Holmes, 3 OCB2d 51 (BCB 2010)

(IP) (Docket Nos. BCB-2810-09, BCB-2811-09, BCB-2812-09, BCB-2813-09).

Summary of Decision: Petitioners alleged that DC 37 and Local 371 breached a duty of fair representation by negotiating an agreement with the City in 2001 that transferred them from their permanent positions to provisional appointments. Petitioners alleged that DC 37 and Local 1549 breached the duty of fair representation by failing to appeal the termination of their City employment thereafter in 2009. Petitioners also alleged that the City violated the NYCCBL by terminating their employment and by refusing to bargain in good faith with the Union and the Locals. Respondents argued that the petitions were untimely at least in part. Local 371 argued that it did not represent Petitioners when they were terminated. Local 1549 asserted that it did not breach its duty by failing to file a grievance or procure permanent civil service positions for members that did not pass the necessary civil service exam. The City argued that some of the allegations were outside the Board's jurisdiction. The Board found the claims against Local 371 untimely, that Petitioners lacked standing to bring failure to bargain claims, and that Petitioners' allegations did not state a claim of breach of the duty of fair representation. Accordingly, the petitions were denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petitions

-between-

PEARLIE HOLMES, YEDLINA LAWRENCE, GERALDINE B. KNIGHT, and SHEILA JACKSON BOYKIN,

Petitioners,

-and-

ADMINISTRATION FOR CHILDREN'S SERVICES; DISTRICT COUNCIL 37, LOCALS 371 and 1549, AFSCME, AFL-CIO; and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On October 26, 2009, Pearlie Holmes, Yedlina Lawrence, Geraldine B. Knight, and Sheila Jackson Boykin ("Petitioners") individually filed improper practice petitions against Local 371 and

Local 1549, District Council 37, AFSCME, AFL-CIO, the City of New York ("City"), and the New York City Administration for Children's Services ("ACS").[1] Petitioners allege that Local 371 and Local 1549 (collectively, "Locals") breached the duty of fair representation and failed to bargain in good faith on their behalf, in violation of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b). Petitioners allege that Local 371 and DC 37 violated the NYCCBL by negotiating a 2001 agreement with the City in which Petitioners' layoff was averted in exchange for their transfer into provisional titles. Local 1549 and DC 37 allegedly violated the NYCCBL in 2009, by not adequately challenging Petitioners' terminations and failing to procure employment for them. Petitioners allege that the City violated NYCCBL § 12-306(a) by terminating Petitioners' employment and by refusing to bargain in good faith with the Locals.

Respondents argue that the allegations relating to events in 2001 are untimely. Local 371 argues that as it had ceased representing Petitioners in 2001, it did not have a duty to represent them when they were terminated in 2009. Local 1549 asserts that Petitioners failed to state a claim because a union does not breach its duty of fair representation by failing to file a grievance or procuring a permanent civil service position for a member who has not qualified for such a position by passing the necessary civil service exam. The City argues that some of Petitioners' claims are outside the Board's jurisdiction, and that Petitioners have failed to establish that either Local breached its duty of fair representation. The Board finds that the claims against Local 371 are untimely and that Petitioners lack standing to bring failure to bargain claims. Further, Petitioners did not allege facts to show that Local 1549's actions were arbitrary, discriminatory or in bad faith

[1] On February 3, 2010, the Parties agreed to consolidate these petitions for purposes of resolving these matters.

in breach of the duty of fair representation because the claims Petitioners wanted Local 1549 to bring to court, which it declined to do, lacked merit. Accordingly, the petitions are denied.

BACKGROUND

Petitioners were employees of ACS, a City agency that provides child welfare services. Until 2001, Petitioners were employed in the non-competitive title of Houseparent in ACS' Congregate Care Unit. Employees in the Houseparent title were represented by District Council 37 ("DC 37") in Local 371. In the 1990s, ACS initiated structural changes, which included phasing out the Congregate Care Unit and eliminating the Houseparent title. This plan contemplated that the employees serving in the eliminated title would be laid off.

On June 13, 2001, Local 371, DC 37, ACS, and the City entered into a Memorandum of Understanding ("MOU") that addressed the future employment of incumbents in the Houseparent title, which was being eliminated. The MOU provided that Houseparents at ACS could change employment in lieu of termination:

> Whereas, ACS has developed new staffing models as part of its Child Care Staff Reform Plan;
>
> Whereas, as part of the staffing model the Department of Citywide Administrative Services has established the new civil service title of Congregate Care Specialist;
>
> Whereas, the staffing model replaces current Houseparent positions with a combination of Congregate Care Specialist and Child Welfare Specialist title series positions; and
>
> Whereas, the parties desire to provide certain opportunities for those Houseparents displaced as a result of the implementation of the Child Care Staff Reform Plan. . . .

> Houseparents with more than two years of service at the time of their appointment to [a] Competitive title will be considered to have fulfilled the requisite service in the new title to qualify for the contractual due process disciplinary procedures for provisional employees. . . .
>
> If any of the provisions of [the MOU] are found to be in conflict with the Civil Service Law, or any other applicable rules and regulations, it is understood by the parties that Civil Service Law, or the applicable rules and regulations, shall govern. Such conflict shall not impair the validity and enforceability of the remaining provisions of this MOU.

(City Ans., Ex. 2).

In August 2001, pursuant to the MOU, Petitioners were appointed to the competitive title of Clerical Associate, as provisional employees, retaining their compensation, seniority, and benefits. Petitioners were all assigned to the Queens Field Office of ACS's Division of Children Protection. Clerical Associates are represented by Local 1549. Therefore, when Petitioners moved into the Clerical Associate title, Local 1549 became their bargaining representative.

More than six years later, on October 3, 2007, Notices of Examination were posted for the Clerical Associate open competitive civil service exam and the promotional civil service exam. On October 5, 2007, ACS sent an email to its employees encouraging all provisional employees to file for and take a civil service exam, as doing so would enable them to be placed on a certified list for that title and be eligible to be appointed as a "probable permanent" employee for ACS. Some of Petitioners filed for and took the civil service exam for Clerical Associate. Others did not. However, none of Petitioners passed the exam.

In 2008, the City directed ACS to make budget cuts for the upcoming fiscal year. ACS determined that in order to meet these budget cuts, it would lay off 50 provisional Clerical Associates. According to the City, a determination was made that, of the ten provisional Clerical

Associates employed at the Queens Field Office where Petitioners worked, two would be retained and eight would be laid off. In June 2009, ACS informed Petitioners individually by letter that they would be laid off for economic reasons and that their last day of service would be June 26, 2009.

On October 26, 2009, Petitioners filed the instant improper practice petitions. Three days later, Petitioners also filed an Article 78 petition in the Supreme Court of the State of New York, asserting claims under the Civil Service Law ("CSL"), the NYCCBL, and alleging that ACS's actions were arbitrary and capricious and contrary to law. On July 12, 2010, the Supreme Court issued a decision dismissing Petitioners' claims with prejudice. *Matter of Boykin v. Admin. of Children's Svcs., City of New York*, Index No. 114996/09 (Sup. Ct. N.Y. Co. Jul. 12, 2010)(Diamond, J.) (the "Article 78 Decision"). In the Article 78 Decision, the Supreme Court explained:

> [Petitioners allege that] their transfer into a provisional job status was improper, that they are entitled to be classified as permanent appointees by operation of estoppel in view of the representations which were made to them in 2001, that their lay-offs were made in violation of the Civil Service Law since their seniority was not taken into account and that ACS violated the NYCCBL by failing to adjust their status from provisional to permanent status.
>
> All of [Petitioners'] claims . . . turn on the issue of whether they are entitled to permanent employment status even though they were transferred to a job which was otherwise provisional. . . . ACS asserts that [P]etitioners are time-barred from challenging their provisional status and that the petition must therefore be dismissed. The court agrees.
>
> The court therefore concludes that [P]etitioners are time-barred from challenging the administrative determination classifying them in their position of Clerical Associate II as provisional employees. As such, [P]etitioners' claims under the Civil Service Law, the NYCCBL and the principles of estoppel are without merit. The petition must therefore be dismissed against ACS.

> Finally, the Court notes that [P]etitioners have conceded that this proceeding may not be maintained as against the respondent unions. The petition must therefore also be dismissed as against these respondents.

(*Id*. at 1-2).

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners assert that the Locals violated NYCCBL § 12-306(b) and § 12-307 by interfering with, restraining and coercing them in the exercise of their rights, by refusing to bargain in good faith with the City, and by failing to represent Petitioners in their claims against the City and ACS.[2] Petitioners also claim that ACS and the City violated NYCCBL § 12-306(a) by interfering with, restraining and coercing them from exercising their rights, and by refusing to bargain in good faith with the Union and Locals. At the time they were laid off, Petitioners had seniority in their City employment. Further, had their permanent status been grandfathered back to 2001 when they were transferred, they would not have been laid off. Failing to grandfather them was "an arbitrary and capricious, and illegal act by ACS and the City and [it] constituted [a] lack of fair representation by DC 37." (*See* BCB-2810-09 Pet. ¶ 41). Further, when Petitioners were laid off in 2009 and requested help from Local 1549, the Local stated that it could not help, which shows it breached its duty of fair representation.

DC 37 and the City negotiated Petitioners' transfer from the Houseparent title into the Clerical Associate title in 2001, but failed to ensure that Petitioners' permanent status continued in their new position. By moving Petitioners from permanent status to provisional status, the Union,

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[2] Petitioners also assert that the Locals violated NYCCBL § 12-307. Under NYCCBL § 12-307, a union does not possess responsibilities running directly to a member, therefore, we do not address this claim.

the Locals and the City did not act in Petitioners' best interests. These actions resulted in demotion and wrongful discipline. Further, the interview process that the City used in 2001 to determine which employees would be transferred was unlawful and unconstitutional because it was not sufficiently practical and did not fairly test the employees' capacity and fitness. Relying upon *Kaney v. NY State Civil Service Comm., et al.*, 190 Misc. 944 (1948), Petitioners assert that an exam and resulting appointments may be invalidated long after the events in question. DC 37's failure to ensure that Petitioners were grandfathered into permanent status in their new Clerical Associate positions in 2001 further demonstrates its breach of its duty of fair representation.

CSL § 65 limits the provisional appointments to nine months and requires that examinations for such positions should be conducted soon after a provisional appointment to prevent provisional employment from continuing for longer than nine months. By keeping Petitioners in provisional status for longer than nine months, ACS violated Petitioners' rights under the CSL when it acted in an arbitrary and capricious manner, and abused its discretion. Further, Local 1549 breached its duty to Petitioners by failing to take action to change their status back to permanent and by failing to fight for its members right to have the test given sooner.

Petitioners also claim that there were several problems with the Civil Service examination given on January 5, 2008. Some of the petitioners passed portions of the test but failed the typing section. They argue that typing is not a relevant skill, and it should not be a qualifying factor for the Clerical Associate position. The examination also should have utilized an objective standard that could be challenged and reviewed by other examiners. Moreover, the test should have utilized a rating key in order to give candidates credit for their practical experience in the title. Also, ACS "lulled the potential candidates into a false sense of comfort in the permanency of their jobs by

giving the examination six years later and not informing the candidates that they were 'provisional' employees for that entire period of time." (BCB-2810-09 Pet. ¶ 35). Petitioners also suggest that the City's actions in keeping Petitioners in their provisional status should have accorded them permanent status. Alternatively, they argue that they should have been transferred to a different permanent position or that their "provisional status should have ripened into that of permanency by operation of law." (*See* BCB-2810-09 Pet. ¶ 35). Further, the examination could have been waived due to a legal doctrine, such as laches.

Petitioners served as Clerical Associates for many years, and such experience makes them qualified for their positions. Typing skills, which are not part of the Tasks and Standards for the Clerical Associate title "is a ridiculous inequitable and illegal standard" upon which to base eligibility. (BCB-2810-09 Pet. ¶ 37). The examination for the title was not practical and was not a fair test and therefore the Civil Service Commission should rescind the resultant Clerical Associate eligibility list.

Finally, Petitioners argue that some provisional Clerical Associates were permitted to remain employees, and on that basis, Petitioners make discrimination claims on the basis of race, disability, and age.

Local 371's Position

Local 371 asserts that Petitioners fail to state a claim against it upon which relief can be granted. Although Petitioners were members of Local 371 until June 2001, when the MOU was negotiated, when they were reassigned to serve as Clerical Associates, their representation shifted to another local. Thus, Petitioners were no longer members of Local 371 when they were terminated. Accordingly, Local 371 could not and did not act on their behalf. Further, any actions taken by Local

371 would have occurred more than eight years ago. Given the four-month statute of limitations, any claims against Local 371 are untimely.

Local 1549's Position

Local 1549 asserts that, as to the allegations regarding the creation and signing of the MOU and surrounding events that occurred in 2001, the petitions are untimely. Pursuant to Section 1-07(d) of the Office of Collective Bargaining Rules and NYCCBL § 12-306(e), a petition must be filed no later than four months from the date a disputed action occurred. Petitioners' allegations relate back to 2001; however, their petitions were not filed until 2009.

The petitions also fail to state a claim that Local 1549 breached its duty of fair representation to Petitioners. In cases in which a union member has not passed the necessary civil service test to qualify for appointment to a permanent position, a union does not breach its duty of fair representation by failing to file a grievance or procuring a permanent civil service position for that member. Petitioners have not shown that Local 1549 treated them in a hostile or discriminatory way. Local 1549 decided not to challenge Petitioners' terminations based on their status as provisional employees. Such a determination is not arbitrary, capricious, or in bad faith. As provisional employees, Petitioners' terminations were required by CSL § 65. Finally, to the extent that Petitioners bring claims under the CSL, New York State Law, and Federal law, the Board lacks subject matter jurisdiction.

City's Position

The City argues that the petitions should be dismissed as untimely; the petitions were filed in October 26, 2009, and given the four-month statute of limitations, allegations concerning events occurring prior to June 26, 2009, may not be remedied. Further, to the extent that Petitioners claim

violations of the CSL and the New York State Constitution, such claims are not within the Board's jurisdiction and must therefore be dismissed.

Further, the City asserts that Petitioners failed to establish their claims that the Locals breached their duty of fair representation. Therefore, their derivative claims against the City must also fail. Regarding the claims against the City, Petitioners failed to establish that the City retaliated or discriminated against them in violation of NYCCBL § 12-306 (a)(1) or (3). Petitioners have neither asserted that they were engaged in any protected activity, which is a necessary element of a discrimination or retaliation claim, nor have they shown the City had any anti-union animus against them. The City asserts that, in fact, Petitioners were treated in accordance with governing procedures, including the Citywide Agreement and the Department of Citywide Administrative Services Layoff Procedures. In response to Petitioners' various discrimination claims, the City asserts that the provisional employees that were permitted to remain have more seniority, earn a higher salary, and were the same age or older than Petitioners.

DISCUSSION

NYCCBL § 12-306(e) provides that an improper practice petition must be filed within four months of the accrual of the claim.[3] Claims filed outside of that period are untimely, and this Board

[3] 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. . . .

will not rule upon the substantive merits of such claims. See Local 2627, DC 37, 3 OCB2d 37, at 15 (BCB 2009); Castro, 63 OCB 44, at 6 (BCB 1999).

Petitioners filed their improper practice petitions on October 26, 2009, and our review is restricted to events occurring after June 26, 2009. Petitioners' claims arising out of the signing of the MOU in 2001 are therefore untimely. Similarly, Local 371 ceased acting as the bargaining representative for Petitioners in 2001, and any actions it may have taken occurred long before the four-month statute of limitations. Accordingly, all claims against Local 371 are dismissed as untimely. Only those claims against Local 1549, the City, and ACS based on events occurring after June 26, 2009 are timely. However, these claims must also be dismissed because Petitioners allegations which, if established, fail to make out violations of the NYCCBL.

Petitioners allege that both Local 1549 and the City failed to bargain in good faith concerning their termination. The Board has held that "individual employees lack standing to initiate a claim of the failure to bargain in good faith." *Proctor*, 3 OCB2d 30, at 11 (BCB 2010) (citing *Brown*, 75 OCB 30, at 7-8 (BCB 2005)); *McAllan*, 31 OCB 15, at 15 (BCB 1983) ("the duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not the union's members"). Therefore, we deny any claims of alleged failure to bargain in good faith by Local 1549 and by the City.

Petitioners claims that Local 1549 breached the duty of fair representation fare no better. This Board has "long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Morales*, 3 OCB2d 25, at 10 (BCB 2010) (internal citations omitted); *see also Whaley*, 59 OCB 41, at 12 (BCB 1997). Petitioners assert that Local 1549

breached its duty of fair representation by failing to advocate for or ensure that the City continued to employ Petitioners, despite their failure to take or pass the civil service examination for their position. They also complain that Local 1549 did not advance a claim that their transfer to and acceptance of a provisional title violated their rights under the CSL. In this instance, since Petitioners had not taken and/or passed the CSL exam, the Local's failure to appeal their terminations cannot be found to be unreasonable.[4] Further, Petitioners themselves brought the CSL claims to the Supreme Court, which found that the claims were time-barred.[5] Therefore, we find Local 1549's decision not to bring the claims was also reasonable. A union's "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *James-Reid*, 1 OCB2d 26, at 25 (BCB 2007) (quoting *Sicular,* 77 OCB 33, at 15 (BCB 2006)). Accordingly, Local 1549 did not violate the NYCCBL by not bringing Petitioner's CSL claims

[4] Unions have only limited recourse to dispute the terminations of provisional employees. *Gillard*, 67 OCB 35 (BCB 2001); *see Matter of City of Long Beach v. Civ. Serv. Empl. Assn*, 8 N.Y.3d 465 (2007). In *Gillard*, a former provisional Clerical Associate who had not passed the civil service exam for her title brought a petition alleging that Local 1549 breached its duty of fair representation by not advocating for her continued employment. This Board found that the petitioner in *Gillard* failed to demonstrate that the union breached its duty of fair representation, because "the rights of provisional employees are limited by law, [therefore] the union could not and did not have an obligation to file a grievance on Petitioner's behalf." *Id.*, at 6. In all relevant regards, Petitioners' case is indistinguishable from *Gillard*. Petitioners were provisional employees who did not pass the civil service exam for their title, and based upon the limits of the CSL, the Local and the Union could not act to stop their termination.

[5] As we explained in *DC 37, L. 376*, 1 OCB2d 36, at 15, n. 5 (BCB 2008), a decision of the New York Supreme Court is preclusive on factual and legal issues necessarily decided by that court and within its jurisdiction upon a party that has had a full and fair opportunity to litigate that issue.

regarding their provisional status. Moreover, we note that there are no allegations or evidence to support a claim that Local 1549's actions were motivated by arbitrary or discriminatory reasons.

We find that Petitioners failed to establish that Local 1549 breached its duty of fair representation. As there is no viable claim against Local 1549, there are no derivative claims against the City. Accordingly, the petitions are denied in their entirety.[6]

[6] Petitioners' assert claims arise under statutes, including the CSL, New York State Law, and Federal laws. These claims fall outside of our jurisdiction, which is limited to the NYCCBL; therefore we will not consider them.

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 petitions docketed as BCB-2810-09, BCB-2811-09, BCB-2812-09, BCB-2813-09, be and the same hereby are, denied.

Dated: October 26, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER