitration. The Union contends that no other employees in Petitioner's position have proceeded to arbitration because of a Court of Appeals decision holding that provisional employees have no disciplinary grievance rights. The City asserts that Petitioner fails to allege sufficient facts to demonstrate that the Union breached its duty of fair representation, that any independent claims against the City are untimely, and that, even if such claims were timely, Petitioner does not plead sufficient facts to establish her claims arising out of retaliation. The Board finds that the petition was untimely and dismisses the claims in their entirety.

BACKGROUND

On October 27, 2002, the Petitioner received a provisional appointment to the position of Principal Administrative Associate ("PAA") at the Department of Transportation ("DOT"). On August 23, 2004, Petitioner received a provisional appointment to the position of Associate Staff Analyst ("ASA") at the DOT. As an ASA, Petitioner was represented by OSA. On August 12, 2008, the Advocate General's office of the DOT served disciplinary charges on Petitioner alleging that, among other things, she neglected or refused to perform her assigned duties and engaged in acts prejudicial to the good order and discipline of the DOT.

On September 23, 2008, an informal conference was held at the Office of the Department Advocate, at which the charges against Petitioner were found to be substantiated. Termination of Petitioner's employment was recommended. On October 16, 2008, Petitioner and a Union

representative attended a disciplinary conference. At the conclusion of the conference, the DOT's Director of Labor Relations upheld the recommended penalty of termination, and the DOT terminated Petitioner's employment effective at the close of business on October 17, 2008. At the time of her termination, Petitioner was a provisional employee.

On October 21, 2008, the Union filed a Request for Arbitration with the Office of Collective Bargaining ("OCB") pursuant to the contractual grievance procedure, alleging that the City violated Article VI § (1)(f) of the parties' collective bargaining agreement. Article VI, § 1(f) defines a grievance as "a claimed wrongful disciplinary action taken against a provisional employee who has served continuously for two years in the same or similar title or related occupational group in the same agency."

The Union claims that as a result of *Matter of the City of Long Beach v. Civ. Serv. Assn.*, 8 N.Y.3d 465 (2007), which found, in part, that provisional employees have no disciplinary grievance rights, the Union informed Petitioner that it would file the request for arbitration to preserve the right to arbitrate her termination, but the matter would not be scheduled for arbitration. The Union claims that they informed Petitioner of this situation a number of times through the grievance process up to and including the time when Petitioner signed the waiver that accompanies the request for arbitration. The Union also claims that it further explained to her, as it had done before, that in response to the *City of Long Beach* decision, the New York State Legislature amended the Civil Service Law to permit public employers such as the City to negotiate grievance rights for provisional employees. According to the Union, it also explained to her that since negotiations were still ongoing between DC 37, the city-wide bargaining representative, and the City, no provisional disciplinary arbitrations were being heard until the negotiations reached fruition. The Petitioner

admits that the Union told her that she did not have disciplinary grievance rights because of the *City of Long Beach* decision, and that her grievance would not proceed to arbitration as a result. However, she asserts that she indeed had grievance rights at the time and the Union had no reason to keep her grievance from arbitration.

On February 9, 2009, Petitioner wrote to OCB inquiring whether OSA had filed a request for arbitration in her case and whether OSA "has been arbitrating on matters pertaining to provisional employees." (Union Ans., Ex. K). In this letter, Petitioner stated that, "[i]n August 2008 [she] was informed that due to a ruling that provisional employees had no rights all requests for arbitration pertaining to this group were on hold with the [OCB]." *Id.* The Deputy Chair for Dispute Resolution at OCB responded that OSA had filed her request for arbitration on October 23, 2008, and that an arbitrator had been designated on December 5, 2008. The Deputy Chair further wrote that the Court of Appeals had held that "provisional employees did not have disciplinary grievance rights" and while some unions had formally notified OCB that all disciplinary arbitrations involving provisional employees were being held in abeyance, OCB did not know whether OSA and the City had agreed to hold those cases in abeyance. The Deputy Chair then suggested that the Petitioner contact her Union representative for further information. (Pet. Ex. 1).

On April 17, 2009, Petitioner filed the instant improper practice petition. The Executive Secretary of the OCB sent a letter to Petitioner on May 12, 2009, finding that her petition was deficient and would not be processed at that time. The Petitioner sent another, more extensive, submission to the OCB on June 10, 2009, and on July 20, 2009, the Executive Secretary deemed that petition sufficient. The Union claims that Petitioner did not contact it between the filing of the request for arbitration and the date that Petitioner filed the improper practice petition.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner asserts that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by failing to move her case to arbitration.[1] Petitioner claims that on October 17, 2008, she was wrongfully terminated from her position as an ASA for the DOT. The Union filed the request for arbitration on October 21, 2008, and Petitioner was informed by OCB in a letter dated February 12, 2009 that an arbitrator had been selected to hear her case. As of the date she filed her petition, she was still waiting for a date for arbitration.

The Petitioner admits that the Union advised her of the situation involving grievance rights for provisional employees and the *City of Long Beach* decision. However, the Petitioner argues that if she did not have grievance rights, then the Union had no basis for going through the steps of the grievance process and attending the disciplinary hearings. Further, she asserts that given the Union's refusal to file what are legitimate grievances in other situations, it would not have represented her if she did not have grievance rights. Petitioner asserts that in late 2007, before she was terminated, the Governor of New York State signed legislation amending the New York State Civil Service Law providing for grievance rights for provisional employees with more than two years of service.

Further, the Petitioner argues that in November 2008 District Council 37 ("DC 37") signed

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[1] NYCCBL § 12-306(b) provides that it shall be an improper practice for a public employee organization:

> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so. . . .
>
> (3) to breach its duty of fair representation to public employees under this chapter.

a Memorandum of Economic Agreement ("MEA") with the City, which includes a grievance procedure for provisional employees with over two years, so the Union's and the City's claims that an agreement regarding provisional employees is still pending are false. Petitioner notes that a DC 37 local filed a grievance, which it won, for the City's refusal to pay an employee for a day's wage, but that OSA has not only refused to represent her or provide information but has deliberately misinformed her of her rights and colluded with the agency to violate her rights.

The Petitioner further claims that the City took several adverse employment actions against her, the latest prior to her dismissal being a transfer within the agency in April 2008, and that the Union failed to capably assist her with her complaints.

Union's Position

The Union claims that Petitioner's claims are time-barred. Since Petitioner filed her improper practice petition on April 17, 2009, any occurrences prior to December 17, 2009 should be dismissed. Here, the Union filed for arbitration in October 2008, yet Petitioner did not file her petition until six months later. Moreover, as is made clear in Petitioner's February 9, 2009 letter to OCB, she admitted that the Union had told her in August 2008 that all requests for arbitration for employees in her situation were on hold with OCB. Moreover, the Union contends that in her Petition, she admits that "it has been six months since OSA filed for arbitration, but they cannot tell me why it is taking so long." (Pet., ¶ 5). Thus, all of Petitioner's claims should be dismissed as time-barred.

The Union asserts that Petitioner fails to allege facts necessary to show that it breached its duty of fair representation. At all times relevant, from Petitioner's first contact with the Union after she was served with disciplinary charges, through the disciplinary hearings, and through the filing

of the request for arbitration, the Union, as Petitioner admits, advised Petitioner that, as a result of *City of Long Beach,* her case would not be heard at arbitration. The Union further advised Petitioner of the amendment to the Civil Service Law after *City of Long Beach*, and the ongoing negotiations between the City and its unions in an attempt to reach a new contract provision that would permit arbitration of provisional disciplinary grievances. The Union made the good faith determination not to pursue arbitration of her grievance until a new grievance procedure is negotiated, since moving the grievance to arbitration would be successfully challenged by the City as a result of *City of Long Beach*. Though the Union did not formally advise OCB that it would not process grievances alleging violations of provisional employee discipline, OSA, to the date of the filing of the Union's Answer on August 21, 2009, had not moved to hearing any of the six requests for arbitration it has pending at OCB for employees in similar situations as Petitioner. As to the other untimely allegations that the Union failed to represent her properly before her termination and during the disciplinary process after her termination, OSA properly exercised its duty in regard to Petitioner.

City's Position

The City asserts that Petitioner failed to allege sufficient facts to demonstrate that the Union breached its duty of fair representation; therefore, the petition must be dismissed. The City argues that Petitioner fails to show that the Union's conduct was arbitrary, discriminatory, or founded in bad faith, since the course pursued by the Union in processing Petitioner's grievance was not a matter of discretion but was compelled by law through the *City of Long Beach* decision. As the Union did not breach its duty of fair representation, any derivative claim against the City must also be dismissed.

The City also argues that any allegations of retaliation that Petitioner intended to plead under

NYCCBL § 12-306(a)(1) and (3) are untimely.[2] NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") delineate a four-month statute of limitations.[3] All of the Petitioner's described allegations against the City occurred prior to December 17, 2008. Thus, the petition, as it pertains to allegations against the City, must be dismissed in its entirety.

Even if the Board finds that the petition was timely, Petitioner has not set forth the facts necessary to establish retaliation. Specifically, Petitioner did not assert that she participated in protected activity prior to the disciplinary charges she received on August 12, 2008. Therefore, Petitioner is unable to provide a nexus between any protected activity and any alleged improper

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[2] NYCCBL § 12-306(a) provides, in pertinent part, that it is an improper practice for an employer to:

> (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 public employee organization.

[3] NYCCBL § 12-306(e) provides that:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. Such petition may be filed by one or more public employees or any public employee organization acting on their behalf, or by a public employer, together with a request to the board for a final determination of the matter and for an appropriate remedial order.

OCB Rule § 1-07(b)(4) provides that an improper practice "petition must be filed within four months of the alleged violation."

action by the DOT. Based on Petitioner's pleadings, it is evident the disciplinary charges were not brought in retaliation for alleged union activity. Indeed, the DOT brought the charges in order to enforce its code of conduct, which is a legitimate business reason.

DISCUSSION

We address Respondents' argument that the instant improper practice petition is time-barred. It is well established that an improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *see also DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008)*; Tucker*, 51 OCB 24, at 5 (BCB 1993).[4] Therefore, "claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 27 (BCB 2009); *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)).

Even using the date of Petitioner's first submission to OCB, which was declared insufficient by the Executive Secretary, as the date that Petitioner filed her petition, the petition would be

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[4] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(d) provides, in relevant part: "A petition alleging that a public employer or . . . a public employee organization . . . has engaged in or is engaging in an improper practice in violation of [§] 12-306 of the statute may be filed with the Board within four (4) months thereof . . ."

untimely. Petitioner's first submission was filed at OCB on April 17, 2009, so any claims against the Union and the City that allegedly occurred prior to December 17, 2008, are untimely.

As for Petitioner's claims against the Union, Petitioner admits that the Union made her aware of the *City of Long Beach* decision, though not the myriad number of times that the Union claimed that it had. In her February 9, 2009, letter to OCB, she affirmatively stated that "[i]n August 2008 [she] was informed that due to a ruling that provisional employees had no rights all requests for arbitration pertaining to this group were on hold with the [OCB]." (Union Ans., Ex. K). We are able to establish, through her assertions, that Petitioner had actual notice that the Union was not going to move her grievance to arbitration in August 2008. Further, the Union submitted the request for arbitration in October 2008, which is the latest discernible date on which Petitioner was allegedly informed that the Union was merely preserving her right to arbitrate, but that no arbitration would be scheduled. Since the petition was not filed until April 2009, it would be untimely regardless of whether the Board uses the date that Petitioner admits that she was told that the grievance would not be pursued to arbitration or the later date that the Union filed the request for arbitration but at the same time, again, informed Petitioner that the grievance would not move forward. Any remaining allegations that the Union breached its duty of fair representation prior to her termination in October 2008 and through the grievance process are untimely as well.

We note that Petitioner relies upon an amendment, enacted on January 28, 2008, to the Civil Service Law, which provided a mechanism for a binding plan to provide for disciplinary grievance rights for provisional employees. The amendment mandated that this plan be submitted to the state civil service commission, and for such plan to be fully implemented within five years of approval, with provision for a one-year extension. N.Y. Civil Service Law § 65 (2008). Petitioner is perhaps

referring to § 5(g) of the amendment, which states, in pertinent part:

> Agreements governing disciplinary procedures. Notwithstanding any inconsistent provision of this chapter or any other law or rule to the contrary, any DCAS employer and an employee organization . . . may enter into agreements to provide disciplinary procedures applicable to provisional appointees or categories thereof who have served for a period of twenty-four months or more in a position which is covered by such an agreement.

Section 1-03(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) requires that every public employer entering into a written collective bargaining agreement with a public employee organization shall file copies of that agreement with OCB within 15 calendar days of the execution of such an agreement. As of the date of this decision, no such agreement has been filed with OCB, nor has OCB been notified that the parties have reached such an agreement. Thus, Petitioner has failed to establish that an agreement for provisional disciplinary procedures has been reached and she is unable to assert any change of facts or subsequent development that would serve to provide a source of timely allegations of an act or omission on the part of the Union.[5]

Petitioner's claims against the City are also untimely. All of her allegations of misconduct

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[5] Petitioner appears to believe that the 2008 MEA constitutes an agreement to provide disciplinary rights to provisional employees with over two years of service with disciplinary grievance rights pursuant to the amendment to the Civil Service Law. The 2008 MEA merely states in general terms that the provisions of the prior Citywide Agreement, which included a disciplinary grievance procedure for certain provisional employees, were to continue in full force and effect. By its very terms, such language is limited to such terms and provisions as were in full force and effect. However, the provisions of the Citywide Agreement that the MEA extended pre-date the *City of Long Beach* decision, and no specific language entering into an agreement pursuant to § 5(g) is contained within the 2008 MEA. Nor, do we find, can language which generally extends the terms of such an agreement override the determination made by the New York State Court of Appeals in its decision. Therefore, Petitioner is incorrect when she asserts that she indeed had disciplinary grievance rights at any time during the processing of her grievance, to date.

and retaliation by the City are asserted to have happened while she was a City employee. The last date on which she was a City employee was October 17, 2008. Therefore, any petition against the City should have been filed by February 17, 2009 in order for the Board to deem the petition timely filed.

We, therefore, find that Petitioner's claim that the Union breached its duty of fair representation must fail, as must any derivative claim against the employer pursuant to NYCCBL § 12-306(d). *See Nardiello,* 2 OCB2d 5, at 42 (BCB 2009); *Howe*, 79 OCB 23, at 13-14 (BCB 2007); *Samuels*, 77 OCB 17, at 16 (BCB 2006). Additionally, we dismiss any claim that the City retaliated against Petitioner for engaging in protected Union activity. Thus, we dismiss the petition in its entirety.

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 Josephine Mahinda, docketed as BCB-2759-09, be, and the same hereby is denied.

Dated: New York, New York
November 23, 2009

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER