OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice

-between-

RICHARD McALLAN, and
GEORGE ENGSTROM,

DECISION NO. B-25-81

Petitioners,

DOCKET NO. BCB-499-81

-and-

EMERGENCY MEDICAL SERVICES,
DIVISION OF NEW YORK CITY
HEALTH & HOSPITALS CORPORATION

Respondent.

- x

In the Matter of the Improper Practice

-between-

ALFRED HANAN,

Petitioner,

DOCKET NO. BCB-500-81

-and-

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Respondent.

- x

In the Matter of the Improper Practice

-between-

FRED WILLIAMS,
GEORGE ENGSTROM,

Petitioners,

DOCKET NO. BCB-501-81

-and-

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Respondent.

- x

INTERIM DECISION AND ORDER

Petitions were filed in the above-captioned cases on June 11, 1981 (McAllan Engstrom), June 17, 1981 (Hanan), and June 22, 1981 (Williams Engstrom). The respondent's answers in these matters were filed on June 26 and July 10, 1981. The petitioners filed replies in all three proceedings on July 30, 1981, together with a request by their joint attorney that the cases be consolidated or, alternatively, that they be set down for a joint hearing. On August 20, the respondent Health and Hospitals Corporation submitted a written statement in opposition to the request for consolidation and in support of "motions to dismiss" alleged to have been contained in each of the respondent's answers. The petitioners~ attorney wrote on September 8, 1981 to request that these matters be set down for hearing as soon as possible to put the respondent and the Office of Collective Bargaining on notice that he intends to move to amend the petitions at the time of hearing to include additional incidents of alleged harassment; and to reiterate his request for consolidation.

NATURE OF THE PETITIONS

The three verified improper practice petitions herein were filed by employees of the Emergency Medical Services division of the New York City Health and Hospitals Corporation (hereinafter referred to as "EMS" and "HHC" respectively). Each petition

alleges specific acts taken by representatives of EMS and HHC and directed against one or more of the petitioners, which are claimed to constitute improper employer practices, in violation of subdivisions (1),(2), and (3) of Section 1173-4.2a of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The petitioners contend that the various alleged acts of interference with protected rights, coercion, and discrimination on account of union activity, to which they claim to have been subjected by representatives of management, are all part of a scheme by the employer to interfere with and dominate the certified collective bargaining representative, Local 2507, by means of insuring the re-election of the Local's incumbent President and his election slate. The petitioners assert that they were candidates or supporters of candidates who ran in opposition to the incumbent Local President and his slate, and that the employer, by its agents, committed improper practices against them in order to discredit their candidacy for union office and to stifle their involvement in internal union electoral matters.

The petitions specify incidents occurring both before and after the holding of the internal union election on April 8, 1981. The particular acts alleged include interference with union officers' handling of grievance and safety matters (McAllan, Engstrom), unwarranted and discriminatory withholding of pay

(William , Engstrom), discriminatory filing of disciplinary charges (McAllan, Hanan, Engstrom), and attempts to coerce the use of defective and/or unlawfully equipped ambulances (McAllan, Engstrom, Hanan, Williams).

The petitioners' pleadings allege that they were active in the union, Local 2507, that McAllan was an incumbent union officer and was a candidate for the position of President of the Local, in opposition to the incumbent President, Eric Mitchell; that Engstrom was a shop steward and co-chairman of the Safety Committee, and was an independent candidate for the offices of Executive Board member and District Council 37 Delegate; that Hanan was a shop steward and had been nominated as a candidate for the position of Vice President; and that Williams was a known supporter of Engstrom's union activity, in addition to being Engstrom's ambulance partner. The petitioners further allege that representatives of the employer knew of the petitioners' internal union activity in connection with the coming election, and sought to discredit them and to interfere with their legitimate activities in order to bolster the candidacy of the incumbent union President and his election slate.

THE MOTIONS TO DISMISS

No formal motion to dismiss has been filed by HHC. However, the letter from HHC's attorney, dated August 20, 1981, contends

that motions to dismiss were contained within its verified answers to the petitions herein. A reading of HHC's answers indicates that in the McAllan & Engstrom case, the "WHEREFORE" clause requests dismissal of the petition, and that in the Hannan and the Williams & Engstrom cases, each of the respondent's affirmative defenses concludes with a statement that "Respondent moves that the petition herein be dismissed...."

In each case, HHC's answer, as supplemented by its attorney's letter of August 20, 1981, presents a detailed factual explanation of the circumstances surrounding the incidents asserted in the petition to constitute improper practices. The HHC alleges that the facts demonstrate that the actions taken by the employer were fully justified and constituted reasonable exercises of managerial discretion in the areas of employee discipline and administration. The facts alleged by HHC are, in many particulars, inconsistent with the facts alleged by the petitioners. In some instances, the facts alleged by HHC do not dispute but rather supplement the petitioners' averments in an attempt to show the propriety of HHC's actions. In every instance, HHC denies the motivation ascribed to it by petitioners, and asserts that its actions were within the scope of its statutory management rights under NYCCBL §1173-4.3b.

The HHC contends that the petitions fail to state causes of action, that the exercise of a management prerogative cannot

constitute an improper practice, and that the evidence shows that no improper practices have occurred. For these reasons, HHC requests that the petitions be dismissed.

THE REQUEST FOR CONSOLIDATION

The petitioners' attorney requests that the three proceedings be consolidated, or set down for a joint hearing, because:

> "It would facilitate matters greatly as subpoenaed documents and personnel in many instances will relate to more than one of the above matters."

In his response to HHC's statement of opposition to consolidation, petitioners' attorney further alleges that the petitions all involve a "common scheme" by HHC, and that the evidence available in each proceeding will serve to "bolster" the evidence of each of the other petitioners.

The HHC opposes the request for consolidation on the asserted grounds that the parties to each proceeding are different; different circumstances are alleged in support of each claim, the claimed actions took place at different times; and the alleged protagonist in each is different. It is argued that the consolidation of these cases would waste time and unduly-complicate matters.

DISCUSSION

Ordinarily, we would not consider a respondent's request for dismissal, inserted in an affirmative defense or a "WHEREFORE" clause of a verified answer, to be the procedural equivalent of a

motion to dismiss. However, since HHC, on notice to the petitioners, has urged that its request be considered as a motion to dismiss, we will deem it to be such in this case only, and will rule thereon. Nevertheless, we believe that the circumstances of this case demonstrate the basic procedural difference which exists between a notion to dismiss and an affirmative defense, and the reason why a motion to dismiss generally is not properly asserted in an answer on the merits.

On a motion to dismiss, the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether, taking the facts as alleged by the petitioner, a cause of action has been stated. A respondent is not permitted to assert facts contrary to those alleged by the petitioner, in support of a motion to dismiss. It is not the function of this Board, in considering a notion to dismiss, to resolve questions as to the credibility and weight to be given o each of two or more inconsistent versions of a disputed factual incident. Those questions are properly determined after the holding of an evidentiary hearing.

In the cases at bar, HHC's motions to dismiss are based upon the premise that the facts alleged by HHC demonstrate that the actions it took with respect to the petitioners were reasonable and proper under the circumstances, that legitimate motivation for such

actions existed wholly apart from the improper motivation asserted by the petitioners, and that HHC's actions constituted a lawful exercise of its management rights under the NYCCBL.

The flaw in HHC's argument is that, at least with respect to BCB-499-81 (McAllan & Engstrom) and BCB-501-81 (Williams & Engstrom), HHC's version of the facts differs sharply from the version alleged by the petitioners in their pleadings. Without questioning the veracity of either party, and without determining the merit of the legal conclusions drawn by the parties from their respective versions of the facts, it is clear that this Board cannot dispose of these proceedings price to the holding of an evidentiary hearing to resolve the disputed factual questions.

We do not accept HHC's contention that an action within the scope of the statutory management rights provision of the NYCCBL can never be found to constitute an improper practice. For example, although the right to discipline employees is an unquestioned management prerogative, if discipline is used for coercive or discriminatory purposes, it may constitute an improper practice within the meaning of the NYCCBL. The motivation for the use of discipline by an employer, if disputed, may be a question of fact which can only be resolved by this Board following an evidentiary hearing.

We find that in BCB-499-81 and BCB-501-81, the petitioners'

allegations, if deemed true, as they must be on a notion to dismiss, state a sufficient basis for a claimed improper employer practice to warrant the holding of a hearing. Accordingly, we will deny HHC's motion to dismiss as to these cases, and direct that a hearing be held.

In BCB-500-81 (Hanan), HHC's answer alleges facts which do not contradict, but rather expand -upon the petitioner's statement of the circumstances surrounding disciplinary charges filed against him for misusing an EMS ambulance on March 24, 1981. Petitioner, in his reply, does not dispute the bulk of the material allegations advanced by HHC concerning this incident. we find that the undisputed facts establish that there existed a reasonable basis for HHC to exercise its management prerogative to discipline its employee under the circumstances of that incident. Specifically, petitioner's pleadings do not deny that he failed timely to return to his primary area of response, that he failed to answer the radio calls of his dispatcher, and that he parked and left an EMS ambulance outside his home during working hours. Additionally, petitioner's contention that the disciplinary action resulting from this incident was a consequence of his nomination for union office is conclusory and unsupported by any allegation of fact.

The facts concerning the second incident involving petitioner Hanan are in dispute. However, accepting petitioner's version of the facts as true, as we must on a motion to dismiss, we

find that petitioner has failed to state a prima facie claim of an improper practice. Unlike the claim in BCB-499-81, which alleges, inter alia, interference with union officers' handling of grievance and safety matters, and BCB-501,81, which alleges, inter alia, involvement by employer representatives in the internal union election process, the pleadings in BCB-500-81 fail to allege facts sufficient to establish a nexus between management action and union activity. The only union activity asserted by petitioner is the fact that he was nominated for union office. Petitioner does not show that the disciplinary action taken against him was connected to his union candidacy. Moreover, we note that the second incident occurred an April 15, 1981, after the union election on April 8, 1981. Petitioner was not elected to office at the April 8 election. We therefore question whether disciplinary action taken as a result of an incident occurring after the holding of the election could constitute evidence of the employer's intent to dominate the union by interfering with its electoral process.

The parties in BCB- 500-81 hotly dispute the question of whether petitioner was required to serve a six-month or a one-year probationary period. We question whether this issue is relevant to the claim of an improper practice in this case. The documentary evidence submitted by HHC demonstrates that when petitioner accepted an appointment to his position as an ambulance corpsman in October, 1980, he signed a document which expressly indicated that the applicable probationary period was one year. Absolutely no connection

has been alleged between the establishment of a one-year probationary period, at least as early as October, 1980, and the petitioner's nomination for union office on March 4, 1981. Accordingly, we are unable to find that the establishment and enforcement of a one-year probationary period constitutes an improper practice.

For the above reasons, we find that the petition in BCB-500-81 fails to state a cause of action, and we will order that the petition be dismissed.

We have considered the petitioners' request to consolidate, and we agree that the remaining proceedings, BCB-499-81 and BCB-501-81, should be consolidated for hearing. The same employer is involved in both cases, and one petitioner (Engstrom) is a party to both cases. The claimed violation of the NYCCBL is the same in each case, although the facts alleged to have given rise to the violation are different in each. Both cases are claimed to be part of one "scheme" by the respondent to deprive petitioners and persons similarly situated of rights protected under the NYCCBL, and to dominate and interfere with the affairs of one union, Local 2507. Significantly, there has been no allegation that the rights of any party will be prejudiced by consolidation. Under these circumstances, we will direct that these matters be consolidated for purposes of a hearing before a Trial Examiner.

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 HHC's motion to dismiss the petition in BCB-500-81 be, and the same hereby is, granted; and it is further

ORDERED, that HHC's motion to dismiss the petitions in BCB-499-81 and BCB-501-81 be, and the sane hereby are, denied; and it is further

ORDERED, that the proceedings in BCB-499-81 and BCB-501-81, be, and the same hereby are, consolidated for purposes of a hearing to be held before a Trial Examiner designated by the Office of Collective Bargaining.

DATED: New York, N.Y.
October 7, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD J. CLEARY
MEMBER

CAROLYN GENTILE
MEMBER