Harason, 12 OCB2d 19 (BCB 2019)

(IP) (Docket No. BCB-4330-19)

Summary of Decision: Petitioner appealed the Determination of the Executive Secretary dismissing his improper practice petition as untimely. The Board determined that additional information was needed and directed the Union and HHC to answer the petition.

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ERIC HARASON,

Petitioner,

- and-

COMMUNICATION WORKERS OF AMERICA, LOCAL 1180, and NEW YORK CITY HEALTH + HOSPITALS,

Respondents.

DECISION AND ORDER

On June 7, 2019, Eric Harason ("Petitioner") appealed the Determination of the Executive Secretary of the Office of Collective Bargaining issued on May 24, 2019, *Harason*, 12 OCB2d 12 (ES 2019), dismissing Petitioner's improper practice petition against Communication Workers of America, Local 1180 ("Union") and New York City Health + Hospitals ("HHC").[1] 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

[1] We refer to the New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to notify him of the status of his grievance regarding overtime pay for on-call time and failing to advance the grievance.[2] Petitioner argues that the Executive Secretary erred by finding the petition untimely. Based on the record, the Board determines that additional facts are needed and directs the Union and HHC to answer the petition.

BACKGROUND

The Improper Practice Petition

Unless otherwise stated, all facts recited here are based on Petitioner's improper practice petition. Petitioner is employed by HHC in the title of Coordinating Manager. From April 27, 2016 to approximately May 16, 2017, Petitioner was assigned to the E.I.T.S. Business Applications Unit. During this time, HHC was integrating a new electronic record storage system and application. HHC required Petitioner to stand by at home, subject to recall, in order to troubleshoot errors and address issues that arose during integration of the new application. Petitioner asserts that his on-call time during this period totaled 3,711 hours and that he was not compensated for any of this time.

[2] Petitioner did not specify any claims against HHC. Accordingly, we construe the petition as only asserting a claim against HHC under NYCCBL § 12-306(d), which provides:

> Joinder of parties in duty of fair representation cases. The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

Sometime in 2017, Petitioner spoke with both the Union and HHC regarding compensation that he believed he was due for his on-call time. Petitioner contends that the Union directed him to a list of attorneys to contact regarding a potential claim under the Fair Labor Standards Act ("FLSA"). He subsequently notified the Union that he was unsuccessful in retaining counsel. Thereafter, the Union informed Petitioner that it would pursue his claim via the contractual grievance procedure.

On or about May 16, 2017, the Union filed a grievance on Petitioner's behalf alleging violations of Article IV, §§ 2(b) and 11(b) of the 1995-2001 Citywide Agreement ("Agreement"), which remains in *status quo*.[3] A Step 1(a) hearing was held on or about August 28, 2017. HHC subsequently held a Step II hearing and issued a decision. The Union requested a Step III hearing, which was held in late March 2018. Petitioner alleges that a Step III determination was never issued.

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[3] We take administrative notice of the Agreement, which was not included with the petition. Article IV, § 2(b) of the Agreement provides as follows:

> "Ordered involuntary overtime" and "ordered involuntary standby time" shall be defined as overtime or standby time which the employee is directed in writing to work and which the employee is therefore required to work. Such overtime or standby time may only be authorized by the agency head or representative of the agency head who is delegated such authority in writing.

Article IV, § 11(b) of the Agreement provides, in pertinent part, as follows:

> "Employees who are required, ordered and/or scheduled on an involuntary basis to stand by in their homes subject to recall, as authorized by the agency head or the agency head's designated representative shall receive overtime payment in cash for such time on the basis of one half (1/2) hour paid overtime for each hour of standby time."

On August 22, 2018, Petitioner emailed Union Representative Olivia Lyde to inquire about the status of his grievance but did not receive a response. On September 12, 2018, Petitioner again emailed his Union Representative, in addition to Union Vice President Gina Strickland, regarding the status of the grievance, and again he received no response. Petitioner contends that he became concerned regarding the status of his grievance and, on February 12, 2019, emailed the Union Vice-President asking whether a Step III decision had been issued, whether the City was offering a settlement, and whether the Union would continue to pursue the grievance. He did not receive a response. Petitioner followed up on his prior correspondence with emails to the Union Vice-President on February 19 and 26, 2019, but received no response to either email.

Petitioner filed this improper practice petition on May 13, 2019, alleging that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to pursue his grievance and failing to notify him of the status of the grievance. In the petition, he asserted that his claims were timely because his last communication with the Union was on February 26, 2019, "[t]herefore covering the past four (4) months of arbitrary silence by the Union." (Pet. ¶ 32) He argued that his grievance was meritorious because HHC failed to compensate him for his on-call time in accordance with the Agreement. Citing Board precedent, Petitioner asserted that arbitrarily ignoring a meritorious grievance violates the duty of fair representation. He argued that by failing to respond to any of his emails inquiring about the status of his grievance, the Union violated the duty of fair representation.[4] He further argued that the Union's failure to respond was arbitrary, as no valid excuse or explanation existed as to why the Union failed to "uphold its basic responsibilities." (Pet. ¶ 44) Petitioner noted that his time to file an FLSA claim had expired.

[4] The petition stated that the Union failed to respond to "all six (6) of Petitioner's email correspondences." (Pet. ¶ 42). However, the petition only recounted five email messages sent by the Petitioner to the Union between August 22, 2018 and February 26, 2019.

The Executive Secretary's Determination

On May 24, 2019, the Executive Secretary issued a Determination ("ES Determination") pursuant to § 1-07(c)(2)(i) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), declining to reach the merits and dismissing the petition as untimely.[5] *See Harason*, 12 OCB2d 12 (ES 2019).

The Executive Secretary explained that any alleged claims or actions that occurred prior to January 13, 2019, fell outside of the statute of limitations and were time-barred. The Executive Secretary then determined that none of Petitioner's claims against either the Union or HHC arose during the four-month period preceding the filing of his petition. The Executive Secretary noted that Petitioner's last contact with the Union regarding his grievance was at the Step III hearing in March 2018, and that Petitioner had received no response when he contacted the Union by email concerning the status of his grievance on August 22, 2018, and then again on September 12, 2018. The Executive Secretary noted that, based on these facts, Petitioner should have reasonably concluded prior to January 13, 2019, that the Union would not respond to his inquiries concerning his grievance. The Executive Secretary found that Petitioner's 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.

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[5] OCB Rule § 1-07(c)(2)(i) provides, in relevant part, as follows:

> 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 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.

The Appeal

Petitioner appealed the ES Determination on June 7, 2019. On appeal, Petitioner argues that his claims are timely because they arose on February 26, 2019, when he emailed the Union to inquire as to whether it would continue to pursue his grievance and received no response. Petitioner argues that, since his inquiries as to the status of his grievance in August and September 2018 were met with silence, he did not know that the Union had decided not to proceed with the grievance. Petitioner distinguishes between his 2018 inquiries as to the status of his grievance and his February 2019 inquiries as to whether the Union was going to proceed with his grievance. He contends that a reasonable interpretation of the Union's earlier silence was that a Step III determination had not yet been rendered and that he was not placed on notice that the Union would not be pursuing his grievance until his February 2019 inquiries regarding whether the Union would continue to pursue his grievance were also met with silence. Petitioner states that the Board decisions cited in the ES Determination are distinguishable because, in those cases, the petitioners were aware that their union was not going to further process their grievances.

Petitioner also argues that, should the Board find his claims regarding his communications with the Union prior to January 13, 2019 to be untimely, the Union nevertheless possessed an ongoing obligation to him. According to the Petitioner, the Union's silence in response to his February 2019 emails represents "a new and different abandonment of responsibilities" that it owed him. (Appeal ¶ 63)

DISCUSSION

The statute of limitations for filing an improper practice petition is set forth in § 12-306(e) of the NYCCBL, which provides, in relevant part, as follows:

> A petition alleging 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 the petitioner knew or should have known of said occurrence*. . . .

(Emphasis added.) *See also* OCB Rules § 1-07(c)(2)(i). "It is well established that an improper practice charge '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.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009) (citations omitted), *affd., Matter of Mahinda v. City of New York*, Index No. 117487/2009 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.,* 91 A.D.3d 564 (1st Dept. 2012). Consequently, "claims antedating the four-month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)).

A union's failure to respond to inquiries regarding the status of a grievance within a reasonable time may constitute a violation of NYCCBL § 12-306(b)(3). *See Morales*, 5 OCB2d 28, at 23 (BCB 2012) (citing *Mora-McLaughlin*, 3 OCB2d 24, at 14 (BCB 2010); *Whaley*, 59 OCB 41, at 14 (BCB 1997); *Krumholz*, 51 OCB 21, at 12 (BCB 1993); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 23 PERB ¶ 3042 (1990); *Letter Carriers Branch 529 (Postal Serv.)*, 319 NLRB 879, 881 (1995)).

If a union has not explicitly stated that it will not pursue a grievance, a claim under NYCCBL § 12-306(b)(3) accrues when "Petitioner knew or should have known that the Union

would not be processing her claims."[6] *Raby*, 71 OCB 14, at 12 (BCB 2003), *affd., Matter of Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.) (petitioner should have known that the union was not proceeding with her grievances regarding matters in which there had been no activity for periods ranging from four to ten months when it did not respond to numerous phone calls). In determining when a claim accrues, the Board has considered whether a union's failure to respond to questions regarding a grievance puts a petitioner on notice that it will not be proceeding with the matter. *See Gonzalez,* 8 OCB2d 10, at 8 (BCB 2015) (petitioner should have known that the union was not going to arbitrate her grievance when the union did not respond to her repeated requests for assistance); *Dixon*, 8 OCB2d 9, at 12 (BCB 2015) (petitioner should have known that the union was not pursuing his grievance "[a]t the point where the [u]nion had not responded within a reasonable time")

In the present case, the petition was filed on May 13, 2019. Based on this filing date, Petitioner's claims would have to have arisen on or after January 13, 2019. On the facts as pleaded, the Executive Secretary determined that Petitioner should have reasonably concluded that the Union was not pursuing his grievance prior to January 13, 2019. The petition alleges that the Union pursued the grievance through the Step III hearing held in March 2018. Due to the alleged lack of communication from the Union following the Step III hearing, it is not entirely clear that Petitioner's delay in filing was unreasonable. In this instance, Respondents' positions regarding the allegations may provide additional facts that would assist the Board in determining when

[6] In contrast, if a union informs an employee that it will not pursue a grievance, a claim under NYCCBL § 12-306(b)(3) accrues on the date of that communication. *See, e.g.*, *Lutz*, 4 OCB2d 13, at 9-10 (BCB 2011) (petition found untimely when filed more than four months after petitioner received letter from union stating that her "termination cannot be challenged"); *Page*, 53 OCB 31, at 10 (BCB 1994) (time to file improper practice petition began to run when the petitioner was informed of the union's decision not to submit the matter to arbitration).

Petitioner's claim accrued and if the Executive Secretary's conclusion was correct. Accordingly, we direct the Union and HHC to answer the petition.

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 within 10 business days after service of this Order, Communication Workers of America, Local 1180 and New York City Health + Hospitals serve their respective answers to the verified improper practice petition, docketed as BCB-4330-19, upon petitioner Eric Harason and file them, with proof of service, with the Board.

Dated: July 30, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER