

Sherrod, 14 OCB2d 29 (BCB 2021)
(IP) (Docket No. BCB-4444-21)

Summary of Decision: Petitioner appealed the Executive Secretary’s dismissal of his petition for untimeliness and failure to state a claim. Petitioner argued that the Union refused to provide him with certain documents in a timely manner without which he could not have known whether it had misled and improperly represented him. The Board found that the Executive Secretary properly deemed the petition untimely and determined that it did not state a claim, and thus denied the appeal. (*Official decision follows.*)

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

In the Matter of the Improper Practice Proceeding

-between-

ROGER SHERROD,

Petitioner,

-and-

**NYC HEALTH + HOSPITALS and
DISTRICT COUNCIL 37, LOCAL 420,**

Respondents.

DECISION AND ORDER

On August 25, 2021, Roger Sherrod (“Petitioner”) filed an improper practice petition, *pro se*, against New York City Health + Hospitals (“HHC”) and District Council 37, Local 420 (“Union”).¹ 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 “collaborat[ing]” with HHC to create

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.

a hostile work environment, refusing to properly investigate his safety and retaliation complaints, refusing to provide him with forms and documents pertaining to grievances, failing to provide information for a fair hearing, and providing misleading information and directions during his involuntary medical leave process. (Pet. at 1) He further alleged that HHC retaliated against him for complaining about working conditions, in violation of NYCCBL § 12-306(a)(3).² On September 9, 2021, the Executive Secretary of the Board of Collective Bargaining (“Board”) 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”) and because the petition failed to state a claim under the NYCCBL. On September 22, 2021, Petitioner appealed the ES Determination (“Appeal”). The Board finds that the Executive Secretary properly determined that the petition fails to state a claim and deemed it untimely, and denies the Appeal.

BACKGROUND

Petitioner was employed by HHC as a Housekeeping Aide at Lincoln Hospital for over 18 years prior to being placed on an involuntary medical leave of absence pursuant to Regulation 1 of the HHC Personnel Rules and Regulations (“PRR”) on or about March 31, 2020. The Union represented Petitioner at a December 1, 2020 hearing held by HHC to consider Petitioner’s objections to the determination to place him on involuntary medical leave. Following Petitioner’s failure to fulfill the stated conditions for his return to work, HHC notified him by letter dated July

²While Petitioner did not explicitly allege a violation of NYCCBL § 12-306(a)(3), we interpret his pleading liberally based on the allegations set forth in the petition. *See Phelan*, 12 OCB2d 35, at 5 (BCB 2019) (we review a *pro se* 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”) (quoting *Feder*, 1 OCB2d 23, at 13 (BCB 2008)).

23, 2021, that his employment would be terminated on August 23, 2021, pursuant to PRR 7.3.4(b), due to his inability to perform the essential functions of his job.

Improper Practice Petition

In late 2018, Petitioner began corresponding with various HHC personnel to complain about safety concerns pertaining to unsanitary conditions at his assigned area at Lincoln Hospital.³ Petitioner expressed his concerns about, among other things, HHC's failure to provide him with the proper cleaning products, sanitary equipment, and adequate training. He also repeatedly requested detailed policies and procedures on how to perform the work assignments he was given. The record reflects that Petitioner continued to complain via email to HHC officials about safety and working conditions and request written procedures through March 2020. He copied Jose Robles, Lincoln Hospital's Union Chapter Chair, on most of this correspondence. The record further reflects that initially HHC appears to have regularly responded to Petitioner's correspondence and met with him and the Union in May 2019 to discuss his concerns.

However, Petitioner asserts that HHC created a hostile work environment by harassing and intimidating him in retaliation for complaining about safety issues. On April 28, 2019, Petitioner emailed Robles stating that he was being retaliated against by HHC officials due to his safety complaints. He further alleges that on April 30, 2019, his supervisor submitted a written request to HHC Labor Relations that disciplinary action be taken against Petitioner for refusal to complete an assignment on April 24, 2019. Petitioner was subsequently counseled regarding the incident, which he claims was retaliation for complaints about working conditions. In July 2019, he was reassigned to work in the lobby area, which he also believed was retaliation for his complaints.

Beginning in November 2019, Petitioner initiated a series of complaints to HHC personnel

³ Petitioner submitted over 300 pages of exhibits containing dozens of email exchanges with HHC and the Union, some of which contains correspondence documenting these complaints.

stating that he had been the target of “Gang Stalking” and “workplace group bullying/harassment by internal and external sources” at Lincoln Hospital since he started questioning safety and cleaning procedures. (Pet., Ex. 15, 16) In his complaints, Petitioner advised HHC that individuals posing as visitors and “participating employees” were engaged in “[n]oise [h]arassment,” such as banging on walls and “high heels stomping,” and that there was a surveillance team stalking him that was “designed to study my habits and routines in detail while walking from one assignment to the next.” (Pet., Ex. 16) In February 2020, Petitioner met with HHC management to discuss his concerns about harassment. On March 31, 2020, following a meeting between HHC Labor Relations, the Union, and Petitioner, HHC placed Petitioner on an involuntary medical leave of absence.⁴ Union counsel notified HHC that it objected to his involuntary medical leave.

A hearing was held by HHC’s Personnel Review Board (“PRB”) on December 1, 2020, to hear Petitioner’s objections to his placement on involuntary medical leave. The Union represented Petitioner at the hearing.⁵ The PRB Hearing Officer issued a Report and Recommendation (“Report”) on January 28, 2021, in which he noted that the psychiatrist who examined Petitioner concluded that he has a “persecutory paranoid delusional disorder” and that Petitioner had not heeded the doctor’s recommendation that he get psychiatric treatment. (Pet., Ex. 33) The Report stated that the psychiatrist concluded that Petitioner’s delusional disorder “has a serious impact” on his ability to work and leaves him disabled and unable to work. (*Id.*) In determining whether to grant Petitioner’s appeal of his involuntary medical suspension, the Hearing Officer balanced

⁴ HHC subsequently referred Petitioner for a psychiatric evaluation of his fitness for duty. In a June 11, 2020 report, a doctor concluded that based on his evaluation, Petitioner was medically disabled and not currently capable of returning to his duties as a Housekeeping Aide.

⁵ The Union hired a private attorney to represent Petitioner at the hearing. For reasons not set forth in the record, the Union subsequently replaced the private attorney with in-house counsel, who represented Petitioner at the hearing and thereafter.

the undisputed evidence presented by the psychiatrist and his finding that Petitioner “has not been a model employee” due to, among other things, his repeated requests for policy and procedure that were disruptive and negatively impacted the operation of his unit, against his finding that he had a long history of satisfactory service prior to 2018 and that “he is well qualified and capable of performing the responsibilities of a Housekeeping Aide.” (Pet., Ex. 33) He therefore recommended that Petitioner be provided an opportunity to return to work on the condition that he undertake psychotherapy, counseling, or training to “understand the inappropriateness of his conduct that led to this suspension and modify his behavior to avoid further problems.” (Pet., Ex. 33)

The Union sent a letter dated February 5, 2021, in which it argued that HHC should adopt the Report’s findings only to the extent it found Petitioner to be rational and capable of performing his work and immediately restore him to work and make him whole for all losses incurred as a result of being placed on involuntary medical leave. By letter dated February 12, 2021, Lincoln Hospital Director of Human Resources Barbara Marrero upheld the involuntary medical leave of absence determination and notified Petitioner that he can make a written request to return to work by submitting documentation from his treating health care professional stating that he was fit to perform the essential duties of his title, with or without a reasonable accommodation, and in compliance with the Hearing Officer’s recommendation regarding psychiatric treatment. The Union was copied on the February 12, 2021 letter.

There is no evidence in the record that Petitioner obtained a fit for duty letter from a medical professional or that he sought treatment pursuant to the Report. By letter dated July 23, 2021, HHC notified Petitioner that his employment would be terminated on August 23, 2021, due to his inability to perform the essential functions of his job.

Executive Secretary's Determination

On September 9, 2021, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2)(i), dismissing the petition for untimeliness and failure to state a claim. She noted that, under NYCCBL § 12-306(e), the statute of limitations for claims filed with the Board is four months. Since the petition was filed on August 25, 2021, the Executive Secretary determined that any alleged violations about which Petitioner knew or should have known that occurred prior to April 24, 2021, were untimely.⁶ She further found that there was no evidence in the record to reflect that the only timely event in the petition, the issuance of a July 23, 2021 letter from HHC notifying Petitioner of his termination pursuant to the PRR, was based on his union activity. Accordingly, the petition was dismissed.

The Appeal

On September 22, 2021, Petitioner filed an appeal of the ES Determination. In the Appeal, Petitioner states that the Union failed to provide him with “required and necessary documentation,” which deprived him of a fair PRB hearing, resulting in his subsequent discharge. He elaborated

⁶ 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. . .

that his Appeal is based on the fact that:

I would not have known my union mislead [sic] and misrepresented me during the entire involuntary medical leave process without written documentation detailing union reps responsibilities and union members rights regarding complaints against management, counselings, pre grievance meetings, PSU evaluation process, and so on.

(Appeal) Petitioner also references certain correspondence, which he claims demonstrates that the Union refused to provide him with “required information” for a fair hearing. (*See* Appeal, referencing Exs. 23, 27, 29, 31, 35) He further states, “Refer to exhibits [sic] 42 demonstrating my union lack of involvement.” Exhibit 42 appears to contain documents presented at the PRB hearing.⁷ (*Id.*)

DISCUSSION

This Board finds that the Executive Secretary properly dismissed the petition for untimeliness and failure to state a claim. As 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)).

⁷ Petitioner labelled the documents in Exhibit 42 as “Personal [sic] Review Board (PRB) Objection Hearing, HHC “Involuntary Medical Leave” Exhibits Pages 1-109, Specifics of the allegations were left out which includes reports, names, dates time and places”. The Exhibit includes, among other things, a position description, correspondence between Petitioner and HHC regarding his stalking and harassment claims, the March 31, 2020 letter notifying Petitioner that he was being placed on involuntary medical leave, and a June 15, 2020 letter informing Petitioner of the results of a physician’s medical assessment finding him unable to perform the essential duties of his position.

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.” *Phelan*, 12 OCB2d 35, at 5; *see* OCB Rule § 1-07(b)(4). 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). Petitioner does not dispute that with the exception of the July 23, 2021 termination letter, none of the claimed violations occurred within four months of the August 25, 2021 filing of the petition. Accordingly, we affirm the determination of the Executive Secretary that the remainder of the claims in the petition must be dismissed as untimely.

Petitioner argues on appeal that he would not have known that the Union misled and misrepresented him during the involuntary medical leave process and hearing without written documentation, with which it failed to provide him. Petitioner states that the Union refused to provide him with the “required and necessary documentation,” which he claims consists of “written documentation detailing union reps responsibilities and union members rights regarding complaints against management, counselings, pre grievance meetings, PSU evaluation process and so on.” (*See Appeal*) It appears from the record that Petitioner is referencing documents that he requested prior to or during the PRB hearing that he did not receive.

We construe Petitioner’s assertion as an equitable tolling argument. This Board has held that equitable tolling is established where the filing of an improper practice petition is delayed because of a petitioner’s reasonable reliance on the conduct of the opposing party. *See Gonzalez*, 8 OCB2d 10, at 8 (BCB 2015); *see also Pahlad v. Brustman*, 33 A.D.3d 518, 520 (1st Dept. 2006) (explaining that equitable tolling is available only where the “defendant’s affirmative wrongdoing produced a delay between the accrual of the cause of action and the institution of the legal proceeding.”) (internal citations omitted).

In this instance, the PRB hearing took place in December 2020, and the resulting Report was issued on January 28, 2021. Accordingly, Petitioner knew by late January or early February 2021, at the latest, that he was allegedly not provided with the documentation he considered necessary to conduct the hearing with respect to the involuntary medical leave process. Even assuming he relied to his detriment on the Union's failure to provide him with documents prior to the hearing, the petition was not filed until seven months after Petitioner learned of the HO's recommendations in the Report. Thus, he knew or should have known of the Union's alleged refusal to provide him with documents well before the statute of limitations began to run in this matter. Consequently, and assuming *arguendo* that the Union refused to provide Petitioner with relevant and necessary documents for the hearing, the record does not support a claim that this refusal caused Petitioner to delay filing the petition. *See Gonzalez*, 8 OCB2d 10, at 8. Accordingly, the equitable tolling claim is dismissed.⁸

Further, we dismiss Petitioner's claim that his Union lacked "involvement" in his case. Based on Petitioner's representations, it is clear that the Union represented Petitioner before, during, and after the PRB hearing.

Finally, the Board affirms the Executive Secretary's determination that the petition fails to state a claim against HHC under the NYCCBL. The Executive Secretary properly found that there was no evidence in the record to reflect that HHC's issuance of the July 23, 2021 termination letter resulted from or was based on Petitioner's union activity. Petitioner's Appeal fails to support a

⁸ Similarly, in his Appeal, Petitioner cites to five exhibits consisting of correspondence from 2020 in which he requested and did not receive "required information" for a fair hearing from the Union. At best, these exhibits make clear that Petitioner had requested certain information that was not provided to him by the time he went before the PRB in December 2020. Thus, he knew of the alleged refusal to provide documents more than eight months prior to the filing of his petition. We note that Petitioner does not assert that he discovered any additional "required and necessary" documentation subsequent to the hearing that he had not previously requested.

claim that the termination letter was in retaliation for his union activity. For these reasons, we affirm the dismissal of the improper practice petition and deny the Appeal.

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-4444-21 is affirmed, and the appeal therefrom is denied.

Dated: December 2, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER