Buttaro, 13 OCB2d 1 (BCB 2020)

(IP) (Docket No. BCB-4361-19)

Summary of Decision*:** Petitioner appealed the Executive Secretary's dismissal of his petition for untimeliness because none of the claims raised occurred within four months of its filing date. The Board found that the Executive Secretary properly deemed the petition untimely, rejected Petitioner's allegations against the respondents as barred by *res judicata*, and denied the appeal. ***(Official decision follows.)

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.

DECISION AND ORDER

On November 15, 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 engaging in a continuing pattern of bad faith, fraud, and misconduct against him. On December 2, 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 December 17, 2019, Petitioner appealed the ES Determination ("Appeal"). The Board finds that the Executive Secretary properly deemed the petition untimely, rejects Petitioner's allegations against the respondents as barred by *res judicata*, and denies the Appeal.

BACKGROUND

This is the third petition that Petitioner has filed in less than ten months alleging that the Union violated his duty of fair representation by, *inter alia*, engaging in or failing to engage in actions stemming from two grievances it filed on his behalf in 2014. The two prior petitions were dismissed by the Executive Secretary and those dismissals were each affirmed by the Board. *See Buttaro*, 12 OCB2d 23 (BCB 2019); *Buttaro*, 12 OCB2d 29 (BCB 2019).[1] The instant petition fails to assert any facts not already asserted in the prior two petitions and merely restates arguments based on the facts previously alleged.[2]

Petitioner was employed by the FDNY as a Firefighter, a title represented by the Union,

[1] Petitioner filed the first petition on February 26, 2019, alleging that the Union failed to properly represent him prior to and following his termination in 2015, and that the Union's bad faith conduct contributed to his unjust termination. He filed the second petition on June 28, 2019 ("June 2019 Pet."), again alleging that the Union breached its duty of fair representation during the same time period as in the first petition by engaging in a "continuing pattern and course of conduct." *Buttaro*, 12 OCB2d 29, at 6. Petitioner further alleged in the June 2019 petition that, after filing the first petition, he became aware of additional bad acts by the Union that took place during the time period surrounding the filing of the 2014 grievances.

[2] The details of these claims are not summarized herein, except as set forth in the Discussion below.

until his termination on February 10, 2015.[3] 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 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 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, and 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

[3] Unless otherwise noted, the facts herein are based on allegations in the petition, findings in prior Board decisions, decisions of the New York City Office of Administrative Trials and Hearings ("OATH"), and the records of the New York City Office of Collective Bargaining ("OCB").

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 petition challenging arbitrability ("PCA") and noted that Union counsel had consented to the request.[4] 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' 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). 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 id.* 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."

[4] 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.

Id. 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.[5] *See id.* at 16.

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").

Improper Practice Petition

The petition provides a detailed description of the events surrounding Petitioner's 2015 termination, including the filing of the First and Second Grievances and the PCA, and alleges that the Union engaged in "a long term, continuing, and acute pattern and practice of bad faith, gross

[5] NYCCBL § 12-312(d) provides, in pertinent part:

> 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 said grievant or grievants and said organization 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.

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.

misconduct, fraud and misrepresentation," and "deliberately interfered with, restrained, and/or coerced [Petitioner] in the exercise of his Section 12-306 rights," in violation of NYCCBL § 12-306(b)(1) and (3).[6] (Pet. ¶¶ 191, 193)

Petitioner alleges that he learned for the first time in July 2019 that in 2014 the Union agreed to permit the FDNY to file its PCA "after the Rules of OCB had expired." (Pet. ¶ 149) He asserts that he gained such knowledge after reviewing documents he requested and received from the OCB on July 15, 2019. Petitioner argues that the statute of limitations should be equitably tolled because the Union intentionally deceived him in this and other instances for the purpose of dissuading him from filing a grievance and taking other legal action. (*See* Pet. ¶¶ 159-64)

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. ¶ 197) He further requests that the Board order the City and the Union to refrain from "refusing and/or failing to retaliate, discourage, and/or take adverse actions against him" from exercising his "Section 12-306 rights," to order the Union to ensure that all of its members are provided with a current copy of the collective bargaining agreement and made aware of their rights under Article XVII of the agreement, to reimburse him for all monetary losses and costs, and to post notices. (*Id.*)

Executive Secretary's Determination

On December 2, 2019, Petitioner was served with the ES Determination by email. The Executive Secretary dismissed the petition as untimely pursuant to OCB Rule § 1-07(c)(2)(i).[7] She

[6] Petitioner also alleges that the FDNY derivatively violated NYCCBL § 12-306(d).

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

> Within 10 business days after a petition alleging improper practice

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 and found that the petition was not filed within four months of when the alleged violations occurred.[8]

The Executive Secretary found that the petition asserts the same continuing violation and equitable tolling arguments relating to events that took place between approximately January 23, 2012 and October 23, 2018, that Petitioner previously pled and which the Board twice rejected. She explained that "[t]he fact that Petitioner continues to 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." (ES

> 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. . . .

