Cherry, 4 OCB2d 15 (BCB 2011)

(IP) (Docket No. BCB-2896-10).

Summary of Decision: Petitioner appealed the Determination of the Executive Secretary of the Board of Collective Bargaining. The Executive Secretary dismissed the petition as both untimely and insufficient because it alleged a violation that occurred more than four months prior to the filing of the charge and it did not plead facts sufficient to establish a violation of the NYCCBL. Petitioner argued that the petition was timely and that he pleaded facts establishing that the Union breached the duty of fair representation. The Board found that the Executive Secretary properly deemed the charges in the petition untimely and insufficient, and it denied the appeal. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

BERNARD CHERRY,

***Petitioner*,**

-and-

THE CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On September 22, 2010, Bernard Cherry ("Petitioner") filed a *pro se* verified improper practice petition ("Petition") against the Correction Officers' Benevolent Association ("COBA" or "Union").[1] Petitioner claimed that the Union breached the duty of fair representation, in violation

[1] Petitioner failed to name the City of New York ("City") and the New York City Department of Correction ("DOC") as defendants in this matter. In his Appeal Letter, Petitioner questioned the Executive Secretary's listing of these entities in the caption of his Determination,

of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), during the course of administrative and judicial proceedings related to Petitioner's termination. Pursuant to Section 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 November 10, 2010, the Executive Secretary of the Board of Collective Bargaining dismissed the Petition on the grounds that Petitioner's claims were untimely and insufficient. *See Cherry*, 3 OCB2d 51A (ES 2010) ("ES Determination"). On November 22, 2010, Petitioner appealed the ES Determination ("Appeal"). The Board finds that the Executive Secretary properly deemed the charges in the Petition untimely and insufficient, and it denies the Appeal.

BACKGROUND

The Petition

Petitioner is a former correction officer employed by the New York City Department of Correction ("DOC"). He was terminated on March 22, 2007, based on the recommendation of an Administrative Law Judge ("ALJ") from the Office of Administrative Trials and Hearings ("OATH"). The ALJ found Petitioner guilty of insubordination, excessive usage of sick leave, and failure to document sick leave usage. *See Matter of Dept. of Correction v. Cherry*, OATH Index

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explaining that he did not file the Petition against the City or DOC. These entities should have been joined because the NYCCBL requires the joinder of such parties in a duty of fair representation case. Specifically, "[t]he public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization." NYCCBL § 12-306(d). Thus, although not noted by the Executive Secretary, Petitioner's failure to join the City and DOC constitutes a defect in the Petition.

No., 184/07 (Feb. 28, 2007) ("OATH Decision"), *affd*, *Matter of Cherry v. Horn*, No. 1099938/07 (Sup. Ct. N.Y. Co. Jan 14, 2008), *affd*, 66 A.D.3d 556 (1st Dept 2009). More specifically, the ALJ sustained the following charges against Petitioner: (1) failure to submit reports of his whereabouts while on sick leave; (2) failure to submit timely medical documentation; (3) excessive time out of residence; (4) insubordination for refusing to submit a report regarding his absences; and (5) insubordination for refusing to submit a written report about a use of force ("UOF Report"). *Id.* at 2-5, 7-9. The ALJ, however, did not sustain charges against Petitioner of falsifying documents and of excessive absenteeism following a 2006 work-related injury. *Id.* at 5-6.

The Union retained Koehler & Isaacs, LLP ("Union Counsel") to represent Petitioner in connection with proceedings related to his termination, including the OATH hearing. Upon Petitioner's termination, Union Counsel recommended that he file an appeal with the Civil Service Commission. Petitioner, however, declined Union Counsel's recommendation. Likewise, at the Union's request, Petitioner signed a letter acknowledging that he chose to pursue an Article 78 proceeding and that his decision was contrary to Union Counsel's advice. Union Counsel then filed a timely petition for an Article 78 proceeding seeking review of Petitioner's termination. Thereafter, Petitioner terminated Union Counsel's representation. Accordingly, on June 3, 2008, Union Counsel sent Petitioner a letter, which documented Petitioner's request that the law firm no longer represent him in connection with his Article 78 proceeding and provided for the reimbursement of funds not yet expended on Petitioner's behalf.

The New York State Supreme Court rendered a decision on January 14, 2008, rejecting Petitioner's claim that DOC's excessive sick leave charge was contrary to law and finding that the Commissioner of Correction had authority to take disciplinary action against him. *See Matter of*

Cherry, No. 1099938/07. The Court transferred Petitioner's claims regarding substantial evidence to the Appellate Division, which held, on October 22, 2009, that the findings against Petitioner underlying his termination were supported by substantial evidence. *See Matter of Cherry*, 66 A.D.3d at 557. On December 21, 2009, Petitioner filed a malpractice action against Union Counsel in New York State Supreme Court. *See Cherry v. Koehler & Isaacs, LLP, et al*, No. 310302/09 (Sup. Ct. Bronx Co. Sept. 30, 2010).

In his Petition, Petitioner argued that Union Counsel did not submit certain evidence–such as a "false and misleading" Tour Commander's Report containing a forged signature of the Assistant Deputy Warden–at the OATH hearing which could have helped him keep his job. Instead, Petitioner asserted that Union Counsel relied solely on doctor's notes and letters for his entire defense. Petitioner alleged that a colleague's attorney in a similar case introduced such evidence.[2] Moreover, Petitioner alleged that Union Counsel permitted DOC to prosecute him on a time-barred charge of medical incompetence. Petitioner asserted that Union Counsel failed to introduce the memorandum of complaint into evidence and argue that it was defective under DOC regulations because it concerned a time-barred charge and was not completed by a commanding officer of the facility. Furthermore, Petitioner maintained that Union Counsel did not submit a "Use of Force Package Accountability Sheet" into evidence. This document, Petitioner contended, would have shown that he filed the UOF Report in question, and, therefore, he should not have been charged with insubordination for failing to submit such report. Petitioner additionally claimed that Union Counsel's argument on appeal was weak and that Union Counsel lied to him regarding the ability to

[2] Petitioner claims that although this evidence would have helped his colleague's case, the attorney subsequently withdrew the evidence, and his colleague was terminated.

introduce new evidence in the Article 78 proceeding. Specifically, Petitioner asserted that Union Counsel "[k]new she can submit new evidence [i]n an Article 78; but chose to lie to me, and submit that weak argument deliberately." (Pet. ¶ 9).

Petitioner alleged that his Petition was timely because he was not aware that he could bring an action against the Union until June 5, 2010, when opposing counsel in Petitioner's state court malpractice action stated in his oral argument that Petitioner should have sued the Union instead of Union Counsel. Petitioner maintained that his four month statute of limitations, pursuant to CPLR §§ 214(c)(6)(b) and 217, did not begin to run until he became aware of his right of action against the Union.

The Executive Secretary's Determination

On November 10, 2010, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the Petition for untimeliness and for failure to state a cause of action under the NYCCBL. *See Cherry*, 3 OCB2d 51A (ES 2010).

The Executive Secretary determined that Petitioner's claims accrued no later than June 3, 2008, when Union Counsel advised Petitioner that the law firm was no longer representing him. Accordingly, the Executive Secretary explained that Petitioner's claims against the Union should have been filed by October 3, 2008. Given that the Petition was filed on September 22, 2010, the Executive Secretary found that it was filed more than four months after Petitioner's claims accrued, and, therefore, the Petition was untimely. The Executive Secretary rejected Petitioner's assertion that the statute of limitations was tolled until he discovered the existence of his right to file a duty of fair representation claim in June 2010. Instead, the Executive Secretary explained that awareness of the occurrence giving rise to a claim of improper practice establishes the time of accrual. The Executive

Secretary determined that, at the very latest, Petitioner knew of the facts that formed the basis of his breach of the duty of fair representation claim by December 21, 2009, when he filed his state court malpractice action alleging the same acts of negligence and/or misconduct.

In addition to finding the Petition untimely, the Executive Secretary found that Petitioner also failed to allege facts sufficient to state a breach of the duty of fair representation. The Executive Secretary noted that Petitioner complained of a series of tactical and strategic decisions by Union Counsel that he asserts to have been "negligent" and/or to have involved "deliberately los[ing] [his] case." *Cherry*, 3 OCB2d 51A, at 9 (quoting Petition). The Executive Secretary determined that Petitioner's allegations did not amount to a breach of the duty of fair representation because the Union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Id.* (quoting *Mora-McLaughlin*, 3 OCB2d 24, at 13 (BCB 2010) (citations omitted)). Therefore, Petitioner's dissatisfaction with Union Counsel's representation was insufficient to establish a breach of the duty of fair representation.

Furthermore, the Executive Secretary found that Petitioner's claims of bad faith were speculative and/or conclusory.[3] Consequently, the Executive Secretary determined that no viable claim had been stated because conclusory allegations of wrongdoing are insufficient to establish a breach of the duty of fair representation under NYCCBL § 12-306(b)(3).

The Appeal

[3] The Executive Secretary noted that Petitioner alleged that Union Counsel "lied" to him regarding her ability to introduce new evidence in an Article 78 proceeding. The Executive Secretary found that Petitioner's assertion was without merit as a matter of law. Citing a host of decisions by the New York Court of Appeals, the Executive Secretary explained that Union Counsel, in fact, was not free to submit new evidence in the Article 78 proceeding.

On November 22, 2010, Petitioner filed the Appeal.[4] Petitioner alleges that the Executive Secretary erred in the ES Determination for several reasons.

First, Petitioner argues that the Petition is not time-barred because CPLR § 214 provides that he has three years to file a claim once he becomes aware. Petitioner maintains that he was unaware that he could bring a claim against the Union under the NYCCBL until June 5, 2010, when opposing counsel raised the possibility during a state court proceeding related to his malpractice action.

Second, Petitioner maintains that the Executive Secretary erred in dismissing the merits of his claim. Petitioner argues that the Union's "failed" tactical maneuvering and strategy led to his termination and that he should not have lost his job or have been charged with the infractions against him.[5] (Appeal at 6). Specifically, Petitioner alleges that Union Counsel allowed DOC to introduce "false and misleading documents" against him without challenging their validity. (Appeal at 2). Accordingly, Petitioner explains that he lost his Article 78 appeal because the "discovery package" for his OATH hearing contained a "false and misleading document" and Union Counsel did not present certain evidence that would have exonerated him. (*Id.*) In fact, according to Petitioner, Union Counsel "deliberately chose a weak argument and the union [k]new about it and did

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[4] The page numbers listed on the pages of the Appeal are not easily comprehensible. Therefore, to the extent that pages of the Appeal are cited in this Decision, the Board has renumbered them in proper sequence.

[5] Petitioner explains that his colleague "did the right thing" by hiring an outside attorney to represent him. (Appeal at 7). Petitioner complains that he trusted his Union and the law firm the Union retained for him; however, Union Counsel "failed [him] and the Union failed [him]." (*Id.*) Petitioner notes that his colleague "w[on] his job back" after he decided to no longer be represented by Union Counsel because such attorneys "mishandle[d] his case." (Appeal at 6).

nothing."[6] (Appeal at 5).

Petitioner alleges that despite Union Counsel's assertions, Union Counsel would have been permitted to introduce such exculpatory evidence on appeal and the Executive Secretary erred by citing the Court of Appeals for the proposition that new evidence may not be presented at an Article 78 proceeding. While Petitioner agrees that the Court of Appeals does not entertain the presentation of new evidence, he makes the distinction that Union Counsel filed his appeal with the Appellate Division and not the Court of Appeals.

Petitioner additionally accuses the Executive Secretary of "playing politics with [his] petition," arguing that the Executive Secretary improperly found that his claims of bad faith and/or negligence were speculative or conclusory. (Appeal at 6). To the contrary, Petitioner maintains that he submitted factual documentation from his OATH hearing that establishes Union Counsel's malpractice. He further alleges that the Union did not respond to several letters that he sent and that the Union did not order Union Counsel to file a motion to appeal the OATH decision or to obtain a continuance, pursuant to §§ 2-04 and 2-44 of the OATH Rules of Practice, respectively. Petitioner alleges that the Union "knew about this and did nothing on [his] behalf." (Appeal at 4). Petitioner contends that Union Counsel "deliberately mishandle[d]" his case and that the Union "allowed them to do it" because the Union "sat back and let it happpen [*sic*]." (Appeal at 4, 7). More specifically, Petitioner believes that he proved his case because the Union "allowed [DOC] to charge [him] with false and misleading charges and retained Koehler & Isaacs law firm," which "had no intention of

[6] Petitioner disagrees with the Executive Secretary's characterization of his argument that Union Counsel did not present the "best evidence" at his OATH hearing. (Appeal at 2). Rather, Petitioner claims that Union Counsel failed to challenge the validity of "false and misleading documents" introduced against him, and, therefore, his argument did not solely concern Union Counsel's decisions regarding which evidence to present. (*Id.*).

saving [his] job." (Appeal at 6). Thus, Petitioner complains of the Union's "ineffectiveness" to save his job despite DOC's presentation of "false and misleading" evidence. (*Id.*).

Third and finally, Petitioner complains that the Executive Secretary called him, prior to dismissing his Petition, to inquire about the New York State Supreme Court's ruling in his malpractice action. Petitioner maintains that the state court decision should not have any bearing on his Petition.

DISCUSSION

We find that the Executive Secretary properly dismissed the Petition because it was untimely. It is well-established that 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 the occurrence." *Raby*, 71 OCB 14, at 9-10 (BCB 2003) (citing NYCCBL § 12-306(e)), *affd*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).[7] *See also DC 37, L. 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Tucker*, 51 OCB 24, at 5-6

[7] 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.

Similarly, OCB Rule § 1-07(b)(4) provides:

> One or more public employees or any public employee organization acting on their behalf or a public employer may file 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

(BCB 1993). Accordingly, "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 28 (BCB 2009) (citations omitted).

Petitioner cites CPLR § 214 in support of his claim that he had three years to file the Petition. Petitioner's reliance on CPLR § 214 is misplaced because this provision sets forth, among other things, the statute of limitations for legal malpractice, a distinctly different action than a breach of the duty of fair representation claim under the NYCCBL.

Here, all of Petitioner's claims relate to conduct which occurred either in connection with Petitioner's OATH hearing in 2007 or in connection with his Article 78 proceeding in 2008 and 2009. Petitioner does not contend that he lacked knowledge of the Union's or Union Counsel's conduct in 2007 and 2008. Therefore, the statute of limitations on Petitioner's claims began to run at the time the alleged acts occurred in 2007 and 2008.[8] Furthermore, even assuming Petitioner lacked knowledge of the alleged conduct, certainly he was aware of his claims on December 21, 2009, when he filed his state court malpractice action. Indeed, his malpractice action against Union Counsel complained of the very same acts which form the basis of his breach of the duty of fair representation claim here. Petitioner filed the Petition on September 22, 2010. Therefore, the Petition is untimely because all of Petitioner's claims concerning the breach of the Union's duty of

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> violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

[8] Union Counsel's representation of Petitioner ceased on or before June 3, 2008.

fair representation arose more than four months prior to his filing the Petition.[9]

The Executive Secretary correctly ruled that Petitioner's argument for equitable tolling–that he did not know that he could file a breach of the duty of fair representation claim until June 2010–is not a basis upon which the statute of limitations may be tolled. A petitioner's awareness of the legal theory supporting a right of action does not commence the statute of limitations period. Rather, the occurrence of the disputed action, or when the petitioner knew or should have known of the occurrence, establishes the time of accrual, and it is at that time that a petitioner's duty to investigate and bring the claim arises. *See OSA*, 2 OCB2d 30, at 14 (BCB 2009); *Raby*, 71 OCB2d 14, at 9-10. Here, at the very latest, Petitioner was aware of the alleged misconduct nine months before he filed the Petition. Therefore, the Petition is untimely.[10]

We need not address the merits of Petitioner's claim regarding the Union's alleged breach of the duty of fair representation because the Petition was untimely. However, if we were to reach the

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[9] It is noted that Petitioner argues that the "continuous representation" doctrine was misapplied to his claims. Although the Executive Secretary discussed this doctrine, it was not the basis for the dismissal of Petitioner's claims. The Board has not adopted this doctrine and finds that it is not applicable to the statute of limitations issues considered herein.

[10] The Board takes administrative notice of the Second Circuit's affirmance of the District Court's dismissal of Plaintiff's employment discrimination action against the City, arising from the same facts involved here. The Second Circuit found, similar to our ruling today, that Petitioner's complaint was untimely and that equitable tolling should not apply because "he has not asserted, much less established, that extraordinary circumstances justify application of the equitable tolling doctrine." *Cherry v. City of New York*, 381 Fed.Appx. 57, 59 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 940 (2011), *reh'g denied*, No. 10-7390, 2011 WL 767680 (Mar. 7, 2011). The Second Circuit noted that Petitioner's "only argument in favor of equitable tolling is that he was misled by his union and/or DOC" and that "nothing in the record supports [Petitioner's] claim of a conspiracy or shows that there existed exceptional circumstances sufficient to excuse his delay." *Id*. Likewise, the Second Circuit also dismissed Petitioner's separate federal action against the Union "because it lacks an arguable basis in law or fact." *Cherry v. Corr. Officers' Benevolent Assoc.*, No. 10-cv-4063 (2d Cir. Feb.3, 2011).

merits, we would find that the Executive Secretary correctly determined that Petitioner failed to state a claim. Here, Petitioner objects to Union Counsel's strategic and tactical decisions made during its representation of him in connection with his OATH hearing and Article 78 proceeding, maintaining that Union Counsel's "failed" tactical maneuvering and strategy led to his termination. In short, Petitioner claims that Union Counsel was negligent and/or deliberately lost his case. Petitioner's various allegations of negligence and/or malpractice do not establish a breach of the duty of fair representation because a petitioner must allege more than negligence to state such a claim. *See Nardiello*, 2 OCB2d 5, at 40. Further, Petitioner's claims of deliberate misconduct–allowing DOC to charge and terminate him with "false and misleading" documents and deliberately mishandling his case–also do not amount to a breach of the duty of fair representation. There are simply no facts presented to show that the Union acted in bad faith or in a discriminatory manner when representing Petitioner in connection with his OATH hearing and Article 78 proceeding. *See Rosioreanu*, 1 OCB2d 39, at 15, 18 (BCB 2008), *affd, Matter of Rosioreanu v. NYC OCB*, No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009), *affd*, 78 A.D.3d 401 (1st Dept 2010). Therefore, we find that the Executive Secretary's dismissal of the Petition was proper.[11]

Finally, Petitioner complains that the Executive Secretary called him prior to dismissing his Petition to inquire about the outcome of his state court malpractice action. The Executive Secretary's

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[11] Similarly, we need not address Petitioner's claims regarding the introduction of new evidence in an Article 78 proceeding or the Executive Secretary's legal conclusion on this issue. Petitioner has not alleged sufficient grounds to suggest that the Union's strategic decisions were made in bad faith. *See Mora-McLaughlin*, 3 OCB2d 24, at 13-14. Without more, errors in judgment do not breach the duty of fair representation. *See Burtner*, 75 OCB 1, at 15 (BCB 2005). *See also Gertskis*, 77 OCB 11, at 11-12 (BCB 2005) (finding no breach of the duty of fair representation where union failed to acquire certain documents petitioner requested for arbitration and failed to obtain expert testimony regarding them).

inquiry was appropriate given that Petitioner brought the state court malpractice action to the Executive Secretary's attention, and there is no basis upon which to conclude that the Executive Secretary's actions in this regard were prejudicial to Petitioner. The Executive Secretary did not find that the malpractice action had any bearing on the dismissal of the Petition. Moreover, we reviewed the Petition de novo and we find that the Executive Secretary's conclusions were correct.

For the reasons stated above, the Appeal 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, Cherry, 3 OCB2d 51A (ES 2010), is affirmed, and the appeal therefrom is denied.

Dated: March 30, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A.WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
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CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER