

**Payne, 17 OCB2d 11 (BCB 2024)**

(IP) (Docket No. BCB-4546-24)

**Summary of Decision:** Petitioner appealed the determination of the Executive Secretary of the Board of Collective Bargaining dismissing a portion of his improper practice petition as untimely and for failure to plead facts sufficient to establish a violation of the NYCCBL. Petitioner argued that his claims were timely and that he had pled sufficient facts to establish that the UFA and the FDNY violated the NYCCBL. The Board found that the Executive Secretary properly dismissed all but two of the claims as untimely or insufficient and denied the appeal. *(Official decision follows.)*

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**WILLIAM H. PAYNE III,**

*Petitioner,*

*-and-*

**UNIFORMED FIREFIGHTERS ASSOCIATION, THE CITY OF  
NEW YORK, and NEW YORK CITY FIRE DEPARTMENT,**

*Respondents.*

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**INTERIM DECISION AND ORDER**

On January 29, 2024, Petitioner William H. Payne III filed a verified improper practice petition, amended on February 23, 2024, asserting that the Uniformed Firefighters Association (“Union” or “UFA”) violated § 12-306(b)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) and the City of New York (“City”) and New York City Fire Department (“FDNY”) violated § 12-306(a)(1), (2) and (3)

of the NYCCBL.<sup>1</sup> Petitioner alleged a history of mistreatment and racial discrimination against him by the FDNY, failure of the FDNY to respond to his requests for information, and failure of the Union to respond to his complaints and to bargain policies to remedy the FDNY's alleged history of racial discrimination against Black Firefighters. 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") dismissed the majority of the claims in the petition on the ground that they were untimely or insufficient to establish a violation under the NYCCBL, with the exception of claims that the Union had breached its duty of fair representation by not responding to or processing grievances Petitioner filed on August 18 and 31, 2023, and not responding to his October 4, 2023 follow-up inquiry regarding those grievances.<sup>2</sup> ("ES Determination"). On March 19, 2024, Petitioner appealed the ES Determination ("Appeal"). The Board finds that the Executive Secretary properly dismissed all but two claims and denies the Appeal.

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<sup>1</sup> Petitioner also alleged violations of NYCCBL § 12-306(a)(4) and (5); (b)(2); (c)(1), (2), (3), (4) and (5); (d) and (e). NYCCBL § 12-306(a)(4) and (5), (b)(2), and (c) apply exclusively to the bargaining relationship between a union and the employer; individual employees do not have standing to bring claims under these provisions. *See e.g. Johnson*, 17 OCB2d 3, at 7 (BCB 2024); *Jones*, 11 OCB2d 3, at 8-9 (BCB 2018); *Benjamin*, 4 OCB2d 6, at 17 (BCB 2011). NYCCBL § 12-306(d) and (e) are procedural provisions that do not give rise to a cause of action.

<sup>2</sup> The duty of fair representation claims that were deemed sufficient are proceeding separately under the same docket number.

## **BACKGROUND**

### **The Petition**<sup>3</sup>

Petitioner was employed as a Firefighter by the FDNY until September 26, 2023. He was represented by the Union for purposes of collective bargaining. Petitioner began his training at the Fire Academy on March 29, 2022, and graduated on August 7, 2022. During his time at the Academy, Petitioner alleges that he was ordered to come to the training facility before the start of his shift but was not compensated for the additional hours. At an unspecified time, Petitioner learned that non-Black Firefighters were paid for all hours worked, whereas Black Firefighters, such as himself, were not.

Upon graduating from the Fire Academy, Petitioner was assigned to Ladder 24. He was directed to bring a cake to his first day and to cook, as were other Black Firefighters, while the non-Black probationary Firefighter was not asked to bring a cake or cook but was instead given a tour of the firehouse. Throughout his time at Ladder 24, Petitioner alleges that he was asked to be at work two hours before his shift but was not compensated for the additional hours. On an unspecified date, Petitioner began complaining to the Union about his mistreatment and about not being paid for all hours worked but asserts that he received no response. Petitioner alleges the Union and the FDNY colluded in failing to pay him for all hours worked and in subjecting him to race-based hazing.

In March 2023, Petitioner had a text exchange with Chris Nock, a Firefighter with Ladder 24, regarding the “mutuals” policy.<sup>4</sup> Petitioner states that Nock gave incorrect or misleading

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<sup>3</sup> All facts recounted here are taken from the original and amended improper practice petition and the attached exhibits.

<sup>4</sup> According to Petitioner, a mutual refers to when a Firefighter “exchang[es] a tour with another Firefighter[.]” (Am. Pet. ¶ 4)

information about the policy “that was designed to result in [Petitioner’s] termination from the FDNY.” (Am. Pet. ¶ 5) Petitioner later learned that Nock was a Union delegate, though Nock never identified himself as such to Petitioner. On April 19, 2023, Petitioner spoke with his Commanding Officer (“CO”) about the mutuals policy and asked for clarity and a copy of the policy. Petitioner contends that the CO was not helpful and did not provide Petitioner with a copy of the policy. According to Petitioner, the Union and the FDNY colluded to deny him equal opportunities to work using the mutuals system.

In April and May 2023, Petitioner began inquiring with the FDNY about Paid Family Leave and leave pursuant to the Family Medical Leave Act (“FMLA”). He received inadequate or unhelpful responses. He was nevertheless approved for FMLA leave on May 22, 2023. Petitioner asserts that after he began using his FMLA leave, his colleagues at Ladder 24 began making racist and harassing comments accusing him of abusing leave and being a poor worker.

On June 21, 2023, Petitioner began inquiring with the FDNY about the official grievance form and received inadequate or unhelpful responses. On July 14, 2023, Petitioner submitted a Freedom of Information Law (“FOIL”) request to the FDNY for security camera footage that would corroborate the hours Petitioner had worked at Ladder 24. According to Petitioner, the FDNY did not provide the requested information and stopped providing status updates on the request in October 2023.

On August 18 and 31, 2023, Petitioner emailed written grievances to representatives of the FDNY and the Union.<sup>5</sup> He followed up with the FDNY on October 4, 2023, but did not receive any response from either the FDNY or the Union. Without reference to any specific adverse action,

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<sup>5</sup> Petitioner attached copies of the grievances and the August 31 email. Though not on traditional grievance forms, the Petitioner identified them as “formal grievances” in the subject line of the email.

Petitioner alleges that the FDNY retaliated and discriminated against him for filing grievances.

Citing news articles about a lawsuit that the City had agreed to settle in 2014 regarding systemic discrimination at the FDNY and about ongoing discrimination issues thereafter, Petitioner asserts that the Union had waived its opportunity to bargain over practices of the FDNY that had a negative, disparate impact on Black Firefighters.

Petitioner was terminated by the FDNY on September 26, 2023.<sup>6</sup> He was a probationary employee at the time.

### **The Executive Secretary's Determination**

On March 6, 2024, the Executive Secretary issued the ES Determination pursuant to OCB Rule § 1-07(c)(2), dismissing the petition, except for claims that the Union violated the duty of fair representation by failing to process or respond to grievances Petitioner filed on August 18 and 31, 2023. As a threshold matter, the Executive Secretary noted that only incidents of alleged improper practices that were first known or should have been known to Petitioner on or after September 28, 2023, were properly within the statute of limitations. The Executive Secretary found most of the allegations untimely. In addition, she found that certain claims that did fall within the four-month statute of limitations did not state a cause of action under the NYCCBL.

With respect to Petitioner's claims against the FDNY, the Executive Secretary noted that the majority of events Petitioner cited had occurred prior to September 28, 2023. The Executive Secretary further noted that the Board's jurisdiction with respect to complaints against the FDNY pursuant to NYCCBL 12-306(a)(3) is limited to allegations of discrimination or retaliation on the

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<sup>6</sup> Petitioner's original and amended petition indicated that he had been terminated but did not include the date of his termination. He included it, for the first time, in his Appeal. Although this fact was not before the Executive Secretary at the time of her determination, for the sake of clarity, we have included it here.

basis of union activity, and thus the Board does not have jurisdiction to evaluate Petitioner's claims of racial discrimination. The Executive Secretary found that while one of Petitioner's claims against the FDNY was timely filed, specifically that the FDNY did not respond to Petitioner's October 4 inquiry about his grievances, Petitioner did not identify any facts to suggest that this was discrimination grounded in anti-union animus. Thus, the Executive Secretary dismissed this claim.

To the extent Petitioner's claims against the Union included allegations that the Union failed to act and denied Petitioner representation on issues that were not encompassed within the August 2023 grievances, the Executive Secretary found that Petitioner did not allege facts with sufficient specificity to support a claim under the NYCCBL. The Executive Secretary noted that to the extent that Petitioner alleged the Union failed to bargain over practices at the FDNY that have a disparate impact on Black Firefighters, Petitioner did not have standing to bring this claim and, notwithstanding, had not identified any such incidents on or after September 28, 2023.

### **The Appeal**

On March 19, 2024, Petitioner filed an appeal of the ES Determination. In the Appeal, Petitioner argues that all his claims should be found timely because the Union did not educate him about his rights under the NYCCBL, and thus he could not have been aware of the facts underlying his claims within four months of their occurrence. Petitioner adds that the FDNY's failure to compensate him for all hours worked is a continuing violation and "[u]ntil all compensation owed is appropriately remitted, the money owed compounds rendering all claims [related to underpayment] . . . timely." (Appeal at 1) He specifies, for the first time, that his last paycheck was dated October 13, 2023, and adds that he was not paid correctly for his last three days of work.

He asserts that to the extent that the FDNY's alleged acts of racial discrimination included violations of the collective bargaining agreement, they were inherently motivated by anti-union animus. Petitioner asserts, for the first time on appeal, that the FDNY subjected him to an unfounded disciplinary hearing and terminated him once it became aware that he had filed a grievance with the Union. Petitioner further adds, for the first time, that he copied the Union on all complaints he made to the FDNY accusing the FDNY of violating its policies and procedures, New York City administrative law, and New York State and federal laws, and thus it was his union activity that motivated the termination.

Petitioner argues that by not adhering to the terms of the collective bargaining agreement and by refusing to respond to his FOIL request and his request for grievance forms, "[t]he FDNY interfered with/restrained [his] ability to assist the UFA in pursuit of . . . the August 2023 grievances." (Appeal at 1) Petitioner argues that the FDNY dominated the Union delegate for Ladder 24 and caused the delegate to give bad or inadequate representation starting in November 2022. Specifically, Petitioner alleges the delegate told Petitioner to follow an unwritten policy and adds, for the first time on appeal, that the delegate spread rumors about him to others in the company.

Petitioner asserts, for the first time on appeal, that the Union and the FDNY actively conspired to "defy the [s]ettlement" of a federal lawsuit addressing systemic racial discrimination "in [s]pirit and [f]unction" by hiring a diverse class of Firefighters to meet the settlement's requirements, but then selectively enforcing house rules, policies and procedures, and other unsubstantiated claims against Black Firefighters to illegally terminate them during their

probationary periods.<sup>7</sup> (Appeal at 6)

Petitioner argues that the Union consistently denies “appropriate, fair, and accurate counsel” to probationary Firefighters who are Black. (Appeal at 6) Petitioner asserts that the UFA had no intention of representing him competently in any forum and that it conspired with the FDNY to terminate him.

### **DISCUSSION**

“Recognizing that a *pro se* Petitioner may not be familiar with legal procedure, the Board takes a liberal view in construing a *pro se* Petitioner’s pleadings.” *Bonnen*, 9 OCB2d 7, at 15 (BCB 2016) (quoting *Rosioreanu*, 1 OCB2d 39, at 2 n. 2 (BCB 2008), *affd.*, *Matter of Rosioreanu v. NYC Off. of Collective Bargaining*, Index No. 116796/08 (Sup. Ct. N.Y. Co.) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept.), *lv. denied*, 17 N.Y.3d 702 (2011)) (internal quotation omitted).

The “purpose of an appeal is to determine the correctness of the Executive Secretary’s decision based upon the facts that were available . . . in the record as it existed at the time of [her] ruling.” *Buttaro*, 12 OCB2d 23, at 13 (BCB 2019), *affd.*, *Matter of Buttaro v. New York City Off. of Collective Bargaining*, Index No. 152489/2020, 2021 WL 1624394 (Sup. Ct. N.Y. Co. Apr. 23, 2021) (Engoron, J.) (quoting *Babayeva*, 1 OCB2d 15, at 10 (BCB 2008)) (citations omitted). “A petitioner may not add new facts at a later date to attack the basis of the Executive Secretary’s determination.” *Babayeva*, 1 OCB2d 15, at 10; *see also Cooper*, 69 OCB 4, at 5 (BCB 2002).

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.” *Buttaro*, 12 OCB2d 23, at 9-10 (BCB 2019) (quoting

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<sup>7</sup> Upon information and belief, Petitioner is referring to a settlement reached in 2014 as part of *U.S. v. City of New York (FDNY)*, 07-cv-2067.



*Raby*, 71 OCB 14, at 9-10 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.); *see also Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd. sub nom.*, *Matter of Mahinda v. City of New York*, Index No. 117487/09 (Sup. Ct. N.Y. Co.) (Scarpulla, J.), *affd.*, 91 A.D.3d.564, 565 (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.” *Buttaro*, 12 OCB2d 23, at 10 (quoting *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (citations omitted)).

As a threshold matter, because they were raised for the first time on appeal and were not part of the record before the Executive Secretary at the time of her decision, we cannot consider Petitioner’s allegations that the FDNY subjected him to an unfounded disciplinary hearing, terminated him once they became aware of his grievance filing, retaliated against him because he copied the Union on complaints he submitted to the FDNY, paid him incorrectly for his last three days of work, that the Union and the FDNY conspired to “defy the [s]ettlement” of the federal lawsuit pertaining to systemic racial discrimination, or that a Union delegate spread rumors about Petitioner. (Appeal at 6) *See, e.g., Babayeva*, 1 OCB2d 15, at 10; *Cooper*, 69 OCB 4, at 5. We note, however, that except for Petitioner’s claims about inaccuracies in his October 13, 2023, paycheck, had these allegations been asserted in the petition, they would have been untimely and subject to dismissal.<sup>8</sup>

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<sup>8</sup> Petitioner’s allegation that his October 13, 2023, paycheck was incorrect was similarly subject to dismissal. There is no evidence that the alleged inaccuracies constituted discrimination or retaliation based on union activity. To the extent Petitioner alleges that the incorrect paycheck constitutes a contractual violation, we do not have jurisdiction to address contract violations under these circumstances. *See, CIR*, 67 OCB 40, at 5-6 (BCB 2001) (“[T]he board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.”).

The Executive Secretary correctly found that most of the incidents alleged by Petitioner to violate the NYCCBL cannot support a cause of action because they were not timely filed. Specifically with respect to the FDNY, the record reflects that prior to September 28, 2023 Petitioner was aware of his claims that he had not been paid for all hours worked; that the mutuals policy was being inequitably applied to him and that he was not being given a written copy of it; that the FDNY had been unresponsive to or unhelpful with his leave requests, his FOIL request, and his request for a grievance form; that he had been treated in a discriminatory manner by his colleagues and superiors; and that he had been terminated.

Petitioner asserts that he “had no knowledge of the OCB, its jurisdiction, rules or regulations until the date of filing” of his petition, and that the statute of limitations should therefore accrue as of January 29, 2023. (Am. Pet. at 1) However, it is well established that “the date a petitioner becomes aware of the legal theory supporting a right of action does not commence the statute of limitations period.” *Buttaro*, 12 OCB2d 29, at 10-11 (BCB 2019); *see also Phelan*, 12 OCB2d 35, at 7 (BCB 2019) (holding “the fact that Petitioner was unaware until later that he could file a breach of the duty of fair representation claim before the Board is not a basis upon which the statute of limitations may be tolled.” (citations omitted)); *Garg*, 6 OCB2d 35, at 10 (BCB 2013); *Cherry*, 4 OCB2d 15, at 11 (BCB 2011). The Board’s approach is consistent with the legal principal that “[e]xcept in cases of fraud where the statute expressly provides otherwise, the statute of limitations starts to run when the cause of action accrues even though the plaintiff may be ignorant of the existence of the injury or unaware that they have a cause of action.” 75A N.Y. Jur. 2d Limitations and Laches § 264.

We also concur with the Executive Secretary that notwithstanding the statute of limitations, the complaints Petitioner raised with respect to the FDNY were outside the Board’s jurisdiction,

as they relate to discrimination on the basis of race. OCB does not have jurisdiction to remedy acts of discrimination other than those based on union activity. *See* NYCCBL § 12-309; *Holmes*, 4 OCB2d 14, at 14 (BCB 2011) (claims of “discrimination based on race or gender may be actionable under other statutes, but do not constitute improper practices under the NYCCBL, to which our jurisdiction is limited”); *Vazquez*, 75 OCB 36, at 11 (BCB 2005) (“[T]he Board lacks statutory authority to consider claims that allege a violation of a statute other than our own, as they do not raise issues that are within our jurisdiction.”).

We further agree with the Executive Secretary that Petitioner did not set forth facts to show that the alleged actions taken by the FDNY on or after September 28, 2023, constituted retaliation based on Petitioner’s union activity. The sole timely complaint against the FDNY was that it did not respond to Petitioner’s follow up inquiry about the status of his grievances. This, however, is not an adverse employment action, as it did not affect the terms and conditions of Petitioner’s employment, and thus does not meet the standard for actionable retaliation under the NYCCBL. *See L. 376, DC 37*, 14 OCB2d 13, at 6 (BCB 2021); *Andreani*, 2 OCB2d 40, at 28 (BCB 2009) (a “crucial determination in such claims [is] whether a petitioner has alleged an adverse employment action taken by an employer”).

With respect to Petitioner’s claims against the Union, we agree with the Executive Secretary that Petitioner did not plead sufficient facts to support a timely claim that the Union colluded with the FDNY to deny him pay or opportunities to work pursuant to the mutuals policy. Petitioner’s allegation that a Union delegate deliberately gave him incorrect or misleading information about the mutuals policy in order to set him up for termination is also insufficient to set forth a claim under the NYCCBL. The petition asserts only conclusory and speculative claims but neither explains the relationship between the alleged misleading information and Petitioner’s

eventual termination, nor sets forth facts supporting collusion. Likewise, Petitioner's allegation that the Union discriminates against its Black bargaining unit members in its negotiations is insufficient. He set forth no specific facts from on or after September 28, 2023, related to these claims that could be construed as a violation of the duty of fair representation. The Board has long held that conclusory and speculative allegations will not support a *prima facie* claim that a union has breached its duty of fair representation. *See, e.g., D'Onfrio*, 79 OCB 26, at 13 (BCB 2007) (dismissing a claim that the City and Union colluded because the allegation was speculative and conclusory); *Gertkis*, 77 OCB 11, at 13 (BCB 2006) (allegation that Union attorney's conduct at arbitration showed she colluded with the City attorney was speculative and conclusory, and thus did not state a claim). Moreover, to the extent that Petitioner intended to claim the Union violated its duty to bargain in good faith, individual union members do not have standing to bring such claims. *See Johnson*, 17 OCB2d 3, at 7 (BCB 2024).

The Executive Secretary correctly found that the only timely and sufficiently pled claims were that the Union breached its duty of fair representation by not responding to or processing grievances Petitioner filed on August 18 and 31, 2023, and not responding to his October 4, 2023, follow-up inquiry regarding those grievances. In reaching this conclusion, we make no findings as to the merits of those remaining claims.

For these reasons, we affirm the Executive Secretary's Determination 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-4546-24, except for claims that the Union breached its duty of fair representation by not responding to or processing grievances Petitioner filed on August 18 and 31, 2023, and not responding to his follow-up October 4, 2023, inquiry regarding those grievances, is affirmed, and the appeal is denied.

Dated: May 9, 2024  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

CAROLE O’BLENES  
MEMBER

PETER PEPPER  
MEMBER