Buttaro, 14 OCB2d 14 (BCB 2021)

(IP) (Docket No. BCB-4422-21)

Summary of Decision*:** Petitioner appealed the Executive Secretary's dismissal of his petition on the grounds that it was precluded by *res judicata* and collateral estoppel, untimely, and failed to state a claim. The Board found that the Executive Secretary properly dismissed the petition 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 March 4, 2021, 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") alleging that the Union violated its duty of fair representation to him prior to and following his termination from the FDNY in 2015. On March 18, 2021, the Executive Secretary of the Board of Collective Bargaining dismissed the petition ("ES Determination") 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 the grounds that it was precluded by *res judicata* and collateral estoppel, untimely, and failed to state a claim

under § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). On April 1, 2021, Petitioner appealed the ES Determination ("Appeal") to the Board. The Board finds that the Executive Secretary properly dismissed the petition and denies the Appeal.

BACKGROUND

This is the fourth improper practice that Petitioner has filed alleging the Union breached its duty of fair representation concerning his 2015 termination from the FDNY. Facts pertaining to the Union's representation of Petitioner and his termination from the FDNY in 2015 are set forth in detail in *UFA*, 9 OCB2d 25 (BCB 2016); *Buttaro*, 12 OCB2d 23 (BCB 2019), *aff'd sub nom., Matter of Buttaro v. Off. of Collective Bargaining*, Index No. 152489/2020, slip op. (Sup. Ct. N.Y. Co. Apr. 23, 2021) (Engoron, J.); *Buttaro*, 12 OCB2d 29 (BCB 2019); and *Buttaro*, 13 OCB2d 1 (BCB 2020), *aff'd sub nom., Matter of Buttaro*, Index No. 152489/2020, slip op., and are not summarized here.

Improper Practice Petition

In this petition, Petitioner repeats the allegations addressed in *Buttaro*, 12 OCB2d 23, *Buttaro*, 12 OCB2d 29, and *Buttaro*, 13 OCB2d 1, largely verbatim. He asserts some additional non-material details regarding events from 2012 to 2018. He also claims that on October 5, 2020, he became aware that the Union's August 2014 request to arbitrate his first grievance was filed and served in person rather than by mail and that in January 2021 he learned that the administrative law judge ("ALJ") at the Office of Administrative Trials and Hearings ("OATH") who recommended his termination in January 2015, had previously worked at the Office of Collective Bargaining ("OCB"). Petitioner avers that the Union knew of her prior employment.

In addition, he asserts that in September 2020 the Union denied his request to "look into

th[e] apparent double standard" in the FDNY's September 4, 2020 directive regarding uniforms, which allegedly supports the position he took in his first grievance that the FDNY only regulates on-duty attire and is a "stark contrast" to the FDNY and OATH ALJ determinations that lead to his 2015 termination for, in part, off-duty attire.[1] (Pet. ¶ 207) Petitioner asserts that, in contrast, several years ago the FDNY relaxed its zero-tolerance drug policy and that the Union assisted firefighters who had been terminated pursuant to that policy and lost their pensions. He further asserts that the UFA also assisted a firefighter who had resigned rather than face charges in getting rehired.

Executive Secretary's Determination

The Executive Secretary dismissed the petition pursuant to OCB Rule § 1-07(c)(2)(i).[2] The Executive Secretary found that, with limited exceptions, the facts and legal claims in Petitioner's fourth improper practice petition were identical or substantially the same as those alleged in his third improper practice petition, which the Board denied as untimely and barred by *res judicata*. Accordingly, the ES Determination found that those claims are barred by *res judicata* and

[1] We take administrative notice that Petitioner already raised the allegedly "selective enforcement" of the FDNY's uniform policies and improper regulation of his off-duty attire in an action asserting violations of the United States Constitution, among other things, and his claims were dismissed. *See Buttaro v. City of New York*, 2016 U.S. Dist. LEXIS 125965, at *31 (E.D.N.Y. Sept. 15, 2016) (Glasser, J.), *modified*, 2017 U.S. Dist. LEXIS 70193, at *7-*8 (E.D.N.Y. May 8, 2017)

[2] 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 . . . .

collateral estoppel.

To the extent that Petitioner attempted to expand upon his third improper practice petition by adding factual details that were not previously alleged, the ES Determination found that those allegations were also barred by *res judicata* and collateral estoppel. Citing court and BCB precedents, the ES Determination explained 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." ES Determination at 2 (quoting *In re Hunter*, 4 N.Y.3d 260, 269 (2005) and citing *Ryan v. New York Tel. Co*., 62 N.Y.2d 494, 504 (1984); *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981); *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 29-30 (1978); *Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP*, 80 A.D.3d 453, 454 (1st Dept. 2011); *CSTG, L. 375*, 45 OCB 77 (BCB 1990)). In addition, the ES Determination found that, with one exception, the "new" allegations were untimely because they pertained to events that occurred between January 2012 and October 2018. The Executive Secretary found that these "non-probative details regarding allegations already asserted and rejected by this Board," including but not limited to Petitioner's assertions regarding the OATH ALJ and the timeliness of the City's 2014 petition challenging arbitrability, were irrelevant and did not support a finding of equitable tolling or a continuing violation for the reasons set forth in *Buttaro*, 12 OCB2d 23, *Buttaro*, 12 OCB2d 29, and *Buttaro*, 13 OCB2d 1. ES Determination at 3.

Regarding the Union's failure to "look into" the September 4, 2020 FDNY directive regarding uniforms, the ES Determination found that the allegations did not state a claim for a breach of the duty of fair representation under the NYCCBL. The ES Determination noted that "Petitioner has not established standing to bring a claim against the Union for failure to assist him based on a policy enacted after he was terminated from FDNY employment" and that he had not identified a contractual or statutory mechanism by which the Union could retroactively challenge

a 2018 arbitration award based on a directive that was not in effect at that time. ES Determination at 4 n. 7 (citing *McAllan*, 31 OCB 14, at 22-23 (BCB 1983)).

The Appeal

Petitioner argues that *res judicata* and collateral estoppel do not apply to his claims because he was not given a full and fair opportunity to litigate his prior improper practice petitions and there was no final determination on the merits because each petition was dismissed as untimely. Petitioner asserts that timeliness is an affirmative defense that was never raised by the respondents, who did not have to answer the petitions because they were dismissed by the Executive Secretary.

Petitioner contends that he did not have actual or constructive knowledge until October 5, 2020, that an August 28, 2014 request for arbitration was filed and served by hand. As a result, Petitioner asserts that OCB should not have granted the City an additional five days for service by mail to file its petition challenging arbitrability in 2014. Petitioner asserts that he was not given due process in his disciplinary proceedings at the FDNY or at OATH prior to his termination in 2015, that OCB violated the OCB Rules in finding the 2014 petition challenging arbitrability timely, and that the Board misapplied the NYCCBL's waiver provision in its 2016 decision, *UFA*, 9 OCB2d 25.[3] Petitioner reiterates his claim that equitable tolling is appropriate because the Union "hid the facts on how and when" the Union's requests for arbitration and the City's petition challenging arbitrability were filed in 2014. (Appeal at 6) Petitioner disputes the Board's prior ruling that he has offered only conclusory allegations about the circumstances surrounding these filings because OCB "knew the specific details" regarding how they were served and filed. (Appeal at 6)

[3] We take administrative notice that with respect to his 2015 termination, the federal district court found that "Buttaro had a full and fair opportunity to litigate his position at the administrative hearing" before OATH. *Buttaro*, 2016 U.S. Dist. LEXIS 125965, at *16 n. 4.

According to Petitioner, not all the claims in his fourth improper practice petition pertain to events that occurred more than four months prior to its filing date. Petitioner avers that in January 2021 he learned that the OATH ALJ had previously been the Executive Secretary at OCB and worked with past and current members of OCB, including its current Chair.[4] In light of her work history and knowledge of improper practices, Petitioner argues that she should have delayed the start of the 2014 OATH trial until his related grievances were resolved. Further, when his attorney notified the OATH ALJ in December 2014 that the City was challenging the arbitrability of his grievances based on the claims pending before OATH, she should have delayed her 2015 OATH determination.

According to Petitioner, his third improper practice petition against the Union raised the question of whether OCB's Deputy Director for Dispute Resolution properly granted extension requests in 2014 for the filing of the City's petition challenging arbitrability.[5] Since the current Chair served as OCB's Deputy Director for Dispute Resolution in 2014, Petitioner argues that in signing *Buttaro*, 13 OCB2d 1, the Chair ruled on her own actions.

Regarding the 2020 FDNY Directive, Petitioner asserts that he has standing to raise a claim because there has been a policy regarding uniforms since 2000, which the FDNY has improperly and selectively enforced with no objection from the Union. Petitioner argues that the Union failed to protect him when the FDNY sought to regulate his off-duty attire between 2012 and 2015 and it allowed the FDNY to "contradict themselves" in 2020. (Appeal at 11) Petitioner objects to the determination that this allegation does not state a claim under the NYCCBL because the Executive

[4] We take administrative notice that Alessandra Zorgniotti worked at OCB from 2001 to 2006.

[5] The propriety of OCB's granting of extension requests in 2014 was not before the Board in *Buttaro*, 13 OCB2d 1. Petitioner first asserted that the Chair had a conflict of interest on appeal, and the Court rejected his argument. *See Matter of Buttaro*, Index No. 152489/2020, slip op. at 3.

Secretary "supplie[d] an answer and defense for the [Union] without actually allowing them to answer." (*Id*.)

DISCUSSION

We find that the Executive Secretary properly dismissed Petitioner's fourth improper practice petition alleging that the Union breached its duty of fair representation regarding his 2015 termination. This Board has ruled, and the New York State Supreme Court has affirmed, that Petitioner's claims against the Union, initially filed more than four years after his termination, are untimely. *See Matter of Buttaro*, Index No. 152489/2020, slip op. at 3; *Buttaro*, 12 OCB2d 23, at 9-14. We have repeatedly found that "Petitioner's allegations of additional, newly discovered errors that he believes the Union's counsel made many years ago . . . do[] not toll the statute of limitations nor state[] a claim of a continuing violation of the Union's breach of its duty of fair representation."[6] *Buttaro*, 13 OCB2d 1, at 10; *Buttaro*, 12 OCB2d 29, at 11; *Buttaro*, 12 OCB2d 23, at 12-14.

It is well established that a dismissal based on the statute of limitations is "at least sufficiently close to the merits for claim preclusion purposes to bar a second action." *Smith v. Russell Sage College*, 54 N.Y.2d 185, 194 (1981). Thus, this Board has found, and the New York State Supreme Court has affirmed, that Petitioner's claims against the Union arising from his termination from the FDNY are barred by *res judicata* as well as untimely, and we will not repeat our analysis here. *See Matter of Buttaro*, Index No. 152489/2020, slip op. at 3; *Buttaro*, 13 OCB2d

[6] We also noted that the Union "errors" alleged by Petitioner failed to state a claim under the NYCCBL. *See Buttaro*, 13 OCB2d 1, at 11 n. 11; *Buttaro*, 12 OCB2d 29, at 11 n. 8. Thus, the Executive Secretary correctly found that the doctrine of collateral estoppel also precludes Petitioner from relitigating issues that have been decided against him. *See DC 37*, 79 OCB 25, at 13-14 (BCB 2007). *See also Buttaro*, 2016 U.S. Dist. LEXIS 125965, at *15 (finding that the OATH ALJ's fact-finding has preclusive effect).

1, at 13. *See also OSA*, 11 OCB2d 8, at 17-18 (BOC 2018) (summarizing prior holdings without repeating the analysis), *affd.*, 2019 N.Y. Slip. Op 30466(U) (Sup. Ct. N.Y. Co.) (Crane, J.), *affd.*, 179 A.D.3d 573 (1st Dept. 2020), *lv. denied*, 35 N.Y.3d 906 (2020); *OSA*, 10 OCB2d 2, at 17 (BOC 2017) (same), *affd., Matter of NYC Health + Hosps. v. Org. of Staff Analysts*, 2017 N.Y. Slip. Op 32393(U) (Sup. Ct. N.Y. Co.) (Edwards, J.)), *affd.*, 171 A.D.3d 529 (1st Dept. 2019), *lv. denied*, 34 N.Y.3d 909 (2020); *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3039, at 3144 n.2 (2010) (no need to repeat the reasoning for rejecting legal arguments that a party raised in a prior case).

In addition, as the Executive Secretary properly found, Petitioner's allegations fail to state an improper practice claim under NYCCBL § 12-306. By definition, an improper practice petition can only be filed against a public employer or a public employee organization. *See* NYCCBL § 12-306(a) & (b). Thus, to the extent that Petitioner asserts that OCB or this Board erred in processing or deciding various matters OCB in 2014, 2015, and 2016, such claims are not only untimely but also cannot constitute an improper practice under the NYCCBL. These allegations are not properly before this Board, and we do not rule on them.[7]

We also reject the allegation that the Union is that it failed to "look into" an FDNY directive issued five years after Petitioner was terminated. (Pet. ¶ 207) The Executive Secretary correctly noted that the FDNY's 2020 directive, enacted after he was discharged, does not apply to Petitioner. Thus, Petitioner has not established standing to file an improper practice petition regarding the 2020 directive, and his allegations regarding the Union's failure to "look into" the

[7] Moreover, we do not have jurisdiction to hear appeals of OATH determinations. *See* NYCCBL § 12-309(a).

2020 directive do not state a claim under the NYCCBL.[8] *See Edwards*, 65 OCB 35, at 9 (BCB 2000); *McAllan*, 31 OCB 14, at 22-23 (BCB 1983). The Executive Secretary correctly "determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation" and properly dismissed the petition without requiring Respondents to answer. OCB Rule § 1-07(c)(2)(i).

As we have previously advised Petitioner that his claims are untimely, barred by *res judicata* and collateral estoppel, and fail to state a claim under the NYCCBL, we wish to make clear that his repeated filing of duplicative claims is an unnecessary burden on government resources. *See United Fedn. of Teachers (Fearon)*, 39 PERB ¶ 3020 (2006). Such continued abuse of OCB's administrative process by Petitioner may result in sanctions. *See United Fedn. of Teachers (Grassel)*, 44 PERB ¶ 3034 (2011); *Halley*, 30 PERB ¶ 3023 (1997).

[8] To the extent that Petitioner is asserting that the 2020 directive is further evidence in support of his claim that the Union breached its duty of fair representation regarding his 2015 termination, we reiterate that his claim is untimely, barred by *res judicata* and collateral estoppel, and does not state a claim under the NYCCBL. *See Buttaro*, 13 OCB2d 1; *Buttaro*, 12 OCB2d 29; *Buttaro*, 12 OCB2d 23; *Buttaro*, 2017 U.S. Dist. LEXIS 70193, at *7-*8 (finding that Buttaro did not establish disparate treatment based on attire).

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-4422-21 is affirmed, and the appeal therefrom is denied.

Dated: June 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER PEPPER
MEMBER