James-Reid, 79 OCB 9 (BCB 2007)

[Decision No B-09-2007] (IP) (Docket No. BCB-2539-06).

Summary of Decision: Union moved to disqualify counsel asserting that the prior representation of the Union by the predecessor firm of petitioner's counsel created a conflict of interest. The Trial Examiner denied the motion, on the grounds that the Union failed to allege facts sufficient to establish that the prior representation was in a manner related to the improper practice petition herein; rather, the factual allegations underlying the motion merely established that counsel had a familiarity with the disciplinary process applicable to police officers, and the provision of counsel by the Union, which was on retainer to the Union, which is in any event publicly available information. The Union appealed the denial of the motion to disqualify counsel to the Board. The Board denies the motion on the ground the Union had failed to state grounds sufficient to create grounds for disqualification, for the reasons stated by the Trial Examiner. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

AMRYL JAMES-REID,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. and THE CITY OF NEW YORK,

Respondents.

INTERIM DECISION AND ORDER

The petition in this matter alleges that the Patrolmen's Benevolent Association ("PBA" or "Union") breached its duty of fair representation in violation of Section § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12,

Chapter 3)("NYCCBL") when the counsel afforded Petitioner by the Union in her disciplinary hearing for alleged misconduct: (1) induced Petitioner to waive her rights to a hearing and plead guilty to charges and specifications allegedly outside of the applicable limitations period for such charges and specifications, and as to which Petitioner had maintained her factual innocence; (2) failed to raise before the Trial Room the potential preclusive effect of the finding of a special master in a federal civil rights action that Petitioner had been the subject of, and was eligible for an award of compensation stemming from , "discriminatory discipline" arising from the facts and circumstances comprising certain of the disciplinary charges against her; and (3) failed again to raise these issues to the Commissioner in opposing the recommended penalty of termination.

After unsuccessfully moving to dismiss the petition,[1] the Patrolmen's Benevolent Association (the "PBA") filed with the Executive Secretary a letter dated October 19, 2006 requesting the disqualification of Petitioner's counsel, Cronin & Byczek, LLP ("Cronin & Byczek") in this improper practice matter (the "Letter Motion"). Because the role of the Executive Secretary in reviewing improper practice petitions is limited to determining their facial sufficiency under Section 1-107(2) of the Rules of the Office of Collective Bargaining (codified at title 61 of the Rules of the City of New York, chapter 1 (the "Rules")), this Board at its meeting on October 25, 2006, unanimously delegated the task of responding to the motion to a Trial Examiner in this matter.

Subsequently, the Trial Examiner set a briefing schedule, allowing counsel to each submit written memoranda addressing the merits of the motion. In addition, the PBA was asked to address

---

[1]This Board denied the motion to dismiss the petition in an interim decision rendered on September 12, 2006. *James-Reid,* Decision No. B-29-2006. The allegations of the respective parties and the underlying controversy are detailed in that decision, and will not be rehearsed here.

the question of the nature of the relationship between any alleged prior representation by Cronin & Byczek and its predecessor firms of the PBA bears to the representation of Ms. James-Reid herein; it was also requested to produce a complete copy of the deposition of Linda Cronin, a portion of which it relied upon in its initial Letter Motion. Cronin & Byczek was afforded an opportunity to respond to the PBA's more particularized statement, and was asked to respond to the PBA's claim that it had assisted petitioner in the drafting of her petition, which was filed *pro se*. A briefing schedule was agreed to by the parties, and adhered to.

On December 28, 2006, the Trial Examiner rendered a letter decision denying the motion. For the reasons stated in the letter decision, and as further explained here, the Board affirms the Trial Examiner's ruling that the PBA failed to plead grounds sufficient to warrant disqualification of Petitioner's counsel, assuming the truthfulness of the allegations *arguendo*.

As a threshold matter, Rule 1-10(k) clearly states that, in normal course, the Board "shall not entertain appeals from a trial examiner's rulings prior to the Board's consideration of the entire record for decision." In this case, the PBA has sought the leave of the Director to file this appeal in an interlocutory fashion, pursuant to Rule 1-10(k). Because of the potential for systemic harm posed by one party's counsel continuing to provide representation in a case where prior representation warrants disqualification, that request was granted, and we consider this appeal on the merits, finding that no such representation has been alleged.

The Trial Examiner correctly concluded that this Board has the authority to disqualify counsel from appearing before it when such practice would violate the Disciplinary Rules of the Code of Professional Responsibility, including that assertedly violated here, DR 5-108, codified at 22 N.Y.C.R.R. § 1200.27

This Board is empowered, pursuant to NYCCBL §12-309(a)(4), to "establish procedures, make final determinations and issue appropriate remedial orders" in improper practice cases brought, as was the instant case, pursuant to § 12-306. Pursuant to that authority, the Board has promulgated procedural rules contained within the Rules. Section 1-10 of the Rules provides for the "summary exclusion" from a hearing by any participant for "[m]isconduct at any hearing conducted under these rules" and further provides that "such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the Board or its agents after due notice and opportunity to be heard." *Id.* We find that authority extends to enforcement of the Disciplinary Rules. *See Matter of Board of Education of Wappingers Cent. Sch. Dist. v. Watkins*, 189 A.D.2d 1069, 1070 (3d Dept.), *app. den.* 82 N.Y.2d 655 (1993).

Under DR 5-108, a "party seeking disqualification of its opponent's counsel under this provision must prove that there was an attorney-client relationship between the moving party and opposing counsel, the matters involved in both representations are substantially related, and the interests of the present and former clients are materially adverse." *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144, 151 (1st Dept. 2006) (applying standard; finding no conflict on facts established); *Kassis v. Teachers Insurance and Annuity Association*, 93 N.Y.2d 611, 615-616 (1999) (forbidding successive representation in "the same or a substantially related manner"). While the party urging disqualification need not betray the very confidences imparted in order to establish disqualification, "[m]ore than 'mere generalized assertions' are required to justify disqualification." *Waehner v. Northwest Bay Partners, Ltd.*, 30 A.D.3d 799, 800 (3d Dept. 2006), quoting *Jamaica Pub. Serv. Co. Ltd. v. AIU Insurance*, 92 N.Y.2d 631, 638 (1998); *Andre v. City*

of New York, 19 A.D.3d 340 (1st Dept. 2005).

Where a specific matter arising out of the same facts can be pleaded and proven and both the prior and the case in which a conflict is asserted present similar claims, a "colorable" claim of conflict has been raised. *St Barnabas Hospital v. New York City Health & Hospitals Corp.*, 7 A.D.3d 83, 89-90 (1st Dept. 2004) (same data and its implications at issue in both cases); *Kassis*, 93 N.Y.2d at 615-616; *compare Gaspar v. Hallrock Poured Concrete Inc.*, 7 A.D.3d 871, 872 (3d Dept. 2004)) (insufficient "nexus" between facts linking actions to warrant disqualification); *Morgan Stanley DW, Inc. v. Carlinsky*, 306 A.D.2d 190 (1st Dept. 2003) (representation of affiliate on different issues did not create conflict violative of DR 5-108). The movant cannot merely assert a remote resemblance; in the absence of some other compelling, fact-specific relationship between the two cases, "the issues in the present litigation must be identical to or essentially the same as those in the prior case." *Lightning Park v, Wise Lerman & Katz*, 197 A.D.2d 52, 55 (1st Dept. 1994); *Bloom v. St. Paul Travellers Co., Inc.*, 24 A.D.3d 584, 585 (2d Dept. 2005).

In its letter to Director Marlene Gold of January 25, 2007, the PBA acknowledges that Cronin & Byczek's alleged awareness of "secrets and confidences that could either demonstrate or disprove the existence of an agency relationship between the PBA and the Worth Firm" is "based on past custom and practices." (January 25, 2007 PBA Letter at 5). We affirm the Trial Examiner's finding that the PBA's submission would require us to assume identical terms of retention between two different firms years apart, and that the practices of two unrelated firms were substantially the same.

In the instant case, the "substantial relationship" alleged between the representation of Petitioner before this Board and the prior representation of other police officers in disciplinary cases and/or the PBA itself in other litigation was not borne out. The PBA asserts that confidential

information in the possession of Cronin & Byczek has already been disclosed, pointing to the assertions in the petition that Worth, Longworth & London, P.C. "has a financial obligation to the PBA first and then to the member when assigned by the PBA" and that "Stuart London is the house counsel to the PBA and its members, including Petitioner." November 13, 2006 PBA Letter at 3.

In addition to the other grounds relied upon by the Trial Examiner's decision, which we adopt, this Board stresses that the alleged financial arrangements between the PBA and Worth Longworth & London were, as the Trial Examiner correctly found, not confidential at all. As the Court of Appeals has recently reaffirmed, "Communications regarding 'the identity of a client and information about fees paid by the client' are not generally protected under the privilege, nor are communications regarding the payment of legal fees by a third person." *In re Nassau County Grand Jury (Doe Law Firm)*, 4 N.Y.3d 665, 678-679 (2005) (finding documents reflecting such matters to be outside of protection of attorney-client privilege; *quoting Matter of Priest v. Hennessy*, 51 N.Y.2d 62 (1980)). In this case, the fact that Worth, Longworth & London is "affiliated" with the Union is borne out by Exhibit 2 to the PBA's own Answer here – a Guide to the disciplinary process published by the NYPD. Moreover, the Trial Examiner correctly pointed out that in *United States v. Schwartz*, 283 F.3d 76, 91 (2d Cir. 2002), the Second Circuit Court of Appeals provided more information concerning the relationship between the PBA and the Worth Firm that the "past custom and practice" from which the PBA speculates deductions regarding current practice might be drawn:

> While the Worth firm had been barred by the district court from formally representing the PBA or any of its members in the Louima civil suit, Worth nevertheless had an unalloyed duty to the PBA as his client to refrain from any conduct injurious to its interests. Moreover, because the Worth firm's retainer agreement with the PBA provided that (a) a portion of the $ 10 million retainer (which was otherwise payable in equal monthly installments) would be held back and paid

> quarterly to ensure the PBA's satisfaction with the Worth firm's performance and (b) the PBA could unilaterally cancel the contract upon thirty days' notice, and because Worth could expect that satisfaction with the firm's performance would result in a renewal of the retainer upon its expiration, Worth had a strong personal interest in refraining from any conduct to which the PBA might object.

As the Trial Examiner stated, "this specific finding of fact upheld by an appellate court and published in the Federal Reporter carries far more weight than any hypothetical extrapolation that Cronin & Byczek might urge based upon the Lysaght Firm's prior course of dealings with the PBA. In any event, the fact that a judicial body has publicly determined that the financial relationship between the PBA and the Worth Firm has previously posed a conflict of interest for the Worth Firm's representation of an individual officer undercuts severely the PBA's argument that such an assertion is traceable to inside knowledge stemming from client confidences received by an attorney at Lysaght who subsequently was employed by Cronin & Byczek." December 28, 2007 Trial Examiner Decision at 6-7.

Thus, to the extent that the assertion that the "past custom and practice" known to some employees at Cronin & Byczek could be theorized to speculatively reflect on Worth Longworth's alleged subsequent financial interest in pleasing the PBA, the PBA has shown neither a relationship between the two retainer agreements, nor that either agreement constitutes a confidential communication.

Likewise, the PBA's claim that inside knowledge of "past custom and practice" as to the role of PBA trustees and delegates in disciplinary proceedings on the part of Cronin & Byczek employees is substantially related to issues presented in the instant case is likewise unavailing. We agree with the Trial Examiner's conclusion that "Mere familiarity with the disciplinary process applied to PBA

members through unrelated cases, the most recent of which would have had to take place at least 6 years prior to Petitioner's administrative trial, which took place, the parties agree, 'on or about November 14, 2005' (PBA Answer ¶ 50, Petition ¶ 20), cannot constitute the sort of 'substantial relationship' between the cases as to give rise to a conflict," absent some further display of relevance to the issues here. (December 28, 2006 Decision at 6.)

The PBA has denied Petitioner's allegation that trustees and/or delegates are involved in "each and every case," but nonetheless asserts that this "does not mean that there is no confidential information in C&B's possession regarding the extent of PBA representatives' involvement in the past." (PBA January 25, 2007 Letter at 6.) The PBA's contention that the Trial Examiner's ruling is predicated on such a finding is simply untenable. The Trial Examiner's decision, in the context of the issues raised by the PBA, clearly finds only that the PBA had failed to plead the existence of facts sufficient to find a "substantial relationship" between any knowledge Cronin & Byczek attorneys might have about the practices of PBA trustees and delegates generally to the claims advanced by Petitioner specifically. (December 28 Decision at 7.) We agree.

The Petitioner has alleged in opposing the motion to dismiss that the PBA delegate and trustee assigned to her case did not assist in her representation at her trial. *James-Reid*, Decision B-29-2006 at 9-10. She has claimed, essentially, that the PBA delegate and trustee effectively ratified her counsel's action through their inaction. *James-Reid*, Decision B-29-2006 at 15-16. There has been no allegation by Petitioner tending to suggest any relevance to this case of any past practice on the part of PBA delegates or trustees, as opposed to contemporaneous acts on their part. Nor has the PBA raised any legal or factual issue as to which the past practice of trustees and delegates could be relevant, nor has it suggested any manner in which any confidences regarding the role of trustees and

delegates in other cases, at the earliest six years prior to Petitioner's disciplinary trial, have any bearing on the issues presented in this case. Far more germane, as the Trial Examiner noted, is the fact that Petitioner "had herself been involved in disciplinary proceedings, and represented by the Worth Firm, which would give her a basis of knowledge as to how such proceedings were conducted after the representation by Cronin & Byczek," including the role played, if any, by PBA delegates and trustees. (December 28 Decision at 7.)

In short, the PBA has alleged what constitutes nonconfidential information and mere background information regarding the disciplinary process applicable to police officers, which as the Trial Examiner correctly found, does not constitute grounds for disqualification, unless such background knowledge is demonstrated to be sufficiently relevant as to establish a substantial relationship between the prior representation and the case at hand, as it has not been here. *See e.g., First Hudson Group, Inc. v. Martinos*, 11 Misc.3d 394, 812 N.Y.S.2d 767, 771 (Sup. Ct. N.Y. Co. 2005).

This Board affirms the ruling of the Trial Examiner in denying the motion to disqualify Petitioner's counsel, Cronin & Byczek, LLP.

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 motion to disqualify the petitioner's counsel in this matter be, and hereby is, denied.

Dated: New York, New York
March 29, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

Note: Impartial Member Carol Wittenberg and City Member M. David Zurndorfer recused themselves and did not participate in the decision in this case.