Witek, 7 OCB2d 10 (BCB 2014)

(IP) (Docket No. BCB-4013-13)

Summary of Decision: Petitioner alleged that HHC violated NYCCBL § 12-306(c)(1), (2), (3), and (4) by the manner in which it processed a disciplinary action brought against her. Petitioner's allegations included claims that HHC failed to approach meetings with a sincere resolve to reach an agreement, was hostile and biased, refused to grant adjournments, did not afford her Union representation, and refused to provide information she requested. HHC contended that Petitioner is not a certified or designated employee organization and thus lacks standing to file a failure to bargain in good faith claim. Additionally, HHC alleged that the claims are untimely and relate to employee discipline, a management right pursuant to NYCCBL § 12-307(b). The Board found that Petitioner, as an individual, lacks standing to allege claims relating to a failure to bargain in good faith pursuant to NYCCBL § 12-306(c), and that her other claims were without merit. The Board further found that Petitioner was afforded the right and opportunity to secure Union representation. Accordingly, the petition was dismissed in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

IRYNE WITEK,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On November 13, 2013, Iryne Witek ("Petitioner"), through her attorney, filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC"), alleging that HHC violated § 12-306(c)(1), (2), (3), and (4) of the New York City

Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Specifically, Petitioner alleges that HHC, in its handling of a disciplinary action against Petitioner: failed to approach meetings with a sincere resolve to reach agreement; created a hostile and biased environment at both the Step I(a) and Step II disciplinary conferences; did not grant Petitioner's requests for adjournments of the Step II conference; held the Step II conference even though a Union representative was not present; and was unresponsive to Petitioner's requests, including requests for documents relating to HHC's basis for terminating her. Petitioner further claims that HHC violated the collective bargaining agreement between HHC and the New York State Nurses Association ("NYSNA"). HHC contends that Petitioner is not a certified or designated employee organization and thus lacks standing to file a failure to bargain in good faith claim. Further, HHC argues that Petitioner's claims are untimely and relate to employee discipline, a management right pursuant to NYCCBL § 12-307(b). The Board finds that Petitioner, as an individual, lacks standing to allege, as a basis for an improper practice claim, the failure of HHC to bargain in good faith pursuant to NYCCBL § 12-306(c), and that her other claims are without merit. The Board further finds that Petitioner was afforded the right and opportunity to secure Union representation. Accordingly, the improper practice petition is dismissed in its entirety.

[1] By letter dated February 10, 2014, after the record was closed and pleadings were complete, Petitioner's attorney informed the Trial Examiner, counsel for HHC, and NYSNA, that she was no longer representing Petitioner. Subsequently, on April 1, 2014, Petitioner submitted a document attempting to raise additional facts and claims of retaliation and disparate treatment not alleged in the original petition. The Board deems the April 1, 2014 submission an independent improper practice petition and hereby refers it to the Executive Secretary for processing.

BACKGROUND

Petitioner was employed by HHC in the title of Staff Nurse. On or about March 8, 2013, Woodhull Medical and Mental Health Center preferred disciplinary charges upon Petitioner. Petitioner was charged with eight specifications of misconduct between October 11, 2012, and February 14, 2013.

Employees in the title of Staff Nurse are represented by NYSNA. HHC and NYSNA are parties to a collective bargaining agreement for the period from December 1, 2007, through January 20, 2010 ("Agreement"), the terms of which remain in effect under the *status quo* provision of the NYCCBL. Article VI, § 1, (D) of the Agreement defines a "Grievance" in part, as "[a] claimed wrongful disciplinary action taken against an employee." (Ans., Ex. 2) The Grievance Procedure for Article VI, § 1, (D), is addressed in Article VI, § 8, of the Agreement, which states in pertinent part:

* * *

> Step II. If the employee is dissatisfied with the decision in Step I above, she/he may appeal such decision. The appeal must be within five (5) working days of the receipt of such decision. Such appeal shall be treated as a grievance appeal beginning with Step II of the Grievance Procedure set forth herein.

(Ans., Ex. 2) The next Steps of the Grievance Procedure, referenced in Step II above, are found in Article VI, § 2, of the Agreement:

* * *

> Step II. An appeal from an unsatisfactory determination at Step I or Step I(a) where applicable, shall be presented in writing to the agency head or his designated representative who shall not be the same person designated in Step I. The appeal must be made within five (5) working days of the receipt of the Step I or Step I(a) determination. The agency head or his designated representative, if any, shall meet with the employee and/or [NYSNA] for review of the grievance and shall issue a determination in writing by the end of the tenth (10^{th}) work day following the date on which the appeal was filed.

> Step III. An appeal from an unsatisfactory determination at Step II shall be presented by the employee and/or [NYSNA] to the Commissioner of Labor Relations, in writing within ten (10) working days of the receipt of the Step II determination. Copies of such appeal shall be sent to the agency head. The Commissioner of Labor Relations, or his designee, shall review all appeals from Step II determinations and shall answer such appeals within ten (10) working days following the day in which the appeal was filed.

(Ans., Ex. 2)

Petitioner alleged a violation of Article VI, § 11(c)(ii)(6), of the Agreement.[2] However, this section applies only to the "Expedited Arbitration Procedure," which is expressly limited to "disciplinary cases wherein the proposed penalty is a monetary fine of one week or less or written reprimand, and other cases pursuant to mutual agreement by the parties." (Ans., Ex. 2)

On June 4, 2013, a "Step I(a) Disciplinary Conference" was held.[3] By email dated June 14, 2013, Petitioner's attorney informed the Union Representative in pertinent part:

> please be advised that we are trying to reach [the Step I(a) review officer] to obtain the documents from [Petitioner's] hearing that took place on June 4, 2013. As per conversation that [the Step I(a) review officer] had with [Petitioner's attorney] she was supposed to forward the documents from the meeting on the same day or the next day. As of today, we did not receive any documentation. I spoke to [the Step I(a) review officer] on June 12 and left her messages on June 13 and June 14 with the request to fax the documents. Please provide us with [the Step I(a) review officer's] fax number or email address, so we can forward her another request in writing.[4]

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[2] The petition refers to a "violation of Article 6, Sec. 11, ii (6)" of the Agreement. (Pet. 5) At the pre-hearing conference on January 21, 2014, Petitioner's attorney confirmed that she was referring to Article VI, § 11(c)(ii)(6).

[3] The Board will refer to the grievance conference held on June 4, 2013 as a "Step I(a)" conference because HHC's decision that responded to this conference referred to it as such.

[4] Petitioner alleges that before, during, and after the Step I(a) conference, she requested documents related to HHC's basis for terminating her and contends that she still has not received "a single document proving [her] [ ] guilt." (Pet. 5) Specifically, Petitioner alleges that HHC

(Pet., Ex. A)

A written decision was issued from the Step I(a) conference by letter dated June 28, 2013 ("Step I(a) Decision"). (Pet., Ex. A) The Step I(a) Decision found Petitioner guilty of all charges preferred against her and recommended that Petitioner be separated from service. The Step I(a) Decision noted that the conference was attended by Petitioner, Petitioner's attorney, a NYSNA Nursing Representative ("Union Representative"), a NYSNA Release Nurse Representative, the Associate Director of Nursing, and the Assistant Director of Hospitals Human Resources. The Step I(a) decision stated that, "[the Union Representative] signed a private attorney waiver form, indicating that she will be in attendance, but the private attorney will be vocal during the conference." (Pet., Ex. A) By facsimile dated July 3, 2013, Petitioner's attorney received a copy of the Step I(a) Decision.

By letter dated August 6, 2013, the Union Representative informed HHC that, "[NYSNA] in accordance with our contractual agreement is appealing to Step II the enclosed decision on behalf of [Petitioner]." (Ans., Ex. 5) Attached to the request was the Step I(a) Decision, and an Election of Rights form that included Petitioner's selection of the option to "proceed with an appeal to the Contractual Grievance Procedure." (Ans., Ex. 6)

HHC informed the Union Representative by email dated August 23, 2013, that Petitioner's Step II conference was scheduled for August 28, 2013. (Ans., Ex. 8) On or about August 27, 2013, the Union requested an adjournment of the Step II conference. On or about August 28, 2013, HHC received a call from Petitioner's attorney's office alerting HHC that Petitioner was represented by a private attorney.

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failed to produce a copy of a letter that Dr. Roman Sapozhikov wrote concerning Petitioner's alleged misconduct.

By email dated August 28, 2013, HHC notified Petitioner's attorney that the first adjournment had been granted and the Step II conference had been rescheduled for September 25, 2013, at 12:00 p.m. On or about September 17, 2013, Petitioner's attorney requested an adjournment of the Step II conference due to a conflict in her schedule. HHC responded that it could not grant an adjournment because the Step II conference had already been adjourned once. Nevertheless, HHC asserts that it rescheduled the conference time to 9:30 a.m. to accommodate Petitioner's attorney's schedule.[5]

According to HHC, and not rebutted by Petitioner, on the morning of September 25, 2013, a paralegal called HHC on behalf of Petitioner's attorney and asked for another adjournment of the Step II conference due to the attorney's unavailability. The Associate Counsel and Chief Review Officer for HHC submitted an affidavit in which he affirmed that he spoke with Petitioner's attorney's paralegal and:

> denied this request, noting that this matter had been around for some time…[additionally] in order to schedule the conference on September 25, 2013, the Union, the Facility, the designated Review Officer, and [Petitioner's attorney's] office all had to confirm this conference date almost a month in advance, and had just recently agreed to adjust the time as an accommodation for [Petitioner's attorney].[6]

(Ans., Ex. 7 at ¶ 22-23)

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[5] Petitioner also asserts, and HHC denies, that HHC failed to update Petitioner's attorney about "the rescheduling of the meeting." (Pet. 4) From the petition, it is unclear which "meeting" was allegedly rescheduled without updating Petitioner's attorney. No reply was filed in this case. Nonetheless, the record is clear that Petitioner's attorney attended both the Step I(a) and Step II conferences.

[6] Petitioner alleges, and HHC denies, that the Associate Counsel and Chief Review Officer for HHC "explicitly confirmed that [the Union Representative] will be present at the hearing." (Pet. 3) In his affidavit, the Associate Counsel and Chief Review Officer affirmed that he has never spoken with Petitioner's attorney, only her paralegal, and he "did not confirm that [the Union Representative] or [the Union] would be or were present on Wednesday September 25, 2013 at 9:30 a.m." (Ans., Ex., 7 at ¶¶ 20, 24)

On September 25, 2013, a Step II disciplinary conference was attended by Petitioner and her attorney, but not by a Union representative. Petitioner alleges, and HHC denies, that the Step II Review Officer was exceptionally rude and was "openly and straightforwardly expressing his intolerance and bigotry towards [Petitioner] and [her attorney]." (Pet. 2) Further, Petitioner alleges, and HHC denies, that the Review Officer refused to make a copy of the attendance sheet for Petitioner's attorney, got up and left in the middle of the meeting, threatened to call the police if they did not leave, and made other "offensive" remarks. (Pet. 2) HHC alleges that at the conclusion of the Step II conference, Petitioner and her attorney refused to leave the conference room until directed to do so by the Review Officer.

On November 15, 2013, the Step II Review Officer issued a detailed five page decision in which he found that "[v]iolation of even one of these elements is an extremely serious example of misconduct, particularly for a staff nurse. Taken together, the only appropriate penalty is termination."[7] (Ans., Ex. 10) The record reflects that a Step III conference was scheduled for February 11, 2014.

[7] The Step II decision was sent to the Union with a footnote requesting that the Union forward the determination to Petitioner's attorney. Petitioner's attorney acknowledged that she had received a copy of the Step II decision from the Union Representative.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that HHC violated NYCCBL § 12-306(c)(1), (2), (3), and (4).[8] Petitioner alleges that HHC violated NYCCBL § 12-306(c)(1) by failing to approach meetings with a sincere resolve to reach agreement. According to Petitioner, beginning with the Step I(a) conference, HHC was unresponsive to Petitioner's requests and uncooperative. Additionally, Petitioner asserts that HHC created a hostile and biased environment at both the Step I(a) and the Step II conferences.

Petitioner alleges that HHC violated NYCCBL § 12-306(c)(2) and (3) by refusing to adjourn the Step II conference; by failing to update Petitioner's attorney on the rescheduling of a meeting; and by holding the Step II conference even though a Union representative was not present.[9] The petition notes that an adjournment request was made due to a conflict with Petitioner's attorney's schedule. Finally, Petitioner alleges that HHC violated NYCCBL § 12-

[8] NYCCBL § 12-306(c) provides in pertinent part:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;

[9] Petitioner's pleadings fail to allege the date of the adjournment request(s).

306(c)(4) and Article VI, § 11(c)(ii)(6) of the Agreement by being unresponsive to Petitioner's requests, including requests made for documents related to HHC's basis for terminating Petitioner.

HHC's Position

HHC contends that all of Petitioner's claims should be dismissed because Petitioner is not a certified or designated employee organization and thus does not have standing to file an improper practice charge regarding a failure to bargain in good faith. Further, HHC asserts that the claims should be dismissed because they relate to employee discipline, a management right pursuant to NYCCBL § 12-307(b), which is expressly excluded from the scope of collective bargaining.[10]

Finally, HHC asserts that the claims are untimely. The disciplinary charges were served on March 8, 2013, more than eight months before the petition was filed on November 13, 2013. Additionally, the Step I(a) conference was held on June 4, 2013, more than five months before the petition was filed. As such, any allegations relating to the preferral of disciplinary charges or what occurred at the Step I(a) conference are untimely and must be dismissed. Further, HHC asserts that Petitioner made no allegation that it requested any documents after July 3, 2013, when the Step I(a) review officer faxed the Step I(a) decision to Petitioner. As such, Petitioner

[10] NYCCBL § 12-307(b) provides:

> It is the right of the city, or any other public employer, acting through its agencies, to … take disciplinary action.... Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

had until November 3, 2013 to file a timely petition. Thus, the improper practice petition filed on November 13, 2013, should be dismissed in its entirety.

DISCUSSION

As a hearing was not held in the instant matter, "in reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, *arguendo*, that the factual allegations are true, analogous to a motion to dismiss." *Seale*, 79 OCB 30, at 6-7 (BCB 2007); *see also Morris*, 3 OCB2d 19, at 12 (BCB 2010). Under this standard, the Board finds that the facts alleged, if proven, would not establish any violations of the NYCCBL.

At the outset, we note that the petition cited (c)(1), (2), (3), and (4) as the Subsections of § 12-306 that the Petitioner alleged were violated. However, this appears to have been an error as Petitioner has alleged violations of the NYCCBL which, on their face do not give an individual a cognizable cause of action. Thus, under the circumstances of this case, we will look to the substance of the violation alleged and not merely the specific section of the NYCCBL alleged to be violated. *See Seale*, 79 OCB 30, at 7 (where Petitioner cited inapplicable provisions of the NYCCBL but the facts as alleged suggested potential violations of § 12-306(b)(3), the Board considered them as such); *see also Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) ("[L]iberal pleading principles do not permit dismissal for failure in a complaint to cite a statute, or to cite the correct one. . . . Factual allegations alone are what matters."). In doing so, we agree with HHC's contention that Petitioner does not have standing to raise certain claims and find those to be without merit.

It is well established that "[t]he duty to bargain in good faith runs between the employer

and the Union and is enforceable by each of those parties under NYCCBL § 12-306(b)(2) (breach of a union's duty) and § 12-306(a)(4) (breach of employer's duty)."[11] *Brown*, 75 OCB 30, at 7-8 (BCB 2005). Specifically, we have held that, "[i]ndividual 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); *see also McAllan*, 31 OCB 15, at 15 (BCB 1983). Petitioner alleges violations of the NYCCBL based upon HHC's failure to approach the meetings with a sincere resolve to reach agreement, its refusal to grant adjournments, its violation of the Agreement, and its failure to provide information. All of these allegations stem from a duty an employer has to bargain with an employee organization under the NYCCBL. However, as stated above, this obligation does not run to an individual. Thus, to the extent that Petitioner articulated claims against HHC on the basis of failing to bargain in good faith, we must dismiss these claims because Petitioner does not have standing to assert them.[12] *Proctor*, 3 OCB2d 30, at 11-12; *Johnson*, 4 OCB2d 11, at 11 (BCB 2011).

We also dismiss those claims alleging a hostile and biased environment, and, liberally construing the pleading, that the failure to grant adjournments infringed upon Petitioner's rights under the NYCCBL. Petitioner has not alleged that any of HHC's actions were motivated by

[11] Additionally, to the extent that Petitioner attempted to plead a cause of action against HHC under NYCCBL § 12-306(a)(4), she does not have standing to bring such a claim. *Lewis*, 4 OCB2d 24, at 12 (BCB 2011) ("Individual unit members… lack standing to allege bad faith bargaining by the employer because the duty to bargain runs exclusively between the employer and the union.")

[12] We further note that Petitioner's allegation that HHC violated Article VI, § 11(c)(ii)(6), of the Agreement is deficient as Article VI, § 11 applies only to expedited arbitrations, which is a level of the Grievance Procedure which does not apply to the Petitioner's termination. To the extent Petitioner claims HHC violated the grievance procedure of the Agreement when it proceeded with the Step II conference without the Union representative present; such a claimed violation of the Agreement is outside the jurisdiction of this Board.

Petitioner's Union activity. Since this essential element is missing, we also dismiss these claims.[13]

Further, we dismiss all claims arising out of the Step I(a) conference on June 4, 2013, as untimely. Pursuant to NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), an improper practice petition "must be filed no later than four months from the time the disputed action occurred or from the time petitioner knew or should have known of said occurrence." *DC 37, L. 420,* 5 OCB2d 19, at 7 (BCB 2012); *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 (1st Dept. 2012)); *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.). Here, Petitioner filed the instant petition on November 13, 2013. Thus, to be timely, the acts or omissions about which Petitioner complains must have occurred on or after July 13, 2013. Accordingly, Petitioner's claims that HHC violated NYCCBL § 12-306(c)(1), and (4), in part, due to its actions or inactions at the Step I(a) conference in June 2013, are untimely.

Finally, we dismiss Petitioner's claim that HHC denied her Union representation at the Step II conference as without merit. Initially, we note that Petitioner was represented at the Step

[13]Alternatively, we note that to the extent that Petitioner articulated a claim against HHC for discrimination by stating that the Step II Review Officer was "openly and straightforwardly expressing his intolerance and bigotry towards [Petitioner] and [her attorney]," this claim may be actionable under other statutes, but does not, as plead, constitute an improper practice under the NYCCBL. (Pet. 2) *Smith*, 3 OCB2d 17, at 10 (BCB 2010) (Claims of discrimination based on race or gender may be actionable under other statutes, but do not constitute improper practices under the NYCCBL). We have held that "[t]hough our statute mentions discrimination, it explicitly requires that the alleged discrimination be based upon union membership or activity." *Babayeva*, 1 OCB2d 15, at 8 (BCB 2008); *see also Smith*, 3 OCB2d 17, at 10.

I(a) conference by both a Union representative and her chosen private attorney. Thereafter, a Step II conference was scheduled. The Step II conference was rescheduled once at the Union Representative's request and once at Petitioner's request due to her attorney's unavailability. Petitioner does not allege that she sought an adjournment due to the unavailability of her Union Representative.[14] Indeed, when the date, and later the time, of the Step II conference were rescheduled, HHC confirmed them with the Union. Thereafter, at the Step II conference, Petitioner was represented by counsel of her choosing, although the Union Representative did not attend, and no substitute was sent by the Union. These facts do not establish a denial of a request by Petitioner for Union representation at the Step II conference, and thus no grounds exist for a finding of a violation of Petitioner's rights pursuant to NYCCBL § 12-306(a)(1). *See DC 37*, 3 OCB2d 2 at 19-21 (BCB 2010). Thus, we dismiss this claim.

Accordingly, the instant petition is dismissed in its entirety.[15]

[14] Petitioner's pleadings do not allege that in the process of seeking an adjournment of the September 25, 2013 date that Petitioner's attorney's paralegal communicated that Union Representative unavailability was the basis for the request. Petitioner only alleges that counsel's unavailability was communicated. This is consistent with HHC's representations.

[15] In view of the disposition of this matter, we need not address HHC's argument that the claims should be dismissed because they relate to employee discipline, a management right pursuant to NYCCBL § 12-307(b).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-4013-13, be and the same hereby is, dismissed in its entirety.

Dated: April 3, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER