CSTG, L. 375, 7 OCB2d 14 (BCB 2014)

(IP) (Docket No. BCB-4000-13)

Summary of Decision*:** The Union alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by retaliating against two members when it refused to grant their requests for release time under EO 75. NYCHA argued that the petition was untimely and that collateral estoppel applied, as the Board has previously determined that NYCHA employees are not entitled to leave under EO 75 unless they are the "regularly designated union representative" citywide for their union. The Board found that the petition was untimely. Alternatively, the Board found that the Union's claims did not establish a violation of the NYCCBL. 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-

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, AFSCME,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On August 26, 2013, the Civil Service Technical Guild, Local 375 ("Union" or "Local 375") filed a verified improper practice petition on behalf of its members, Mitchell Feder and George Sona, against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Feder and Sona when it refused to grant their requests for Union release time under Executive Order 75 (EO

75").[1] NYCHA argues that the petition is untimely and that collateral estoppel applies, as the Board has previously determined that NYCHA employees are not entitled to leave under EO 75 unless they are the "regularly designated union representative" citywide for their union. The Board finds that the petition is untimely. Alternatively, the Board finds that the Union's claims do not establish a violation of the NYCCBL. Accordingly, the petition is dismissed in its entirety.

BACKGROUND

NYCHA is a public benefit corporation created pursuant to the New York State Public Housing Law to provide affordable housing to low income families in the City of New York ("City"). *See* N.Y. Pub. Hous. Law § 401. Feder and Sona both work in NYCHA's Department for Development. Feder has been employed by NYCHA since 1991, currently as an Associate Housing Development Specialist, and has been the Treasurer of the Union since December 2012. Sona has been employed by NYCHA since 1988, currently as an Associate Project Manager, and was elected as the Labor and Political Activity Chair of the Union in December 2012.

EO 75 is issued to all Mayoral agencies and sets forth standard time and leave policies for designated union representatives conducting union and labor-management activities. NYCHA has a Human Resources Manual ("HR Manual") that applies to all of its employees. NYCHA

[1] The cover page of the petition cited (a)(1) and (4) as the subsections of § 12-306 that the Union alleged were violated. However, this appears to have been an error. It is clear from the substance of the pleadings as well as the discussion held at the pre-hearing conference in this matter that the Union is alleging claims of retaliation for protected union activities. Thus, the Board deems the petition to allege violations of § 12-306 (a)(1) and (3) of the NYCCBL. *See Seale*, 79 OCB 30, at 7 (BCB 2007) (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.").

contends, and the Union disputes, that although its HR Manual refers to EO 75, because NYCHA is not a Mayoral agency, EO 75 does not apply to it.

NYCHA's HR Manual contains Time and Attendance Regulations, and § 14, entitled "Absences of Employee Representatives," differentiates between "Regularly Designated Representatives" in subsection (a), and "Ad Hoc Representatives" in subsections (b) and (c). (Pet. Ex. C) Section 14(a) of the HR Manual covers regular and recurring release time. This section states that regularly designated representatives shall be granted absences with pay "for labor-management activities of employee representatives, duly designated by certified bargaining organizations (unions) operating under [EO 75], acting on matters related to the employees in their respective unions. The aforementioned labor-management activities are detailed [in] Section 2 of [EO 75]." (*Id*.) These activities include the investigation of grievances, participation in departmental labor-management committees, and participation in negotiations, among others.[2]

In contrast, § 14(b) of the HR Manual states that *ad hoc* representatives are authorized to be released with pay only to handle grievances at work locations, participate in meetings of departmental joint labor-management activities, and to participate in negotiations between NYCHA and the employee's union. *Ad hoc* representatives must be designated by the Union and approved by a NYCHA Department Director. Additionally, *ad hoc* representatives must request the leave at least 24 hours in advance, in writing to their supervisor, and they are limited to no more than 24 hours, or eight absences of all or part of the day from their work location, during any calendar month. Under § 14(c) of NYCHA's HR Manual, *ad hoc* representatives can be

[2] The Board takes administrative notice of EO 75, which was not included as an exhibit in the record.

granted time off without pay, or chargeable to their annual leave allowances, for a handful of other union activities.

NYCHA contends that an employee will qualify for release under § 14(a) of its HR Manual when the City and a union have agreed that that particular employee will serve as the union's sole Citywide designated representative for purposes of EO 75. NYCHA states that between 2004 and 2007, the City's Office of Labor Relations ("OLR") informed it that the Union had designated Joshua Barnett, a NYCHA employee, as its regularly designated representative for Citywide joint management activities pursuant to EO 75. Based upon this notice, NYCHA released Barnett from his NYHCA-assigned duties one day per week with pay, pursuant to § 14(a) of its HR Manual. NYCHA states, upon information and belief, that thereafter the Union named a non-NYCHA employee as its regularly designated representative. Barnett was subsequently returned to full-duty at NYCHA.

In the past, the Union has requested the release of Feder and/or Sona as *ad hoc* representatives pursuant to § 14(b) of the HR Manual. NYCHA states, and the Union acknowledges, that on most occasions, if not all, the release time was granted. On February 20, 2013, Local 375's President wrote a letter to NYCHA's Assistant Director of Human Resources for Labor Relations ("Assistant Director of HR"). The letter stated that it was a request for "five (5) days release with pay and benefits for Mitchell Feder and George Sona, newly elected Officers of Local 375 to serve as Business Representatives to handle grievances and other union related business." (Rep., Ex. D) Although not explicitly stated in this letter, the Union has characterized this request as one for regular and recurring release under EO 75. On March 14, 2013, the Assistant Director of HR denied the Union's request for "full-time release," stating that, "[NYCHA] is unable to accommodate this request as it does not fall within the purview of

the Authority. Please be advised that your request for release should be sent to [OLR]." (Rep., Ex. E)

On April 10, 2013, Local 375's President wrote separate letters to the OLR Deputy Commissioner requesting one day of release with pay and benefits for Sona and Feder.[3] (*See* Rep., Exs. F, G) On April 15, the then-Commissioner for OLR responded and stated, in pertinent part, that "[OLR] has been informed that [NYCHA] has previously declined these same requests for release time. Accordingly, we respectfully defer to [NYCHA], by whom both of these individuals are employed." (Rep., Ex. H) This letter was stamped as received on April 19, 2013.

The Union submitted as evidence a memorandum from Local 375's President to the Director of Research and Negotiations of its parent union, District Council 37 ("DC 37"). This memorandum was dated May 15, 2013, and requested release time for seven separately-listed individuals, including Feder and Sona. It further stated, "Brother Feder and Sona, believe that NYCHA should have considered our previous request since NYCHA seems to have its own structure. Brother Feder had asked me to make this request for the one day release time for him and Brother George Sona under protest." (Rep., Ex. 1). The Union contends that, "[n]ot long thereafter, Local 375's request was again denied by NYCHA." (Rep. ¶ 3 (f))[4]

In a previous decision involving NYCHA's denial of paid release time for Feder, the Board noted that NYCHA's HR Manual incorporates EO 75 only for employees who are "regularly designated union representatives." *Feder*, 5 OCB2d 14, at 29 (BCB 2012). In that

[3] Again, although not explicitly stated, the Union has characterized these letters as requests for regular and recurring release under EO 75.

[4] The Union did not submit any evidence to support this assertion in its Reply, nor did it provide this evidence at the pre-hearing conference held in this matter. The Trial Examiner subsequently gave the Union the opportunity to supplement the record with the documents it claimed existed, demonstrating that an additional request had been denied, and the Union declined to do so.

case, the Board found that Feder was not entitled to paid release time under EO 75 because he was an *ad hoc* union representative and not the regularly designated union representative.[5]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that NYCHA's refusal to grant Feder and Sona release time is punitive and retaliatory and impedes the Union's ability to collectively bargain and to represent its members. It asserts that Feder and Sona have long been active in the Union among NYCHA employees. Further, the Union states that "Feder has been the victim of a number of improper practices by NYCHA in retaliation for this activity." (Pet. ¶ 4) (citing *Feder*, 4 OCB2d 46 (BCB 2011); *CTSG, L. 375*, 4 OCB2d 61 (BCB 2011)).

The Union asserts that NYCHA's contention that EO 75 does not apply is specious, as its HR Manual incorporates provisions of EO 75. There is no requirement in § 14(a) of the HR Manual that the person designated for release time by a union be utilized by that union to regularly represent employees at NYCHA. Section 14(a) simply requires that the employee be designated to act on "matters related to the employees in their respective unions."

Further, the Union argues that the doctrine of collateral estoppel is inapplicable here. Neither the Union nor Sona has ever litigated release time issues with NYCHA before OCB. The Union asserts that Feder did litigate, *pro se*, a discrete *ad hoc* release time issue, but the Union was not a party to that action. Further, the Union contends that two prior Board decisions established that NYCHA unlawfully discriminated against Feder. Consequently, if collateral

[5] In that case, Feder requested paid release time to "meet, greet and distribute union related documents to the union's upstate members covering the water-shed area." *Feder*, 5 OCB2d 14, at 29. The Board found that NYCHA's HR Manual did not entitle Feder to receive paid release time for these activities, and it noted that even if EO 75 were applicable, it would not either.

estoppel were found applicable, it would relate to the Board's prior finding that NYCHA harbors discriminatory animus towards Feder.

Finally, the Union contends that the petition is timely because it submitted requests for EO 75 release time which were denied within four months of the petition's filing.

NYCHA's Position

NYCHA contends that the Union has failed to assert facts sufficient to constitute a *prima facie* case that NYHCA retaliated against Feder or Sona in violation of NYCCBL § 12-306(a)(1) and (3). First, NYCHA argues that the petition must be dismissed as untimely, as it was not filed within four months from when NYCHA denied Feder and Sona paid release time under EO 75. Specifically, NYCHA denied the request for five days of release time on March 14, 2013, and indicated that only OLR could designate a union representative to receive paid release time under EO 75. Even if the Union could argue that this denial was not final, the evidence demonstrates that OLR informed it on April 15, 2013 of its denial of the Union's request for one day of release time. Further, although the Union alleged, without any documentation, that sometime after May 15, 2013, "Local 375's request was again denied by NYCHA[,]" NYCHA does not have any record of this request. Thus, NYCHA contends that the very latest that the Union could have timely filed its petition was August 15, 2013.

NYCHA further asserts that the petition must be dismissed as barred by collateral estoppel. In *Feder*, 5 OCB2d 14, at 28-29 (BCB 2012), the Board found that Feder was not entitled to paid release time under EO 75 where he was not the duly designated representative selected by the Union for Citywide labor management issues. Thus, under the doctrine of collateral estoppel, Feder and Sona should be precluded from claiming that they are entitled to release time in this situation, as neither has been selected by the City and the Union as the duly designated representative.

DISCUSSION

As a preliminary matter, we consider NYCHA's argument that the petition was not timely filed. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). "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." NYCCBL § 12-306(e); *see also* OCB Rules § 1-07(b)(4). Consequently, "[a]ny claims antedating the four month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)) (internal quotation marks omitted).

The record here establishes that the Union requested full-time release for Feder and Sona on February 20, 2013. On March 14, 2013, NYCHA's Assistant Director of HR denied the requests and informed the Union that the requests did not fall under NYCHA's purview and must instead be directed to OLR. The Union then sent requests to OLR for one day per week of release time for Feder and Sona. On April 15, 2013, OLR denied these requests, stating that NYCHA has denied these types of requests in the past and that it therefore deferred to NYCHA's decision.

The Board finds that NYCHA's March 14, 2013 response was sufficient to place the Union on notice that its requests for recurring release time for Feder and Sona were not approved. Thus, the four month period in which to file an improper practice petition began to run on this date. As the instant petition was not filed until August 26, 2013, more than four months later, it is therefore untimely. Furthermore, even if we were to find that the statute of

limitations did not begin to run until the Union received OLR's denial of its second request on April 19, 2013, we would still be constrained to find the petition untimely.

The Union asserts that it made an additional, subsequent request for release time that NYCHA denied within four months of the filing of the instant petition. However, there is no evidence to support this contention, and NYCHA affirmatively states that it has no record of any additional requests. Further, even assuming, *arguendo*, that the Union had submitted evidence to demonstrate that it made another attempt to request the release time, we would reach the same conclusion. This is because repeated requests for a particular action "do not serve to toll the running of the statute of limitations when a petitioner knew or should have known at an earlier time" that its request was not granted. *Mahinda*, 2 OCB2d 38 (BCB 2009), *affd., Matter of Mahinda v. Bd. of Collective Bargaining*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), 91 A.D.3d 564, 565 (1st Dept. 2012); *see also Sweeney*, 73 OCB 9, at 4 (BCB 2004) (citing *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.)).

Alternatively, we find that even if the petition had been timely filed, nevertheless the claims would not, if proven, establish that NYCHA retaliated against Feder or Sona for protected union activities. The Union did not rebut NYCHA's assertions that an employee will be qualified for regular and recurring release time under § 14(a) of its HR Manual only when the City and the Union have agreed that the employee will serve as the Union's sole Citywide designated representative for purposes of EO 75. Furthermore, in a prior decision also involving Feder, this Board noted that NYCHA's HR Manual incorporates EO 75 only for those employees who are "regularly designated union representatives." *Feder*, 5 OCB2d 14, at 29. Because the Union has not demonstrated that Feder and/or Sona were so designated, it has not established that either were entitled to the requested release time. Thus, even assuming that the Union could

establish a *prima facie* case of discrimination, we would nevertheless find that NYCHA has a legitimate business reason which "would have caused [it] to take the action complained of even in the absence of protected conduct." *Local 376, DC 37*, 5 OCB2d 31, at 22 (BCB 2012) (citing *Feder*, 4 OCB2d 46, at 45 (BCB 2011); DC 37, 1 OCB2d 5, at 64 (BCB 2008)). Accordingly, we dismiss the petition in its entirety.

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-4000-13, filed by the Civil Service Technical Guild, Local 375, AFSCME, against the New York City Housing Authority, 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