

¹ Plaintiff responded on February 22, 2016, and Defendants replied on March 7, 2016.

STANDARD

A motion asserting a defense under Federal Rule of Civil Procedure 12(b) must be raised by the party before filing a responsive pleading.² According to Federal Rule of Civil Procedure 12(b)(6), a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."³ Generally, when considering such a motion, the Court must first identify the elements of a claim and identify the items the Plaintiff must sufficiently plead.⁴ The Supreme Court of the Virgin Islands has explained that "a claim requires a complaint with enough factual matter (taken as true) to suggest the required element."⁵ Thereafter, the Court can liberally construe the pleadings to the extent permitted by the pleading requirements of Federal Rule of Civil Procedure 8⁶ and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.⁷ While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation."⁸

² FED. R. CIV. P. 12; *see Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015) ("[T]he Court relies on the principles espoused in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and construes pleading requirements under Rules 8(a) and 12(b)(6) of the Federal Rules Civil Procedure. Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7....").

³ FED. R. CIV. P. 12(b)(6).

⁴ *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 458 (V.I. 2013).

⁵ *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011); *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 494 (V.I. 2008) (citations and internal quotations omitted).

⁶ *Iqbal*, 556 U.S. at 678 ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁷ *Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649-50 (V.I. 2011) (internal quotations and citations omitted); *see also Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom* ("[I]n considering a motion to dismiss under Rule 12(b) (6), the Court must accept as true the well-pleaded allegations in the complaint [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . .") (internal citations omitted).

⁸ *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. Ct. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

The Supreme Court of the Virgin Islands has further instructed that “[t]he plausibility determination is a ‘context-based’ determination which should be guided by the court’s ‘judicial experience and common sense.’”⁹ “Plausibility requires that the plaintiff allege facts that are more than simply ‘consistent with a defendant’s liability’ and must permit the court to infer more than the mere possibility of misconduct.”¹⁰ Only after satisfying this multi-step analysis can a party survive a motion to dismiss.

ANALYSIS

Plaintiff asserts first that Arbitrator Klecger violated the forty-five (45) day requirement for issuing a decision under Article V, Section 2 (C) of the Collective Bargaining Agreement and that Arbitrator Kleeger exceeded his powers under Section 10(a)(4) of the Federal Arbitration Act (“FAA”). Defendants contend that Callwood has failed to state a cause of action upon which relief can be granted in his Complaint because the Arbitrator did not exceed his authority or violate the CBA in his decision and because Plaintiff seeks extraordinary relief from the Court outside the scope of the CBA.

The Superior Court has jurisdiction over the “violation of contracts between a public employer and an exclusive representative, or between labor organizations... without respect to the amount in controversy or without regard to the citizenship of the parties.”¹¹ Nevertheless, “plaintiffs suing government agencies may be statutorily or judicially required to first exhaust any

⁹ *Joseph*, 54 V.I. at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)) (quoting *Iqbal*, 129 S. Ct. at 1950).

¹⁰ *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949).

¹¹ 24 V.I.C. § 383 (“Suits for violation of contracts between a public employer and an exclusive representative, or between labor organizations, may be brought in any court of this Territory having jurisdiction of the parties ... without respect to the amount in controversy or without regard to the citizenship of the parties.”); *Joseph*, 54 V.I. at 651 (The Legislature “has expressly conferred the Superior Court with jurisdiction over all civil actions, including lawsuits alleging violations of collective bargaining agreements.”) (citing 4 V.I.C. § 76(a)).

available administrative remedies before seeking redress through the Court.”¹² “Exhaustion in such cases is discretionary,” but the court may require the exhaustion of all administrative remedies depending on the circumstances of the case.¹³

Plaintiff alleges that “[n]o prior application for relief requested in this complaint has been made in any forum. All administrative remedies have been exhausted in that Plaintiff Callwood has pursued all avenues in the parties [sic] Collective Bargaining Agreement.”¹⁴ This, however, is a legal conclusion couched as a factual allegation, which the Court is not bound to accept as true. Therefore, while the Court has discretion, the Complaint does not allege any facts regarding the administrative remedies from the CBA that were exhausted prior to the institution of this judicial proceeding.

Additionally, Plaintiff asks the Court to vacate the arbitration award because of the Arbitrator’s failure to issue a decision within forty-five (45) days, claiming this is a breach of an express term of the CBA.¹⁵ Defendants argue that nothing in the contract provides for an Arbitrator’s decision to be vacated for failure to render a decision within that time limit.

To establish a claim for breach of contract, a party must plead that a contract existed, that there was a duty created by the contract, that such duty was breached, and that the party suffered damages as a result of the breach.¹⁶ Here, the CBA establishes that the parties shall “select an arbitrator from a list of five arbitrators from either PERB or the American Arbitration

¹² *Pate v. Gov’t of the V.I.*, 2014 V.I. LEXIS 112, *14 (V.I. Super. Ct., Dec. 11, 2014) (citations omitted).

¹³ *Id.* at 10-11.

¹⁴ Compl. ¶ 4.

¹⁵ See Compl. ¶¶ 33-36; see Ex. A, CBA Article V, Section 2 (C).

¹⁶ *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *9 (V.I. Super. Ct., Dec. 18, 2015) (“Given that a plaintiff in the Virgin Islands has had to prove the same elements for a breach-of-contract claim that it would have to prove in any other jurisdiction in the United States, the soundest rule for the Virgin Islands is to perpetuate the rule stated by the Supreme Court of the Virgin Islands in *Chapman v. Cornwall*, having now subjected same to a Banks analysis.”).

Association.”¹⁷ Callwood relies on Article V, Section 3, which states “the Arbitrator shall not have the authority to add, subtract, nor modify the written provisions of this Agreement,” to further bolster his argument that the Arbitrator’s award needs to be vacated for his failure to render a decision within forty-five (45) days. Although Plaintiff states that “[t]he CBA required the Arbitrator to issue a decision no later than August 29, 2015”¹⁸ and that “Arbitrator Kleegeer failed to render a decision within 45 days despite repeated requests that he do so,”¹⁹ Callwood has not alleged any facts to indicate that the forty-five (45) day deadline was in fact binding on the Arbitrator, since the Arbitrator was not a party to the CBA.²⁰ Further, Plaintiff has failed to allege facts that establish that Plaintiff suffered harm as a result of the delay of the Arbitrator’s decision.

Additionally, Plaintiff attacks the Arbitration award based on the standards of the Federal Arbitration Act, 9 U.S.C. §10(a)(1)-(4), while Defendant requests dismissal because Callwood failed to allege facts to show that the Arbitrator was biased in his decision.²¹ It is questionable whether the FAA applies in this jurisdiction.²² In *Gov’t of the V.I. v. United Indus., Transp., Prof. & Gov’t Workers of N.A.*,²³ the Supreme Court of the Virgin Islands reiterated that “the FAA is premised on Congress’s power to regulate interstate commerce — and not Congress’s plenary

¹⁷ See Def.’s Motion to Dismiss, Exhibit A, Article V, Section 2 (B).

¹⁸ Compl. ¶ 35.

¹⁹ Compl. ¶ 36.

²⁰ On July 14, 2015, the parties commenced arbitration. Plaintiff alleges that based on Article V, Section 2 (C) of the CBA, the Arbitrator was required to issue a decision within 45 days, or by August 29, 2015.

²¹ “The scope of judicial review, therefore, is whether the arbitrator acted in manifest disregard of the law, not whether the award was made in error.” Def.’s Mot. to Dismiss, at 3 citing *Bouton v. Gov’t of the V.I.*, 28 V.I. 211 (3d. Cir. 1993).

²² See *Gov’t of the V.I. v. United Indus., Transp., Prof. & Gov’t Workers of N.A.*, No. 2015-0060, __ V.I. __, __, 2016 V.I. Supreme LEXIS 2, at *14-17 n.3 (V.I. Jan. 13, 2016) (“But even if we were to overlook the Union’s failure to comply with our rules, its argument clearly lacks merit. To the extent the FAA even applies to this matter, this Court previously distinguished between the substantive and procedural aspects of the FAA, and concluded that the provisions of the FAA that merely establish procedures in the federal system — such as those pertaining to jurisdiction, or that establish filing deadlines — do not preempt local law.” *Allen v. HOVENSA, LLC.*, 59 V.I. 430, 435 (V.I. 2013); see also *V.I. Water & Power Auth. v. V.I. Water & Power Auth., Prof. & Tech. Emples. Union*, 2016 V.I. LEXIS 34, *4-7 (V.I. Super. Ct., Apr. 14, 2016).

²³ No. 2015-0060, __ V.I. __, __, 2016 V.I. Supreme LEXIS 2, at *14-17 n.3 (V.I. Jan. 13, 2016).

powers under the territorial clause,” and thus “a contract comes within the purview of the FAA only when an interstate nexus is shown.”²⁴ Further, the court recognized that “some courts have held that section 10 of the FAA is among the procedural provisions of the FAA that do not apply to state and territorial courts even if an action otherwise comes within the purview of the FAA, unless agreed to in the arbitration agreement.”²⁵ Nevertheless, the court simply held that the FAA did not apply in that particular case and, instead, reviewed the Arbitrator’s decision based on whether the arbitrator applied the terms of the CBA rather than imposing his own brand of justice.²⁶ Here, neither party alleges that the CBA incorporated the FAA as a term of the contract, or that the CBA involved commerce.²⁷ Accordingly, the Court reviews the arbitrator’s decision to determine whether he acted within the terms of the parties’ CBA or exceeded his authority.²⁸

While Callwood alleges that the Arbitrator ignored a conflict of interest created by former police commissioner Rodney Querrard, that Ms. Brooks recanted her statement that she was assaulted, and that the criminal charges against Plaintiff were dismissed, Plaintiff fails to cite to a violation of a specific portion of the CBA by the Arbitrator. Further, Callwood indicates the arbitrator’s disregard of the conflict raises serious concerns about the arbitrator’s impartiality in

²⁴ *Id.* (citations omitted) (collecting cases) (“We do not interpret the jurisprudence concerning the FAA to include any and every contract containing an arbitration clause. [T]he question is simply whether the contract evidences a transaction involving commerce ... [I]t is the burden of the party seeking to compel arbitration to prove that the contract at issue involves commerce.” (internal quotations and citations omitted)).

²⁵ *United Indus., Transp., Prof. & Gov’t Workers of N.A.*, 2016 V.I. Supreme LEXIS 2, at *22-23 (internal citations and citations omitted).

²⁶ *Id.* at *35-36.

²⁷ Considering that the CBA was executed between the Government of the Virgin Islands, the Virgin Islands Police Department, and the Police Benevolent Association, the Union for the VIPD, it is highly unlikely that the parties would be able to establish that the contract involved interstate commerce.

²⁸ See *United Indus., Transp., Prof. & Gov’t Workers of N.A.*, 2016 V.I. Supreme LEXIS 2, at *24 (“We need not decide whether this deferential standard of review should apply, however, because the arbitrator clearly exceeded his powers under the collective bargaining agreement, 9 U.S.C. § 10(a)(4), to the extent that he imposed his ‘own brand of industrial justice’ rather than attempting to apply the terms of the collective bargaining agreement.”); *V.I. Water & Power Auth., Prof. & Tech. Emples. Union*, 2016 V.I. LEXIS 34, *7.

the case, but, again, Plaintiff fails to allege any facts to demonstrate any violation of the CBA. Instead, the arguments Callwood presents in his Complaint are nearly identical to the arguments made during arbitration. In the substantive issues portion of the Arbitrator's decision, the Arbitrator recognized that termination of employment was justified under section 4.5.2 for illegal acts performed off duty, and also within section 4.5.1 as misconduct reflecting discredit upon the Department. While the Court recognizes that the Arbitrator could have reached a different conclusion, without facts indicating that the Arbitrator exceeded his authority under the CBA, Plaintiff's Complaint must be dismissed.

CONCLUSION

Accordingly, because the Complaint fails to contain factual allegations that plausibly suggest Plaintiff exhausted all administrative remedies provided for in the CBA or that exhaustion is excused, the first cause of action, breach of the collective bargaining agreement, is premature. Nonetheless, the Court must give Plaintiff an opportunity to amend the Complaint, unless amendment would be futile.²⁹ "An amendment would be futile if the complaint, as amended, would fail to state a claim upon which relief could be granted."³⁰ Here, the Court finds that allowing Plaintiff to amend the Complaint to include allegations regarding the exhaustion of administrative remedies and breach of contract would not be futile. Moreover, the Court will allow Plaintiff to amend the Complaint to include citations to portions of the CBA the arbitrator violated. Accordingly, Defendants' January 22, 2016, Motion to Dismiss is granted, but the Court will grant

²⁹ *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, at *12-13 (V.I. Super. Ct., June 15, 2015) (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

³⁰ *Id.* at 13 (citing *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010)).

Plaintiff leave to amend the Complaint in accordance with the holding of this Memorandum Opinion.

Dated: June 29, 2016

ATTEST: Estrella H. George
Acting Clerk of Court ____/____/____


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

by: _____
Lori Boynes-Tyson
Court Clerk Supervisor ____/____/____

CERTIFIED A TRUE COPY

DATE: 7-01-16
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: 
Camellia Clarke
Court Clerk II