Rivers, 9 OCB2d 27 (BCB 2016)

(IP) (Docket No. BCB-4177-16)

Summary of Decision*:** Petitioner argued that NYCHA retaliated against him in violation of NYCCBL § 12-306(a)(1) and (3) by withholding part of a Workers Compensation award and taking improper deductions from his paycheck related to that award. NYCHA argued that Petitioner's claims are untimely and that its actions were authorized by the Workers' Compensation award and the collective bargaining agreement. The Board found that Petitioner's claim was timely but did not establish a *prima facie* case of retaliation. Accordingly, the Board dismissed the improper practice petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JAKWAN RIVERS,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On July 21, 2016, Jakwan Rivers ("Petitioner") filed an improper practice petition against the New York City Housing Authority ("NYCHA"). Petitioner argues that NYCHA retaliated against him in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by withholding part of an April 2016 Workers' Compensation Board award, WCB Case #G058 8334 ("WCB Case"), and by taking improper deductions from his paycheck in connection with that award. NYCHA argues that Petitioner's claims are untimely. NYCHA further argues that its actions were

authorized by the WCB Case Award and its collective bargaining agreement with Petitioner's union, the International Brotherhood of Teamsters, Local 237 ("Union"). The Board finds that Petitioner's claim was timely but that he has not established a *prima facie* case of retaliation. Accordingly, the improper practice petition is dismissed.

BACKGROUND

Petitioner is employed by NYCHA as a Maintenance Worker. He has been an active member of the Union for 20 years and a shop steward for ten years. In 2005, Petitioner was appointed Business Agent, a full time Union position he held until January 2009, when he returned to working full time at NYCHA. Petitioner averred that upon his return in January 2009 he was "immediately faced with retaliatory action" when NYCHA assigned him to a work site in the Bronx, which created a travel hardship from his home on Long Island. (Rep. p. 1) After Petitioner complained, NYCHA reassigned him to a work site in Queens. In addition, Petitioner is a plaintiff in a civil suit against NYCHA and the Union alleging violations of his Constitutional rights in the 2009 Union election. Petitioner also ran unsuccessfully for Union president in 2014.

NYCHA and the Union are parties to a 2015 Consent Determination covering Petitioner's title ("Agreement"), Article 36 of which addresses Workers' Compensation. Article 36(a) provides that for the first six months of a Workers' Compensation leave, employees will receive their full salary if they have enough accrued leave to cover 30% of their absence. Article 36(b) provides that, if the employee is out for more than six months, the employee will receive their full salary without charge to annual leave for the seventh through the twelfth month. The Agreement does not provide for any wages after the twelfth month. Article 36 provides that "any Workers' Compensation payments to which such employee may be entitled for such absence for the period

during which the employee receives such leave with full pay shall be reimbursed by the employee to [NYCHA]." (Ans., Ex. 1) Article 36(c) provides that gross payments provided by NYCHA to an employee pursuant to Article 36 "shall be reduced such that the total net pay received" by the employee when receiving Workers' Compensation payments and NYCHA pay "shall be no higher than the normal net pay received by the employee solely from [NYCHA]." (*Id.*)

Petitioner has received several Workers' Compensation awards; however, the petition before the Board only concerns the WCB Case Award. While the WCB Case Award was issued in April 2016, it concerned an injury that occurred in May 2012 for which Petitioner returned to work in June 2013, and for which he was considered partially disabled through June 2014.[1] The WCB Case Award to Petitioner was "$75,419.64, less payments already made." (Pet., Ex. C) (emphasis in original)[2] On April 26, 2016, Petitioner received a check for $30,144.83 from NYCHA's insurance carrier, RMPG, related to the WCB Case Award. Petitioner received other checks from RMPG but believes that those payments were related to other Workers' Compensation awards.[3] There were thousands of dollars in deductions from Petitioner's paycheck for which NYCHA provided no explanation prior to its Answer. Petitioner made numerous inquiries to NYCHA, the Union, and outside agencies such as the New York State Department of Labor ("NYS DOL"). In his complaint to the NYS DOL, Petitioner stated: "I am sure thousands of NYCHA

[1] Petitioner went out on disability on May 22, 2012, returned to work on June 18, 2012, had a recurrence on August 2, 2012, and returned to work on June 27, 2013.

[2] At the conference before the Trial Examiner in this matter, Petitioner acknowledged that the $75,419.64 WCB Case Award was inclusive of legal fees. Petitioner was awarded $698.33 per week for 82.2 weeks (May 16, 2012, to June 11, 2014).

[3] The checks from RMPG do not indicate which Workers' Compensation award they are related to, and NYCHA acknowledges that Petitioner has received checks from RMPG for over $18,000 related to other Workers' Compensation awards.

employees are also victims of this same deliberate tactic[] to undermine[] the process. I am requesting [an] investigation ensue to remedy this particular issue and any and all other [Workers' Compensation] fraud administered by [NYCHA]." (Pet., Ex. B) The NYS DOL informed Petitioner that it lacked jurisdiction over his claim. (Pet., Ex. A)

NYCHA asserts that it has paid Petitioner the amount he is owed under the WCB Case Award and that all deductions to Petitioner's pay were made in accordance with the Agreement and the WCB Case Award. Specifically, NYCHA avers that it is allowed to recoup wages it paid to Petitioner when he was on Workers' Compensation leave. NYCHA states that further adjustments were made to ensure that the Workers' Compensation payments were properly treated for tax purposes and to ensure that Petitioner's total net pay did not exceed his net pay before his Workers' Compensation leave, as provided for in the Agreement.

At the request of the Trial Examiner, NYCHA provided a detailed accounting that it avers explains the entire $75,419.64 of the WCB Case Award and all adjustments to Petitioner's paycheck related to it.[4] NYCHA accounted for the $75,419.64 WCB Case Award as follows: its payroll records show that Petitioner received from NYCHA $1,319.85 under Article 36(a), $21,369.00 under Article 36(b), and that NYCHA deducted from Petitioner's pay $1,256.99 as authorized under Article 36, such that Petitioner received a net pay of $21,431.85 from NYCHA while out on Workers' Compensation leave related to WCB Case Award.. In addition, NYCHA produced checks from RMPG showing that Petitioner and his counsel received $53,987.78 from RMPG related to the WCB Case Award. The net monies received by Petitioner from NYCHA

[4] At the conference, NYCHA explained its accounting. Several exhibits were entered into the record, including copies of Petitioner's pay stubs and checks issued by RMPG. The parties also agreed that a hearing in the matter was not necessary.

plus the monies received by Petitioner and his counsel from RMPG equal the amount of the WCB Case Award. In sum:

$ 1,319.85	= Wages Paid Petitioner under Article 36(a)[5]
$21,369.00	= Wages Paid Petitioner under Article 36(b)
($ 1,256.99)	= Monies deducted from Petitioner's pay
$21,431.85	= Net received by Petitioner from NYCHA
$53,987.78	= Monies paid directly to Petitioner and counsel by RMPG
$75,419.64	= Amount received by Petitioner

(*See* NYCHA Exs. 3, 4, 6 & 7)

On March 21, 2013, NYCHA deducted $1,256.99 from Petitioner's pay, listed as "Recoupment Workers' Compensation Rivers." After Petitioner received the wages he was entitled to under Article 36(a), he was suspended from NYCHA's payroll until he became entitled to receive wages under Article 36(b). Petitioner did not become eligible to have his entire salary under Article 36(b) until the seventh month of his leave (February 2, 2013). Petitioner's first pay check after being restored to payroll was on March 21, 2013. Between February 2 and March 21, 2013, Petitioner received checks directly from RMPG while being entitled to wages from NYCHA. NYCHA explained that under the Workers' Compensation law, an employee cannot receive funds from both the insurer and the employer for the same period. Therefore, it deducted from the first check that Petitioner received after being reinstated to payroll the amount he had received from RMPG for the period covered by that payroll check, which was $1,256.99 (*i.e.*, NYCHA deducted $1,256.99 from Petitioner's March 21, 2013 check). NYCHA avers that this is the only deduction it made to Petitioner's pay related the WCB Case Award.[6]

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[5] When Petitioner began his leave, he had $565.65 worth of annual leave. Accordingly, by September 20, 2012, Petitioner received $1,885.50 from NYCHA, of which 30% ($565.65) was annual leave and 70% ($1,319.85) were wages subject to the reimbursement.

[6] In 2015, there were other deductions listed under "Recoupment Workers' Compensation Rivers" from Petitioner's pay checks related to other Workers' Compensation awards that totaled $9,400.

NYCHA produced copies of the checks from RMPG related to the WCB Case Award to document that $53,987.78 was paid directly by RMPG to Petitioner and his attorneys. (*See* NYCHA, Ex. 4)[7]

NYCHA explained the other adjustments made to Petitioner's pay related to the WCB Case Award. On Petitioner's pay stubs, between April 18, 2013, and February 20, 2014, are entries under the lines "Recoupment Workers' Compensation NYCHA" and "Reimbursement Workers' Compensation Disability" that appear to be deductions but did not actually reduce Petitioner's pay. NYCHA explained that these adjustments were made for tax reasons. According to NYCHA, in any period when it paid Petitioner while it received funds from RMPG, part of Petitioner's pay from NYCHA was considered to be non-taxable Workers' Compensation income. To account for this, NYCHA would determine the amount considered to be Workers' Compensation income, deduct that amount from Petitioner's gross income under the line "Recoupment Workers' Compensation NYCHA" and then offset that deduction by adding back the same amount as a "negative deduction" on the line "Reimbursement Workers' Compensation Disability." (Ans. ¶ 7) This adjustment did not reduce the amount paid by NYCHA or the net amount received by Petitioner; it only reduced the taxable portion of Petitioner's pay.

Finally, there were deductions to Petitioner's pay related to the provision of Article 36 of the Agreement that authorizes NYCHA to adjust the pay of a recipient of a Workers' Compensation award such that the "total net pay received" of the sum of Workers' Compensation payments and NYCHA pay "shall be no higher than the normal net pay received by the employee

[7] Petitioner acknowledges receipt of these checks but avers that only the April 26, 2016, check for $30,144.83 has been shown to be related to the WCB Case Award. However, the checks from RMPG to NYCHA correspond exactly with the figures on the Wage Reimbursement Request Form that NYCHA submitted to RMPG in March 2015 regarding the WCB Case. (*See* NYCHA, Ex. 3)

solely" from NYCHA prior to the disability. (Ans., Ex. 1) Between April 4, 2013, and Petitioner's return to work on June 27, 2013, over $1,500 was deducted from Petitioner's pay under this provision related to the WCB Case Award. This adjustment appears on the line "Workers' Compensation Adjustment NYCHA."[8] NYCHA's payroll records show that Petitioner's net normal pay did not decrease as a result of this adjustment.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that NYCHA retaliated against him in violation of NYCCBL § 12-306(a)(1) and (3).[9] He asserts that his claim is timely as he received the final check for the WCB Case Award in April 2016 and filed the improper practice petition in July 2016.

Petitioner argues that NYCHA is aware of his Union activity and that he often worked in opposition to upper management on labor management issues. Petitioner characterizes NYCHA's

[8] As a result of his various Workers' Compensation awards, between April 2013 and March 2016, over $8,300 was deducted from Petitioner's pay under this provision of the Agreement.

[9] NYCCBL § 12-306(a)(1) and (3) provide, in pertinent part, that:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing, and shall have the right to refrain from any or all of such activities."

withholding part of the WCB Case Award and the improper deductions as retaliatory actions for exercising his rights to organize, run for Union president, and publicly break from Union leadership. Petitioner notes that NYCHA had retaliated against him in 2009 for his Union activity when he returned to NYCHA after being a Union Business Agent by assigning him to work in the Bronx even though he lived on Long Island.[10] Petitioner argues that NYCHA's responses have been inconsistent and its claim that the adjustments to his paychecks were made for tax purposes was not raised before its Answer and, he believes, has not been substantiated.

Prior to the conference in this matter, Petitioner argued that the figures presented by NYCHA were purposely distorted in order to circumvent his rights under the Workers' Compensation law. At the conference, Petitioner argued that NYCHA was merging unrelated Workers' Compensation cases to justify the amount deducted when each Workers' Compensation claim is independent of each other. Petitioner notes that, while the changes to his pay were executed by the Payroll department, they were at the direction of the Human Resources department and that no one from that department has given a reasons for those directives.

NYCHA's Position

NYCHA argues that, as the improper practice petition was filed on July 21, 2016, any claims related to acts that occurred prior to March 21, 2016, are time-barred. NYCHA further argues that it had legitimate reasons its actions, as the deductions to Petitioner's paychecks were explicitly authorized by the Agreement as well as the WCB Case Award and the other adjustments were to ensure appropriate tax treatment of the WCB Case Award. Accordingly, NYCHA argues that it has established that the wage deductions would have been made in the absence of any protected conduct and that Petitioner has not suffered any adverse consequences.

[10] Petitioner in the instant petition has not pled a claim regarding the alleged retaliation in 2009.

NYCHA argues that Petitioner's claim that it is retaliating for his participation in Union activity "strains credulity." (Ans. ¶ 18) Petitioner has been active in Union politics for 20 years while the alleged acts of retaliation have only been occurring since 2012. NYCHA argues that the passage of time between Petitioner's involvement in Union activities and any alleged retaliatory action undermines any claim that his Union activity was a motivating factor.

DISCUSSION

Petitioner claims that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by withholding part of the WCB Case Award and taking improper deductions from his paycheck. The Board finds the petition is timely but that Petitioner has not established a *prima facie* case of retaliation.

We first address NYCHA's claim that the instant petition is untimely. *See Bonnen*, 9 OCB2d 7, at 15 (BCB 2016); *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) ("timeliness is a threshold question"). The statute of limitations for an improper practice claim under the NYCCBL is four months. Therefore, an improper practice petition "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)).[11] The instant petition was filed on July 21, 2016. Accordingly, only

[11] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer 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.

claims Petitioner knew or should have known of after March 21, 2016, are timely. Although the disputed payments and deductions began more than four months prior to the petition, Petitioner could not have known if he had received all that he was entitled to under the WCB Case Award or whether NYCHA's adjustments regarding that award were proper until he received the last check from the insurance company regarding that award. The last payment regarding the WCB Case Award was not made until April 26, 2016—less than three months prior to the filing of the instant petition. Thus, we find the petition is timely.

To establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and (3), the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), requiring that petitioner demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity[; and]
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also CSTG, L. 375*, 7 OCB2d 16, at 19 (BCB 2014), *affd., Matter of Donas v. City of New York & NYC Off. of Collective Bargaining*, Index No. 101265/14 (Sup. Ct. N.Y. Co. Oct. 23, 2015) (Wooten, J.).

Regarding the first prong of the *prima facie* case, it "is satisfied 'where the employer is shown to have knowledge of the protected union activity.'" *Garces*, 9 OCB2d 23, at 12 (BCB 2016) (quoting *CSTG, L. 375*, 7 OCB2d 16, at 20). In the instant matter, NYCHA acknowledges that Petitioner has been engaged in protected activity. Accordingly, Petitioner has satisfied the first prong of the *prima facie* case.

OCB Rule § 1-07(d) provides, in relevant part: "A petition alleging that a public employer . . . has engaged in or is engaging in an improper practice in violation of [§] 12-306 of the statute may be filed with the Board within four (4) months thereof. . . ."

Regarding the second prong of the *prima facie* case, proof, "absent an 'outright admission of any wrongful motive . . . must necessarily be circumstantial.'" *CSTG, L. 375*, 7 OCB2d 16, at 20 (quoting *CWA, L. 1180*, 77 OCB 20, at 15 (BCB 2006)). The Board's "willingness to accept indirect evidence of wrongful intent does not, however, permit [Petitioner] to carry [his] burden of proof through mere assertion." *SSEU*, 77 OCB 35, at 15 (BCB 2006). A petitioner "must offer more than speculative or conclusory allegations." *Local 1180, CWA*, 8 OCB2d 36, at 18 (BCB 2015) (quoting *SBA*, 75 OCB 22, at 22 (BCB 2005)). "[A]llegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001). Further, a "crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer." *Andreani*, 2 OCB2d 40, at 28 (2009). *See also Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *affd., Matter of Moriates v. NYC Off. Of Collective Bargaining*, Index No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.).

We find that Petitioner has not established the second prong of the *prima facie* case and thus has not established retaliation because he has not established that he was subjected to an adverse employment action. While Petitioner only acquired the level of detail necessary to understand whether he was fully paid by NYCHA pursuant to the WCB Award after filing the instant petition, the documents produced by NYCHA establish that, between wages from NYCHA and direct payments from RMPG, Petitioner and his attorneys received the entire $75,419.64 WCB Case Award.[12] NYCHA's deduction of $1,256.99 directly from Petitioner on March 21, 2013, under the line "Recoupment Workers' Compensation Rivers" appears to be authorized by the

[12] Petitioner correctly notes that the checks from RMPG do not indicate on their face which Workers' Compensation award they relate to. However, we find that the documentation provided by NYCHA established that the checks comprising NYCHA Ex. 4 are RMPG's payments of the $75,419.64 WCB Case Award.

Agreement and did not reduce the total amount received by Petitioner.[13] Similarly, the deductions listed as "Workers' Compensation Adjustment NYCHA" also appear to be authorized by the Agreement, and the payroll records show that they did not reduce Petitioner's normal net pay.[14]

Further, Petitioner has not shown a causal connection between NYCHA's actions and his protected activity as he has not offered evidence that NYCHA's actions were motivated by his Union activity. Lacking evidence or probative statements of fact, Petitioner's allegations are based upon mere speculation. Without more, a claim of retaliation cannot be sustained. *See Holmes*, 4 OCB2d 14, at 20 (BCB 2011); *Turner*, 3 OCB2d 48, at 13 (BCB 2010); *Rosioreanu*, 1 OCB2d 39, at 18, n. 15 (BCB 2008), *affd., Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.); *affd.*, 78 A.D.3d 401 (1st Dept. 2010), *lv denied*, 17 N.Y.3d 702 (2011); *see also Walker*, 59 OCB 22, at 13 (BCB 1997). Petitioner's claim that NYCHA has taken similar action against thousands of other NYCHA employees who receive Workers' Compensation weighs against his claim of retaliatory intent. As NYCHA has made similar payroll deductions to its employees, irrespective of union activity, we cannot conclude that its treatment of Petitioner was motivated by his union activity. In the absence of any probative evidence that NYCHA's actions were in reprisal for Union activity, NYCHA cannot be found to have retaliated against Petitioner in violation of the NYCCBL. Accordingly, we dismiss the petition in its entirety.

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[13] We note that, while NYCHA's "negative deduction" may be confusing and unexplained, it did not reduce the amount of the WCB Case Award received by Petitioner. (Ans. ¶ 7) The Board does not opine on the propriety of this adjustment and the lack of explanation given to employees who receive Workers' Compensation.

[14] In reaching this conclusion, we do not interpret the parties' Agreement, nor do we make any findings regarding Petitioner's allegations that NYCHA violated the Workers' Compensation law as this is beyond our jurisdiction. Rather, we find that the record is insufficient to meet Petitioner's burden of establishing an adverse employment action.

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 verified improper practice petition filed by Jakwan Rivers, docketed as BCB-4177-16, against the New York City Housing Authority hereby is dismissed in its entirety.

Dated: December 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER