Johnson v. Dep't of San., 39 OCB 17 (BCB 1987) [Decision No. B-17-87 (ES)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

JAMES S. JOHNSON,
Petitioner,

DECISION NO. B-17-87(ES)

DOCKET NO. BCB-936-87

-and-

NEW YORK CITY DEPARTMENT
OF SANITATION,
Respondent.

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DETERMINATION OF EXECUTIVE SECRETARY

On February 18, 1987, petitioner James S. Johnson filed a verified improper practice petition charging that he was improperly terminated by the Department of Sanitation "for being A.W.O.L." Petitioner asserts that he was not "A.W.O.L." because, in each instance, he either notified the Department that he would be late or he arrived within one-half hour of the commencement of his tour of duty. Further, petitioner avers that the major reason for his lateness was the unreliability of the trains particularly in the early morning hours. In a letter addressed to the Department of Sanitation, a copy of which is attached to the petition herein, petitioner recites a number of other extenuating circumstances, including that he was required to take three trains in order to get to work and that the trip

took from one and a half to two hours, that he was late only when he worked on the morning shift, a time when the trains are particularly slow, that in any event he was never more than five to ten minutes late, that his supervisors have written him letters of recommendation and were training him to perform specialized garage duties at the time of his termination. Petitioner further asserts that the ongoing training required hat he work a variety of shifts which resulted in his being unaware of his impending termination and to do anything to improve his performance. Petitioner asserts that he received the letter of termination two days prior to the expiration of his probationary period.

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, I have reviewed the improper practice petition herein and have determined that it does not allege facts sufficient as a matter of law to state a violation of Section 1173-4.2a of the New York City Collective Bargaining Law ("NYCCBL").[1] The petition does not allege that

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[1]Section 1173-4.2a of the NYCCBL provides as follows:

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

(continued...)

the Department of Sanitation or its agents have committed any of the acts prohibited by the statute. Nor does it appear from the allegations of the petition, or from the letter appended thereto, that petitioner was terminated for any of the reasons proscribed by the NYCCBL.

I note further that it is well-recognized that the rights of probationary employees are limited by law.[2] Such an employee may be terminated by the employer for any reason at the end of the probationary term without charges or a hearing provided that the decision to terminate is not made in bad faith.[3]

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(...continued)

> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (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;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

[2]Decision Nos. B-21-86(ES); B-11-76.

[3]Voll v. Helbing, 9 N.Y.S. 2d 376 (3d Dep't 1939), appeal dismissed, 294 N.Y. 653 (1954); Ramos v. Department of Mental Hygiene, 311 N.Y.S. 2d 538 (1st Dep't. 1970); Howard V. Kross, 202 N.Y.S. 2d 445 (1960).

The NYCCBL does not provide a remedy for every perceived wrong or inequity. It protects the rights of public employees to form, join or assist public employee organizations, to bargain collectively through certified organizations of their own choosing and to refrain from any or all of such activities. Since the petitioner herein does not allege that the termination of his employment was effected in order to deprive him of any of the rights protected by statute, I find that no improper practice has been stated. Accordingly, pursuant to Section 7.4 of the OCB Rules, the petition is dismissed.

DATED: New York, N.Y.
May 6, 1987

William J. Mulry
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.

§7.8 Answer-Service and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations 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 other 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) days.