

Jacobs v. HRA, Gross (Comm. of HRA), 37 OCB 26 (BCB 1986)  
[Decision No. B-26-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

JERRY L. JACOBS,

DECISION NO. B-26-86

Petitioner,

DOCKET NO. BCB-819-85

-and-

GEORGE GROSS, COMMISSIONER,  
HUMAN RESOURCES ADMINISTRATION,

Respondent.

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**DECISION AND ORDER**

The petitioner, Jerry L. Jacobs, filed a verified improper practice petition on October 22, 1985, in which he charged that respondent George Gross, Commissioner, Human Resources Administration committed an improper practice in violation of §1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL").

The petition was reviewed by the Executive Secretary of the Board of Collective Bargaining, pursuant to §7.4 of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "OCB Rules"), and based upon such review a determination was issued on November 13, 1985,<sup>1</sup> dismissing the petition for failure to allege facts sufficient as a matter of law to constitute an

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<sup>1</sup> Decision No. B-36-85(ES).

improper practice within the meaning of the NYCCBL. The petitioner submitted a letter dated November 22, 1986, but notarized on November 25 and received by the Office of Collective Bargaining on November 27, 1985, in which petitioner states that:

"... I intend to appeal the decision made by the Office of Collective Bargaining to dismiss my Improper Labor Practice Petition."

This letter has been deemed to constitute an appeal under §7.4 of the OCB Rules. The respondent's representative, the Office of Municipal Labor Relations ("OMLR") was informed by the Trial Examiner of its right to submit a response to the petitioner's appeal, if it desired to do so.<sup>2</sup>

### **Background**

#### **A. The Petition**

The petitioner was employed as a Shift Supervisor at the Greenpoint Men's Shelter. He alleges that the respondent committed an improper practice in connection with his termination of the petitioner's employment on

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<sup>2</sup> The OCB Rules do not require a respondent to submit any response to an appeal filed under §7.4. However, it is the Board's policy to give a respondent the opportunity to present its position on an appeal.

July 2, 1985. The petition implies, but does not expressly allege, that the termination was a consequence of an incident occurring on March 10, 1985, in which the petitioner was cut slightly in the course of an altercation with a female "curfew violator". The petition notes that criminal charges arising out of this incident were dismissed in court.

**B. The Executive Secretary's Determination**

Upon receipt of the petition, the Executive Secretary reviewed the allegations thereof as required by §7.4 of the OCB Rules, and determined that the petition did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. In his written determination, the Executive Secretary stated:

"The petition does not specify which of the improper practice provisions of Section 1173-4.2 of the NYCCBL are claimed to have been violated by the respondent, nor does the petition allege any facts tending to show that the respondent employer committed any of the acts specified in that section of the law. Even assuming the truth and accuracy of the allegations of the petition, it does not appear that the employer terminated the petitioner's employment for any of the proscribed reasons set forth in the NYCCBL."

C. The Appeal

In his letter of appeal, the petitioner does not respond to the basis stated by the Executive Secretary for dismissing the petition. Rather, he alleges new facts which were not pleaded in the petition. These facts, and the arguments made in reliance thereon, all involve the allegation that the petitioner was required to work out of title. The petitioner contends that his title was Provisional Caseworker, but he was required to work as a Shift Supervisor. He asserts that he should not be penalized in his title of Caseworker for an incident which occurred while he was acting as a Shift Supervisor. Finally, he alleges that his union, Local 371, District Council 37, did not represent him properly because it was aware that he was working out of title but "...didn't look into the situation."

**Discussion**

Initially, we find that the appeal in this matter was not timely filed. Pursuant to §7.4 of the OCB Rules, an appeal must be filed with this Board within ten days after receipt of the decision of the Executive Secretary. The certified mail return receipt shows that the decision

of the Executive Secretary was received by the petitioner on November 16, 1985. The petitioner's letter of appeal was received by the office of Collective Bargaining on November 27, 1985, eleven days later. The fact that the letter is back-dated to November 22 is of no consequence; in this regard, we note that the letter also bears the stamp and signature of a notary public, dated November 25. The dispositive date is the date of filing, which in this case was the date of receipt by the Office of Collective Bargaining on November 27, one day after the expiration of the time permitted for filing an appeal.

As an general matter, we do not comment on the merits of an appeal which we have found to be untimely. We choose to do so in this instance because of the circumstances involving the filing of this appeal. Thus, we observe that if this appeal were properly before us in a timely manner, we would dismiss it on its merits. We would not consider the new facts alleged in the letter of appeal, since the purpose of an appeal is to review the correctness of the Executive Secretary's determination based upon the facts that were available to him in the record as it existed at the time of his ruling. New facts may not be alleged at a later date to attack the basis for his determination. Based upon the record which was before the Executive Secretary in this case,

we would agree entirely with his finding that no facts were alleged which tended to demonstrate the basis for any improper practice as defined in §1173-4.2a of the NYCCBL. Accepting the truth and accuracy of the petitioner's allegations, nothing more was shown than that the petitioner was fired because of an altercation with a client. Regardless of whether petitioner's termination under the circumstances was justifiable, it did not constitute an improper practice within the meaning of the NYCCBL.

The NYCCBL does not provide a remedy for every perceived 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 those rights. Accordingly, were this appeal properly before us, we would find that no improper employer practice had been stated.

Finally, we note that under no circumstances could the conclusory allegations of inadequate representation by the Union be considered, since the Union was never served with any papers in this proceeding nor made a party herein. In any event, there is no allegation that the petitioner ever filed a grievance or requested the Union to take any action concerning his allegedly out-of-title assignment. Accordingly, no cognizable claim against the Union exists in this proceeding.

For the reasons stated above, we will dismiss the petitioner's appeal.

**O R D E R**

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 petitioner's appeal be, and the same hereby is, denied; and it is further

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ORDERED, that the determination of the Executive Secretary  
be, and the same hereby is confirmed.

DATED: New York, N.Y.  
April 22, 1986

ARVID ANDERSON  
CHAIRMAN

MILTON FRIEDMAN  
MEMBER

DANIEL G. COLLINS  
MEMBER

EDWARD SILVER  
MEMBER

JOHN D. FEERICK  
MEMBER

EDWARD F. GRAY  
MEMBER

IDA TORRES  
MEMBER