

Bermudez v. DEP, Dep't of Personnel, 47 OCB 28 (BCB 1991) [Decision No. B-28-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding : DECISION NO. B-28-91
:
-between- : DOCKET NO. BCB-1299-90
:
RAYMOND BERMUDEZ, :
Petitioner, :
:
-and- :
:
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION SUB-DIVISION WATER :
SUPPLY - DEPARTMENT OF PERSONNEL, :
Respondent. :
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DECISION AND ORDER

On June 28, 1990, Raymond Bermudez ("the petitioner") filed a verified improper practice petition against the New York City Department of Environmental Protection Sub-Division Water Supply - Department of Personnel ("the respondent").

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"),¹ the Executive Secretary of the Board

¹ OCB Rule 7.4 provides as follows:

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

(continued...)

of Collective Bargaining reviewed the petition and determined that it was untimely on its face. Accordingly, in a determination dated August 17, 1990, the petition was dismissed.² The Determination of the Executive Secretary was sent to the petitioner by certified mail, return receipt requested, on August 20, 1990. Delivery was attempted by the United States Postal Service on August 22, August 27 and September 7, 1990. On September 11, 1990, the United States Postal Service marked the envelope "unclaimed" and returned the envelope containing the Determination to the Office of Collective Bargaining ("OCB").

On or about March 26, 1991, a person claiming to represent the petitioner called the Executive Secretary and informed her that the petitioner was never notified of the disposition of his improper practice petition. A copy of Decision No. B-48-90(ES) was mailed to the petitioner's representative on that date. After investigating the petitioner's claimed failure to receive

¹(...continued)

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.

² Decision No. B-48-90(ES).

a copy of Decision No. B-48-90(ES), the Executive Secretary wrote to the petitioner's representative on April 2, 1991. The Executive Secretary advised the petitioner's representative that the United States Post Office was unsuccessful in its attempts to deliver the envelope containing the Determination to the petitioner and, consequently, the petitioner did not receive a copy of Decision No. B-48-90(ES) when it was issued in August 1990. Included in the April 2, 1991 letter to the petitioner's representative was a copy of the front and back of the envelope used by the OCB to send to the petitioner a copy of Decision No. B-48-90(ES).

By letter dated March 3, 1991,³ the petitioner filed an appeal pursuant to Section 7.4 of the OCB Rules.

THE PETITION

The petitioner, a Construction Laborer with the Department of Water Supply, ("the Department"), alleges that he was singled out and charged with misconduct because he was a shop steward, and because he was a substance abuser prior to the time in question. In a letter attached to the improper practice petition the petitioner explains that he voluntarily entered a drug rehabilitation clinic in 1988. Upon his release from the clinic, the petitioner was required to sign a stipulation in which he agreed to a one year probationary period. The petitioner signed the stipulation and was returned to his job on June 30, 1988.

In May 1989, while still serving his probationary period, the petitioner was brought up on charges of misconduct for leaving his work location during working hours to get breakfast at a donut shop. The petitioner claims that it was necessary for him to eat breakfast so he could take medication prescribed

³ Inasmuch as the petitioner alleges that he did not know his improper practice petition was denied until on or about March 26, 1991, it is apparent that the date on the appeal filed by the petitioner, March 3, 1991, was a mistake. In any event, we note that the petitioner's appeal was received by the Office of Collective Bargaining on April 5, 1991.

by his doctor for the treatment of ulcers. Although there were 14 other Construction Laborers in the donut shop at the time in question, the petitioner contends that he was the only one singled out and brought up on charges because he was a shop steward.

In early June 1989, the petitioner's union representative met with a representative of the Department to discuss the charges against him. According to the petitioner, the Department agreed that the penalty for those charges - termination - would be reduced to a five day deduction in salary. On July 5, 1989, however, the petitioner was notified that he was terminated from his position with the Department.

The petitioner maintains that he was found guilty of misconduct by the Department without being given a chance to prove his innocence. Therefore, the petitioner argues, he should be given an opportunity to be heard.

THE EXECUTIVE SECRETARY'S DETERMINATION

In Decision No. B-48-90(ES), the Executive Secretary found that the petition was untimely on its face. Section 7.4 of the OCB Rules provides that an improper practice petition must be filed within four months of the acts alleged to constitute a violation of Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL"). The Executive Secretary held that "[s]ince the instant petition was filed almost 12 months after the alleged wrongful acts by the Department it must be dismissed as untimely without consideration of its merits."

In her Determination, the Executive Secretary noted that the petitioner also was the grievant in a recent decision of the Board of Collective Bargaining, Decision No. B-21-90, which denied the request for arbitration filed by the Union, District Council 37, Local 376, on his behalf. The Executive Secretary pointed out that contrary to the petitioner's assertion in his improper practice petition that he was singled out and charged with misconduct, in Decision No. B-21-90 it was not disputed that the other

employees involved in the donut shop incident were docked one day's pay as a penalty for their misconduct. Moreover, while the petitioner was the only one that was terminated as a result of the incident, it seems that he was also the only one who violated the express terms of an agreement, i.e., the stipulation signed by the petitioner in 1988 setting forth the requirements for successful completion of his probationary period.

THE APPEAL

By letter dated March 3, 1991,⁴ and filed with the OCB on April 5, 1991, the petitioner sought to appeal Decision No. B-48-90(ES). In support of his appeal, the petitioner alleges that the improper practice petition was timely filed in that it "was sent out in the time frame allowed...." With regard to the filing of the instant appeal of the Executive Secretary's Determination, the petitioner claims that it was timely filed in that "[a] response to my petition dated August 17th, [1990] according to the document sent by [the Executive Secretary] was received by my attorney on March 27th, 1991, the post dated on the envelope by the Postal Service March 26th, 1991." (Citations to exhibits submitted with the appeal omitted.)

The petitioner notes that in a letter dated July 5, 1990, the Office of Collective Bargaining informed him that it was in receipt of his improper practice petition. The letter stated that the petition was under review by the Executive Secretary who would determine, pursuant to Section 7.4 of the OCB Rules, whether it was sufficient on its face and whether further proceedings thereon would be warranted. The petitioner contends, however, that neither he nor his attorney were notified of the results of the Executive Secretary's review until March 27, 1991.

In conclusion, the petitioner explains that he is only asking "for a fair chance to have an impartial judicial body of government receive the facts

⁴ See note 3 supra at p. 3.

from both sides, and render a decision...." The petitioner states that "my only ambition here, is to try and get someone of authority to give me the opportunity to proclaim, the facts of the petition in order to have a fair hearing."

DISCUSSION

The purpose of an appeal of a determination made by the Executive Secretary in which it is found that an improper practice petition must be dismissed under Section 7.4 of the OCB Rules, is to review the correctness of that decision based upon the facts that were available to the Executive Secretary at the time the determination was made.⁵ We have reviewed the record that was before the Executive Secretary in the instant matter, and we agree that the petition was untimely on its face.

In reaching this decision, we note that the precipitating act which forms the basis for the improper practice petition occurred no later than July 5, 1989, the day the petitioner was notified that he was terminated from his position with the Department. Thus, the petition, which was filed on June 28, 1990, more than eleven months later, was filed in excess of the four month period prescribed by Section 7.4 of the OCB Rules. The fact that the petitioner chose to pursue his contractual remedies through the grievance-arbitration procedure prior to filing his improper practice petition⁶ does not toll the running of the period of limitations prescribed by the OCB Rules,

⁵ See Decision Nos. B-62-89; B-33-89; B-29-88; B-55-87; B-26-86.

⁶ We take administrative notice of the fact that the petitioner filed his improper practice petition two months after he was notified that the petition filed by the City of New York, challenging the arbitrability of the grievance concerning his termination, was granted and, accordingly, his request for arbitration denied. See Decision No. B-21-90.

which commenced running when he was notified of his termination.⁷

Accordingly, we find that the petitioner has not alleged any basis for overturning the Executive Secretary's ruling. Therefore, we shall confirm Decision No. B-48-90(ES) and dismiss the petitioner's appeal.

ORDER

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 Raymond Bermudez be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-48-90(ES) be, and the same hereby is, confirmed.

DATED: New York, New York
May 23, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS GIBLIN
MEMBER

⁷ Decision Nos. B-33-89; B-16-80.