Johnson, 17 OCB2d 3 (BCB 2024)

(IP) (Docket No. BCB-4530-23)

Summary of Decision*:** Petitioner appealed the Executive Secretary's determination dismissing her petition for untimeliness and failure to state a violation of the NYCCBL. Petitioner argued that her petition should be deemed timely because she filed her petition within four months of realizing that she was entitled to a grievance hearing regarding her termination despite previously being told that she did not have grievance rights. The Board found that the Executive Secretary properly deemed the petition untimely and insufficient. Accordingly, the appeal was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SHONDEQUA JOHNSON,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 3333, and
THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On July 28, 2023, Shondequa Johnson ("Petitioner") filed an improper practice petition, *pro se*, against District Council 37, AFSCME, AFL-CIO, Local 3333 ("DC 37 or "Union") and the New York City Department of Parks and Recreations ("DPR" or "City"). Petitioner filed an amended petition on August 7, 2023. Petitioner alleges that the Union violated § 12-306(b)(2) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to bargain in good faith and breaching the duty of fair representation. Specifically, Petitioner alleges that the Union failed to adequately represent her

during her termination review and refused to file a grievance regarding her termination. Petitioner also alleges that DPR breached NYCCBL § 12-306(a)(4) by refusing to bargain in good faith and creating a hostile work environment. 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 dismissed the amended petition on the grounds that: the claims were untimely; the one timely allegation did not state a violation of the NYCCBL; and Petitioner had no standing to raise refusal to bargain claims against the Union or the City ("ES Determination"). Petitioner appealed the ES Determination ("Appeal"), arguing that her petition should be deemed timely because she filed her petition within four months of realizing that she was entitled to a grievance hearing regarding her termination despite previously being told that she did not have grievance rights. The Board finds that the Executive Secretary properly deemed the petition untimely and insufficient. Accordingly, the Appeal is denied.

BACKGROUND

Petitioner was a Job Training Participant ("JTP") in DPR's Parks Opportunity Program ("POP") from April 2022 until her termination on September 6, 2022. The Union is the certified bargaining representative for JTPs. Petitioner previously worked for DPR as a City Seasonal Aide until being terminated in 2019.

The Petition[1]

Between May and September 2022, Petitioner regularly corresponded with various Union representatives and DPR personnel regarding, among other issues, her concerns surrounding alleged unsanitary and unsafe working conditions; unsubmitted timecards; retaliation from co-

[1] All facts recounted here are taken from the amended improper practice petition and attached exhibits.

workers; and time and leave issues. Specifically, in June 2022, Petitioner emailed and called multiple Union representatives to request a transfer following a workplace incident that made her feel unsafe. On July 8, 2022, Petitioner emailed a DPR employee about her supervisor's failure to submit her timecard for approval, which resulted in her paycheck being delayed. On July 9, 2022, she emailed Union Representative Viviana Santiago ("Union Representative") and others, noting that her timecards had not been submitted for three weeks and inquiring as to why the Union Representative had not responded to her prior emails and calls.

On August 10, 2022, Petitioner was issued a Supervisor's Conference Note ("Conference Note") for attendance issues and allegedly falsifying her timesheet following an incident on August 6, 2022. Thereafter, on August 19, 2022, Petitioner emailed the Union Representative regarding various concerns, such as the Conference Note, retaliation and bullying by the supervisor who issued the Conference Note, her desire for the Union to file a grievance regarding the retaliation and bullying, improper paycheck deductions made by the supervisor, her request that the supervisor be brought up on charges, and unsafe and stressful working conditions.

On September 1, 2022, Petitioner's co-workers submitted statements to DPR alleging that Petitioner threatened to fight her supervisor regarding the Conference Note. On September 6, 2022, Petitioner was terminated for making the alleged threat.

On October 17, 2022, a termination review was held with DPR Review Officer T.J. Harris ("Review Officer") and the Union Representative.[2] Petitioner asserts that she explained to the Review Officer that she never made the alleged threat and that her co-workers conspired to write false statements against her. Petitioner avers that the Review Officer disregarded her testimony.

[2] Petitioner requested a new Review Officer because Harris previously conducted the termination review following her removal as a City Seasonal Aide in 2020. However, Petitioner's request was denied, and the review proceeded.

Petitioner alleges that she also explained to the Review Officer that she requested a grievance hearing to speak about ongoing retaliation and work issues. However, she asserts that the Union Representative interrupted her and told her that she was not "allowed a grievance." (Amended Pet., Factual Statement ¶ C) Petitioner requested a copy of the contract from the Union Representative and asked where in the contract it stated that she was not entitled to a grievance hearing. According to Petitioner, the Union Representative stated that she would not give her a copy of the contract because Petitioner should have her own copy. Overall, Petitioner alleges that the Union Representative failed to provide fair and unbiased representation during her termination review and that DPR failed to grant her a fair hearing.

On October 31, 2022, the Union Representative informed Petitioner that her termination was upheld and that she would not get her job back. On November 16, 2022, Petitioner received a copy of the final determination. Petitioner asserts that DPR Labor Relations Deputy Director K.C. Reilly informed her that the decision was final, that her termination would stand, and that POP employees are only entitled to a termination review, not a grievance hearing.[3]

On June 23, 2023, Petitioner received a letter from DPR's Office of Payroll & Timekeeping, enclosing a check for a lump sum payment issued pursuant to the 2021-2026 Memorandum of Agreement ("MOA") entered into between the Union and the City.[4] Petitioner contends that her eligibility for this payment pursuant to the MOA is evidence that the Union had the right to file a grievance regarding her termination as a JTP. Therefore, she argues that the Union's failure to file such a grievance violated the duty of fair representation.

---

[3] We take administrative notice of the JTP Agreement. Pursuant to the JTP Agreement, the definition of a grievance does not include alleged wrongful disciplinary actions.

[4] We take administrative notice of the 2021-2026 MOA. The MOA is an economic agreement broadly applicable to DC 37-represented employees, which does not amend the grievance rights afforded by individual unit agreements.

The Executive Secretary's Determination

On August 17, 2023, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the petition for untimeliness and failure to state a claim. With respect to timeliness, she noted that because the petition was filed on July 28, 2023, any alleged violations about which Petitioner knew or should have known that occurred prior to March 27, 2023, were untimely. She further found that although the issuance of the June 23, 2023 letter and check from DPR fell within the statutory time period, the petition did not "allege that anything about the letter [was] improper nor [did] it establish a timely claim against [the] Union or DPR." (ES Determination, at 2) Moreover, in addition to being untimely, the Executive Secretary explained that individual employees, such as Petitioner, lack standing to raise refusal to bargain claims against the Union or DPR because the duty to bargain in good faith only runs between the union and the public employer. Accordingly, the petition was dismissed.

The Appeal

On August 29, 2023, Petitioner appealed the ES Determination. Petitioner asserts that her petition was timely because she did not realize until she received the June 2023 letter and payment from DPR that she was entitled to file a grievance challenging her termination pursuant to the 2021-2026 MOA. Indeed, she avers that, prior to June 2023, Union and DPR representatives repeatedly told her that, as a JTP, she was only entitled to a termination review. In addition, Petitioner reiterates her contentions that the Union failed to bargain in good faith and file grievances on her behalf, whereas DPR failed to bargain in good faith, submit her timecard in a timely manner, and protect her from workplace harassment and violence.

DISCUSSION

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)).

As noted in the ES Determination, the statute of limitations for filing an improper practice petition is set forth in NYCCBL § 12-306(e), which provides, in relevant part, as follows:

> 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 . . . .

See also OCB Rule § 1-07(b)(4). Consequently, "[a]ny claims antedating the four[-]month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (internal quotation marks omitted) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)). Pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-12(f), the four-month period begins the day after the alleged violation occurred.

The petition in this matter was filed on July 28, 2023. Based on this filing date, Petitioner's claims must have arisen on or after March 27, 2023, in order to be timely. Accordingly, we affirm the Executive Secretary's conclusion that all claims arising prior to March 27, 2023, are untimely, including any claims against the Union or DPR related to Petitioner's working conditions throughout 2022 and her JTP termination review in October 2022.

Moreover, although Petitioner received the June 23, 2023 letter and payment from DPR pursuant to the 2021-2026 MOA within the four-month statutory filing period, we affirm the Executive Secretary's conclusion that she has failed to state a timely claim regarding the letter or

the Union's failure to file a grievance regarding her termination as a JTP.[5] Indeed, Petitioner admits that the Union and DPR repeatedly told her that she was only entitled to a termination review as a JTP, and the record shows that she knew or should have known prior to March 2023 that the Union would not be filing a grievance on her behalf regarding her termination. *See* NYCCBL § 12-306(e); OCB Rule § 1-07(b)(4). To the extent Petitioner avers that she only became aware of the alleged right to file a grievance regarding her September 2022 termination upon receiving the June 2023 letter and payment pursuant to the MOA, we do not find support for an equitable tolling of the statute of limitations. *See Garg*, 6 OCB2d 35, at 10 (BCB 2013) ("[T]he time period within which to file a petition begins when the wrongful act occurred, not when the effect of the act is realized") (citations omitted); *Buttaro*, 13 OCB2d 1, at 11 (BCB 2020) (rejecting the petitioner's argument that his otherwise untimely claims against the union should be deemed timely because his discovery of new information within the statutory four-month filing window allegedly provided actual knowledge of violations of the duty of fair representation), *affd.*, *Matter of Buttaro v. New York City Office of Collective Bargaining*, Index No. 152489/2020 (Sup. Ct. N.Y. Co. Apr. 23, 2021) (Engoron, J.); *Buttaro*, 12 OCB2d 29, at 10-11 (BCB 2019).

In addition to being untimely, we affirm the Executive Secretary's conclusion that Petitioner lacks standing to raise refusal to bargain claims under NYCCBL §§ 12-306(a)(4) and (b)(2). *See, e.g.*, *Lawtone-Bowles*, 15 OCB2d 4, at 8 (BCB 2022); *Proctor*, 3 OCB2d 30, at 11 (BCB 2010). Indeed, the Board has repeatedly held that the duty to bargain in good faith only runs

---

[5] Furthermore, even if Petitioner's claim regarding the Union's failure to file a grievance regarding her termination were timely, Petitioner has failed to establish a source of right for such a grievance since JTPs have no right to grieve claimed wrongful disciplinary actions pursuant to the JTP Agreement and the 2021-2026 MOA does not provide additional grievance rights. *See Ibreus*, 15 OCB2d 30, at 10 (BCB 2022) ("[W]here a petitioner complains that a union failed to take a specific action and in doing so allegedly breaches the duty of fair representation, the petitioner must first demonstrate a source of right to the action sought.") (internal quotation marks omitted) (quoting *Howe*, 73 OCB 23, at 10 (BCB 2007)).

between the public employer and union. *See Witek*, 7 OCB2d 10, at 10-11 (BCB 2014) ("[T]he duty to bargain in good faith runs between the employer and the [u]nion and is enforceable by each of those parties under NYCCBL § 12-306(b)(2) (breach of a union's duty) and § 12-306(a)(4) (breach of employer's duty).") (internal quotation marks omitted) (quoting *Brown*, 75 OCB 30, at 7-8 (BCB 2005)); *McAllan*, 31 OCB 15, at 15 (BCB 1983) (the union's duty to bargain in good faith is a duty "owed to the public employer and not the union's members").

Accordingly, we affirm the dismissal of the 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-4530-23 is affirmed, and the Appeal is denied.

Dated: February 21, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER