

Gonzalez, 8 OCB2d 10 (BCB 2015)

(IP) (Docket No. BCB-4085-14)

Summary of Decision: Petitioner appealed the Determination of the Executive Secretary that dismissed as untimely Petitioner's improper practice petition. Petitioner argued that the Executive Secretary's decision was in error. The Board found that the Executive Secretary properly deemed the charges in the petition untimely and denied the appeal. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

CYNTHIA GONZALEZ,

Petitioner,

-and-

**COMMUNICATION WORKERS OF AMERICA, LOCAL 1182
and the NEW YORK CITY POLICE DEPARTMENT,**

Respondents.

DECISION AND ORDER

On December 9, 2014, Cynthia Gonzalez ("Petitioner"), *pro se*, appealed the November 12, 2014, Determination of the Executive Secretary of the Office of Collective Bargaining, *Gonzalez, 7 OCB2d 30 (BCB 2014)*, that dismissed Petitioner's improper practice petition against the Communication Workers of America, Local 1182 ("Union") and the New York City Police Department ("NYPD"). The underlying improper practice petition alleged that the Union breached its duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

(“NYCCBL”) by failing to represent her at arbitration following her suspension and that the NYPD violated § 12-306(a)(1) and (3) by discriminating and retaliating against her. Petitioner now argues that the Executive Secretary erred by finding the petition untimely. The Board finds that the Executive Secretary properly deemed the claims in the petition untimely and denies this appeal.

BACKGROUND

Petitioner has been employed by the NYPD as a Traffic Enforcement Agent Level II since August 22, 2005. The Union and the NYPD are parties to the Traffic Enforcement Agents agreement (“Agreement”).

Petitioner’s Allegations

Petitioner alleges that since at least 2006, various NYPD personnel have subjected her to “employment discrimination, disparaging remarks and . . . physical touching.” (Appeal, p. 1) In connection with this alleged treatment by the NYPD, Petitioner filed a complaint with the Office of Equal Employment Opportunity on March 30, 2009 (“EEO Complaint”), which was dismissed. Petitioner asserts that her supervisor, along with other NYPD personnel, has since retaliated against her for filing the EEO Complaint. Her most recent allegation occurred in July 2011 when, she contends, her supervisor failed to provide her with a functioning portable radio, resulting in a workplace injury. Petitioner charges that she reported the alleged harassment and subsequent retaliation to the NYPD and the Union to no avail.

The improper practice petition arose specifically from two charges and specifications (“Charges”) issued by the NYPD in 2010. On January 26, 2010, the NYPD alleged that Petitioner failed to comply with an order to sign a training log and to submit medical

documentation for an absence. On August 24, 2010, the NYPD alleged that Petitioner shouted at and threatened a Police Officer, failed to identify herself to a Police Officer, failed to turn over her NYPD identification card and shield when requested, and was discourteous to an NYPD Captain. Both Charges provided that such alleged behavior violated NYPD Patrol Guidance Procedures and, as result, the NYPD suspended Petitioner for 60 days.

In response to the Charges, the Union filed a grievance on Petitioner's behalf, alleging wrongful discipline in violation of the Agreement, and represented Petitioner through Step III of the grievance process. In a Step III Reply dated December 7, 2012 ("Step III Reply"), the New York City Office of Labor Relations determined that the NYPD did not violate the Agreement when it suspended Petitioner. It denied the grievance and upheld Petitioner's 60-day suspension.

Following her receipt of the Step III Reply, Petitioner wrote two letters urging that the Union file an improper practice charge against the NYPD for wrongful discipline. On March 24, 2013, Petitioner sent a letter to the Union expressing that she was "not satisfied" with the Step III Reply and requested that the Union appeal the Step III Reply to arbitration. (Pet., March 24, 2013 Letter).

On April 4, 2013, Petitioner sent a second letter, again seeking assistance from the Union. She reasserted that she was suspended unjustly and without cause, and relayed a conversation that she had with the Union President. That portion of the letter reads:

The union president Robert Cassar has received an appeal letter stating my request for collective bargaining arbitration the last step for a suspension process I had the opportunity to speak to Robert Cassar he stated for me to plead guilty [without] hearing my case. I had to explain quickly what had taken place on both dates when I was suspended [without] pay [for] 60 days in total. I am perplex[ed] at the behavior of Robert Cassar . . . [he] has denied the grievance process without requiring a formal meeting with me to prove or show written [proof] that I followed the orders

requested . . . I am very disappointed at the fact that he has refuse[d] to help me.

(Pet., April 4, 2013 Letter) (hereinafter, “April 2013 Letter”). There is no evidence that she received a response to this letter.

Petitioner filed the improper practice petition on October 27, 2014, alleging that the Union breached its duty of fair representation by failing to prosecute her grievance through arbitration. In particular, Petitioner alleged that the Union has ignored her requests to intercede in her 60-day suspension. She also alleged that “the president of the union refused to go any further without having a formal meeting to discuss the evidence that I have to present and prove my case.” (Pet., Oct. 12, 2014 Letter) She further contended that the Union failed to provide her the “proper help” in declining to proceed past the Step III grievance proceeding. (*Id.*) Petitioner acknowledged that her petition was time-barred, but argued that the statute of limitations should be tolled due to the Union’s negligence and its failure to present evidence at the Step III conference substantiating that her suspension was retaliatory.

Against the NYPD, Petitioner asserted that she was suspended without cause and that she has been the victim of “defamation of character, harassment, discrimination, and retaliation.” (Pet., Oct. 12, 2014 Letter) She further charged that her supervisors had attempted to “create a paper trail” in order to establish a basis to suspend her. (*Id.*) In this regard, Petitioner alleged that the August 24, 2014 Charge was premised on perjured testimony. She further asserted that she has experienced “numerous incidents of harassment . . . outside the job,” which she reported to the NYPD and the Union. (*Id.*)

The Executive Secretary’s Determination

On November 12, 2014, the Executive Secretary issued a Determination (“ES Determination”) pursuant to § 1-07(2)(i) of the Rules of the Office of Collective Bargaining

(Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”),¹ declining to reach the merits and dismissing the petition as untimely. *See Gonzalez*, 7 OCB2d 30 (BCB 2014).

The Executive Secretary explained that any alleged claims or actions that occurred prior to June 27, 2014, fall outside the statute of limitations and are time-barred. The Executive Secretary then determined that none of Petitioner’s claims against either the Union or the NYPD arose during the four-month period preceding the filing of her petition. Instead, the Executive Secretary noted, Petitioner’s most recent claim occurred in connection with the April 2013 correspondence to the Union, well over a year prior to June 27, 2014. In this regard, the Executive Secretary emphasized that Petitioner should have known that the Union was not pursuing her grievance because the Union neither responded to Petitioner’s repeated requests for assistance nor took any further action following the Step III Reply. The Executive Secretary did not specifically address the timeliness of Petitioner’s claims against the NYPD because those claims pre-date her claims against the Union.

¹ OCB Rule § 1-07(2)(i) provides, in relevant part:

Within 10 business days after a petition alleging improper practice is filed, the Executive Secretary shall review the petition to determine whether the facts as alleged may constitute an improper practice as set forth in § 12-306 of the statute. If, upon such review, the Executive Secretary determines that the petition is not, on its face, untimely or insufficient, notice of such determination shall be served upon the parties by mail. Such determination shall not constitute a bar to defenses of untimeliness or insufficiency which are supported by probative evidence available to the respondent. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, the Executive Secretary may issue a decision dismissing the petition or send a deficiency letter. Copies of such decision or deficiency letter shall be served upon the parties by certified mail.

The Executive Secretary concluded that Petitioner's 18-month delay in filing the improper practice petition compelled a finding that the causes of action alleged fell outside of the NYCCBL's statute of limitations and must be dismissed.

The Appeal

Petitioner appealed the ES Determination on December 9, 2014. Petitioner acknowledges that her claim is time-barred, but urges that Civil Service Law § 75 tolls the statute of limitations where the Union fails to take further action following a Step III disciplinary proceeding. In particular, Petitioner argues that her delay in filing was because she "was never provided with the proper legal guidance from the Union," which "failed to correspond [to] many of my questions . . ." (Appeal, p. 1) Petitioner further alleges that the Union's failure to respond to her inquiries following the Step III Reply constitutes improper abandonment of her claims, thereby providing an additional basis to toll the statute of limitations. She also charges that the Union was negligent in failing to explain the suspension and grievance process.

With respect to her claim against the NYPD, Petitioner argues that under Civil Service Law § 75, the statute of limitations will toll where the "suspension was a form of retaliation." (Appeal, Nov. 20, 2014 Letter) In this regard, she contends that she has faced harassment by NYPD personnel and suffered various forms of retaliation following the filing of the EEO Complaint.

Petitioner requests that the Board reverse the ES Determination and deem the petition timely.

DISCUSSION

As a preliminary matter, we note that Petitioner's appeal of the ES Decision was submitted past the limitations period. OCB Rule § 1-07(c)(2)(ii) provides that a party may appeal a decision of the Executive Secretary "[w]ithin 10 business days after service of [the] decision" The ES Decision was served on November 13, 2014. Petitioner filed the appeal 17 business days later, on December 9, 2014. Accordingly, Petitioner's appeal is untimely.

Even if we were to reach Petitioner's appeal of the ES Determination, we would find that the Executive Secretary properly dismissed the petition as untimely. It is well-established that an improper practice charge "must be filed no later than four months from the time the disputed action occurred." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Off. of Collective Bargaining*, No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.); *see* OCB Rule § 1-07(b)(4); *see also Minervini*, 71 OCB 29, at 12 (BCB 2003). The four-month period is measured from the time the petitioner knew or should have known of the breach. *See Minervini*, 71 OCB 29, at 12. Any claims prior to "the four month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007).

Petitioner's charges against the Union were not filed within the four-month statute of limitations. The petition was filed on October 27, 2014. Thus, any claims accruing before June 27, 2014, are untimely. She alleges that the Union breached its duty of fair representation both by failing to take further action following the Step III hearing of December 2012 and by declining to respond to her requests for further assistance in March and April of 2013. These events occurred over a year before June 27, 2014. We therefore agree with the Executive Secretary that the Petition is untimely.

Further, the April 2013 Letter submitted by the Petitioner demonstrates that she knew, more than four months before the petition was filed, that assistance from the Union was not forthcoming. There, Petitioner sought help in persuading the Union to advance to arbitration, and alleged that the Union President had previously declined to assist her appeal. Petitioner's own contentions thus demonstrate that Petitioner knew or should have known by April 2013 that the Union was not going to appeal her grievance. *See Lutz*, 4 OCB2d 13, at 9 (BCB 2011) (concluding that Petitioner should have known that the union was not going to challenge her termination upon Petitioner's receipt of a letter from the union stating that "the termination cannot be challenged").

Petitioner contends that the limitation period should be tolled because she was prevented from filing an improper practice petition due to the Union's alleged inaction following the Step III Reply. This argument is without merit. This Board has held that equitable tolling is available where the filing of an improper practice petition is delayed because of a petitioner's reasonable reliance on the conduct of an opposing party. *See Donnelly*, 7 OCB2d 23, at 8 (BCB 2014); *see also UFA*, 3 OCB2d 13, at 12-13 (BCB 2010); *cf. Pahlad v. Brustman*, 33 A.D.3d 518, 520 (1st Dept 2006) (explaining that equitable tolling is available only where the "defendant's affirmative wrongdoing produced a delay between the accrual of the cause of action and the institution of the legal proceeding") (internal citations omitted). Here, although Petitioner asserts that the Union neither appealed the Step III Reply nor responded to her follow-up inquiries, such alleged conduct does not demonstrate that the Union did anything to dissuade or prevent Petitioner from filing sooner. Petitioner's allegations therefore do not suffice to establish a basis for equitable tolling.

Petitioner's allegations against the NYPD do not raise any claims under the NYCCBL inasmuch as Petitioner contends that the alleged actions taken against her were because she filed the EEO Complaint and not due to any alleged Union activity. Nevertheless, even if they fell within our jurisdiction, they would be time-barred. The alleged retaliatory and discriminatory acts all occurred in 2010 and 2011, well outside the period within which to file a petition. Nor does the Petitioner raise any basis to toll the statute of limitations as to these claims. We thus find that the Executive Secretary correctly dismissed this portion of the petition as well.

Accordingly, Petitioner's appeal of the dismissal of the verified improper practice petition is hereby denied.

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 Executive Secretary's Determination, *Gonzalez*, 7 OCB2d 30 (BCB 2014), is affirmed, and the appeal therefrom is denied.

Dated: March 26, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLNES
MEMBER

PETER B. PEPPER
MEMBER