Seale, 79 OCB 30 (BCB 2007)

[Decision No B-30-2007] (IP) (Docket No. BCB-2551-06)

Summary of Decision: Petitioner alleges that Union breached its statutory duty of fair representation under the NYCCBL by failing to properly process her grievance. Petitioner's claims against the Union have been resolved by a settlement agreement between Petitioner and Union. Dismissing the petition, the Board finds that Petitioner had not stated a viable claim under the NYCCBL against the City. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

REBECCA SEALE,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1549,
THE CITY OF NEW YORK, and
THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.

DECISION AND ORDER

On May 31, 2006, Rebecca Seale, a member of District Council 37, AFSCME, Local 1549 ("Union"), filed a verified improper practice petition against the Union, the City of New York and the Department of Citywide Administrative Services ("City" or "DCAS"). Petitioner alleges violations of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") §§ 12-306(a)(4), 12-306(c)(3), (4) and (5), and 12-306(d) and (e).

The City alleges that the petition should be dismissed because it is untimely and, alternatively, because there can be no derivative claim against the City since Petitioner has failed to allege sufficient facts demonstrating that the Union violated its statutory duty of fair representation. The Union did not file a verified answer but indicates that it has entered into an agreement with Petitioner resolving her claims against the Union. In light of this agreement, the Board dismisses the petition in its entirety, finding that Petitioner has not stated a claim under the NYCCBL against the City.

BACKGROUND

On or about January 20, 2005, Petitioner, then a Clerical Associate III, filed a Step I grievance with DCAS alleging that she had been assigned out of title duties and responsibilities. A union representative was assigned to handle Petitioner's grievance. By letter dated February 18, 2005, the Director of Labor Relations for DCAS denied the grievance. On or about July 12, 2005, a Step III grievance hearing was convened by the Mayor's Office of Labor Relations ("OLR").[1] Petitioner alleges that on the day of the Step III hearing she first met with a different union representative who had been assigned to handle her grievance due to the absence of the first union representative. Petitioner alleges that on this day, she and the union representative discussed the possibility of the grievance proceeding to arbitration. The Step III Review Officer sent the Union a decision dated July 22, 2005, denying the grievance. Petitioner alleges that in the months that followed she made several attempts to contact the union representative that represented her at the Step III hearing. Petitioner alleges that in September 2005, she spoke with this union representative who indicated that he would reach out to her when he determined the status of her grievance.

[1] According to the City, a Step II hearing was not held.

Petitioner alleges that the union representative never followed up with her.

On November 4, 2005, Petitioner alleges that she was assigned additional job responsibilities. Her concern over these new responsibilities prompted her to contact the Union. Petitioner alleges that she called the union representative who handled her Step III grievance to discuss the new responsibilities. During this conversation and in a subsequent fax to the union representative, Petitioner asked about the status of her grievance. Petitioner claims that her queries regarding the status of her grievance were not answered by the union representative.

Petitioner alleges that on February 6, 2006, she contacted the union representative's supervisor who indicated that he would speak with her about the grievance after he reviewed the file. Subsequently, the supervisor told Petitioner that her grievance had been denied at Step III and that while the Union did not file a request for arbitration, he would attempt to have the grievance reopened.[2] Petitioner alleges that the supervisor could not explain to her why arbitration was not sought in a timely fashion. Regarding the assignment of new duties that began on or about November 4, 2005, the supervisor recommended that Petitioner file a new out of title grievance, which she did, on or about February 23, 2006. This resulted in a Step III hearing convened on May 23, 3006. The record is silent as to whether a Step III decision was issued. However, the City alleges that after the hearing Petitioner was promoted to Principal Administrative Associate II retroactive to January 1, 2006.

After the filing of the petition giving rise to this proceeding, Petitioner and Union reported that they entered into an agreement resolving Petitioner's claims against the Union. Pursuant to that

[2] The City alleges that the union supervisor first requested an extension of time to file a request for arbitration, which was denied. The City also alleges that the union supervisor then requested that the grievance be reopened. This request was also denied.

agreement Petitioner agreed that she "shall withdraw the Improper Practice Petition . . . as against the Union with prejudice."

POSITIONS OF THE PARTIES

Petitioner's Position

Although Petitioner's claims against the Union have been resolved, the petition asserts that the failure of the union representative to return her telephone calls after the July 12, 2005 Step III grievance hearing and contact her regarding the disposition of her Step III grievance constitute violations of the NYCCBL §§ 12-306(c)(3), (4) and (5). Petitioner further alleges that the Union acted in bad faith by not informing her of the July 22, 2005 Step III determination, and that the Union's failure in this regard deprived her of the opportunity to encourage the Union to pursue arbitration in a timely fashion. Petitioner claims as evidence of the Union's bad faith the Union's allowing the contractual timelines that must be followed with regard to the filing of grievances to elapse without action, and claims that these actions constitute violations of NYCCBL § 12-306(a)(4) and § 12-306(d) and (e).

Petitioner signed the settlement document (a copy of which has been provided to the Board) agreeing to withdraw these claims against the Union, and has not disputed the validity or binding nature of this settlement agreement.

Union's Position

Because of the settlement of Petitioner's claims, the Union has not submitted an answer in this matter.

City's Position

The City alleges that the petition is barred by the statute of limitations contained in NYCCBL § 12-306(e), which states in pertinent part that an improper practice petition must be filed "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." The City argues that Petitioner was informed by the union representative in September 2005 that her grievance was "lost." (City Answer, ¶ 25.) Therefore, the City concludes, Petitioner's claim accrued in September 2005 and the petition, filed May 2006, is time-barred and must be dismissed.

Alternatively, the City alleges that the petition should be dismissed because Petitioner has failed to allege facts sufficient to demonstrate a breach in the duty of fair representation by the Union. The City argues that the statutory duty owed by a union to its members is only breached when the union engages in conduct that is discriminatory or arbitrary or that demonstrates bad faith, and that Petitioner fails to allege sufficient facts showing that the Union has not engaged in any such acts. Moreover, the City argues, Petitioner's dissatisfaction with the Union's handling of her grievance does not amount to a breach of the duty of fair representation.

DISCUSSION

As a preliminary matter, we address the City's timeliness argument. The City alleges that Petitioner's claims accrued in September 2005 "when she did not receive a response from her union representative [and] should have known that the union was not processing her claim," and, therefore,

the instant petition is time-barred.[3] (City Answer, ¶26.) However, the facts alleged state that in September 2005 the union representative indicated to Petitioner that he would need to research her grievance before he could inform her of its status.

This Board has held that a petitioner's claim that a union breached its duty of fair representation may be untimely where petitioner is experienced with the grievance process and has "had experience with the procedures, timing, and communication with the Union." *Raby*, Decision No. B-14-2003 at 11, *aff'd Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003). In *Raby*, this Board dismissed the petition where petitioner alleged that "she did not know about the alleged breach at the time it occurred" but it was shown that petitioner had "filed many grievances in the previous several years" and was aware of the requisite filing periods. On the record before us, it is unclear at what stage Petitioner knew or should have known of the Union's allegedly improper conduct. We find that it is reasonable, based on Petitioner's allegations, to conclude that it was only on February 6, 2006, when she spoke with the union supervisor, that she became aware that the Union had decided not to pursue arbitration of her grievance. Therefore, the instant petition, filed on May 31, 2006, is timely.

Since no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings, and assume, *arguendo*, that the factual allegations contained in the petition are true, analogous to a motion to dismiss. *See*

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[3] NYCCBL § 12-306 (5)(e) states, in pertinent part, that
[a] petition 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 petitioner knew or should have known of said occurrence.

D'Onofrio, Decision No. B-3-2007 at 20, n. 11; *James-Reid*, Decision No. B-29-2006 at 11. Furthermore, although Petitioner cites inapplicable provisions of the NYCCBL, the facts as alleged suggest potential violations of § 12-306(b)(3), and we will consider them as such. *See Chambers*, Decision No. B-41-91 at 1, n.1. The principle that claims arise out of the facts asserted and not a petitioner's statutory citations is particularly salient with respect to a *pro se* petitioner. *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."); *Northrop v. Hoffman of Simsbury,* 134 F.3d 41, 46 (2d Cir. 1997) ("[A]ppellant's failure to cite the correct section of the [applicable statute] does not require us to affirm the dismissal of her complaint so long as she has alleged facts sufficient to support a meritorious legal claim."); *see also Lupski v. County of Nassau*, 32 A.D.3d 997 (2d Dept. 2006).

Given Petitioner's agreement to withdraw the instant improper practice charge as against the Union, the remaining issue before the Board is whether any improper practice statutory claims remain against the City. In New York State law, "stipulations of settlement are favored." *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984). Indeed, as we have noted, "in subsequent cases the Court of Appeals has reaffirmed what it terms 'our State's strong policy promoting settlement.'" *Okorie-Ama*, Decision No. B-5-2007 at 15 (citing *Bonnette v. Long Island College Hospital*, 3 N.Y.3d 281, 286 (2004)). The stipulation between Petitioner and the Union conclusively resolves Petitioner's claims against the Union. *Okorie-Ama*, Decision No. B-5-2007 at 15.

The petition names the City as a respondent as well, as required by NYCCBL § 12-306(d). However, no act or omission violative of the NYCCBL on the part of the City has been pleaded. Thus, no independent cause of action against the City has been alleged.

NYCCBL § 12-306(d) requires that the City be named as an additional respondent in cases involving claims that a union has breached its duty of fair representation in the processing or failure to process a grievance filed pursuant to a collective bargaining agreement. In such cases the employer's liability, if any, is contingent entirely on the claims against the union. Where the claim against the union is dismissed, any potential derivative claim against the employer pursuant to NYCCBL § 12-306 (d) must also fail. *Gertskis*, Decision No. B-11-2006 at 13; *see also Okorie-Ama*, Decision No. B-5-2007 at 18-19; *Fair Hearing Representatives*, Decision No. B-6-97 at 7; *CSEA v. Public Employees' Relations Board and Diaz*, 132 A.D.2d 430, 432 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988). To the extent that the City is named a respondent pursuant to NYCCBL § 12-306(d), we find that, on the claims asserted herein, no remedy can properly issue. Since no independent claim has been alleged, 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-2551-06 be, and the same hereby is, dismissed.

Dated: New York, New York
September 25, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER