

Smiley v. L.1182, J. Moses (Pres. Of CWA), et. al, 47 OCB 3 (BCB 1991) [Decision No. B-3-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

ERNEST J. SMILEY,
Petitioner,
-and-

DECISION NO. B-3-91
DOCKET NO. BCB-1327-90

JACKIE MOSES, President,
FREDERICK BROCKENBURY, Vice
President, COMMUNICATIONS WORKER
OF AMERICA, LOCAL 1182

Respondent.

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DECISION AND ORDER

On October 4, 1990, Ernest J. Smiley ("petitioner") filed a verified improper practice petition against Jackie Moses and Frederick Brockenbury, President and Vice President, respectively, of Local 1182 of the Communications Workers of America ("Union"), in which he alleged that the Union violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL").¹

¹ Section 12-306 of the NYCCBL provides in relevant part as follows:

b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(continued...)

The Executive Secretary of the Board of Collective Bargaining ("the Board") reviewed the petition pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules")², and determined, in Decision

¹(...continued)

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

² Section 7.4 of the OCB Rules provides 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 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

(continued...)

No. B-72-90(ES), that the petition was untimely on its face. Accordingly, the Executive Secretary dismissed the petition in its entirety. By letter filed with the Office Of Collective Bargaining ("OCB") on November 19, 1990, petitioner appealed the decision of the Executive Secretary to the Board.

BACKGROUND

Facts Alleged in the Original Petition

Petitioner was employed as a Traffic Enforcement Agent by the Department of Transportation. He alleged that when the Department of Transportation preferred disciplinary charges against him the Union advised him that he could not appeal the charges. Petitioner further alleged that the Union "forced" him to sign an agreement concerning the charges, telling him that he

²(...continued)
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 parties. The statement shall set forth the reasons for the appeal.

would be terminated if he refused to do so. Referring to another, later set of disciplinary charges filed against him, petitioner claims that the Union failed to notify him as to the date and time of his Step III hearing. As a result, petitioner did not attend the hearing, and was terminated.

According to documents that were attached to the improper practice petition, all of the events referred to by the petitioner took place in 1985, 1986 and 1987.

The Executive Secretary's Determination

The Executive Secretary noted that the improper practice petition was filed more than three years after the most recent alleged wrongful act was committed by the Union. However, the statute of limitation contained in Section 7.4 of the OCB Rules provides that an improper practice petition may be filed only within four months of the date that the challenged act occurred. Accordingly, pursuant to Section 7.4 of the OCB Rules, she dismissed the petition on the ground that it was untimely filed without consideration of its merits.

The Appeal

By letter dated November 13, 1990, and filed with the OCB on November 19, 1990, petitioner sought to appeal Decision No. B-72-90(ES). In his letter, petitioner reiterates the facts alleged in his original petition. With regard to the issue of

timeliness, however, petitioner asserts that his delay in filing an improper practice petition was due to the fact that he was unaware of his statutory right to do so. Petitioner claims that when an attorney informed him of this right, he filed a petition.

DISCUSSION

Initially, we note that the appeal in this matter was not timely filed and, therefore, must be dismissed on that basis alone. Pursuant to Section 7.4 of the OCB Rules, an appeal must be filed with this Board within 10 days after receipt of the decision of the Executive Secretary, served upon the parties by certified mail. The certified mail return receipt shows that the decision in the matter herein, Decision No. B-72-90(ES), was received by the petitioner on November 7, 1990. Petitioner's letter of appeal, however, was received by the OCB on November 19, 1990, twelve days later. The fact that petitioner's letter was back-dated to November 13, 1990 is of no consequence to the issue of the timeliness of the instant appeal. The dispositive date is the date of filing, which in this case was the date of receipt by the OCB on November 19, 1990, two days after the expiration of the time permitted for the filing of an appeal.

Even assuming that the appeal herein had been timely filed, however, we would affirm the Executive Secretary's decision. We note that in reviewing a determination of the Executive Secretary we are limited to the facts and record which were before the

Executive Secretary at the time she rendered her decision. We have reviewed the record before the Executive Secretary, and we agree that the events referred to by petitioner in his improper practice petition occurred more than three years prior to the filing of the improper practice petition. Therefore, the petition was untimely filed.

Petitioner's claim that he was unaware of his right to file a petition does not excuse the fact that his petition was untimely filed. It is a well-stated principle of law that every individual is presumed to know the law; ignorance of the law does not excuse an individual from the legal consequences of his acts.³ Thus, petitioner was obliged to inquire as to the means necessary to preserve his rights. Failure to do so within a reasonable period of time is fatal to his claim.

Accordingly, we find that petitioner has not alleged any basis for overturning the decision of the Executive Secretary in Decision No. B-72-90(ES). Therefore, we shall dismiss petitioner's appeal and confirm the determination of the Executive Secretary.

ORDER

³ J. Prince, Richardson on Evidence §82 (1964)

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 Ernest J. Smiley be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-72-90(ES) be;, and the same hereby is, confirmed.

Dated: New York, New York
January 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER