Phelan, 12 OCB2d 35 (BCB 2019)

(IP) (Docket No. BCB-4345-19)

Summary of Decision*:** Petitioner appealed the Determination of the Executive Secretary dismissing his petition as untimely. The petition alleged that the Union violated its duty of fair representation by failing to negotiate certain benefits in 2015. Petitioner argued that the petition was timely because he was continuously trying to resolve the matter with the Union, had only recently learned that the Board was the proper forum for his complaint, and had been continuously harmed by the Union's actions. 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-

PAUL PHELAN,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and
THE CITY OF NEW YORK,[1]

Respondents.

DECISION AND ORDER

On August 12, 2019, Paul Phelan ("Petitioner"), *pro se*, filed an improper practice petition against District Council 37, AFSCME, AFL-CIO ("Union" or "DC 37"). Petitioner claimed that the Union and its affiliate, the Civil Service Technical Guild, Local 375 ("Local 375"), breached the duty of fair representation, in violation of § 12-306(b)(3) of the New York City Collective

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[1] We amend the caption *nunc pro tunc* to add the City of New York because the employer is a necessary party to an alleged breach of the duty of fair representation. *See* NYCCBL § 12-306(b)(3); *James-Reid*, 77 OCB 16, at 2 (BCB 2006).

Bargaining Law ("NYCCBL"), by failing to negotiate certain benefits for his title in 2015. 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 August 22, 2019, the Executive Secretary of the Board of Collective Bargaining dismissed the petition on the ground that Petitioner's claims were untimely ("ES Determination"). On August 30, 2019, Petitioner appealed the ES Determination ("Appeal"). The Board finds that the Executive Secretary properly deemed the charges in the petition untimely, and it denies the Appeal.

BACKGROUND

Petitioner is an Administrative Construction Project Manager. In early October 2015, the Union, Local 375, and the New York City Office of Labor Relations ("OLR") entered into a stipulation that added several titles, including Petitioner's, to Local 375's Engineering and Scientific bargaining unit.[2] Also in October 2015, the Union, Local 375, and OLR entered into letter agreements that specified which sections of the existing Engineering and Scientific bargaining unit agreement applied to the newly accreted titles. (*See* Pet., Exs. A & B) These letter agreements stated that the newly accreted titles, including, Administrative Construction Project Manager, were not eligible for recurring increment payments ("RIPs") or additions to gross.[3]

In March 2016, Petitioner sent a letter to the President of the Union ("March 2016 Letter") in which he complained about Local 375 "negotiating away union member benefits," including

[2] This stipulation resolved a January 2014 petition filed by Local 375 seeking to accrete ten managerial titles, including the Administrative Construction Project Manager title, into its bargaining unit. The agreement to accrete the titles was embodied in *Local 375, DC 37*, 8 OCB2d 31 (BOC 2015).

[3] Additions to gross include, but are not limited to, uniform maintenance allowances, service increments, advancement increases, assignment/level increases, and the following differentials: longevity, assignment, experience, certification, educational, license, evening, and night shift.

the RIPs and certain additions to gross. (Pet., Ex. C) In June 2018 and July 2019, Petitioner sent letters to the Union President reiterating the allegations in his March 2016 Letter. (*See* Pet., Exs. C & D)

Improper Practice Petition

The improper practice petition alleges, in pertinent part, that:

> Local 375 violated its duty of fair representation by not negotiating completely on all matters within the scope of collective bargaining. All contract benefits including my [RIP] and other Additions to Gross were never negotiated. By not bargaining in good faith my duly certified employee organization breached its duty of fair representation in the processing of this collective bargaining and has to this day financially (with each paycheck I receive) continually discriminated against me. Each new paycheck, I lose money from benefits that other titles in the same Union receive, making me a second class employee in my own Union, as I pay full Union dues as those other Union members, but do not reap their same full Union benefits.

(Pet. at 2)

Petitioner requested that the Board consider the matter for the following reasons: (1) he "had been continually attempting to resolve this matter with the Union directly"; (2) he had not realized "[u]ntil recently" that the Board was "the proper body to resolve or remedy [the] matter"; (3) he "didn't know where to turn, so [he] initiated and won a judgement against DC 37 in Small Claims Court for a fraction of [his] continual financial loss"; and (4) he is "continually (with each paycheck) financially discriminated against/adversely affected financially by DC 37's bad faith in negotiations of the collective bargaining involving the taking of my title into the Union." (Pet. at 4) (emphasis deleted)

Executive Secretary's Determination

On August 22, 2019, the Executive Secretary issued the ES Determination pursuant to OCB Rule §1-07(c)(2), dismissing the petition for untimeliness. The Executive Secretary noted that

NYCCBL §12-306(e) sets the statute of limitations for claims filed before the Board at four months. Since the petition was filed on August 12, 2019, the Executive Secretary determined that any alleged violations about which Petitioner knew or should have known that occurred prior to April 12, 2019, were untimely.

The Executive Secretary found that, based upon the March 2016 Letter, Petitioner was "aware of the alleged improper acts taken by the Union by, at the latest, March 22, 2016." (ES Determination at 2) The Executive Secretary noted that in the March 2016 Letter, Petitioner informed the Union President of his "disagreement with the Union's collective bargaining position upon accretion of [his] title into the unit and, specifically, its failure to protect certain negotiated benefits on which [he relies], including the RIP and other additions to gross." (ES Determination at 2) Accordingly, the petition was dismissed.

The Appeal

On August 30, 2019, Petitioner filed the Appeal. Petitioner acknowledged that he "was aware of the alleged improper acts" by March 22, 2016. (Appeal at 2) Petitioner asserts that the Board should consider that he has never intentionally violated the Board's rules and "that the late filing should be a lesser offense/matter" than the Union's violations. *Id.* He argues that the statute of limitations should not "supersede the violation of numerous other collective bargaining rules" by the Union and that the Union's "[b]latant disregard for the Board's collective bargaining rules during negotiations should not be permitted and should be addressed no matter the time frame." (Appeal at 2-3)

In his Appeal, Petitioner also restates the arguments that he made in his petition. He argues that he receives less in each paycheck than he would have received if not for the Union's wrongful acts. Petitioner contends that he was unaware until recently that he could petition the Board and did so once he realized it was the proper forum. Petitioner notes that he was in contact with the

Union "early on" and that it took a long time for him to realize that the Union was giving him the "run-around." (Appeal at 3) He also asserts that the Union should have informed him to contact the Board.

DISCUSSION

This Board finds that the Executive Secretary properly dismissed the petition as untimely. As the Petitioner appears *pro se*, "in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Hinds*, 11 OCB2d 36, at 7 (BCB 2018) (quoting *Morris*, 3 OCB2d 19, at 12 (BCB 2010)). Accordingly, we review Petitioner's allegations "with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and [do] not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 13 (BCB 2008); *see also Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd.*, *Matter of Rosioreanu v. N.Y.C. Off. of Collective Bargaining*, Index No. 116796/2008 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (2010), *lv denied*, 17 NY3d 702 (2011) (As "a *pro se* Petitioner may not be familiar with legal procedure [we] therefore take a liberal view in construing such pleadings.").

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. Off. of Collective Bargaining*, Index No. 109481/2003 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.) (citing NYCCBL § 12-306(e) and OCB Rules § 1-07(d))[4]; *see also Mahinda*, 2 OCB2d 38, at

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

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. sub nom.*, *Matter of Mahinda v. Board of Collective Bargaining*, 91 A.D.3d. 564, 565 (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." *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (citations omitted).

We affirm the determination of the Executive Secretary that the petition must be dismissed as untimely. Petitioner acknowledges that he was aware "at the latest March 22, 2016[,]" of the Union's acts which forms the basis of his claim. (Appeal at 2) Thus, Petitioner acknowledges he knew of his claim more than four months prior to the filing of his petition. *See Gonzalez*, 8 OCB2d 10, at 8 (BCB 2015) (*pro se* duty of fair representation petition found untimely where a letter petitioner sent to the union demonstrated that petitioner knew the basis of his claim more than four months before the petition was filed) (citing *Lutz*, 4 OCB2d 13, at 9 (BCB 2011)).

Petitioner argues that his failure to file sooner was unintentional and should not preclude the Board from addressing the Union's alleged intentional "injustice." (Appeal at 2) The statute of limitations, however, "is not discretionary" and cannot be disregarded by the Board. *Miller*, 57 OCB 40, at 4 (BCB 1996); *see also Howard*, 51 OCB 38, at 4-5 (BCB 1993). Thus, Petitioner's

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> 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 . . . .

OCB Rules § 1-07(d) 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 [NYCCBL § 12-306] may be filed with the Board within four (4) months thereof . . . ."

failure to timely file "precludes us from reaching the actual merits of the complaint." *Howard*, 51 OCB 38, at 4-5; *see also Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question); *McAllan*, 31 OCB 14, at 19 (BCB 1983) (timeliness is jurisdictional).

Petitioner also argues that the statute of limitations should not bar his claim because he has continually been attempting to resolve this matter with the Union and was unaware until recently that the Board was the proper forum. We find that Petitioner asserts an equitable tolling argument. However, Petitioner has not alleged that any act or omission by the Union upon which he relied prevented him from filing sooner, and such an allegation is "a pre-requisite for equitabl[e] tolling." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (citing *Mora-McLaughlin*, 3 OCB2d 24, at 12-13 (BCB 2010); *UFA*, 3 OCB2d 13, at 12-13 (BCB 2010)). *See also Buttaro*, 12 OCB2d 23, at 14 (BCB 2019) (no basis for equitable tolling where "Petitioner has not alleged that the Union did anything to delay or discourage him from filing the improper practice petition sooner"). Petitioner's June 2018 and July 2019 letters only repeat the concerns raised in his March 2016 letter. Repeatedly seeking a response from the Union regarding the same acts of which Petitioner already complains "does not independently extend the limitations period to file a petition based on the complained-of act." *UFA, L.94*, 3 OCB2d 50, at 12 (BCB 2010). *See also Minervini*, 71 OCB2d 24, at 13 (BCB 2003); *Raby*, 71 OCB 14, at 12-13; *Schweit*, 61 OCB 36, at 14 (BCB 1998). Further, Petitioner's "duty to investigate" arose, causing the statute of limitations began to accrue, when he became aware of the facts underlying his claim. *Cherry*, 4 OCB2d 15, at 11 (BCB 2011) (citing *OSA*, 2 OCB2d 30, at 14 (BCB 2009); *Raby*, 71 OCB2d 14, at 9-10). Thus, the fact that Petitioner was unaware until later that he could file a breach of the duty of fair representation claim before the Board "is not a basis upon which the statute of limitations may be tolled." *Cherry*, 4 OCB2d 15, at 11; *see also Buttaro*, 12 OCB2d 23, at 11; *Garg*, 6 OCB2d 35, at 10 (BCB 2013).

See, e.g., Jones, 41 OCB 19 (ES 1988).[5] Accordingly, we find Petitioner has not established grounds for equitable tolling.

Petitioner argues that he is continually impacted by the Union's alleged breach of the duty of fair representation because he believes that with each paycheck he is receiving less compensation as a result of the Union's alleged breach. Thus, we interpret his Appeal as arguing that the Board should apply the continuing violation doctrine to his claim and, thereby, find the petition timely. *See*, *e.g.*, *Schweit*, 61 OCB 36, at 13-14. We have stated that under the continuing violation doctrine, a "petitioner's time to file [does] not begin to run until the *last complained[-]of act* . . . ." *James-Reid*, 77 OCB 16, at 7 (emphasis added). *See also Buttaro*, 12 OCB2d 23, at 13-14. Petitioner alleges that the Union breached its duty of fair representation by entering into letter agreements in October 2015 under which newly accreted titles were not eligible for RIPs or additions to gross. Petitioner alleges that the *impact* of the Union's acts are on-going. However, he acknowledges that he was aware of the Union's acts which form the basis of his claim by "at the latest March 22, 2016." (Appeal at 2) Therefore, the continuing violation doctrine does not apply to this claim and Petitioner's claim is untimely.

Finally, following notification that this matter would be addressed by the Board at its December 2019 meeting, Petitioner sought to add to the record an affidavit from a Union official in a pending suit that he filed against the Union in Civil Court, New York County. The affidavit explains the negotiations that occurred between the City and the Union in 2015 as well as more recent negotiations regarding Petitioner's title. Petitioner also seeks to add allegations related to

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[5] The petitioner in *Jones*, 41 OCB 19, mistakenly filed a petition with the New York State Public Employment Relations Board ("PERB") but did so within four-months of the last complained-of act. PERB dismissed the complaint, informing petitioner that the proper forum was the Board. Petitioner then filed a petition before Board within four months of PERB's dismissal but more than four months after the last complained-of act. The petition was dismissed as untimely. *See id.*, at 3, n. 1.

that affidavit that were not asserted in the petition or the appeal. Procedurally, we note that, "[t]he purpose of an appeal is to determine the correctness of the Executive Secretary's decision based upon the facts that were available . . . in the record as it existed at the time of his ruling." *Buttaro*, 12 OCB2d 23, at13 (BCB 2019) (quoting *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008)). *See also Cooper*, 69 OCB 4, at 5 (BCB 2002); *White*, 53 OCB 20, at 8-9 (BCB 1994); *Marrow*, 45 OCB 54, at 4 (BCB 1990). "A petitioner may not add new facts at a later date to attack the basis of the Executive Secretary's determination." *Babayeva*, 1 OCB2d 15, at 10; *see also Cooper*, 69 OCB 4, at 5. Notwithstanding, we further note that "the new facts as asserted did not cure the deficiencies of the petition" as they do not alter our finding that the petition is untimely. *Id.*; *see also Marrow*, 45 OCB 54, at 5.

Thus, the Executive Secretary correctly determined that the improper practice petition was untimely. Accordingly, Petitioner's Appeal is denied, and the improper practice petition is dismissed.

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-4345-19 is affirmed, and the appeal therefrom is denied.

Dated: December 3, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER