

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B-24-81
DOCKET NO. BCB-482-81

DAVID PABON,

Petitioner,

-and-

CITY OF NEW YORK, HUMAN
RESOURCES ADMINISTRATION, et al

Respondents.

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DECISION AND ORDER

PROCEDURAL BACKGROUND

This proceeding was commenced by the filing on March 16, 1981, of an improper practice petition by David Pabon ("petitioner"), pursuant to §1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL"), alleging that petitioner was terminated on November 7 1980, in retaliation for grievances filed by him on April 15, 1980 and August 29, 1980. On March 31, 1981 petitioner filed an amended

verified improper practice petition identifying Sections 1173-4.2 (a) (1) and (3)¹ as the precise sections of the NYCCBL allegedly violated. On April 8, 1981, respondents moved for an order pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("Rules") dismissing the matter for untimeliness. On April 21, 1981 petitioner submitted an affirmation in opposition to the motion to dismiss.

POSITIONS OF THE PARTIES

Petitioner's Position

The petitioner contends that his termination was retaliatory in that it was responsive to the grievances filed by him. The petitioner maintains that this was in the nature of a continuing wrong as reflected by the fact that following his termination he sought, but was wrongfully denied, unemployment insurance benefits. It is his contention that his disqualification was attributable to an

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§1173-4.2 Improper practices; good faith bargaining.

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter:

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

"unreliable and tainted² submission to the Unemployment Insurance Administrative Law Judge Section by respondents as evidenced by the fact that an appeal from his disqualification culminated in an opinion, dated April 13, 1981, favorable to him. Petitioner also notes the fact that respondents never filed a brief in opposition to petitioner's appeal. In sum, it is petitioner's position that he was subjected to harassment which persisted until January 13, 1981, the date of his unemployment compensation hearing.

In view of the characterization of a continuing wrong, enduring at least through January 13, 1981, petitioner insists that his petition, filed on March 16, 1981, and amended on March 26, 1981, is timely.

Petitioner further challenges the motion to dismiss with a countervailing charge that the motion to dismiss was untimely. Since respondents were in receipt of the petition on March 20, 1981, the motion to dismiss, filed on April 8, 1981, was, according to petitioner, untimely.

City's Position

The City filed its motion to dismiss pursuant to Section 7.4 of the Rules which states, in pertinent part, as follows:

§7.4 Improper Practices. 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 Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee

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¶4 of the respondents affirmation in opposition to the motion to dismiss.

organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order.

Since petitioner's termination was effective November 7, 1980, and the improper practice petition³ filed on March 16, 1981, the matter, it is asserted, is time-barred and should be duly dismissed.

DISCUSSION

Mr. Pabon's termination was effective November 7, 1980. The filing of a petition on March 16, 1981, therefore, was in dereliction of the §7.4 requirement that an improper practice petition be filed within four months of the alleged improper practice. If the termination is regarded as the triggering event, setting the statute of limitations period in motion, we must find the petition time-barred. Petitioner argues, however, that the act of harassment was a persisting one and that "in reality" the final incident in the City's continuing course of action against him was the January 13, 1981 unemployment compensation hearing in which "unreliable and tainted" evidence supplied by the City was the basis, in whole or in part, for the denial of his application for unemployment benefits, Petitioner contends, therefore, that his petition could have been filed as late as May 13, 1981,⁴ without running afoul of Section 7.4. More

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The petition received by the Office of Municipal Labor Relations ("OMLR") on March 20, 1981, was unsigned and unverified. Apart from these deficiencies, the petition exceeded the statute of limitations period by several days.

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¶2 of the petitioner's affirmation in opposition to the motion to dismiss.

particularly, petitioner avers that upon his termination he filed for, but was denied, unemployment insurance benefits based upon a finding that his termination was for misconduct. In his account of the circumstances leading to his discharge, petitioner alleges that the performance report relied upon by Ms. Margolin, Director of GSS/Personnel Services, in recommending petitioner's termination, was written by Director Franco and was neither signed nor dated. In fact, petitioner claims that it was never shown to him. It is petitioner's contention that respondents, presenting as they allegedly did a performance report which it is claimed did not conform to standard guidelines and was devoid of the requisite procedural safeguards, and further by refusing to testify at the unemployment compensation hearing on January 13, 1981, "cost petitioner his job and his entitlement to unemployment benefits."⁵ It is petitioner's position that it was an entire course of action which constituted the improper practice complained of in the petition herein, and that the course of action ended not on November 7, 1980, when he was discharged, but on January 13, 1981, when the unemployment compensation hearing took place.

Petitioner's effort to widen the time frame of the alleged wrong must fail. Even if it is assumed, arguendo, that the evidence supplied at the hearing was inaccurate, such act and the consequent denial of benefits cannot be deemed, even if proven, to constitute an element of an improper practice within the contemplation of

⁵ ¶11 of the improper practice petition.

Section 1173-4.2 of the NYCCBL. This is not to say that all post-dismissal activity of an employer is, ipso facto, irrelevant or beyond the purview of an inquiry on charges of improper practice. At very least, actions by an employer evidencing anti-union bias and discrimination, even though committed after discharge, would be relevant in a proceeding charging that discharge was based upon anti-union bias and discrimination against the employee for union activity. Such alleged actions might even be considered as part of a single, ongoing course of action. The mere showing that an action is wrongful, however, is not enough. It may be true that grievant's discharge was wrongfully based on unfounded charges of misconduct. It may be equally true that reports to the Unemployment Compensation Board that he was discharged for misconduct were false and wrongful. Unless it is further alleged-- based upon probative facts and not upon mere speculation, conjecture and conclusory allegations-- that the action complained of was based upon motives prohibited by Section 1173-4.2 of NYCCBL, there can be no finding of improper practice. The allegation with regard to the January 1981 Unemployment Compensation hearing is that the information supplied by the City was inaccurate. There is no evidence before us, beyond petitioner's conclusory allegations, that it was also improperly motivated. It follows, therefore, that it cannot be utilized to support the argument that there was a continuing course of action by the City constituting an ongoing, continuous and integrated improper practice which did not end until January 13, 1981.

With respect to petitioner's charge that the motion to dismiss was untimely, there is no merit to such contention. The amended improper practice petition was dated March 26, 1981, and filed on March 31, 1981. In a letter dated March 26, 1981, petitioner agreed that respondents would be given thirteen days in which to submit their response. Since respondents' motion to dismiss was received by the Office of Collective Bargaining on April 8, 1981, petitioner's charge is without basis.

In light of the foregoing, we find that the improper practice petition was not filed within four months of the date of the termination and was thus untimely.

O R D E R

Pursuant to the Powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby

ORDERED that the improper practice petition filed herein by David Pabon be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 7, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
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EDWARD J. CLEARY
MEMBER

EDWARD SILVER
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