

DC 37, Locals 508 and 461, 16 OCB2d 20 (BCB 2023)
(IP) (Docket No. BCB-4514-23)

Summary of Decision: Petitioner appealed a portion of the determination of the Executive Secretary of the Board of Collective Bargaining, which dismissed as untimely a NYCCBL §12-306(a)(3) claim made on behalf of the Local 508 Treasurer. Petitioner argued that it had identified discrete, specific instances of the adverse action against the Local 508 Treasurer that occurred within the statutory time period. The Board found that Petitioner pled a timely cause of action, but deferred to arbitration the factual question of whether DPR violated the contract by assigning Rodriguez out-of-title duties. The Board retained jurisdiction over the retaliation issue in the event it remains unresolved following arbitration. (*Official decision follows.*)

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

In the Matter of the Improper Practice Proceeding

-between-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its Affiliated LOCALS 508 and 461,**

Petitioners,

-and-

**NEW YORK CITY DEPARTMENT OF PARKS & RECREATION
and the NEW YORK CITY OFFICE OF LABOR RELATIONS,**

Respondents.

INTERIM DECISION AND ORDER

On March 28, 2023, District Council 37, AFSCME, AFL-CIO, and affiliated Locals 508 and 461 (collectively “Union”), filed a verified improper practice petition, amended on April 17, 2023, alleging that the New York City Department of Parks and Recreations (“DPR”) breached § 12-306(a)(1), (3) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by repudiating the due process and

discipline procedure outlined in the parties' collective bargaining agreement; discriminating against three employees who attempted to enforce their due process rights under the contract; and discriminating against Local 508 Treasurer Javier Rodriguez by demoting him from his position as Lifeguard Coordinator and assigning him out-of-title duties. 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"), the Executive Secretary of the Board of Collective Bargaining ("Executive Secretary") found the amended petition sufficient in part, dismissed Petitioners' NYCCBL §12-306(a)(3) claims with respect to Local 508 Treasurer Rodriguez and one other employee as time barred, and deferred the NYCCBL §12-306(a)(1) and (4) claims to arbitration ("ES Determination"). The Union appealed only the portion of the ES Determination dismissing the retaliation claim pertaining to Union Treasurer Rodriguez. The Board finds that the Union stated a timely claim as to Rodriguez under NYCCBL §12-306(a)(3) but defers the factual question of whether there was an assignment of out-of-title duties in violation of the contract to arbitration. The Board retained jurisdiction over the retaliation issue, to be determined after arbitration, if necessary.

BACKGROUND

The Petition¹

The Union represents employees in the titles of Lifeguard, Lifeguard (DJJ) and Chief Lifeguard. Local 461 represents non-supervisory Lifeguards. Local 508 represents supervisory lifeguards, including Chief Lifeguards who have been assigned to details of Lifeguard Lieutenant, Borough Coordinator, Assistant Coordinator and Citywide Lifeguard Coordinator ("Lifeguard

¹ All facts recounted here are taken from the amended improper practice petition and attached exhibits, and from the parties' collective bargaining agreement.

Coordinator”). These employees are covered by a collective bargaining agreement (“Agreement”) referred to as the Seasonal Unit Agreement.

The Lifeguard Coordinator is the highest position in the Lifeguard Division. The Lifeguard Coordinator job functions and reporting structure are memorialized in Appendix B to the Agreement. Appendix B states DPR “will implement a year-round Lifeguard Coordinator reporting directly to the Deputy Commissioner of Operations [“First Deputy Commissioner”], who will be responsible for all year-round activities, including the school, ordering of supplies and equipment, and other Lifeguard related problems.” (Am. Pet., Ex. A) Article XX of the Agreement spells out a “review or hearing” procedure for employees who have served at least three consecutive years as a Lifeguard or Chief Lifeguard and who have been served with written disciplinary charges, which starts with a Step A conference.² According to the Union, the Step A conference is to be held by the Lifeguard Coordinator. In the summer of 2022, DPR appointed Rodriguez to the position of Lifeguard Coordinator.³ However, it then demoted him after the 2022 summer swimming season.⁴

² The contract language is as follows:

Step A Following the service of written charges, a conference with such employee shall be held with respect to such charges by the Division Head. The employee may be represented at such conference by a representative of the Union. The person designated by the Commissioner of Parks and Recreation (“DPR Commissioner”) to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.

(Am. Pet., Ex. A)

³ Prior to Rodriguez’ appointment, the Lifeguard Coordinator position was filled by Richard Sher, from the 1990s until his retirement in August, 2021.

⁴ We take administrative notice that the season ended on September 11, 2022.

Sometime shortly before November 3, 2022, DPR requested a meeting with the Union and sent it bargaining demands in connection with the upcoming 2023 pool and beach season. According to the Union, among other things, DPR requested “[a]cknowledgement of [the] management right to appoint additional managers in the supervisory chain of command overseeing the lifeguard program, with no required direct[] reporting relationship between the Lifeguard Coordinator and the First Deputy Commissioner” and “[a]cknowledgement that Parks designees outside the lifeguard chain of command may serve as Step [A] hearing officer.” (Am. Pet. ¶¶ 32-33)

The Union alleged that despite the parties not having reached any agreement to change the terms of the Agreement, DPR has begun systematically repudiating the due process provisions of the contract, in violation of NYCCBL § 12-306(a)(1) and (4), and retaliated against employees who attempted to enforce their due process rights, in violation of NYCCBL § 12-306(a)(3). The Union further alleged that DPR retaliated against Rodriguez in violation of NYCCBL § 12-306(a)(3) by demoting him from his position as Lifeguard Coordinator after the 2022 summer swimming season and leaving the position vacant, but nevertheless assigning Rodriguez out-of-title duties that are appropriate only for the Lifeguard Coordinator since October 2022. The Union did not provide specific details or dates regarding the alleged assignment of out-of-title duties. It noted that it had filed an out-of-title grievance on behalf of Rodriguez, as well as a separate grievance contesting DPR’s failure to fill the Lifeguard Coordinator position.

On March 28, 2023, DPR summoned Rodriguez to a meeting with DPR First Deputy Commissioner Iris Rodriguez-Rosa and David Stark. At this meeting, Rodriguez-Rosa and Stark allegedly asked Rodriguez to recertify a DPR Lifeguard who had not completed the certification requirements. Rodriguez refused to do so “without [the lifeguard having] follow[ed] the proper

certification requirements” and as a result “received a hostile response from management.” (Am. Pet. ¶¶ 46-47) The Union alleged that due to his demotion, Rodriguez “should not even be summoned to these high level meetings.” (*Id.*) Rodriguez has requested union representation at “these meetings” due to concerns that the meetings could lead to disciplinary action taken against him. (Am. Pet. ¶ 48).

The Union concluded, “[DPR]’s actions in demoting [Rodriguez] yet continuing to assign him the Lifeguard Coordinator duties without the title nor the compensation, are retaliatory for protected union activity.” (Am. Pet. ¶ 49)

The Executive Secretary’s Determination

On April 28, 2023, the Executive Secretary issued an ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the claim related to Local 508 Treasurer Rodriguez as untimely. The Executive Secretary noted that the Board’s jurisdiction is limited to events that occurred within four months of the filing date, and that any events that occurred prior to November 27, 2023, would be time barred. The Executive Secretary found that the alleged retaliatory action of demoting Rodriguez after the 2022 swimming season and, since October 2022, summoning him to perform duties of the Lifeguard Coordinator, also fell outside the four-month statute of limitations. (ES Determination, at 2) The Executive Secretary noted:

The petition was not pled with greater specificity as to Rodriguez’ demotion date and the dates on which he performed Lifeguard Coordinator duties subsequent to the demotion from that title, and is therefore deficient on that basis. To the extent DC 37 alleges that Rodriguez was asked to perform duties substantially different from those set forth in the job specification for his title, these claims are subject to arbitration under the parties’ collective bargaining agreement.

Id. at 2, n.2

The Appeal

On May 12, 2023, the Union filed an appeal requesting reconsideration of the Executive Secretary's determination that the claims pertaining to Rodriguez were time barred ("Appeal"). The Union clarified that it was not seeking to challenge Rodriguez' demotion, but that it had alleged "discrete, retaliatory acts taken against Javier Rodriguez that occurred within 4 months of filing[.]" (Appeal Letter, at 1) Specifically, the Union clarified that its claim is that DPR engaged in retaliatory conduct by assigning Rodriguez to Lifeguard Coordinator duties "in the couple months prior to the filing[.]" *Id.*

DISCUSSION

"Since no hearing was held, 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." *Local 376, DC 37*, 14 OCB2d 13 (BCB 2021) (quoting *Morris*, 3 OCB2d 19, at 12 (BCB 2010); see also *Witek*, 7 OCB2d 10 at 10 (BCB 2014). In the amended petition, the Union stated that "[s]ince October 2022, [DPR] has regularly summoned Mr. Rodriguez to meetings to perform Lifeguard Coordinator duties" without specifying the exact dates when these assignments occurred. (Am. Pet. ¶ 45) It was not clear from the pleading that the Union was raising the March 28, 2023, meeting as an example of the assignment of out-of-title duties appropriate to the Lifeguard Coordinator. The Union seemingly characterized Rodriguez' objections during the meeting as being about whether the proper certification process had been followed, not about whether the task he had been asked to perform was the exclusive domain of the Lifeguard Coordinator. The Union noted in the amended petition that "[d]ue to [DPR]'s demotion of . . . Rodriguez from Lifeguard Coordinator, he should

not even be summoned to these high level meetings,” but did not explicitly state that during the meeting he was assigned out-of-title duties and focused instead on Rodriguez’ concern that the meetings “could lead to discipline.” (Am. Pet. ¶¶ 47, 48) On this basis, the Executive Secretary reasonably concluded that Petitioner had not identified any facts within the four months preceding the filing of the petition that could support a claim under NYCCBL § 12-306(a)(3).

In its appeal, the Union clarifies that it is alleging that the assignment of out-of-title duties first occurred in October 2022, and continued to reoccur during the four months prior to the filing of the petition, and that it is the assignment of these duties that forms the basis of its discrimination claim as to Rodriguez. Although the amended petition’s statement of the allegation was ambiguous as to whether DPR assigned Rodriguez out-of-title duties during the four months prior to the filing of the petition, the Union’s clarification provides a basis upon which to conclude that it has pled facts sufficient to establish its discrimination claim. Therefore, we conclude that the amended petition can be interpreted to include a claim under NYCCBL 12-306(a)(3) based on the assignment of out-of-title duties to Rodriguez which occurred within the four months prior to the filing of the petition.

To determine whether an action is discrimination or retaliation under the NYCCBL, this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985) and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. To establish a *prima facie* claim of retaliation, a petitioner must demonstrate that 1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee’s union activity; and 2) the employee’s union activity was a motivating factor in the employer’s decision. *See Bowman*, 39 OCB 51, at 18-19; *see also Atl. Mar. Group, Intl. Org. Masters, Mates & Pilots, ILA, AFL-CIO*, 16 OCB2d 15, at 15 (BCB 2023). An essential component of any discrimination claim is the existence of an adverse

employment action. *See L. 376, DC 37*, 14 OCB2d 13, at 6; *Andreani*, 2 OCB2d 40, at 28 (BCB 2009) (“crucial determination in such claims [is] whether a petitioner has alleged an adverse employment action taken by an employer”).

In this case, whether the employer has subjected the employee to any adverse employment action is a question that cannot be resolved without a factual determination of whether DPR violated the contract by assigning Rodriguez out-of-title duties. This specific factual question, as acknowledged by the parties in their Agreement, is best evaluated by an arbitrator. As the Union has filed an out-of-title grievance on Rodriguez’ behalf, we therefore defer to an arbitrator the question of whether DPR violated the Agreement by assigning Rodriguez out-of-title duties during the relevant period. We retain jurisdiction over the improper practice issue of whether DPR retaliated against Rodriguez in violation of NYCCBL §12-306(a)(1) and (3) to determine, if necessary, after the arbitration issue has been resolved.⁵

⁵ Our holding is limited to the unique facts of this specific case and does not establish any practice of deferring NYCCBL § 12-306(a)(3) claims to arbitration.

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 portions of BCB-4514-23 is affirmed, except as to the dismissal of the Union’s NYCCBL § 12-306(a)(3) claim on behalf of Local 508 Treasurer Javier Rodriguez.

Dated: August 3, 2023
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent.

M. DAVID ZURNDORFER
MEMBER

I dissent.

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER