Kapetanos v. L.371, SSEU & HRA, 75 OCB 2 (BCB 2005) [Decision No. B-02-05 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

CHRISTOPHER KAPETANOS,

Petitioner,

Decision No. B-02-2005
Docket No. BCB-2436-04

-and-

LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION AND THE CITY OF NEW YORK,

Respondents.

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DECISION AND ORDER

On October 12, 2004, Christopher Kapetanos filed a *pro se* verified improper practice petition pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") against Local 371, Social Service Employees Union ("Union") and the New York City Human Resources Administration ("HRA").[1] The petition alleging a breach by the Union of its duty fair representation arose out of the Union's decision not to offer certain documents into evidence at an arbitration hearing on January 13, 2004, in Kapetanos' out-of-title contract claim.

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[1] Section 12-306(d) of the NYCCBL provides:

> The 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.

Pursuant to §1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), the Executive Secretary of the Board of Collective Bargaining reviewed the petition and determined that the charge of inadequate representation was untimely. Accordingly, in a determination dated October 28, 2004, the petition was dismissed. *Kapetanos,* Decision No. B-18-2004 (ES). The determination was first mailed to the Petitioner by certified mail dated October 28, 2004, to a prior address of the Petitioner's and again on November 1, at Kapetanos' request, to his current address. Petitioner received the determination on November 6, and filed this appeal on November 29, 2004. Because this Board finds that the appeal is untimely, we deny the appeal and dismiss the petition. Even if the appeal were timely, we would find that the determination of the Executive Secretary was correct and would dismiss the petition.

BACKGROUND

The Petition

Petitioner was appointed Fraud Investigator, Level I, in the Eligibility Verification Review section of HRA's Office of Revenue and Investigation on March 27, 1998. On August 23, 1999, he voluntarily transferred to a unit dealing with claims and collections. According to Petitioner, he reviewed legal documents, conducted negotiations pertaining to pay-off requests, prepared reports on Medicaid lien cases, coordinated special projects, and oversaw the work of five co-workers.

On August 28, 2002, Petitioner filed an out-of-title grievance claiming that since August 23, 1999, he had been performing duties consistent with the title of Associate Fraud Investigator

and seeking the difference in salary. On July 23, 2003, the Union filed a request for expedited arbitration on Petitioner's behalf. According to Petitioner, on December 12, 2003, the Union notified him that his grievance would be heard on January 13, 2004. Petitioner claims that the collective bargaining agreement ("CBA") requires that the Union contact a grievant prior to an arbitration to discuss documents necessary for the hearing and that the Union failed to do so here. Petitioner relies on Article VI of the CBA which concerns expedited arbitrations and states: "the parties shall, whenever possible, exchange any documents intended to be offered in evidence at the hearing at least one week in advance of the first hearing date. . . . " At the hearing Petitioner was represented by Union Representative Robert Jordan and Organizer Jose Valez. Petitioner allegedly told Jordan and Valez during the hearing that he wanted to submit into evidence two twelve-inch thick folders of relevant documents. Jordan and Valez allegedly told him that they had already submitted enough evidence and that there was no need to submit any more.

By Expedited Award dated April 16, 2004, the arbitrator denied the grievance and found that Petitioner's duties were consistent with those described in the position description for Fraud Investigator Level I. Petitioner argues that the Union breached its duty of fair representation when it failed to offer his evidence, which demonstrated that he was working out-of-title.

In August 2004, Petitioner received printed instructions by mail for the filing of verified improper practice petitions under the NYCCBL. The instructions also stated the time requirement for filing an appeal of a decision by the Executive Secretary, pursuant to OCB Rule § 1-07(c)(2)(ii).[2]

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[2] OCB Rule § 1-07(c)(2)(ii) provides, in pertinent part:

> Within 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with

Executive Secretary's Determination

On October 28, 2004, the Executive Secretary found that the petition filed on October 12, 2004, was untimely as to the allegations that the Union did not represent him adequately in processing his out-of-title claim before the arbitrator. *Kapetanos*, Decision No. B-18-2004 (ES). Pursuant to § 12-306(e) of the NYCCBL and OCB Rule §1-07(d), a claim alleging conduct in violation of NYCCBL § 12-306 must be filed within four months of the date the alleged improper practice occurred.[3] Since the arbitration was held on January 13, 2004, and the petition was filed nine months after the alleged violation occurred, it was barred by the applicable four-month statute of limitations.

As to the merits of Petitioner's claims, the Executive Secretary determined that Petitioner had not presented any facts from which the Board could infer that the Union represented him in a discriminatory manner, or that it violated his rights in any other way under the NYCCBL § 12-

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the Board an original and three copies of a written statement setting forth an appeal from the decision with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

[3] NYCCBL § 12-306(e) provides:

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 Rule Section 1-07(d) provides, in pertinent 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 . . . . If it is determined . . . that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary . . . .

306(b)(3).[4] Except for conclusory statements and his dissatisfaction with the outcome of the hearing, Petitioner presented no factual allegations which could demonstrate that the Union's decision not to submit Petitioner's evidence was arbitrary, discriminatory, or in bad faith. *Kapetanos*, Decision No. B-18-2004 (ES). The Executive Secretary determined that the Union in fact arbitrated Petitioner's grievance and submitted evidence on his behalf. She noted that, absent facts to support a claim that a union acted in a manner that could be classified as arbitrary, discriminatory, or in bad faith, the Board will not evaluate or pass judgment on the strategy employed by a union during a hearing. *Grace*, Decision No. B-18-95 at 8; *Miller*, Decision No. B-21-94 at 14; *Hug*, Decision No. b-51-90 at 15, 17. The Executive Secretary further determined that no derivative claim could lie against HRA. *Barbee*, Decision No. B-16-2003; *Silva*, Decision No. B-31-2000.

The Appeal

On November 29, 2004, Petitioner appealed the Executive Secretary's dismissal. Petitioner argues that the Executive Secretary's determination incorrectly found his petition untimely because the petition, filed on October 12, was within the four-month limitations period which, he contends, accrued on September 25, the date he received the arbitration file from the Union and learned that his choice of documents had not been entered into evidence. Petitioner attaches to his appeal a copy of the envelope postmarked September 20, 2004, which he states

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[4] NYCCBL 12-306(b)(3) provides, in pertinent part:

It shall be an improper practice for a public employee organization or its agents:

* * *

(3) to breach its duty of fair representation to public employees under this chapter.

contained the arbitration file from the Union. In his appeal, Petitioner contends that he has supplied sufficient factual support for his claim that the Union failed to present his case adequately to the arbitrator.

Petitioner further argues that the precedent cited by the Executive Secretary – *Minervini,* Decision No. B-29-2003; *Green*, Decision No. B-34-2000; *White*, Decision No. B-37-96; and *McAllan*, Decision No. B-15-83 – was inapposite because the cited cases concerned grievances which the respective unions determined to be without merit. By contrast, Petitioner argues that by taking the grievance to arbitration in his case, the Union had already determined that his claim had merit. Therefore, the Union's failure to place into evidence the documents allegedly demonstrating that he was working out-of-title was a violation of the NYCCBL.

DISCUSSION

We find the instant appeal untimely. As of August 2004 when Petitioner received printed instructions by mail for the filing of verified improper practice petitions under the NYCCBL, he was on notice that an appeal of a decision by the Executive Secretary, pursuant to OCB Rule § 1-07(c)(2)(ii), must be filed within ten business days of service of that decision. The determination was mailed to Petitioner on November 1 and received on November 6; thus, any appeal should have been filed by November 19, 2004. Petitioner filed on November 29 – ten days after the date by which he was required to file an appeal of the ES decision. For this reason, the instant appeal must be denied.

Were we to review the record *de novo*, however, we would find the facts to be as stated above with the same result for the following reason. The Executive Secretary properly dismissed

the petition as to the Union and HRA as time-barred under § 12-306(e) of the NYCCBL and OCB Rule § 1-07(d). The act of which Petitioner complains is the handling of his out-of-title grievance at the arbitration hearing, which occurred on January 13, 2004 – more than four months prior to the filing of the verified petition on October 12, 2004. Petitioner acknowledges that he was aware at the time of the hearing that his Union representatives had not submitted the papers which he sought to submit. Therefore, his claim that he did not have notice of the Union's conduct until September 25, 2004, when he received the Union's file on the case, is not persuasive.

In addition, we find nothing improper in the Union's handling of Petitioner's out-of-title claim. Petitioner fails to allege why the documents he wished to submit were essential to his case, or why the evidence submitted by the Union was otherwise insufficient. No facts are alleged to support the claim that the Union acted in bad faith or in an arbitrary or discriminatory manner; nor will we evaluate or pass judgment upon the Union's strategy or the sufficiency of its representation in arbitrating the grievance. *Antoine*, Decision No. B-8-2004 at 10. Indeed, we have specifically held that a petitioner does not establish a breach of the duty of fair representation merely because the outcome of a grievance was not satisfactory to the grievant after the grievance was, in fact, heard at arbitration. *White*, Decision No. B-37-96 at 6.

With respect to Petitioner's reliance on Article VI of the contractual grievance procedure, which states that the parties shall exchange documents intended to be offered at the hearing at least one week in advance, we find that the Executive Secretary was correct in her determination that Petitioner's reliance was misplaced. This provision refers to obligations between the parties to the agreement, namely, HRA and the Union, to exchange information prior to the hearing. It

does not create an obligation on the Union to meet with its members a week in advance to discuss document exchanges. The Executive Secretary determined that the Union arbitrated Petitioner's grievance and submitted evidence on his behalf. As she noted, absent facts to support a claim that a union acted in a manner that could be classified as arbitrary, discriminatory, or in bad faith, this Board will not find a breach of the duty of fair representation.

For the reasons stated above, we find the appeal untimely.

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 filed by Christopher Kapetanos in the matter docketed as BCB-2436-04 be, and the same hereby is, dismissed; and it is further

ORDERED, that the Executive Secretary's determination in *Kapetanos*, Decision No. B-18-2004 (ES), be, and the same hereby is, affirmed..

Dated: New York, New York
January 27, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER