Garg, 6 OCB2d 35 (BCB 2013)

(IP) (Docket No. BCB-3098-13)

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 violations 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 alleged facts establishing that the Union breached its 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 Proceeding

-between-

MANISH GARG,

Petitioner,

-and-

THE COMMITTEE OF INTERNS AND RESIDENTS, and
THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On August 13, 2013, Manish Garg ("Petitioner") filed a *pro se* improper practice petition against the Committee of Interns and Residents ("Union") and the New York City Health and Hospitals Corporation ("HHC"). Petitioner claimed that the Union breached its duty of fair representation, in violation of §12-306(b)(3) of the New York City Collective Bargaining Law ("NYCCBL"), when it declined to represent him in grievance proceedings related to his separation from employment. 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 October 2, 2012, the Executive Secretary of the Board of Collective Bargaining dismissed the Petition on the grounds that Petitioner's claims were untimely and insufficient. See *Garg*, 6 OCB2d 27 (ES 2013) ("ES Determination"). On November 11, 2013, 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 controversies underlying the current claim have been the subject of a prior decision by this Board. *Garg*, 6 OCB2d 11 (BCB 2013), rendered on April 15, 2013. We therefore take administrative notice of the pertinent background facts set forth therein.

Petitioner is a former PGY 1 Resident, who began his employment with Harlem Hospital Center on July 1, 2009. On December 3, 2009, Petitioner received a letter from a Residency Program Director informing him that, due to concerns about his performance, he would be receiving a notice of non-renewal of his residency contract before December 15, 2009. The letter further stated that the hospital would work with Petitioner to devise a remediation plan. On or about May 11, 2010, Petitioner received another letter from the Residency Program Director stating that there were continued concerns about his performance and that he would be required to repeat the PGY 1 year of the program. However, two days later, on May 13, 2010, Petitioner received a letter from Harlem Hospital's Associate Director of Human Resources informing him that, due to certain allegations made against him, he was suspended pending an investigation. On June 1, 2010, Petitioner received a letter stating that effective May 27, 2010, his suspension would be without pay.

HHC claimed before the Board that Petitioner was separated from his position on June

30, 2010. However, Petitioner claimed that he never received any documentation indicating that he was terminated.[1] Petitioner submitted as an exhibit a February 2, 2012 letter from an Assistant Professor of Medicine at Harlem Hospital. The letter stated:

> This is in response to your interest in continuing your Internal Medicine Training here at Harlem Hospital Center in Affiliation with Columbia University. After careful evaluation of your personnel records, we regret to inform you that we are unable to offer you the opportunity to continue training as a first year intern.
>
> The decision was based on previous evaluations and counsel notes found on your personnel record. A notice of non-renewal of your contract was presented during your 2009-2010 academic training year due to deficiencies in your clinical competency. The opportunity to improve your deficiencies was presented with a remediation plan and a mentor to help implement plans and monitor progress. However, you were unable to demonstrate improvement in your medical knowledge, patient care and clinical judgment.
>
> The Educational Policy Committee (Competency Committee) determined that you did not demonstrate satisfactory skills and performance in all areas of clinical competencies in order to advance and you were released from the program.

Id. at 3-4; (IP Amended Pet., Ex. 4)

Petitioner filed a Step I grievance on April 24, 2012, and subsequently filed a Step II(a) and Step II(b) grievance on May 15, 2012. Petitioner claimed that he submitted the Step II(b) grievance to the House Staff Affairs Committee as required by the relevant collective bargaining agreement ("CBA"), but that it was stamped as "refused" and sent back to him. Thereafter, on September 14, 2012, a Step III conference was held at the New York City Mayor's Office of Labor Relations ("OLR"). On October 16, 2012, a Step III decision was issued, which stated that OLR did not have jurisdiction to review the non-renewal of Petitioner's residency contract "as such matters fell under the purview of the facility's Medical Board for final decision." *Garg*,

[1] Neither party submitted any such documentation.

6 OCB2d 11, at 4. Additionally, the decision indicated that OLR did not have jurisdiction to review any of Petitioner's other claims because they were procedurally untimely.

On December 26, 2012, Petitioner filed a request for arbitration in his individual capacity seeking, among other remedies, reinstatement. Although the Union signed the waiver required under NYCCBL §12-312(d), it informed the Office of Collective Bargaining ("OCB") that it did so "solely because it is necessary to allow the further processing of Dr. Garg's individually filed Request for Arbitration . . . ." *Id*. at 5. In this letter the Union also informed OCB that it would not represent the Petitioner at arbitration, nor did it consider itself an aggrieved party to the matter.[2] Additionally, the Union had previously sent Petitioner a letter on August 20, 2012, explaining in detail that it would not represent him because it believed that his grievance was untimely and without merit.[3] *Id*. at 5.

In its decision, the Board granted the City's petition challenging arbitrability and denied Petitioner's request for arbitration. It found that under the applicable CBA "an individual does not have the right to file a request for arbitration . . . under any circumstance." *Id*. at 7. Further, the Board noted that disputes concerning the non-renewal of a residency contract were specifically excluded from proceeding to arbitration. *Garg*, 6 OCB2d 11, at 7.

Improper Practice Petitions

In the underlying improper practice petition at issue in this Appeal, Petitioner claimed that the Union violated its duty of fair representation by "arbitrarily ignor[ing]" his grievance and not representing him in arbitration. He argued that his grievance had merit because although he was released from employment on the basis of his performance, he characterized his evaluations

[2] Petitioner was also sent a copy of this letter, which was dated January 10, 2013.

[3] The Board in *Garg*, 6 OCB2d 11, took administrative notice of this letter, which was included in Petitioner's request for arbitration.

as "satisfactory."[4] On August 26, 2013, the Executive Secretary issued a deficiency letter stating that the petition "had been found deficient on the grounds that it did not appear to allege any timely acts or omissions on the parties of the respondents, and, further, did not specify either: (1) in what way the Union is alleged to have acted in an arbitrary or discriminatory manner against him, and thus violated the duty of fair representation, or (2) whether the adverse employment action by HHC was alleged to be violative of § 12-306 of the [NYCCBL]." *Garg*, 6 OCB2d 27, at 1 (ES 2013).

Thereafter, on September 17, 2013, Petitioner filed an amended petition. Petitioner argued that the Union breached its duty of fair representation when it did not respond to his requests to file an improper practice petition against HHC. He claimed that the Union treated him disparately by not doing so, because it filed an improper practice claim for an employee Petitioner claims was terminated under similar circumstances.[5]

Executive Secretary's Determination

On October 2, 2013, 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 Garg*, 6 OCB2d 27 (ES 2013).

The Executive Secretary determined that, even assuming all facts and arguments in the light most favorable to Petitioner, his claims against the Union accrued, at the latest, in

[4] Petitioner also argued that, pursuant to Article XXVII, Section 1 of the CBA, his residency contract was never terminated and, therefore, was automatically renewed. However, the language of that Article states only that the CBA itself will be automatically renewed from year to year unless the Union or HHC gives notice of its desire to terminate or modify it. This language does not apply in any respect to individual residency contracts, and Petitioner is not himself a party to the CBA.

[5] In support of this argument Petitioner cited to *CIR*, 51 OCB 26 (BCB 1993), *affd., Matter of Committee of Interns and Residents v. Dinkins*, Index No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993).

December 2012. This is four months after the Union informed him, in its August 2012 letter, that it would not pursue a grievance on his behalf. *Id*. at 6. Furthermore, since Petitioner claims that HHC "released" him from employment in February 2012, any independent claims against HHC would have accrued four months subsequent to then, in June 2012. *Id*. Consequently, the Executive Secretary determined that Petitioner's improper practice petition, filed in August 2013, was untimely.

Additionally, the Executive Secretary found that Petitioner failed to allege facts sufficient to state a breach of the duty of fair representation. The Executive Secretary noted that the Board made a determination that Petitioner's grievance was not subject to arbitration, whether filed individually or by the Union. Consequently, "Petitioner's claim that the Union unreasonably refused to prosecute his grievance . . . does not state a claim." *Id*. at 7 (citing *James-Reid*, 1 OCB2d 26, at 25 (BCB 2006)).

The Executive Secretary additionally found Petitioner's claims that the Union discriminated against him in declining to pursue an improper practice petition against HHC on his behalf to be both untimely and without merit. First, the Executive Secretary noted that Petitioner did not specify any basis for an improper practice charge against HHC, but rather alleged only breaches of contract. Further, the Executive Secretary explained that the employee at issue in *CIR*, 51 OCB 26, whom Petitioner claims was terminated under similar circumstances, was "found by the Board to have 'engaged in significant union activity,' and the Board found that such protected activity was the motivating factor of a series of discriminatory acts taken by the employer." *Garg*, 6 OCB2d 27, at 8 (citing *CIR*, 51 OCB 26, at 39). However, Petitioner did not engage in any protected union activity until after his termination. Consequently, the Executive Secretary stated that "[t]he Union cannot be deemed to have breached the duty of fair representation by declining to bring an improper practice claim that is . . . meritless on its face."

Id. at 8 (citing *James-Reid*, 1 OCB2d 26, at 25(BCB 2008)).

The Appeal

On November 11, 2013, Petitioner filed the present Appeal of the Executive Secretary's Determination. Petitioner asserts that the statute of limitations to file his improper practice petition did not begin to run until the Board issued its decision in *Garg*, 6 OCB2d 11, finding that his grievance was not arbitrable. He argues that because he signed a waiver when filing for arbitration, he was precluded from filing an improper practice claim against the Union at the same time.[6] Hence, he contends that his improper practice petition was timely filed.

As to the merits of his petition, Petitioner argues that the Executive Secretary failed to recognize that the Union ignored his satisfactory evaluations. Consequently, he argues that the Executive Secretary erred when he deemed the Union's decision not to arbitrate Petitioner's claims as a "reasoned refusal." Petitioner asserts that the portions of his grievance involving issues other than the non-renewal of his residency contract fell under Step II (a) of the CBA, and therefore the Union could have filed for arbitration regarding these issues. Petitioner argues that the Union's decision to simultaneously sign the waiver to allow him to file a request for arbitration while also refusing to represent him was unreasonable, arbitrary, and perfunctory. Finally, Petitioner argues for the first time in this Appeal that HHC violated NYCCBL §12-306(a)(1) by releasing him in retaliation for protected union activities, which he claims are the

[6] NYCCBL § 12-312(d) provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

filing of his grievance and sending emails related to the grievance.

DISCUSSION

This Board finds that the Executive Secretary properly dismissed the petition because it was not timely filed. 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." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.) (citing NYCCBL § 12-306(e) and § 1-07(d) of the OCB Rules);[1] *see also Mahinda,* 2 OCB2d 38, at 9 (BCB 2009), *affd., Matter of Mahinda v. City of New York.*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d.564, 565 (1st Dept. 2012). Consequently, "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). The petition was filed on August

[1] 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 Rules § 1-07(d) 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 Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . .

13, 2013, and concerns actions on the part of the Union which occurred in August 2012. This aspect of the Petition is therefore clearly untimely.

Petitioner here asserts that the Union breached its duty of fair representation when it signed a waiver allowing him to file a request for arbitrability, while also refusing to represent him. Petitioner argues that the statute of limitations on his claims did not begin to run until this Board rendered its decision in *Garg*, 6 OCB2d 11 (BCB 2013), on April 15, 2013, granting the City's petition challenging arbitrability and denying Petitioner's request for arbitration. In support of this argument, Petitioner cites to the language of the waiver that he was obligated to sign in order to file his request for arbitration. This language states:

> The undersigned employee organization and employee(s) aggrieved in this matter waive the right, if any, to submit the contractual dispute being alleged under a collective bargaining agreement to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. This subdivision shall not be construed to limit the rights of any public employee or public employee organization to submit any statutory or other claims to the appropriate administrative or judicial tribunal.

(OCB Request for Arbitration Waiver). Petitioner claims that this waiver prevented him from filing an improper practice claim against the Union at the same time that his request for arbitration was pending before the Board. However, Petitioner's reliance on the language of this waiver is misplaced.

This Board has previously clarified that "the scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement." *UFA*, 73 OCB 3A, at 13 (BCB 2004). Therefore, the "underlying dispute" referred to in the waiver "does not encompass all statutory, constitutional, or common law claims arising from the same factual circumstances." *Id*. We further clarified that "[t]he purpose of the wavier is to insure that a grievant who seeks

redress through the arbitration process cannot litigate the same underlying contract dispute in another forum." *IBT, L. 237*, 75 BCB 21, at 10 (BCB 2005) (citing *UFA*, 73 OCB 3A, at 13-14).

Here, Petitioner's improper practice petition against the Union concerns a statutory matter— that is, a claim under the NYCCBL that the Union breached its duty of fair representation. Although arising from the same factual circumstances, this claim is a separate matter from Petitioner's claim that HHC violated the CBA when it released him from employment. Because the improper practice petition does not involve a contractual dispute under the CBA, the waiver does not apply to Petitioner's claims against the Union and did not prevent him from filing the petition concurrently with his request for arbitration. Furthermore, Petitioner's mistaken belief that he could not file his improper practice petition until he received an adverse decision from this Board does not constitute a basis for tolling the statute of limitations. This is because the time period within which to file a petition begins when the alleged wrongful act occurred, not when the effect of the act is realized. *See Cherry*, 4 OCB2d 15, at 11 (BCB 2011) ("A petitioner's awareness of the legal theory supporting a right of action does not commence the statute of limitations period."); *OSA*, 2 OCB2d 30, at 14 (BCB 2009); *Raby*, 71 OCB3d 14, at 9-10.

Here, the Union informed Petitioner on multiple occasions that it would not pursue a grievance on his behalf. Specifically, it did so in a detailed, three-page letter, dated August 20, 2012. Consequently, we find that the Executive Secretary correctly determined that Petitioner's claims, filed approximately one year later, were untimely and warranted dismissal.[7]

[7] Likewise, Petitioner's claim that HHC violated §12-306(a)(1) when it released him from employment is also a statutory claim that is not implicated by the waiver. Thus, the Executive Secretary correctly determined that any independent claims against HHC would have to have been filed no later than June 2012, which is four months after Petitioner claims he was released.

It is not necessary to address the merits of Petitioner's claims regarding the Union's alleged breach of the duty of fair representation or HHC's alleged retaliation because the petition was untimely. However, if we were to reach the merits, we would find that the Executive Secretary correctly determined that Petitioner failed to allege facts sufficient to state a claim in either respect.

In order to demonstrate that a union breached its duty of fair representation, a Petitioner must allege, and substantiate, facts which show that the union acted in an arbitrary, discriminatory or bad faith manner. *See Walker*, 6 OCB2d 1, at 7 (BCB 2013). Here, petitioner asserts that the Union's decision not to represent him or take his claim to arbitration was erroneous and perfunctory. However, we have previously emphasized that "[a] Union is not obligated to advance every grievance." *Nardiello*, 2 OCB2d 5, at 40 (BCB 2009) (citing *Minervini*, 71 OCB 29, at 15 (BCB 2003)). This is because a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Id*. (quoting *Edwards*, 1 OCB2d 22, at 21 (BCB 2008)) (quotation marks omitted). Furthermore, regardless of the merits of Petitioner's grievance, the Board does not have the authority to "substitute its judgment for that of a union or evaluate its strategic determinations." *Edwards*, 1 OCB2d 2, at 21 (citing *Sicular*, 79 OCB 33, at 13 (BCB 2007)).

A union does, however, have "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Nardiello*, 2 OCB2d 5, at 40 (quoting *Edwards*, 1 OCB 2d 22, at 21) (emphasis in original). In this case, the Union informed Petitioner on numerous occasions that it would not represent him regarding his grievance.[8] In particular, on August 20,

[8] The petition includes exhibits which demonstrate that the Union informed Petitioner in writing on more than one occasion that it would not represent him. (*See* Pet. Ex. 8, dated January 30, 2012; Pet. Ex. 6, dated September 1, 2012).

2012, the Union sent Petitioner a three-page letter explaining in detail why it believed that his grievance was untimely and without merit. We find that the Union in this letter set forth a thoughtful and reasonable explanation as to why it believed Garg's grievance was without merit. Although Petitioner disagrees with the Union's legal assessment, this does not make such assessment unreasonable, arbitrary, or discriminatory, as Petitioner suggests. *See James-Reid*, 1 OCB2d 26, at 25 ("even if the Union's legal assessment was erroneous, the pleadings do not show that this exercise of its legal and strategic judgment violated its duty of fair representation."). Consequently, Petitioner has not alleged sufficient facts to set forth a *prima facie* case and we therefore affirm the ES decision in this regard as well.[9]

[9] We decline to discuss in detail Petitioner's claim that HHC violated NYCCBL §12-306(a)(1) by releasing him in retaliation for protected union activities, as this claim was not raised in either the original or amended improper practice petitions. *See Babyeva*, 1 OCB2d 15, at 10 (BCB 2008) ("[T]he purpose of an appeal is to determine the correctness of the Executive Secretary's decision based upon the facts that were available to him in the record as it existed at the time of his ruling.") (quoting *Cooper*, 69 OCB 4, at 5 (BCB 2002)). However, even if we were to do so, we would find that the Executive Secretary correctly noted that Petitioner did not allege any protected union activity that occurred prior to his release from employment and, thus, he failed to state a *prima facie* claim of discrimination against HHC.

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, *Garg*, 6 OCB2d 27 (ES 2013), is affirmed, and the appeal therefrom is denied.

Dated: December 19, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER