

**Buttaro, 12 OCB2d 29 (BCB 2019)**

(IP) (Docket No. BCB-4341-19)

**Summary of Decision:** Petitioner appealed the Executive Secretary’s dismissal of his petition as untimely because it was filed over four years after the Union’s alleged failure to raise a timeliness defense to the City’s petition challenging arbitrability. The Board found that the Executive Secretary properly deemed the petition untimely, rejected Petitioner’s allegations against the Union, and denied the appeal. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**THOMAS A. BUTTARO,**

*Petitioner,*

*-and-*

**THE UNITED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK,  
LOCAL 94, and  
THE NEW YORK CITY FIRE DEPARTMENT,**

*Respondents.*

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**DECISION AND ORDER**

On June 28, 2019, Thomas A. Buttaro (“Petitioner”) filed an improper practice petition against the United Firefighters Association of Greater New York, Local 94 (“Union”), and the New York City Fire Department (“FDNY” or “City”). Petitioner claimed that the Union breached its duty of fair representation, in violation of § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”), by failing to object to the timeliness of the City’s petition challenging the arbitrability (“PCA”) of two grievances filed on his behalf in 2014. On July 15, 2019, the

Executive Secretary of the Board of Collective Bargaining dismissed the petition (“ES Determination”) as untimely pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”). On July 25, 2019, Petitioner appealed the ES Determination (“Appeal”). The Board finds that the Executive Secretary properly deemed the petition as untimely, rejects Petitioner’s allegations against the Union, and denies the Appeal.

### **BACKGROUND**

Petitioner was employed by the FDNY as a Firefighter, a title represented by the Union, until his termination on February 10, 2015.<sup>1</sup> In 2012, another Firefighter filed a complaint against Petitioner with the FDNY’s Equal Employment Opportunity (“EEO”) Office, which was referred to the FDNY’s Bureau of Investigations and Trials (“BITS”). BITS conducted an interview of Petitioner on January 29, 2013. On September 19, 2013, the FDNY served Petitioner with disciplinary charges. An FDNY Deputy Assistant Chief held an informal disciplinary conference on November 8, 2013. On March 23, 2014, the Deputy Assistant Chief substantiated the charges against Petitioner and recommended a forfeiture of 20 days of pay.

Petitioner did not accept the recommended penalty, and the FDNY initiated formal disciplinary proceedings before the City’s Office of Administrative Trials and Hearings (“OATH”). Petitioner filed a motion to dismiss the disciplinary charges on July 9, 2014, on the grounds that the FDNY violated his rights under the collective bargaining agreement and the First Amendment. OATH denied the motion in an interim decision, noting that it did not have

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<sup>1</sup> Unless otherwise noted, the facts are based on allegations in the petition, findings in prior Board decisions, OATH decisions, and the records of the New York City Office of Collective Bargaining (“OCB”).

jurisdiction to hear alleged violations of the collective bargaining agreement. On January 13, 2015, OATH issued a decision denying Petitioner's First Amendment arguments, substantiating the charges against Petitioner, and recommending termination.

The Union filed two grievances on Petitioner's behalf arising from the disciplinary process. On April 28, 2014, the Union filed a grievance ("First Grievance") alleging violations of the collective bargaining agreement concerning the BITS interview as well as retaliation, violations of Petitioner's First Amendment rights, the FDNY's EEO Anti-Retaliation Policy, and the Regulations of the Uniformed Force ("Regulations"). On July 24, 2014, it filed a grievance ("Second Grievance") alleging violations of the Regulations and the collective bargaining agreement concerning the informal disciplinary conference.

The Union filed its request to arbitrate the First Grievance with OCB on August 28, 2014. On September 15, 2014, the City requested a two-week extension of time to file its PCA and noted that Union counsel had consented to the request.<sup>2</sup> OCB granted the extension the same day. On September 29, 2014, the City submitted a letter indicating that the Union and the City had agreed to consolidate the request for arbitration on the First Grievance with a request for arbitration pertaining to the Second Grievance that the Union would be filing and agreed that the City would file a single PCA regarding the consolidated matters. The parties requested that the City's PCA be due ten business days after the filing of the request to arbitrate the Second Grievance, and OCB granted the request.

On October 8, 2014, the Union filed the request to arbitrate the Second Grievance. The cover letter noted that the parties had agreed to consolidate the matter with the request for arbitration on the First Grievance. Ten business days later and consistent with the parties'

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<sup>2</sup> Pursuant to OCB Rule § 1-06(c)(1), an employer may file a PCA within ten business days after service of the request for arbitration. Prior to the 2018 revisions to the OCB Rules, OCB Rule § 1-12 provided for an additional five calendar days if service was effectuated by mail.

stipulation, the City filed its PCA regarding both grievances with the Board on October 23, 2014.

On October 19, 2016, the Board granted the City's PCA in part and denied it in part. *See UFA*, 9 OCB2d 25 (BCB 2016) ("*Buttaro I*"). We found that the portions of the First Grievance claiming violations of the collective bargaining agreement and all of the Second Grievance were arbitrable. *See Buttaro I*, at 18. However, the Board held that the portion of the First Grievance claiming retaliation and violations of Petitioner's First Amendment rights, the FDNY's EEO Anti-Retaliation Policy, and the Regulations were not arbitrable because OATH had "carefully considered these claims raised by [Petitioner] as defenses to his disciplinary charges and found them to be without merit." *Buttaro I*, at 15. Because OATH had fully addressed these issues, the Board found that neither Petitioner nor the Union were able to execute a valid waiver of the right to submit the dispute under the collective bargaining agreement to any other administrative or judicial tribunal, as required by NYCCBL § 12-312(d) as a condition precedent to arbitration.<sup>3</sup> *See Buttaro I*, at 16.

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<sup>3</sup> NYCCBL § 12-312(d) provides:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of such grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purposes of enforcing the arbitrator's award.

OCB Rule § 1-06(b)(iii) provides:

when the party requesting arbitration is a public employee organization, file a waiver, signed by the grievant(s) and the public employee organization, waiving any rights to submit the contractual dispute being alleged under a collective bargaining agreement to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

As a result, a portion of the Union's First Grievance and all of its Second Grievance proceeded to arbitration. The arbitrator held hearings on March 19 and April 9, 2018, and the Union and the City submitted post-hearing briefs in September 2018. On October 23, 2018, the arbitrator issued a decision dismissing both grievances as untimely ("Arbitration Award").

On February 26, 2019, Petitioner filed an improper practice petition claiming that the Union had breached its duty of fair representation by not properly representing him prior to and following his termination ("First DFR Petition"). According to Petitioner, he was terminated because of the Union's bad faith conduct.

The Executive Secretary dismissed the First DFR Petition as untimely on March 11, 2019, because the alleged violations occurred more than four-months before the petition was filed. Petitioner appealed, and the Board denied the appeal on July 30, 2019. *See Buttaro*, 12 OCB2d 23 (BCB 2019) ("*Buttaro I*"). The Board found that the Executive Secretary properly dismissed the First DFR Petition as untimely because Petitioner had contemporaneous knowledge of the Union's alleged actions and omissions from 2013 to September 2018. *See Buttaro II*, at 12. We rejected Petitioner's argument that his claims were timely because he "did not become aware of the basis for his improper practice petition until he received the Arbitration Award denying his grievances." *Buttaro II*, at 11. We found that, even under the continuing violation doctrine espoused by Petitioner, the petition was untimely because none of the acts about which he complained occurred within the four-month limitations period. *See Buttaro II*, at 13.

#### Improper Practice Petition

This improper practice petition incorporates by reference all the facts set forth in the First DFR Petition.<sup>4</sup> Petitioner alleges that the Union violated NYCCBL § 12-306(b)(1) and (3) by

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<sup>4</sup> Petitioner's appeal of the Executive Secretary's dismissal of his First DFR Petition was pending

engaging in a “continuing pattern and course of conduct” that has breached its duty of fair representation.<sup>5</sup> (Pet. ¶ 9) Petitioner asserts that there is “additional Union conduct of which [he] became aware after filing his [First DFR] Petition.” (Pet. ¶ 11)

According to Petitioner, on or about February 28, 2019, he learned that the Board’s decision in *Buttaro I*, which found that a portion of the First Grievance was not arbitrable, “could have been easily avoided” if the Union had raised timeliness as an objection to the City’s PCA in October 2014. (Pet. ¶ 16) Petitioner asserts that the Board’s dismissal of his claims of retaliation and violations of his First Amendment rights, the FDNY’s EEO Anti-Retaliation Policy, and the Regulations in *Buttaro I* was “extremely significant” because these claims went to the heart of the discriminatory treatment that led to his termination. (Pet. ¶ 17) Petitioner alleges that the City’s PCA was filed about a month and a half after the request for arbitration of the First Grievance was filed and that, if the Union had objected to the late filing, it was “virtually assured” that the Board would not have reached its decision finding that part of that grievance was not arbitrable. (Pet. ¶ 19) Accordingly, Petitioner concludes that the bulk of the First Grievance was not arbitrated “solely as a result of the Union’s incompetence.” (Pet. ¶ 20)

Petitioner claims that the Union covered up this alleged error and did not bring it to his

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before the Board when this improper practice petition was filed.

<sup>5</sup> NYCCBL § 12-306(b) provides, in relevant part:

It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted by section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so; ...

(3) to breach its duty of fair representation to public employees under this chapter.

attention, which further illustrates “a long term, continuing and acute pattern and practice of bad faith, gross misconduct, fraud, and misrepresentation.” (Pet. ¶ 21) Petitioner asserts that if the Union had properly notified him and defended him against the City’s violation of the OCB Rules, he “would have been in the position to have known what he should have known, when he should have known [it].” (Pet. ¶ 23)

As a remedy, Petitioner seeks reinstatement as a Firefighter with full backpay, benefits, seniority, promotional opportunities, “all other emoluments of employment,” and rescission of all decisions that negatively impacted him. (Pet. at 3) He further requests that the Board order the City and the Union to refrain from discriminating against him, to reimburse him for all monetary losses and costs, and to post notices.

#### Executive Secretary’s Determination

On July 15, 2019, the Executive Secretary dismissed the petition as untimely pursuant to OCB Rule § 1-07(c)(2)(i).<sup>6</sup> The Executive Secretary noted that, pursuant to NYCCBL §12-306(e) and OCB Rule §1-07(b)(4), the statute of limitations for claims filed before the Board is four months.<sup>7</sup> She found that the petition was not filed within four months of when the alleged

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<sup>6</sup> OCB Rule § 1-07(c)(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 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. . . .

<sup>7</sup> NYCCBL § 12-306(e) provides, in relevant part:

A petition alleging that a public employer or its agents or a public

violations occurred.

The Executive Secretary explained that “[t]he Board has repeatedly held that the date when a petitioner learns of the legal basis for a claim or defense is not the date that the claim accrues pursuant to NYCCBL § 12-306(e).” (ES Determination at 3) (citing *Garg*, 6 OCB2d 35 (BCB 2013); *Cherry*, 4 OCB2d 15 (BCB 2011); *OSA*, 2 OCB2d 30 (BCB 2009)) Thus, the fact that Petitioner allegedly learned in February 2019 that the Union could have raised a timeliness defense in 2014 does not equitably toll the statute of limitations.

In addition, to the extent that the petition alleged an independent violation of NYCCBL § 12-306(b)(1), the Executive Secretary found that the claim was untimely and failed to set forth facts supporting a claim of interference. Further, to the extent that Petitioner alleged a continuing violation of the duty of fair representation, the Executive Secretary noted that there was no timely claim because the last actions about which Petitioner complained occurred several years prior to the filing of the petition.

### The Appeal

On July 25, 2019, Petitioner filed an Appeal of the ES Determination. Petitioner asserts that he was not aware when he filed the petition that the City had requested an extension of time

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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 . . . .

OCB Rule § 1-07(b)(4) provides, in relevant part:

[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 § 12-306 of the statute . . . . must be filed within four months of the alleged violation. . .



to file its PCA. According to Petitioner, under the OCB Rules, the City had until September 11, 2014, to file its PCA. Therefore, Petitioner claims that the City's extension request was untimely and that the Union failed to raise this as a defense to the PCA. Petitioner also asserts that he was not aware that "his appointed union counsel," to whom he had repeatedly reached out for updates, had agreed to the City's extension of time to file a PCA without his consent. (*Appeal at 2*) He notes that he was not copied on the Union's October 8, 2014 cover letter accompanying its request to arbitrate the Second Grievance.

Regarding the request to arbitrate the First Grievance, Petitioner reiterated claims set forth in the petition that the City's PCA was filed over a month after the filing time set forth in the collective bargaining agreement and the OCB Rules. Petitioner argues that the fact that the requests for arbitration were later consolidated did not impact the City's obligation to timely file an extension request for each one individually. Accordingly, Petitioner asserts that the City's PCA was untimely on its face and that the Union's "intentional failure to advocate" on his behalf supports his claim that it breached its duty of fair representation. (*Appeal at 2*) Petitioner contends that *Buttaro I* dismissed "the bulk of his substantive claims." (*Appeal at 2*) According to Petitioner, "these claims were never arbitrated due to the procedural reason of timeliness," and thus an arbitrator never ruled on the merits of his termination case. (*Id.*)

Petitioner argues that, in reviewing the sufficiency of his petition, the Board must accept as true the fact that Petitioner received "actual knowledge" on February 28, 2019, that the Union intentionally failed to tell him of the ten-day limit for the City to file a PCA and failed to allow him to decide whether to consent to an extension request that had "serious repercussions." (*Appeal at 2-3*) Accordingly, Petitioner asserts that it would be arbitrary, an error of law, and an abuse of discretion for the Board to find his claims untimely.

According to Petitioner, it is "not in dispute" that the Union could have raised an issue of

timeliness of the City's PCA in October 2014. (*Appeal* at 3) In the context of his allegations in the First DFR Petition that the Union failed to inform him of his contractual rights, failed to sufficiently advocate for him, and failed to follow his instructions not to waive his rights, Petitioner asserts that the issue in this petition is that, as recently as February 28, 2019, he is still discovering information about which the Union failed to inform him and Union conduct that led to the Board's dismissal of his substantive claims.

### **DISCUSSION**

This Board finds that the Executive Secretary properly dismissed the petition because it was untimely and because it fails to state a violation of the NYCCBL. Pursuant to NYCCBL §12-306(e), 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.” *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/2003 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.) (citing NYCCBL § 12-306(e) and OCB Rules § 1-07(d); *see also Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *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, 565 (1<sup>st</sup> 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.” *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (citations omitted).

In this improper practice petition, Petitioner asserts “additional Union conduct of which [he] became aware after the filing of his [First DFR] Petition,” which we found untimely in *Buttaro II*. (Pet. ¶ 11) Petitioner argues that this petition is timely because he did not know until February 28, 2019, that the Union could have made an argument in 2014 that the City's PCA was untimely under the OCB Rules. It is well established that the date a petitioner becomes aware of “the legal

theory supporting a right of action does not commence the statute of limitations period.” *See Cherry*, 4 OCB2d 15, at 11; *see also Garg*, 6 OCB2d 35, at 10 (upholding the dismissal of a petition as untimely because “the time period within which to file a petition begins when the alleged wrongful act occurred, not when the effect of the act is realized”). Accordingly, Petitioner’s 2019 discovery of the alleged failure to comply with the OCB Rules in 2014 does not toll the statute of limitations.

Furthermore, Petitioner’s assertion that the Union failed to raise a particular legal argument does not state a claim under the NYCCBL. “[D]issatisfaction with [c]ounsel’s tactics is insufficient to demonstrate a violation of the [u]nion’s duty of fair representation.” *Shymanski*, 5 OCB2d 20, at 10 (BCB 2012).

Petitioner argues for the first time on appeal that the City’s September 15, 2014 extension request was filed late, that the Union should not have consented to that extension request or agreed that the City could file one petition challenging the arbitrability of both grievances without consulting him, and that the Union hid its actions by not copying Petitioner on its correspondence.<sup>8</sup> As we explained in *Buttaro II*, we do not consider facts and claims not raised in the petition when considering an appeal of an Executive Secretary determination. *See, e.g., Cooper*, 69 OCB 4, at 5 (BCB 2002). We note, however, that Petitioner’s new arguments in his appeal are merely the latest variation of Petitioner’s “continuing violation” argument that the Union did not represent him properly, which we dismissed as untimely in *Buttaro II*.<sup>9</sup> The fact that Petitioner continues to

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<sup>8</sup> We note that OCB routinely grants extensions of time to file PCAs and that the overwhelming majority of these are on mutual consent of the parties. Further, the Union, not Petitioner, was the respondent in the PCA. Petitioner has not asserted any legal support for the proposition that Union counsel needs to notify the grievant or obtain the approval of a grievant regarding administrative matters such as extensions or consolidation.

<sup>9</sup> After the record closed, Petitioner indicated that he had filed an amended appeal of the ES

allege additional, newly discovered errors that he believes the Union's counsel made in processing his grievances neither tolls the statute of limitations nor states a claim that the Union breached its duty of fair representation.<sup>10</sup> See *Garg*, 6 OCB2d 35; *Shymanski*, 5 OCB2d 20; *Cherry*, 4 OCB2d 15; *Gertsakis*, 77 OCB 11 (BCB 2006).

Further, we note that Petitioner is incorrect as a matter of law in concluding that the Board would have permitted claims that had previously been submitted to another forum to be heard in arbitration if only the Union had objected to the timeliness of the City's PCA. "The Board's consideration of the requirement of [the waiver provision in NYCCBL § 12-312(d)] is not dependent on a timely objection by a party raising the issue, but is a jurisdictional requirement imposed by statute which limits the Board's authority to order a case to arbitration." *NYCHA PBA Inc.*, 17 OCB 7, at 6 (BCB 1976); see also *Local 3, IBEW*, 45 OCB 7, at 1-2 (BCB 1990) (considering a waiver argument raised during arbitration). This Board previously found that the NYCCBL barred arbitration of the claims that OATH had decided on the merits. See *Buttaro I*, at 16. That determination is not subject to collateral attack by Petitioner here. See NYCCBL § 12-308(a) (setting forth a 30-day appeal period).

The Executive Secretary correctly determined that the improper practice petition filed four years after the alleged violation occurred was untimely. Moreover, Petitioner has failed to state a violation of the NYCCBL. Accordingly, Petitioner's appeal of the ES Determination is denied, and the improper practice is dismissed.

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Determination on July 29, 2019. OCB has no record of having received an amended appeal on that or any other date. Nevertheless, we reviewed the amended appeal by Petitioner and find that while it expands on existing arguments, it does not raise any new arguments, and that the arguments raised do not lead us to reach a different conclusion.

<sup>10</sup> In reaching this conclusion, we do not affirm Petitioner's assertion that the City's request for an extension of time to file a PCA on the request for arbitration of the First Grievance was untimely.

**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 dismissing the improper practice petition docketed as BCB-4341-19 is affirmed, and the appeal therefrom is denied.

Dated: October 2, 2019  
New York, New York

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SUSAN J. PANEPENTO  
CHAIR

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ALAN R. VIANI  
MEMBER

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M. DAVID ZURNDORFER  
MEMBER

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PAMELA S. SILVERBLATT  
MEMBER

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CHARLES G. MOERDLER  
MEMBER

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GWYNNE A. WILCOX  
MEMBER