L.1180, CWA v. Dep't of Ports, et. al, 41 OCB 18 (BCB 1988) [Decision No. B-18-88 (ES)]

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

-between-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, on behalf of MARION SEIDENBERG, Principal Administrative Associate,

Petitioner,

-and-

DEPARTMENT OF PORTS, INTERNATIONAL TRADE AND COMMERCE and BARBARA M. JACKSON, Deputy Commissioner,

Respondent.
- - - - - - - - - - - - - - - - - - x

DECISION NO. B-18-88(ES)

DOCKET NO. BCB-1054-88

DETERMINATION OF EXECUTIVE SECRETARY

On May 6, 1988, the Communications Workers of America "petitioner") filed a verified improper practice petition alleging that the Department of Ports, International Trade and Commerce ("respondent") violated Section 1173-4.2a(l) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it terminated Marion Seidenberg on April

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

> 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; ....

15, 1988. Ms. Seidenberg was a provisional Principal Administrative Associate with respondent agency and had served in that capacity for two and a half years at the time of her termination. According to petitioner, Seidenberg received excellent performance evaluations throughout her employment with respondent and the only remarkable event occurring during that period was her appeal of the financial disclosure requirement imposed on her for the calendar year 1986, pursuant to Executive Order No. 91(as amended) ("E.O. 91"). (It is alleged that, when a final determination by the Department of Investigation required Seidenberg to file the disclosure form, she complied promptly.)

Petitioner also alleges that Seidenberg's termination violated an agreement entered into on December 22, 1987, which grants certain due process rights to provisional

employees covered by the Citywide Agreement. Specifically, the agreement provides that, for the period January 1, 1988 to July 14, 1988, a provisional employee with two years of continuous service shall be given two weeks prior written notice of a planned termination. It is alleged that, in violation of this provision, Seidenberg was informed of her termination on April 15, 1988, which was the effective date of the decision to terminate her.

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 petition and have determined that it does not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. Apparently, petitioner would have the Board of Collective Bargaining ("Board") infer that Seidenberg's termination was in retaliation for her exercise of a right to appeal the financial disclosure requirement under E.O. 91. Even if such an inference were to be drawn, however, petitioner has failed to allege any facts which would establish a relationship, other than a circumstantial one, betweenthe filing of the appeal sometime prior to August 31, 1987 [2]

[2] The record shows that the referee's recommendation, made pursuant to the Financial Disclosure Review Procedure (promulgated by the Office of Municipal Labor Relations upon negotiation with the employee unions), was issued on August 31, 1987.

and the termination on April 15, 1988. Neither has petitioner alleged that Seidenberg's termination did, or was designed to, deprive her of any of the rights prescribed by the NYCCBL. The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of public employees to organize, to form, join and assist public employee organizations, to bargain collectively through certified public employee organizations and to refrain from such activities. [3] Since the instant petition does not allege that respondent's actions were intended to, or did, affect any of these protected rights, it must be dismissed.

With respect to the allegation that Seidenberg's termination violated the provisions of a supplemental agreement providing rights for provisional employees to which they otherwise are not entitled under applicable law,[4] I note that such claim may not be considered in the improper practice forum. Section 205.5d of the

[3] NYCCBL §1173-4.1.

[4] Provisional employees, unlike permanent competitive employees, are not entitled to charges and a hearing prior to the termination of their employment under Section 75 of the New York State Civil Service Law.

Taylor Law, which is applicable to this agency, provides:

> the board shall not have authority to en force an agreement between a public em ployer 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 organiza- tion practice.

As no basis has been offered here for construing the al- leged contract violation as an independent improper prac- tice claim, I must conclude that the Board lacks juris- diction to consider such violation.

For the aforementioned reasons, the petition herein shall be dismissed. Such dismissal is, of course, without prejudice to any rights petitioner may have under appli- cable collective bargaining agreements.

DATED: New York, N.Y.
May 27, 1988

Marjorie A. London
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.

OTHER SECTIONS OF THE LAW AND RULES MAY BE APPLICABLE.

CONSULT THE COMPLETE TEXT.