Earp v. City, Dep't of San., Dep't of Personnel, 35 OCB 30 (BCB 1985) [Decision No. B-30-85 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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CLIFTON R. EARP

Petitioner,

-and-

THE CITY OF NEW YORK, NEW YORK CITY DEPT. OF PERSONNEL, NEW YORK CITY DEPT. OF SANITATION

DECISION NO. B-30-85(ES)
DOCKET NO. BCB-799-85

Respondent.

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DETERMINATION

The petition in this matter was filed on July 16, 1985. Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and has determined that it does not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the New York City Collective Bargaining Law ("NYCCBL").

The petition asserts a complaint concerning the petitioner's suspension from work, on the alleged ground that he was "AWOL", and the subsequent termination of the petitioner's employment as a probationary Sanitationman. The petitioner further alleges that the employer failed to comply with the applicable employee evaluation procedure, and violated several provisions of the collective bargaining agreement.

The petition does not allege facts tending to show that

the respondent employer committed any of the acts specified in Section 1173-4.2(a) of the NYCCBL. Even assuming the truth and accuracy of the allegations of the petition, it does not appear that the respondent suspended and/or terminated the petitioner's employment for any of the proscribed reasons set forth in the NYCCBL. In this regard, I note that the rights of probationary employees are limited by law. Unlike permanent competitive employees, probationers are not entitled to charges and a hearing prior to termination of employment.[1]

With respect to the petitioner's allegation of the employer's non-compliance with evaluation procedures, and the violation of several specific sections of the applicable collective bargaining agreement, it is clear that the rights asserted exist, if at all, only as a matter of contract, and arguably would be enforeable through the grievance and arbitration provisions of the applicable collective bargaining agreement. Such a claim of contract violations does not constitute "the basis of an improper practice within the meaning of the NYCCBL.[2]

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[1]See Civil Service Law §75.

[2]Pursuant to §205.5(d) of the Taylor Law, which is made applicable to the Board of Collective Bargaining through §212 of that law, "...the board shall not have authority to enforce an agreement between an 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 NYCCBL does not provide a remedy for every wrong or inequity. It does provide procedures designed to safeguard those employees' rights created in that statute, i.e., the right to organize, to form, join, and assist public employee organizations, to bargain collectively through certified public employee organizations; and the right to refrain from such activities. The petition herein does not allege that the employer's actions were intended to affect the exercise of any of these rights. Accordingly, I find that no improper employer practice has been stated. The petition, therefore, is dismissed pursuant to Section 7.4 of the OCB Rules.

Dated: New York N.Y.
October i5, 1985

William J. Mulria
Executive Secretary
Board of Collective
Bargaining

§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 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. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in section 1173-4.2 of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

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§7.8 Answer-Service and Filing. Within (10) days after service of the petition, or, where the petition contains allegation of improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to Rule 7.4, that the petition is not, on its face untimely or insufficient, respondent shall serve and file its answer upon petitioner and any party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) respondent to serve and file its

answer within less than ten (10) days.

OTHER SECTIONS OF THE LAW AND RULES MAY BE APPLICABLE.
CONSULT THE COMPLETE TEXT.