[8] NYCCBL § 12-306(e) 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 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. . .

Determination at 3, quoting *Buttaro*, 12 OCB2d 29, at 11-12) The Executive Secretary accordingly rejected Petitioner's claim that he learned in July 2019 that the Union acted in bad faith in 2014 when it agreed to permit the FDNY to file a PCA "after the Rules of OCB had expired" without notifying him. (Pet. ¶ 149)

The Executive Secretary also noted that Petitioner had failed to assert any legal support for the assertion that "the Union counsel needs to notify the grievant or obtain the approval of a grievant regarding administrative matters such as extensions or consolidation." (ES Determination at 3 n 5, quoting *Buttaro*, 12 OCB2d 29, at 11 n. 8) She noted that such an act by the Union was within its discretion as a party to the action with the FDNY and does not, on its face, rise to the level of a breach of the duty of fair representation.[9]

The Appeal

On December 17, 2019, Petitioner filed an appeal of the ES Determination. In the Appeal, Petitioner reiterates his assertion that the Union's 2014 granting of "multiple extensions for the FDNY/NYC to file Petition Challenging Arbitrability" after the deadline set forth in the OCB Rules and without informing him, was arbitrary and in bad faith. (Appeal at 2) He argues that this "affirmative wrongdoing" by the Union caused him "significant harm" by delaying the time between the accrual of the cause of action and the institution of his legal proceeding. (*Id.* at 3) Petitioner claims that the Union's actions, taken together, demonstrate an "organized attempt to keep petitioner in the dark" and dissuade and prevent him from filing a legal proceeding sooner. (*Id.*)

Petitioner also disputes the Executive Secretary's finding that his July 2019 discovery of

[9] 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 with the exercise of Petitioner's NYCCBL § 12-305 rights.

new information is time-barred. He asserts that "the string of correspondences as well as the actual knowledge gained from the string of correspondences sent by OCB on July 15, 2019" fall within four months of the filing date because he gained "actual knowledge" at that time which "intricately ties in to other stated facts." (Appeal at 3) Petitioner argues that the Board should consider not only the actual date of the action complained of, but when the petitioner became aware of the Union's action or when the petitioner "actually suffers harm, from this occurrence or action, whichever is later." (*Id.*) Accordingly, Petitioner argues that his July 2019 discovery of the Union's actions as well as other acts, all of which caused him harm, warrant the application of equitable tolling to his claims.

DISCUSSION

We first address the timeliness of the Appeal. The OCB Rules provide that "[w]ithin 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition . . . the petitioner may file with the Board a written statement setting forth an appeal from the decision with proof of service thereof upon all parties." OCB Rule § 1-07(c)(2)(ii). Petitioner was served with the ES Determination by email on December 2, 2019 at the email address he provided when he filed the petition via the OCB's e-filing system. The OCB Rules provide that in cases initiated by e-filing, "service of papers by email is complete upon the date the document is transmitted." OCB Rule § 1-12(g)(3). Service on Petitioner was therefore complete on December 2, 2019 and the 10 business days to appeal set forth in OCB Rule § 1-07(c)(2)(ii) began to run on December 3, 2019.

To be timely filed, Petitioner was required to file his appeal with the Board no later than December 16, 2019. However, Petitioner failed to file the Appeal until December 17, 2019.[10] Accordingly, we deny the Appeal as untimely. *See Kapetanos*, 75 OCB 2, at 6 (BCB 2005) (finding untimely an appeal of an Executive Secretary decision filed 10 days after the deadline set forth in the OCB Rules).

Were we to review the record *de novo*, however, we would find that the Executive Secretary properly dismissed the petition as time-barred. 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)); *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 (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).

This Board has stated that Petitioner's allegations of additional, newly discovered errors that he believes the Union's counsel made many years ago in processing his grievances does not toll the statute of limitations nor states a claim of a continuing violation of the Union's breach of its duty of fair representation. *See Buttaro*, 12 OCB2d 23, at 11 ("petition reflects that [Petitioner] knew or should have known of the Union's alleged violations prior to" receipt of Arbitration Award); *Buttaro*, 12 OCB2d 29, at 10-11 ("It is well-established that the date a petitioner becomes

[10] We note that Petitioner also failed to submit proof of service of the Appeal on all parties, as set forth in OCB Rule § 1-07(c)(2)(ii).

aware of the legal theory supporting a right of action does not commence the statute of limitations period.") (quoting *Cherry*, 4 OCB2d 15, at 11 (BCB 2011)). *See also Garg*, 6 OCB2d 35, at 10 (BCB 2013) (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").

Petitioner continues to assert that the Union breached its duty of fair representation by a series of acts or omissions relating to the First and Second Grievances. Here, Petitioner asserts that his receipt of "newly discovered information" in July 2019 – a chain of 2014 emails - makes his claims timely because the "actual knowledge" he gained from this information about the Union's 2014 actions fell within the four-month statutory period. (Appeal at 3) However, these facts were before the Board in *Buttaro*, 12 OCB2d 29, and as we stated therein, they do not render the otherwise untimely claim timely. *See id.* at 11-12. Similarly, Petitioner's assertion that the Union engaged in a series of bad faith actions in an "organized attempt to keep petitioner in the dark" and dissuade him from filing a legal proceeding sooner, is another iteration of his "continuing violation" argument that the Union did not represent him properly, which we dismissed as untimely in that same decision.[11]

[11] We reject Petitioner's claim that the Union's act of granting the City extensions to file the PCA after the deadline set forth in the OCB Rules and without notifying him was arbitrary or made in bad faith. Petitioner himself recognized that a union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." (Appeal at 2, quoting *Garg*, 6 OCB2d 35, at 11) He offers only speculation and conjecture to support the assertion that the Union's decision to grant an extension outside the deadline stated in the OCB Rules was dishonest or arbitrarily made. In addition, as we stated in *Buttaro*, 12 OCB2d 29, the Union, not Petitioner, was the respondent in the PCA and Petitioner has not asserted any legal support for the proposition that Union counsel must seek the approval of a grievant to obtain an extension. *Id.* at 11 n. 8. As such, Petitioner has failed to state a violation of the NYCCBL.

In the petition he filed in *Buttaro*, 12 OCB2d 29, Petitioner alleged that the Union violated NYCCBL § 12-306(b)(1) and (3) by engaging in a "continuing pattern and course of conduct" that breached its duty of fair representation.[12] (June 2019 Pet. ¶ 9) The petition re-alleged many facts that Petitioner asserted in his first petition filed earlier in 2019, but also added that on or about February 28, 2019, he learned that the Board's decision in *UFA*, 9 OCB2d 25, 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. (*Id.* at ¶ 16) Petitioner alleged 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. (*Id.* at ¶ 19) Petitioner asserted 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 *UFA*, 9 OCB2d 25 was "extremely significant" because these claims went to the heart of the discriminatory treatment that led to his termination. (*Id.* at ¶ 17) Accordingly, Petitioner concluded that the bulk of the First Grievance did not proceed to arbitration "solely as a result of the Union's incompetence." (*Id.* at ¶ 20)

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

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[12] 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 in 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 illustrated "a long term, continuing and acute pattern and practice of bad faith, gross misconduct, fraud, and misrepresentation." (June 2019 Pet. ¶ 21) He asserted 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]." (*Id.* at ¶ 23)

In denying Petitioner's appeal of the Executive Secretary's dismissal of the June 2019 petition, the Board found, *inter alia*, that the Executive Secretary properly dismissed the petition as untimely because Petitioner's 2019 discovery of the Union's failure to make a particular argument during the 2014 proceedings before OCB did not commence nor did it toll the statute of limitations. We found that Petitioner's claim that the Union's failure to consult or inform him about administrative matters pertaining to those proceedings was not actionable as part of a continuing violation. The Board also held that Petitioner failed to state a duty of fair representation claim under the NYCCBL. *See Buttaro*, 12 OCB2d 29, at 10-11.

All of the claims in the instant petition arose from the same set of facts and transactions as those in the prior petitions which culminated in *Buttaro*, 12 OCB2d 23, and *Buttaro*, 12 OCB2d 29. In such instances, the Board has consistently applied the doctrine of claim preclusion, or *res judicata*, "in conformity with their scope as defined by the courts of this State." *See Howe,* 79 OCB 19, at 9 (BCB 2007). As we explained in *Howe*, "[u]nder the doctrine of res judicata, the Court of Appeals has enunciated as a general rule that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. . . . Thus, a cause of action that could have been presented in a prior proceeding against the same party, based upon the same harm and arising out of the same or related facts, is barred by *res judicata*." (citations and internal quotation marks omitted) *Id.* at 7-8. *See also United Marine Division, L. 333, ILA*, 4 OCB2d 37,

at 14-15 (BCB 2011) (*res judicata* not applicable where the central legal questions "implicate different legal standards and distinct dispositive facts" from a prior matter).

Here, the claims in the petition before us arise out of events stemming from the 2014 filing of the First and Second Grievances. These claims were fully and fairly evaluated by the Board. While Petitioner alleges that he is harmed each time he "discovers" new information, such harm arises out of the same set of facts against the same parties and implicates the same legal standards. Therefore, such claims are barred by *res judicata*.

In sum, Petitioner's Appeal is denied as untimely. The Executive Secretary correctly determined that the underlying improper practice petition, filed over four years after the alleged violation occurred, was untimely and is barred by *res judicata*. Moreover, Petitioner has failed to state a violation of the NYCCBL. Accordingly, Petitioner's appeal of the Executive Secretary's Determination is denied on all grounds, and the improper practice 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-4361-19 is affirmed, and the appeal therefrom is denied.

Dated: February 3, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER