Adler, 12 OCB2d 14 (BCB 2019)

(IP) (Docket No. BCB-4315-19)

Summary of Decision*:** Petitioner appealed the Executive Secretary's dismissal of his petition for failure to allege facts sufficient to establish a cause of action under the NYCCBL. Petitioner argued that Respondent violated the NYCCBL and that the Office of Collective Bargaining and the Board of Certification failed to follow its rules. The Board found that the Executive Secretary properly deemed the allegations in the petition insufficient to establish a cause of action. Accordingly, it affirmed the dismissal of the petition and denied the appeal. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

BRIAN ADLER,

Petitioner,

-and-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

DECISION AND ORDER

On February 15, 2019, Brian Adler ("Petitioner") filed a verified improper practice petition alleging that the New York City Employees' Retirement System ("NYCERS") violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by demoting, reclassifying, and/or changing his title from managerial to non-managerial.[1] Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules

[1] Petitioner is represented by counsel, and an amended petition was filed on March 8, 2019. The allegations discussed here include those alleged in both the February 15 petition ("Pet.") and the

of the City of New York, Title 61, Chapter 1) ("OCB Rules"), on March 13, 2019, the Executive Secretary of the Board of Collective Bargaining ("Board") dismissed the petition on the ground that Petitioner did not plead facts sufficient to establish a claim under the NYCCBL ("ES Determination"). On March 19, 2019, Petitioner appealed the ES Determination, arguing that he pleaded facts establishing that Respondent violated the NYCCBL and that the New York City Office of Collective Bargaining ("OCB") and the Board of Certification ("BOC") failed to follow their own rules.[2] The Board finds that the Executive Secretary properly deemed the claims in the petition insufficient to establish a cause of action. Accordingly, the dismissal of the petition is affirmed, and the appeal is denied.

BACKGROUND

We take administrative notice regarding the following proceeding before the BOC. On April 9, 2015, District Council 37, AFSCME, AFL-CIO ("Union") filed a representation petition seeking to add employees in the Administrative Retirement Benefits Specialist ("ARBS") title, among others, to its Accounting and EDP bargaining unit, Certification No. 46D-75. In accordance with OCB Rule § 1-02(u), notice of the representation petition was published in the

March 8 petition ("Amended Pet."). The original petition does not contain citations to any section of the NYCCBL. The amended petition alleges violations of "12-305.5 1, 3, related statutes, rules, 12-307 (4), (5), all related statutes, rules, Management Rights." We are unable to definitively discern which sections of the NYCCBL Petitioner is referencing. Nevertheless, we have considered the allegations broadly and, as did the Executive Secretary, find the petition attempts to allege violations of NYCCBL §§ 12-304, 12-305 and §§ 12-307 (4) and (5).

[2] Petitioner appears to raise claims that OCB and/or the BOC violated the NYCCBL. An improper practice charge is not the correct vehicle to challenge a BOC order. *See* NYCCBL § 12-308. Nevertheless, to fully determine the issues raised in the appeal of the ES Determination, we address whether OCB and the BOC acted in accordance with the OCB Rules.

City Record on May 15, 2015, and posted for at least ten business days at five locations throughout NYCERS.[3] The City of New York ("City") argued that the employees were managerial and/or confidential and thus excluded from collective bargaining. As part of its investigation, the BOC distributed surveys in November 2015 to all employees in the ARBS title to gather information regarding their duties and responsibilities. No objections or motions to intervene were filed. *See* OCB Rule § 1-12(k) (permitting an employee to intervene in BOC proceedings).

The City and the Union engaged in settlement discussions and, on July 24, 2018, signed a stipulated agreement that employees serving in the ARBS title in managerial pay plan levels I and II were eligible for collective bargaining and that employees in the ARBS title in managerial pay plan level III and above were managerial and/or confidential and, therefore, excluded from collective bargaining. Thereafter, in August 2018, the BOC issued an order amending the Accounting and EDP bargaining unit to include employees in the ARBS title currently in managerial pay plan levels I and II. *See DC 37*, 11 OCB2d 23 (BOC 2018). On September 10, 2018, in accordance with OCB Rule § 1-02(s)(1), notice of the BOC's order was published in the City Record. In addition, the BOC's order was posted on the OCB's website. No appeal was filed.

Improper Practice Petition

Petitioner works as an ARBS at NYCERS.[4] Prior to October 2018, and at the time of the BOC's order amending the Union's certification, he alleges that he was in managerial pay plan level I. On November 9, 2018, Petitioner received an email from NYCERS' Supervisor of Payroll

[3] In July 2015, NYCERS advised OCB that notices to employees were posted at the following locations in its facility: "22 S 28", "21 S 27", "23 S 24", "21 N 21" and "Mezz Café."

[4] Petitioner refers to his title as "Administrative Retirement Benefits Analyst." We take administrative notice that there is no such civil service title and that the correct title is ARBS.

Timekeeping and Administration advising him that his title was being reclassified as "non-managerial covered by DC37." (Amended Pet., Ex. B) The email further explained that the re-classification affected his leave balances and that, as of April 30, 2019, his accrued annual leave balance could not exceed 378 hours. In addition, the email advised that he had 346:50 hours of annual leave that he would have to use by October 29, 2019.

In the improper practice petition, Petitioner alleged that when he was reclassified to non-managerial, his title was changed, and/or he was demoted "in violation of NYS Civil Service Laws, NYC laws and rules, without a hearing, or proper legal justification." (Pet. ¶ 1; Amended Pet. ¶ 1) He also complains that this same action violated his "Pension and Age related rights as a male over 55 years old, NYS HRL, US EEOC." (Pet. ¶ 1; Amended Pet. ¶ 5) Petitioner alleges that his new title is an "inferior/lower title" and that his "title description" is incorrect because he continues to perform the same work as in his former title. (Amended Pet. ¶ 2-3) He asserts that he was not given notice of the "application" pending before the BOC and, therefore, his title was changed without due process or a hearing for him to object to the change. (Amended Pet. ¶ 12, 14) He further asserts that under the "NY Civil Service Law, and Rules and Policies of the City of New York, and any applicable collective bargaining agreements, it is a violation of applicable Office of Collective Bargaining rules and Board of Certification rules, and due process" to diminish his compensation without due process and a hearing. (Amended Pet. ¶ 13)

Petitioner alleges that because of the "title change" he has suffered a loss of managerial benefits and receives lesser health insurance and dental benefits. (Pet. ¶ 1; Amended Pet. ¶ 1) In addition, the change impaired his work schedule, reduced his leave benefits, resulted in "inferior work supervision rules," and reduced his retirement benefits. (Pet. ¶ 2; Amended Pet. ¶ 4, 7-12) As a remedy, Petitioner seeks to be returned to his former managerial title with all his benefits

restored retroactive to October 2018.[5] (Pet. ¶ 3) In the alternative, Petitioner seeks a hearing or other proceeding before the Board to challenge the BOC's order.

Executive Secretary's Determination

On March 13, 2019, the Executive Secretary issued the ES Determination dismissing the petition for failure to state a cause of action under the NYCCBL. The Executive Secretary found that Petitioner failed to allege facts to show that NYCERS's conduct violated any provision of the NYCCBL. In addition, the ES Determination explained that Petitioner's claim that NYCERS violated "various other laws, including the New York Civil Service Law, 'NYC laws and rules,' the New York State and City Human Rights Laws, the New York State Constitution, and the United States Constitution," are not within the Board's jurisdiction. *See* ES Determination at 2. Accordingly, the Executive Secretary dismissed the petition.

The Appeal

Petitioner appealed the ES Determination on March 19, 2019 ("Appeal"). Petitioner asserts that the ES Determination failed to "examine, discuss and or [] detail and address in any manner … that NYCERS has demoted him, diminished his pension and other religious leave rights, and managerial rights, and other[s] as stated in the NYCERS handbook, and other Petitioner's rights." (Appeal ¶ 1) He asserts that there is no dispute that he was demoted and that the BOC failed to follow the applicable OCB rules identified in his petition. He claims that the Board has jurisdiction over his claim but has, nevertheless, failed to conference the case, hold a hearing, or mediate. Petitioner further argues that OCB has failed to comply with the statute by providing him with a

[5] Petitioner also refers to lost "compensation" but does not identify any reduction in wages. Accordingly, we read the petition as alleging a loss of insurance, pension, and other benefits identified above.

make whole remedy. Accordingly, Petitioner requests that the Board vacate the ES Determination and order a hearing on his claims.

DISCUSSION

We affirm the ES Determination because we find that the Executive Secretary properly dismissed the petition for failure to state a cause of action under the NYCCBL. Initially, we affirm the dismissal of Petitioner's claims based upon violations of §§ 75 and 76 of New York State Civil Service Law, various pension and Internal Revenue Service rules, as well as City, state, and federal laws prohibiting discrimination based upon sex, age, or religion. This agency does not have jurisdiction over these claims, thus the dismissal by the ES was appropriate.[6] *See* NYCCBL §12-309(b)*; see also*; *CEU, Local 237, IBT*, 2 OCB2d 37, at 16 n. 5 (BCB 2009); *Babayeva*, 1 OCB2d 15 (BCB 2008).

We also affirm the dismissal of Petitioner's claims against NYCERS under §§ 12-304, 12-305, and 12-307(a)(4) and (5) of the NYCCBL.[7] We do not find that any of Petitioner's factual claims concerning the reclassification of the ARBS title and its impact on him allege or establish a violation of the NYCCBL. The Executive Secretary properly dismissed the claim that NYCERS violated NYCCBL § 12-304. This section of the NYCCBL sets forth to whom the statute applies but does not provide an independent basis for an improper practice charge. Petitioner does not allege any facts that could be construed as a violation of any of the provisions of NYCCBL § 12-

[6] Petitioner devotes a considerable portion of his papers to make the argument that he was "demoted," as evinced by his alleged loss of compensation and benefits. In the absence of allegations of discrimination or retaliation by an employer based on union activity, this agency lacks jurisdiction over such a claim.

[7] We note that Petitioner does not contest on appeal the characterization of his claims as violations of NYCCBL §§ 12-304, 12-305, and 12-307(a)(4) and (5) in the ES Determination.

304. To the extent Petitioner cites this section to establish that the NYCCBL applies to NYCERS, the ES Determination does not hold otherwise.

The Executive Secretary also properly dismissed the claim that NYCERS violated NYCCBL § 12-305. This section of the NYCCBL sets forth the right of employees to join unions, or refrain from doing so, and provides that managerial or confidential employees shall not be included in any bargaining unit. As noted in the ES Determination, this section enumerates the rights of public employees; it does not provide a basis for an improper practice petition. Significantly, NYCCBL § 12-305 provides that employees are presumed to be eligible for collective bargaining unless "a determination of managerial or confidential status has been rendered by the [BOC]."

In addition, the Executive Secretary also properly dismissed any claims against NYCERS alleging violations of NYCCBL §§ 12-307(a)(4) and (5). NYCCBL § 12-307(a)(4) applies only to police, fire, sanitation, and correction bargaining units, and § 12-307(a)(5) applies to specified agencies other than NYCERS. The ES Determination correctly determined that these provisions of the NYCCBL are inapplicable to Petitioner and NYCERS. Moreover, Petitioner makes no argument to the contrary in his appeal nor cites any authority for the proposition that these provisions apply to him or NYCERS.

Lastly, we deny the appeal as to Petitioner's claims that the BOC did not act in accordance with its rules and procedures. Petitioner fails to specify the ways in which the BOC failed to follow the OCB Rules or otherwise acted contrary to the NYCCBL. Reading Petitioner's appeal liberally, we find that it could be construed as alleging that the BOC did not give proper notice of the representation petition seeking to add the ARBS title to the Union's bargaining unit, failed to hold a hearing, acted in an arbitrary and capricious manner by finding the ARBS title eligible for

collective bargaining, and did not give proper notice of its order adding the title to the union's bargaining unit. We reject all of these allegations.

The NYCCBL provides than a BOC determination can be appealed by filing with the courts within 30 days of service of the BOC's decision. *See* NYCCBL, § 12-308. Thus, an appeal by a non-party filed outside of the appeal period is not properly before us.[8] Moreover, we note that there is nothing in the petition to suggest that the BOC did not properly follow the NYCCBL and the OCB Rules. *See* NYCCBL § 12-309(b) (enumerating the BOC's powers and duties, including the duty to determine whether employees are managerial or confidential); OCB Rules §§ 1-02(j)(1), 1-02(u) (enumerating BOC's wide latitude in processing petitions including the authority to amend a unit certification to add titles when the employer does not object); *see also Matter of New York City Health & Hosps. Corp. v Board of Certification of the City of NY*, 2007 NY Slip Op 30921(U), Index No. 0402934/2006 (Sup Ct NY County Apr 23, 2007) (Tolub, J.) (BOC "has the power and duty to adopt rules and regulations for the conduct of its business which include rules relating to the standards for the determination of bargaining units").

Accordingly, we find that the Executive Secretary properly determined that Petitioner failed to state a claim under the NYCCBL. We therefore deny the appeal and dismiss the petition.

[8] We note that the BOC complied with the posting requirements in OCB Rule § 1-02(u) and gave additional notice by conducting surveys of the employees.

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 Determination of Executive Secretary is affirmed, and the appeal of the Determination of Executive Secretary, filed by Brian Adler and docketed as BCB-4315-19, is hereby denied.

Dated: June 3, 2019
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