

L.1180, CWA, et. al v. Dep't of Ports, et. al, 41 OCB 29 (BCB 1988)
[Decision No. B-29-68 (IP)]

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,

DECISION NO. B-29-68

-and-

DOCKET NO. BCB-1054-88

DEPARTMENT OF PORTS, INTERNA-
TIONAL TRADE AND COMMERCE and
BARBARA M. JACKSON, Deputy
Commissioner,

Respondent.

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DETERMINATION AND ORDER

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(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL") when it terminated Marion Seidenberg. Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), the petition was reviewed by the Executive Secretary of the Board of Collective Bargaining ("Board") and based upon this review,

a determination issued on June 2, 1988,¹ dismissing the petition for failure to allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. On June 17, 1988, after obtaining an extension of the time limit prescribed in Section 7.4, petitioner filed a written statement setting forth an appeal from the Executive Secretary's determination.

The Petition

The improper practice petition alleges that Ms. Seidenberg, a provisional Principal Administrative Associate was improperly terminated on April 15, 1988. The petition suggests, but does not expressly allege, that the termination was the consequence of Ms. Seidenberg's appeal to the Office of Collective Bargaining of the financial disclosure requirement imposed on her pursuant to Executive Order No. 91 (as amended) ("E.O. 91"). The petition also alleges that the termination violated the notice requirements of an agreement that gives provisional employees such as Seidenberg limited due process rights.

¹ Decision No. B-18-88 (ES).

The Executive Secretary's Determination

Declining to draw the suggested inference that Seidenberg's termination was in retaliation for the exercise of a right to appeal the financial disclosure requirement under E.O. 91, the Executive Secretary stated:

petitioner has failed to allege any facts which would establish a relationship... between the filing of the appeal sometime prior to August 31, 1987 [footnote omitted] and the termination on April 15, 1988. Neither has petitioner alleged that Seidenberg's termination did, or was designed to, deprive her of the rights prescribed by the NYCCBL.

On this basis, the petition was deemed insufficient on its face and was dismissed pursuant to Section 7.4 of the OCB Rules.

With respect to the allegation that Seidenberg's termination violated the provisions of a supplemental agreement, the Executive Secretary noted that, pursuant to Section 205.5d of the Taylor Law, the Board lacks jurisdiction to consider an alleged violation of an agreement that would not otherwise constitute an improper practice. As no basis was alleged for construing the claimed contract violation as a separate improper practice, the Executive Secretary also dismissed this allegation.

The Appeal

In its appeal, petitioner does not challenge the basis for the Executive Secretary's determination. Rather, it alleges new and additional facts which were not pleaded in the petition. These facts, and the arguments made in reliance thereon, involve allegations that Barbara Jackson, the Deputy Commissioner of respondent agency had received an unsatisfactory evaluation from the Commissioner who said that Jackson was "unable to control the staff under her." Petitioner asserts that "[e]veryone concluded this meant Seidenberg's Financial Disclosure Appeal above the Agency Level to the Office of Collective Bargaining." Petitioner alleges that Jackson thereafter attempted to have Seidenberg's evaluations, which had consistently rated her performance as "above-expected," changed to indicate that she had an attitude problem, and that when Seidenberg's immediate supervisor refused to comply with Jackson's wishes, Jackson sought another means of retaliating against Seidenberg for having appealed the financial disclosure requirement above the agency level. Accordingly, she had Seidenberg terminated.

Petitioner also alleges that respondent attempted to justify its improper termination of Seidenberg's employment by arguing at her appeal proceeding before OMLR that it wanted to

upgrade the position held by Seidenberg. However, petitioner asserts, examination of the vacancy notice for the "upgraded" position reveals that this argument was purely a subterfuge as the duties of the upgraded position are substantially the same as those performed by Seidenberg. Additionally, petitioner alleges, respondent's assertion to OMLR that Seidenberg had a "bad attitude problem" was entirely unsubstantiated.

Discussion

The purpose of an appeal of the Executive Secretary's determination that an improper practice petition does not contain facts sufficient as a matter of law to constitute a violation of the statute is to review the correctness of that determination based upon the facts that were available to the Executive Secretary at the time of his or her ruling. New facts may not be alleged to attack the basis for the determination.²

We note that petitioner has failed to allege any basis for overturning the Executive Secretary's ruling with respect to the facts that were before her. Furthermore, we have reviewed the record before the Executive Secretary and we agree that the facts alleged at that time were insufficient to establish the basis for an improper practice

² Decision Nos. B-26-86; B-55-87.

within the meaning of Section 1173-4.2a of the NYCCBL.³ Accordingly, we shall confirm the Executive Secretary's determination. In doing so, however, we make no finding with respect to whether the new facts alleged in support of petitioner's appeal would constitute a sufficient basis for an improper practice petition if they had been pleaded in the original petition. Therefore, our decision is without prejudice to the timely filing of a new petition in which facts sufficient to constitute an improper practice are alleged.

³ Section 1173.-4.2a, of the NYCCBL provides:

a. Improper public employer practices. It shall be an improper practice for a public employer of 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;

(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.

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 appeal filed by the Communications Workers of America be, and the same hereby is, denied without prejudice to the timely filing of a new petition in which facts sufficient to state an improper practice are alleged; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-18-88(ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y.
June 30, 1988

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