

Lutz, 4 OCB2d 13 (BCB 2011)
(IP) (Docket No. BCB-2888-10).

Summary of Decision: Petitioner, through counsel, appealed the Determination of the Executive Secretary of the Board of Collective Bargaining that dismissed Petitioner's improper practice petition against the Union and the City. Petitioner argued that the Executive Secretary erred by finding the petition untimely. The Board found that the Executive Secretary properly deemed the claims in the petition untimely and denied the appeal. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

JOSIE LUTZ,

Petitioner,

- and -

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO and THE NEW YORK CITY TAXI AND
LIMOUSINE COMMISSION,**

Respondents.

DECISION AND ORDER

On December 10, 2010, Josie Lutz ("Petitioner"), through counsel, appealed the November 23, 2010 Determination of the Executive Secretary of the Office of Collective Bargaining that dismissed Petitioner's improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union") and the New York City Taxi and Limousine Commission ("TLC"), a mayoral agency within the City of New York ("City"). Petitioner argues that the Executive Secretary erred by finding the petition untimely. The Board finds that the Executive Secretary properly deemed the

claims in the petition untimely and denies the appeal.

BACKGROUND

Petitioner's Claims

On August 24, 2010, Petitioner, through counsel, filed a verified improper practice petition against the Union and the City. The petition alleged that the Union breached its duty of fair representation to Petitioner, a 15-year employee of TLC, in connection with the termination of her employment. Petitioner also alleged that a stipulation of settlement that she entered with the City on August 21, 2008, ("Stipulation") violated the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA").

TLC terminated Petitioner's employment based on her purported violation of the Stipulation. The Stipulation resolved disciplinary charges that Petitioner violated TLC Code of Conduct provisions governing attendance and provides that Petitioner "agrees to a two day suspension and then a time and leave probation . . . beginning on August 28, 2008 (the next work day after the suspension) and lasting for nine months, ending May 27, 2009 (unless extended pursuant to [the Stipulation's terms])." (Pet., Ex. B). The Stipulation further provides that Petitioner:

[U]nderstands that any violation of the terms of the probationary period above will result in an immediate sanction of termination, and, by agreeing to this Stipulation, [Petitioner] hereby acknowledges that a determination of a violation shall be solely the decision of the TLC and waives all rights to contest the TLC's decision and the resulting termination, including any such rights as provided for in her union contract, including the filing of a grievance, Section 75 of the Civil Service Law, any other administrative provision, or otherwise. Such a violation will thereby end the probationary process

By agreeing to this Stipulation, [Petitioner] waives any and all rights granted to her by her union contract including the filing of a grievance,

Section 75 of the Civil Service Law, any other administrative provision, or otherwise to contest the charges, the penalty, or the TLC's exercise of its discretion under the terms of this Stipulation. [Petitioner] further understands that this waiver of rights is final and irrevocable

[Petitioner] hereby acknowledges that the union has fully and fairly represented her in this matter, including the negotiation of this Stipulation. [Petitioner] also acknowledges that she has read and understands the terms of this Stipulation, and that she enters into it of her own free will.

(Id.).

Despite this last paragraph, Petitioner alleges that the Union breached its duty of fair representation by failing to provide Petitioner with an opportunity to review the Stipulation. Petitioner claims that before signing the Stipulation, the Union representative told her that she could agree to a two-week suspension or sign the Stipulation, which would entail a two-day suspension and compliance with "certain rules." (Pet. ¶ 10). Additionally, she claims that the Union told her "to sign it or she would not have a job." (Pet. ¶ 11). Petitioner alleges that she signed the Stipulation solely because of the Union representative's insistence. Petitioner further asserts that the Union representative failed to advise her of the implications of the Stipulation's probationary period, its ramifications as a "last chance" agreement, and that she was waiving certain legal claims under the collective bargaining agreement. Last, Petitioner claims that the Union representative failed to inform her that the Stipulation might violate the ADA and the FMLA.

Sometime after signing the Stipulation, Petitioner allegedly violated its terms by missing several days of work in August and September 2008.¹ On October 31, 2008, Petitioner received a

¹ The first occasion, on which Petitioner missed two days of work, she attributed her absence to the sudden death of her boyfriend's niece and a resultant quarantine that included Petitioner. Her supervisor asked her to sign a HIPAA disclosure form, but Petitioner refused because her family

letter terminating her employment as of November 3, 2008.

Petitioner did not contact the Union for help in challenging her termination until two weeks later. Thus, sometime in mid-November 2008, Petitioner spoke with the Union President and faxed him the termination letter. In January 2009, Petitioner met with the Union representative, the Union President, another Union official, and Union counsel. According to Petitioner, during this meeting, which lasted ten to fifteen minutes, the Union President stated that the Union would decide whether it would challenge the termination and that it would notify Petitioner of its decision.

Thereafter, Petitioner claims that she repeatedly called the Union concerning its decision, but did not receive a response until June 6, 2009. At this time, the Union official that attended the January 2009 meeting informed Petitioner that she would receive a letter explaining the Union's decision. Petitioner received a letter on June 8, 2009, which stated in full: "Pursuant to our discussion on June 6, 2009, I am forwarding you the assessment done by [Union Counsel] of your case. If you have any further questions, I can be reached at [telephone number]. Thank you." (Am. Pet., Ex. F). The attached memorandum ("Counsel Memorandum") discussed the Stipulation's terms and analogized it to "last chance" agreements that the Appellate Divisions have upheld. It concluded that "[i]n [Petitioner's] case, the Stipulation gives TLC sole discretion to determine if the Stipulation was violated. Therefore her termination cannot be challenged." (*Id.*).

Despite receipt of this letter, Petitioner claims in the amended petition, executed on October 27, 2010 ("Amended Petition"), that she "still did not know whether the Union was going to challenge the termination." (Am. Pet. ¶ 54). Thereafter, she repeatedly called the Union "to find out

doctor allegedly advised her that it "might allow the TLC access to too much information." (Am. Pet. ¶ 28-31). Petitioner again missed two days of work approximately one month later, which she attributed to a respiratory infection for which she provided a doctor's note.

what they were going to do and she left messages,” but she never received a response. (*Id.*). On April 28, 2010, Petitioner’s counsel sent a letter to the Union asking “if the Union is going to take her grievance forward or whether she needs to pursue other options.” (Pet., Ex. E). The following day, the Union replied with a letter that enclosed the Counsel Memorandum. Petitioner, through counsel, filed the improper practice petition on August 24, 2010.

Executive Secretary’s Deficiency Letter

On September 2, 2010, the Executive Secretary issued a letter (“Deficiency Letter”), pursuant to Rule 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”), explaining that Petitioner had not articulated a timely cause of action pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). After reviewing the pleadings, the Executive Secretary considered all possible dates of accrual based on the facts alleged in the petition, and found that none of them fell within the four month statute of limitations. Specifically, the Deficiency Letter stated in pertinent part:

Petitioner has not pleaded any act or omission on the part of the Union that is alleged to constitute a breach of the duty of fair representation, or any act on the part of the City alleged to be discriminatory and/or retaliatory, that is alleged to have taken place within the four (4) month statute of limitations provided . . .

(Deficiency Letter, at 1-2 (citing OCB Rule 1-07)).

On November 18, 2010, Petitioner’s counsel filed a letter expressing her disagreement with the Deficiency Letter and attached the Amended Petition and a supporting affidavit, executed on October 27, 2010 (“Affidavit”). The Executive Secretary reviewed these documents for sufficiency pursuant to OCB Rule § 1-07(c)(2) and issued a Determination of the Executive Secretary, *Lutz*, 3

OCB2d 52 (ES 2010), on November 23, 2010 (“ES Determination”).

ES Determination

The ES Determination found that the Amended Petition failed to state a timely claim under the NYCCBL. Citing *Raby*, 71 OCB 14 (BCB 2003), the Executive Secretary held that “when, as here, the petitioner claims that she did not know about the alleged breach at the time it occurred, the four month period is measured from the time the petitioner knew or should have known of the occurrence.” (ES Determination at 8). Because the Amended Petition and Affidavit established that Petitioner received the forwarding letter and Counsel Memorandum stating that her “termination cannot be challenged” on June 8, 2009, Petitioner should have known that the Union would not pursue her claim at that time. The ES Determination further reasoned that Petitioner’s repeated attempts to obtain a response from the Union subsequent to the receipt of this letter did not toll the statute of limitations. Last, the Executive Secretary ruled that Petitioner’s claims relating to the Stipulation, which was executed more than two years before the filing of the improper practice, were patently untimely. Accordingly, the Executive Secretary concluded that Petitioner stated no viable claims.

Moreover, although the Executive Secretary considered the allegations set forth in the Amended Petition and Affidavit, the ES Determination noted that it was not clear that the Executive Secretary could consider these filings because they were not submitted in a timely manner, but nearly two and a half months after the deficiency letter was served.²

² The Executive Secretary annexed a copy of OCB Rule 1-07(c)(2), titled “Executive Secretary Review of Improper Practice Petitions,” to the ES Determination. It provides in pertinent part:

(ii) Within 10 business days after service of a decision of the

The Appeal

On December 10, 2010, Petitioner appealed the ES Determination. Petitioner asserts that the ES Determination erred by deeming Petitioner's claims untimely because the statute of limitations did not begin to run until Petitioner obtained her own counsel and filed the petition. She contends that she did not know the Union's position regarding her claims because the Union did not provide her with any feedback regarding her termination until after the statute of limitations, did not return her phone calls, and sent her an "opaque letter written in legalese." Statement of Appeal, at 2. Thus, she did not, and could not, know that a cause of action had accrued and that the statute of limitations had begun to run. For this reason, she contends that the Executive Secretary improperly relied on *Raby* in its determination.

In the alternative, Petitioner argues that the Union's misconduct towards her tolled the statute of limitations. Again, Petitioner argues that the Board's holding in *Raby* that a petitioner's continued

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. . . . 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.

attempt to obtain a response from a union does not toll the statute of limitations does not apply to the instant petition. The Union's actions and omissions confused Petitioner, made her believe that it was helping her, and prevented her from seeking counsel. Thus, equity requires that the statute of limitations toll until Petitioner obtained legal counsel and filed the petition.

Petitioner requests that the Board reverse the ES Determination and deem the petition timely.

DISCUSSION

The Executive Secretary properly deemed the charges in this matter deficient. The Board notes that the Executive Secretary addressed the merits of the Amended Petition despite its untimely filing. Pursuant to OCB Rule 1-07(c)(2)(iii), "[w]ithin 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. If the petitioner does not timely file an amendment or otherwise respond, the charge will be deemed withdrawn and the matter closed." Here, Petitioner filed the Amended Petition more than two months after the Deficiency Letter was served and provided no excuse for the delayed filing. Although the Executive Secretary did not reject the Amended Petition on this basis, the Board holds the authority to interpret its own rules and has stated that "[f]iling deadlines [] are not mere technicalities that the parties can ignore." *Doctors Council*, 3 OCB2d 1, at 8 (BCB 2010) (finding a filing that was one day late untimely and precluded). Accordingly, we find that the Amended Petitioner was untimely filed.

Further, even when all permissible inferences are drawn in favor of Petitioner, including the facts alleged in the Amended Petition and Affidavit, Petitioner's claims are untimely. Pursuant to NYCCBL § 12-306(e), an improper practice charge "must be filed no later than four months from the

time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.”³ *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd.*, *Matter of Mahinda v. City of New York, et al.*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.). The Executive Secretary correctly stated that “[w]hen, as here, the petitioner claims that she did not know about the alleged breach at the time it occurred, the four month period is measured from the time the petitioner knew or should have known of the occurrence.” ES Determination, at 8 (quoting *Raby*, 71 OCB 14, at 9-10 (citing NYCCBL § 12-306(e))); *UFA*, 3 OCB2d 13, at 9-10 (BCB 2010). “[C]laims 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)).

Here, as in *Raby*, Petitioner relies on the Union’s failure to respond to her phone calls and to inform her of its decision not to pursue her claim as the basis for the Union’s alleged breach of the duty of fair representation. Petitioner, however, received a letter from the Union dated June 8, 2009, stating clearly and unambiguously that “the termination cannot be challenged.” (Am. Pet., Ex. F). Thus, at the latest, Petitioner should have known that the Union had no intention of challenging her

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

termination on or about June 8, 2009. Accordingly, because Petitioner filed the instant petition more than four months after June 8, 2009, it is time-barred.

In conclusion, the Board finds that the ES Determination, dated November 23, 2010, *Lutz*, 3 OCB2d 52 (ES), properly dismissed Petitioner's claim in its entirety. Therefore, Petitioner's appeal from the ES Determination is denied.

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 Executive Secretary's Determination, Lutz, 3 OCB2d 52 (ES), is affirmed, and the appeal therefrom is denied.

Dated: March 30, 2011
New York, New York

MARLENE A. GOLD
CHAIR

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