

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

-between-

OM CHOJAR, Computer Programmer
Analyst, Department of Personnel,
City of New York,

Petitioner,

DECISION NO. B-68-88

DOCKET NO. BCB-1080-88

-and-

JUDITH LEVITT, New York City
Department of Personnel, New York,

Respondent.

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DECISION AND ORDER

On August 24, 1988, Om Chojar ("petitioner") filed a verified improper practice petition in which he alleged that the New York City Department of Personnel ("respondent") violated his rights under section 12-306 [formerly section 1173-4.2] of the New York City Collective Bargaining Law ("NYCCBL") when it terminated his employment on February 22, 1988. Upon review of the charge, pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules" or "Rules"), the Executive Secretary dismissed the petition, finding that it (a) failed to allege facts sufficient as a matter of law to constitute an improper practice, and (b) was un-

timely filed under section 7.4 of the Rules.¹ On November 15, 1988, petitioner filed a timely written appeal from the Executive Secretary's decision.

¹ Decision No. B-57-88(ES) (Oct. 17, 1988). Section 7.4 of the OCB Rules provides, in its entirety, as follows:

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 [12-306] 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 [12-306] 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

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The Petition

The improper practice petition alleged that, beginning in April 1987 and ending with petitioner's termination in February 1988, respondent committed a number of acts which interfered with and denied petitioner rights prescribed by section 12-306 of the statute.² These allegedly included threatening to fire petitioner because he took legal action against persons who had assaulted him, and who, it was alleged, were "friends" of the

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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.

² Section 12-306 of the NYCCBL provides, in relevant part, as follows:

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director of his unit; requiring petitioner to work in a smoking area; failing to settle the charges that were filed against petitioner; suspending petitioner without

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Improper practices; good faith bargaining.

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

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section [12-305] 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.

c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(1) to approach the negotiations with a sincere resolve to reach an agreement;

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pay; and failing to provide petitioner with information concerning the order terminating his employment.

**The Executive Secretary's
Determination**

In an opinion dated October 27, 1988, the Executive Secretary dismissed the petition pursuant to section 7.4 of the Rules³ finding that, even if petitioner's allegations were true, it did not appear that his termination or any of the other acts complained of were taken

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(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

³

Section 7.4 is quoted at note 1 supra.

for any of the proscribed reasons set forth in the NYCCBL. Further, with respect to the alleged violation of section 12-306c, which defines the good faith bargaining obligation, the Executive Secretary noted that no improper practice could be stated by an individual employee since the duty to negotiate runs between the public employer and the certified representative of its employees. Finally, the Executive Secretary found that the petition was time-barred under section 7.4 as it was filed more than four months after the events complained of.

The Appeal

In this appeal, petitioner asserts two grounds for reversal of the Executive Secretary:

- "1. The copy of the petition was served to the respondent by certified mail on June 25, 1988 and thus is within the four months after the occurrence [sic] of the actions complained of by the petitioner ie. February 22, 1988. The submission of the original to the office of collective bargaining was delayed due to the loss of the original return receipt by the Post Office.

- "2. Nothing in sections 1173-4.2c, 1173-4.0 and 1173-4.1 of the New York City Collective Bargaining Law prohibits the Board of Collective Bargaining to consider complaints of a CONFIDENTIAL EMPLOYEE (such as the Petitioner) even if he wants to represent himself due to the force of circumstances such as denial of any union representation by the respondent to the petitioner."

Discussion

Taking the issues in the order that they are raised on this appeal, we have considered petitioner's proffered excuse for his delay in filing the instant petition, i.e., post office failure, and find it to be insufficient. Section 7.4 of the OCB Rules obligates a party to file its petition within four months of the events alleged to constitute the improper practice. That the Post Office may have lost petitioner's return receipt does not relieve petitioner of the obligation to adhere to the time frame prescribed by the Rules. Moreover, the Rules prescribe the period within which a petition must be filed with the Board of Collective Bargaining ("Board"). Service of a petition on a respondent within four months of the acts complained of does not satisfy the filing requirement and does not stop the running of the limitations

period. Therefore, while we acknowledge that petitioner has submitted evidence which supports his claim that the petition was served on respondent Levitt by certified mail on June 25, 1988, the fact that the petition was not received at the offices of the Board, i.e., filed, until August 24, 1988 precludes our further consideration of the allegations contained therein.⁴

Petitioner's second ground for appeal appears to be that since he is a "confidential employee" and, as such, is denied representation by a union,⁵ this Board should consider the claims he has asserted pro se, and should ignore any limitation in the statute

⁴ We note, in any event, that the date on which the petition was served on respondent, June 25, 1988, is more than four months after petitioner's termination on February 22, 1988. It follows that the filing of the petition thereafter, with proof of service, could not have been timely.

⁵ For purposes of this decision, we have accepted petitioner's representation that he is a "confidential employee". A confidential employee is one of a category of employees who are excluded from coverage by the collective bargaining law. N.Y. Civ. Serv. Law §201.7; NYCCBL §12-305. The designation of an employee as "confidential" is made by the Board of Certification of the New York City Office of Collective Bargaining and not, as petitioner asserts, by the public employer. See, OCB Rules §2.20.

that otherwise would apply.⁶ This argument cannot be accepted. Contrary to petitioner's contention, the NYCCBL denies to employees who have been designated as "confidential" the rights accorded to covered public employees, including, inter alia, the right to bargain collectively and the right to be free from interference, restraint, coercion or discrimination in the exercise of rights prescribed in that section. As the Executive Secretary stated in the determination under review, "the NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to protect the rights of public employees that are created by the statute".

For all of the aforementioned reasons, we must deny petitioner's appeal and shall confirm the determination of the Executive Secretary.

⁶ Petitioner has cited sections 12-306c (formerly section 1173-4.2c) which defines good faith bargaining; 12-304 (formerly section 1173-4.0) which defines the applicability of the NYCCBL to various categories of employers and employees; and 12-305 (formerly section 1173-4.1) which defines the rights of public employees and certified employee organizations and expressly excludes from coverage managerial or confidential 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 Om Chojar be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-57-88(ES) be, and the same hereby is, confirmed.

DATED: New York, N.Y.
December 20, 1988

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