McAllen, Taylor, Engstrom v. Emergency Med. Serv., 31 OCB 14 (BCB 1983) [Decision No. B-14-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

RICHARD McALLAN, BARBARA TAYLOR and GEORGE ENGSTROM,

DECISION NO. B-14-83

DOCKET NO. BCB-621-82

Petitioners,

-and-

EMERGENCY MEDICAL SERVICES, DIVISION OF NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and LOCAL 2507, and DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.

DECISION AND ORDER

Petitioners Richard McAllan, Barbara Taylor, and George Engstrom (hereinafter "petitioners") filed a verified improper practice petition on November 5, 1982, in which they alleged that both the Emergency Medical Services Division of the New York City Health and Hospital's Corporation (hereinafter "EMS" and/or "HHC") and District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2507 (hereinafter "D.C. 37" or "the Union") committed various improper practices in violation of §1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). Verified answers were submitted by respondents HHC and the Union on December 6 and 8, 1982, respectively. The petitioners submitted separate replies to the answers of HHC

and the Union on January 24 and February 1, 1983, respectively. Sur-replies were filed by HHC and the Union on February 18 and March 11, 1983, respectively. Petitioner McAllan submitted a letter, dated March 15, 1983, objecting to Board consideration of the respondents' sur-replies.[1]

Background

The petitioners assert numerous charges against each of the respondents. These charges may be grouped in several categories, as set forth below. The petitioners contend that each charge constitutes an improper practice under the NYCCBL.

I. Charges against EMS/HHC:

A. Charges concerning use of provisional employees.

The petitioners allege that the titles of Ambulance Corpsman, Paramedic Ambulance Corpsman, Supervising Ambulance Corpsman, and Chief Supervising Ambulance Corpsman were created, by HHC in 1974, and that no civil, service examination for the title of Ambulance Corpsman was given until 1979, and no examination for the other titles in this series has ever been given, up, to the present date. These

[1] On March 25, 1983, the Trial Examiner wrote to petitioner McAllan, informing him that the Board would rule on the question of whether any justification existed for the respondents' submission of sur-replies, and would disregard them if it found their submission unwarranted under the circumstances of this case.

facts are not disputed by the respondents. The petitioners assert that HHC has filled and continues to fill many of the Ambulance Corpsman and all of the Paramedic Ambulance Corpsman and supervisory positions with provisional employees, many of whom have served in their provisional positions for periods of many years. The petitioners argue that HHC's practice concerning the use of provisional employees is violative of the New York Civil Service Law and constitutes coercion, harassment, and discrimination against employees in order to intimidate their exercise of rights under the NYCCBL.

B. Charges concerning extension of probationary period.

The petitioners allege that the examination notice for the open competitive examination for the title of Ambulance Corpsman specified a 6 month probationary period. However, petitioners allege, every open competitive candidate who was hired was required to sign a document providing for a one year probationary period. Petitioners assert that they and all other candidates were told that if they refused to sign the probationary document, they would be "passed over" on the civil service list and, as provisionals, they would ultimately be displaced by civil service employees. Petitioners contend that this extension of the probationary

period is violative of the Civil Service Law and is part of a scheme to discriminate against union activists and to discourage participation in the activities of the Union. Petitioners note that Petitioner Engstrom was terminated from employment after completion of the originally specified 6 month probationary term but prior to completion of the, extended one year probationary period.

C. Charges concerning broadbanding.

Petitioners allege that HHC proposes to eliminate the current series of EMS titles, and to "broadband" them into the new titles of Emergency Medical Service Specialist and Supervising Emergency Medical Service Specialist. There will exist two assignment levels within each of the new titles. HHC has promulgated a Personnel Order (No.082/27) to implement this broadbanding program. Under this program, the titles of Ambulance Corpsman and Paramedic Ambulance Corpsman will be equated to assignment levels I and II of the title of Emergency Medical Service Specialist. A similar process will be followed with regard to the current supervisory titles and the new title of Supervising Emergency Medical Specialist.

The Petitioners complain that under the broadbanded titles, employees can never achieve permanent status in a title (assignment level), but can be moved from one assign-

ment level to another in either direction, with appropriate salary differentials, in the sole discretion of management. Petitioners assert that HHC's broadbanding program is a deliberate attempt to circumvent the Civil Service Law, HHC's own rules and regulations, and the provisions of the State law which establish and incorporate HHC. Petitioners further contend that the new job structure has been designed so that it may be utilized by HHC to discriminate against and/or coerce employees in the exercise of rights granted under the NYCCBL.

D. Charges concerning forgiveable loan agreement.

The petitioners allege that a Salary Review Committee was established pursuant to the 1980 collective bargaining negotiations. The Salary Review Committee awarded a package which included a three-step pay plan coupled to the Paramedic Training Program and a three-year work commitment to EMS. Under this package, the value of the Paramedic Training Program administered by EMS is equated to the sum of $10,500. This sum is deemed to constitute a forgiveable loan by EMS to all candidates successfully completing the training program. Candidates are required to make a commitment to work for EMS for three years following completion of the training program. If a candidate completes three years of service, the loan is forgiven.

If the candidate fails to complete three years of service because of death, physical or mental disability, or other cause over which the candidate has no control, the loan similarly is forgiven. However, if a candidate fails to complete three years of service for any other reason, he or she is obligated to repay a pro rata portion of the $10,500 value of the training program. The Salary Review Panel's award, including provision for the forgiveable loan agreement, has been incorporated into the parties' collective bargaining agreement.

The petitioners state that they do not disagree with the forgiveable loan agreement in principle, but they charge that this agreement, in the form implemented by EMS, is violative of the NYCCBL, the State law creating HHC, HHC's own rules and regulations, the grievance provisions of the collective bargaining agreement, and employees' rights to due process under the United States Constitution. Specifically, petitioners object to the forgiveable loan agreement because: all new candidates are required to sign the agreement, without being given the option to decline and to accept the lower wage scale provided in the contract; candidates successfully completing the training program are merely offered provisional appointments; an employee discharged for misconduct or incompetence during

the term of the three-year commitment is required to prove that he or she did not provoke his or her own discharge, in order to avoid repayment of the loan.

The petitioners concede that they, themselves, were not subject to the provisions of the forgiveable loan agreement, since they completed their training before the forgiveable loan program was established. They allege that no current paramedic candidate approached by petitioners was willing to be a party to this petition, allegedly because of fear of EMS reprisals.

II. Charges against the Union:

The petitioners' charges against D.C. 37 generally parallel those against HHC, but are based upon the assertion that the Union has breached its duty of fair representation. Specifically, the petitioners allege:

1. The Union failed to seek judicial relief to force HHC to give civil service examinations for the title of Paramedic Ambulance Corpsman and the supervisory titles in the series, and to compel HHC to cease filling those titles with provisional employees, even though the Union was aware that HHC's practices continued for a period of over 8 years. The petitioners concede that prior to the filing of the petition herein, D.C. 37 did commence a proceeding in State Supreme Court, pursuant to Article 78 of the Civil Practice

Law and Rules, seeking to compel HHC to hold civil service examinations. However, petitioners allege that such lawsuit should have been instituted at an earlier date. Petitioners further allege that counsel for the Union has stipulated to have that proceeding, taken "off calendar" in Court, without prior consultation with the membership, of the Local, and thus has failed to prosecute this matter diligently.

2. The Union improperly "allowed" HHC to place its broadbanding proposal on the bargaining table at the same time that the Union was supposedly prosecuting a lawsuit against HHC for failing to give civil service examinations to fill its Paramedic and supervisory positions. Petitioners contend that the Union has "entertained" HHC's broadbanding proposal, even though the Union realizes or should realize that this proposal, if implemented, would eliminate affected employees' right to a civil service hearing prior to being demoted and reduced in salary.

3. The Union has colluded with EMS management in circumventing the provisions of the Civil Service Law. Specifically, the Union has sent representatives to participate in management's interviews of candidates for possible appointment to the Paramedic Training Program, even though the Union knew that the persons selected and trained would

be given provisional appointments. Additionally, petitioners allege that the Union has not "obtained" a proper promotional chain for the Paramedic title, but instead has allowed management to establish a Promotion Board and to" promote employees provisionally, based upon the submission of resumes.

4. The Union refused to renegotiate part of the Paramedic Forgiveable Loan Agreement in order to protect the rights of new candidates for appointment to Paramedic positions and refused to file an improper practice petition challenging HHC's refusal to renegotiate the Agreement. Petitioners allege that the membership of Local 2507 voted, at a meeting in September, 1982, to direct D.C. 37 to file an improper practice petition if HHC refused to renegotiate the employee rights section of the agreement. Petitioners assert that an attorney for D.C. 37 advised the Local membership in October 1982 that "the Local could do nothing" and that D.C. 37 would not file an improper practice petition challenging the agreement. Petitioners argue that the Union's refusal to act constitutes a breach of the duty of fair representation.

Positions of the Parties

Petitioners' Position

Much of the position of the petitioners is set forth in the above description of the charges against each of the respondents. Additionally, the petitioners assert that the actions of HHC in continuing to employ provisionals and in failing to give civil service examinations in order to fill positions with permanent civil service employees, are prima facie unlawful, under the Civil Service Law. The petitioners argue that in view of the extremely limited due process rights possessed by provisional employees, the continued employment of provisionals by HHC is so "inherently destructive of employee interests" that it should be found to be an improper practice "without need for proof of an underlying improper motive".

Petitioners further contend that HHC has negotiated its proposal with the Union, despite the fact that the proposal should be deemed to be a prohibited subject of bargaining. Petitioners reach this conclusion on the grounds that the Civil Service Law mandates the giving of examinations for all four titles in the Ambulance Occupational Group, and any agreement to broadband these titles which does not include the requirement of examination for each of these titles, would be unlawful.

With respect to their challenge to HHC's alleged extension of the probationary period, the petitioners argue that, as with the continued utilization of provisional employees, the imposition of a longer probationary term is "so inherently destructive of employee interests" that it constitutes an improper practice "without need for proof of an underlying improper motive".

Concerning their improper practice charges against the Union, the petitioners further contend that D.C. 37' s action in removing the Article 78 proceeding from the calendar in State Supreme Court without first consulting with the Executive Board of Local 2507, was violative of provisions of the D.C. 37 Constitution. The petitioners also suggest that "it is a distinct possibility" that D.C. 37 secretly intends to "negotiate out" the civil service status of two of the unit titles in order to obtain concessions for the remaining two titles in the unit. The petitioners submit that D.C. 37's actions, and failure to act, have been arbitrary and discriminatory.

HHC's Position

Respondent HHC submits that even assuming, arguendo, that there is merit to the petitioners' claims that the Civil Service Law has not been complied with concerning the scheduling of examinations and the use of provisionals,

the petitioners have failed to demonstrate any connection between this and any alleged interference with employees in the exercise of their rights under the NYCCBL, any domination Or interefernce with the formation or administration of the union, any discrimination against any employee to encourage or discourage participation in the activities of the Union, or any refusal to bargain collectively in good faith. It is HHC's contention that the violations of the Civil Service Law alleged by the petitioners do not, without more, constitute prima facie improper practices under the NYCCBL. Therefore, HHC argues that this aspect of the petition fails to state a cause of action under the NYCCBL and should be dismissed.

Concerning the issue of broadbanding, HHC observes that, pursuant to NYCCBL §1173-4,3(b),

> "It is the right of the city, or any other public employer, acting through its agencies, to ... determine the content of job classifications,.... Decisions of the city or_ any other public employer on those matters are not within the scope of collective bargaining.... (Emphasis added).

Additionally, HHC states that the Act establishing the HHC, Unconsolidated Law §7385(12), provides that HHC shall have the power:

> ... to promulgate rules and regulations relating to the creation of classes of positions, position classifications, title structure, class specifications,

> examinations, appointments, promotions, ... to prescribe [employees'] duties, fix their qualifications,....” (Emphasis added).

HHC contends that pursuant to the above provisions of law, the establishment of titles or changes in titles is a management right. Moreover, HHC alleges that this management right has not been limited by contract, except to the extent that the collective bargaining agreement requires that the Union be notified of any changes five days prior to implementation. HHC asserts that it notified the Union of its broadbanding proposal, and has voluntarily discussed this matter with the Union at the latter's request, but it has no legal obligation to do so.

It is submitted by HHC that nothing in the broadbanding program will affect the collective bargaining rights of the employees involved. HHC states that petitioners have failed to demonstrate how the broadbanding of titles will interfere with employees' rights under the NYCCBL, will dominate or interfere with the formation or administration of the Union, will discriminate against any employee to encourage or discourage participation in the activities of the Union, or will result in a refusal to bargain collectively in good faith on issues which are mandatory subjects of bargaining. Accordingly, HHC seeks the dismissal of this aspect of the petitioners' claim.

With respect to petitioners' challenge to the Paramedic Forgiveable Loan Agreement, HHC asserts initially that the petitioners lack standing to contest this issue. HHC alleges that the loan agreements only affect Ambulance Corpsmen who are candidates for the Paramedic Training Program. All of the petitioners completed their training prior to implementation of the loan agreements, and two of the petitioners are currently Paramedics, while the third (petitioner Engstrom), although formerly a Paramedic, is no longer an employee. Thus, HHC contends that the petitioners are not affected by the loan agreements, are not interested parties, and lack standing to challenge the agreements.

Moreover, HHC argues that the petitioners have failed to identify how the Forgiveable Loan Agreement causes or was intended to cause discrimination against employees because of their Union affiliation or activity, or how the implementation of the agreements by HHC dominates or interferes with the formation or administration of the Union. For these reasons, HHC submits that this claim fails to state a cause of action under the NYCCBL.

Concerning the petitioners' challenge to the alleged lengthening of the probationary term for Ambulance Corpsmen from 6 months to one year, HHC states that on August 11, 1980, HHC amended §5:2:1 of its Personnel Rules and Regula-

tions to effectuate a change in the term of probationary service from 6 months to one year for all probationary employees appointed on or after August 11, 1980. HHC alleges that it is empowered to fix the length of probationary terms pursuant to §63(2) of the Civil Service Law. It is argued by HHC that the petitioners have failed to allege any evidence to show that HHC's extension of the probationary term for all HHC employees appointed after August 11, 1980 was intended to discriminate against union activists in Local 2507 during 1981 and 1982. HHC submits that there exists no evidence in the record that the lengthening of the probationary term interfered with the employees' exercise of rights under the NYCCBL, and accordingly, HHC requests that this claim be dismissed.

Finally, HHC objects to the petitioners' reference to petitioner Engstrom's termination from employment during his probationary period. HHC notes that Engstrom was terminated on September 11, 1981, was offered reinstatement pending a hearing, pursuant to court order, and failed to report to work as directed. It is further alleged that Engstrom has litigated the circumstances of his termination in court and in other proceedings before this Board. HHC submits that any claim presented in the petition herein concerning Engstrom is barred by the statute of limitations

contained in §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining, and that in any event, the Board should not entertain Engstrom's claim which is already pending before the courts.

The Union's Position

The Union contends initially that the petitioners' claims relating to the Union's alleged failure to challenge HHC's continued use of provisional employees over an eight year period are barred by the statute of limitations, because an improper practice petition was not filed within four months of the Union's alleged failure to act.

The Union further alleges that even accepting the factual allegations of the petition as true, the petition fails to state a claim upon which relief can be granted. Specifically, the Union asserts that the petitioners have failed to allege facts sufficient to state a cause of action for a breach of the duty of fair representation. D.C. 37 argues that the duty of fair representation arises only as to those matters which a union has the sole power to remedy as the exclusive bargaining agent for the employees, it represents. Under the NYCCBL, contends the Union, a union is solely responsible for collective bargaining and contract administration as the bargaining agent for an employee unit. D.C. 37 submits

that a union as the bargaining agent for employees does not have a duty to file a lawsuit enforcing collateral rights" arising under laws, such as the Civil Service Law. In this case, D.C. 37 alleges that the duty of fair representation owed their unit members by Local 2507 and D.C. 37 does not include the duty to file a lawsuit against HHC to compel the holding of civil service examinations. Therefore the Union argues that the Union could not have breached a duty which it never owed its unit members.

Concerning the petitioners' claims that the Union has "entertained" negotiation of HHC's broadbanding proposal, D.C. 37 alleges that under the provisions of the NYCCBL and the Civil Service Law, the creation of civil service titles and the content of job specifications, including broadbanding, are rights reserved to the public employer. The employer need not bargain on the effect of" changes in these areas of management right unless the change creates a practical impact on bargaining unit employees. D.C. 37 states that the Union has been discussing the broadbanding proposal with HHC for the purpose of alleviating any potential practical impact on EMS employees. However the Union submits that a union cannot prevent, and therefore cannot have a duty to prevent, an employer's exercise of a management right. Accordingly, the Union alleges that a

duty of fair representation cannot have arisen with respect to HHC's exercise of its management right to broadband, and the Union cannot have breached a non-existent duty.

With regard to the petitioner's challenge to the Paramedic Forgiveable Loan Agreement, D.C. 37 alleges that this Agreement is incorporated as Appendix A to the parties' 1980-82 collective bargaining agreement, which was duly ratified by the members of Local 2507 with their full knowledge of the loan agreement. The Union argues that the duty of fair representation is not breached merely because the result of good faith bargaining is to create varying benefits for different employee groups. The union meets its duty so long as it acts fairly, impartially and non-arbitrarily in negotiating and administering an agreement. It is the Union's contention that petitioners have failed to demonstrate any manner in which the Union has breached its duty of fair representation in negotiating and administering the Paramedic Loan Agreement.

Finally, regarding the Union's failure to challenge HHC's extension of the probationary period for its employees, the Union states that under the Civil Service Law, the length of a probationary period is set by the public employer and is not a subject of collective bargaining. Therefore, argues the Union, no duty of fair representation

can arise from an event which is beyond the Union's control. Additionally, D.C. 37 notes that it offered to represent petitioner Engstrom before HHC's Personnel Review Board in connection with the termination of his employment during his probationary period, but Engstrom refused, preferring to be represented by his own counsel. Thus, D.C. 37 contends that it satisfied any duty of fair representation it may have owed to Engstrom.

Discussion

Before considering the merits of the petitioners' claims, we first address several procedural and/or jurisdictional issues raised by the parties. The Union contends that the petitioners' claim that the Union breached its duty of fair representation by failing, over a period of eight years, to challenge HHC's continued use of provisional employees, is barred by the statute of limitations[2] because an improper practice petition was not filed within four months of the Union's alleged failure to act. We do not find this defense to be persuasive. Clearly, the petitioners allege that the Union's failure to act was a continuing wrong, at least until the date that the Union commenced a proceeding in State Supreme Court to challenge HHC's practices. While the parties have hot alleged

[2] Revised Consolidated Rules of the office of Collective Bargaining §7.4.

precisely when that proceeding was initiated, the record does reflect that the Union's Article 78 petition was verified on July 27, 1982, a date less than four months from the date the improper practice petition was filed herein. Thus, it appears that for at least some period of time within the four month period of limitation, the union had failed to act. For this reason, we find that the petitioners' challenge to the Union's inaction is not barred by the statute of limitations.

A different situation is presented with respect to the petitioners' challenge to HHC's extension of the probationary period from 6 months to one year. The evidence in the record demonstrates that HHC acted to amend §5:2:1 of its Personnel Rules and Regulations on August 11, 1980, in order to effectuate a change in the term of probationary service from 6 months to one year for all probationary employees appointed on or after that date. The petitioners' attempt to challenge HHC's actions in promulgating this change through the instant petition, which was filed more than two years after the date of HHC's actions, is untimely and is barred by the statute of limitations. Therefore, we do not reach the merits of the petitioners' claims concerning this issue. We note, however, that HHC's actions in this regard appear to have been

authorized expressly by the terms of §63(2) of the Civil Service Law. On the basis of the above finding, we similarly do not reach the merits of the petitioners' claim that the Union improperly failed to challenge HHC's extension of the probationary period. We find this claim, as well, to be time-barred.

A further procedural issue has been raised by HHC concerning whether the petitioners have standing to challenge the negotiation and implementation of the Paramedic Forgiveable Loan Agreement. This Agreement resulted from the award of a Salary Review Panel established through negotiations in 1980, and was part of a package awarded by that Panel which included a three step pay plan (in addition to the across-the-board percentage wage increase achieved through negotiations), a three-year work commitment by new Paramedic candidates, and a link between completion of the Paramedic Training Program and the Forgiveable Loan Agreement. The terms of the Agreement were incorporated into Appendix A of the parties' 1980-1982 collective bargaining agreement, which was ratified by the membership.

It is not disputed that under the terms of the Agreement, only new candidates for the Paramedic Training Program are subject to the terms of the Forgiveable Loan Agreement. It is also not disputed that all of the petitioners completed

their training and were appointed (provisionally) to the position of Paramedic before the Agreement became effective. Thus, the terms of the Agreement have no application to the petitioners, and they are not affected thereby. HHC argues that the petitioners are not interested parties concerning this issue, and lack standing to raise it before this Board. In response, the petitioners assert that they have been unable to find any paramedic candidate affected by the Agreement who is willing to be party to a challenge to the Agreement, and the reasons for this lack of interested petitioners is alleged to be the candidates' fear of reprisals by EMS.

We agree with HHC that the petitioners lack standing to challenge the Forgiveable Loan Agreement. They are not affected or aggrieved by the implementation of this Agreement, and the objections they voice are merely hypothetical. They have failed to allege a single example of any employee whose rights actually have been impaired by the administration of this Agreement. Not only do the petitioners lack standing, but their claim is further speculative and, at best, premature.

We are not persuaded by the petitioners' contention that no affected paramedic candidate whom they approached was willing to be a party to this proceeding because of

fear of reprisals. The petitioners' allegations in this regard are merely conclusory. The petitioners wholly fail to allege which employees they approached, and what objective facts caused those employees to fear reprisals. On the basis of the petitioners' conclusory and speculative allegations, this Board is unable to entertain this claim.

Another ground exists for rejecting this claim. The petitioners state that they do not disagree with the Forgiveable Loan Agreement "in principle", but they contend that the individual loan agreements promulgated by HHC do not conform to the agreement which was incorporated into the collective bargaining agreement and approved by the membership of Local 2507. If this is so, then grounds may exist for alleging a breach of contract under the grievance procedures of the collective bargaining agreement. However, petitioners have failed to allege facts sufficient to show that this alleged failure to adhere to the terms of the contract constitutes an independent improper practice within the meaning of the NYCCBL.

For the above reasons, we find the petitioners' challenge to HHC's implementation of the Forgiveable Loan Agreement to be without merit, and we will dismiss this claim. Consequently, we will also dismiss the petitioners' claim that the Union failed and refused to initiate an improper practice petition challenging HHC's actions in this regard.

We now turn to several substantive issues raised by the petitioners' claims herein. The petitioners allege that although the four titles involved in this proceeding were created in 1974, a civil service examination for the position of Ambulance Corpsman was not given until 1979, and no civil service examination for the other titles has been given up to the present date. The petitioners further allege that HHC has continuously appointed employees to these positions provisionally, and has permitted many incumbents to serve provisionally for periods of several years. It is argued by petitioners that HHC's employment practices are not only violative of provisions of the Civil Service Law, but also constitute improper practices under the NYCCBL.

The petitioners' allegation of improper practices arising out of HHC's continued appointment of provisional employees is based on their contention that, given the extremely limited due process rights possessed by provisional employees, the continued employment of provisionals is so "inherently destructive of employee interests" that it constitutes an improper practice "without need for proof of an underlying improper motive". For this proposition,, petitioners rely on the decision of the United States Supreme Court in National Labor Relations Board v. Great

Dane Trailers, Inc.[3] We believe that petitioners' reliance is misplaced, and that the holding in that case has no bearing upon the facts of the present ratter.

As noted by respondent HHC, the facts in Great Dane Trailers involved the employer's denial of vacation benefits to strikers at the same time that he granted those benefits to workers who had not struck, even though both groups met the requirements for receipt of vacation benefits under the collective bargaining agreement. There was no question that the action of the employer was discriminatory against strikers who engaged in activity protected under the National Labor Relations Act, i.e., striking. The Court held that such discriminatory treatment was capable of discouraging membership in a union. The Court stated:

> "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity."[4]

It was in the context of its finding of the employer's dis criminatory treatment of employees, based solely upon their participation in protected activity, that the Court made the statement relied upon by petitioners herein:

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[3] 388 U.S. 26, 65 LRRM 2465(1967).

[4] Id., 65 LRRM at 2468.

> "Some conduct, however, is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive.... That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'"[5]

We find the present case to be distinguishable from Great Dane Trailers. Here, the record reveals no evidence of any action by the employer which differentiates between employees based upon their involvement in protected union activity. To the contrary, the employment practices complained of by petitioners have been applied uniformly to all employees, without regard to their union membership or involvement in union activity. Based upon our review of the record in this case, we are unable to find that HHC's utilization of provisional employees "bears its own indicia of intent" so as to constitute an improper practice. Therefore, the burden rests on petitioners to allege facts sufficient to show how HHC's actions encourage or discourage membership in, or participation in the activities of, a public employee organization; or interfere with, restrain or coerce employees in the exercise of their rights to organize, form, join or assist a union, bargain collectively, or refrain therefrom.

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[5] Id.

We hold that the petitioners have failed to satisfy their burden of proof. Their allegations of violations of the NYCCBL are merely conclusory. Petitioners may have pleaded a convincing[6] case of HHC's failure to comply with the provisions of the Civil Service Law regarding the appointment of provisional employees and the giving of competitive civil service examinations. However, they have failed to establish any nexus between the alleged violations of the Civil Service Law and any encouragement or discouragement of membership in or participation in the activities of a union, or any interference with employee rights under the NYCCBL. Further, the contention that HHC's alleged Civil Service Law violations constitute domination or interference with the formation or administration of Local 2507 is, in our view, frivolous. Accordingly, for all of the reasons stated above, we find the petitioners' claim to be without merit, and we shall order that it be dismissed.

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[6] We note that in an Article 78 proceeding commenced by petitioners McAllan and Taylor, the Supreme Court, New York County, hat denied HHC's motion to dismiss claims substantially identical to those asserted by petitioners herein, holding that the petitioners have stated a cause of action in mandamus for alleged ongoing violations of the Civil Service Law and the State Constitution. McAllan v. City, Index No.27728/82 (Meyers, J., May 5, 1983).

We note, in regard to this claim, that petitioners McAllan and Taylor, together with others, have commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules in State Supreme Court, to compel HHC to give competitive civil service examinations for the positions currently filled by provisional appointees. We express no view as to the issues presented in that proceeding, inasmuch as the interpretation and application of provisions of the Civil Service Law is outside the scope of this Board's jurisdiction. Our dismissal of the petitioners' claim under the NYCCBL is without prejudice to any claims they may raise in court based upon the Civil Service Law.

The petitioners claim that the Union's failure (at least prior to July, 1982) to challenge HHC's utilization of provisional employees and refusal to give civil service examinations, constitutes a breach of the Union's duty of fair representation. The Union responds that it has no duty to commence legal action to enforce provisions of the Civil Service Law which do not involve collective bargaining or contract administration.

It is well established that this Board has jurisdiction over claimed breaches of a union's duty of fair representation.[7] The claim presented herein differs from

[7] Decision Nos. B-16-79; B-13-81; B-11-82; B-18-82; B-39-82.

most we have considered in the past because the petitioners complain of the Union's failure to commence a court proceeding to enforce rights derived not from a collective bargaining agreement or from the NYCCBL, but from external law (i.e., the Civil Service Law). The question presented for our determination is whether a union owes a duty to unit employees to enforce such rights.

The United States Supreme Court, in defining the scope of the duty of fair representation, has stated that when Congress empowered unions to bargain exclusively for all employees in a bargaining unit, thereby subordinating individual interests to the interests of the unit as a whole, it simultaneously imposed on unions a correlative duty "inseparable from the, power of representation to exercise that power fairly".[8] The fair representation doctrine thus serves as a counterbalance to a union's exclusive authority: since exclusive representation reduces the individual rights of employees, the doctrine protects "individuals stripped of traditional forms of redress by the provisions of the ... labor law."[9]

Pursuant to the doctrine, as it has been applied by the courts, a union must represent fairly the interests

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[8] Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944).

[9] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

of all bargaining unit members with respect to the negotiation, administration, and enforcement of collective bargaining agreements.[10] The question posed by the petitioners herein is whether the union has an obligation to represent unit members with respect to matters outside the scope of negotiation, administration, and enforcement of collective bargaining agreements. The respondent Union asserts that this question must be answered in the negative. We agree.

We believe that duty of fair representation is coextensive with a union's exclusive authority to act with respect to certain matters. To the extent that a union's status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, such as negotiation with the employer, the union owes a duty to represent fairly the interests of the employee who is unable to act independently to protect his own interests. In the context of a certified employee representative's exclusive authority under the NYCCBL and the applicable provisions of the Taylor Law, the duty of fair representation does not reach into and control all aspects of the Union's relationship with its members. The duty extends only to the negotiation, administration, and enforcement of a collective bargaining agreement. It does not extend to the enforcement of provisions of law, the

[10] International Brotherhood of Electrical Workers v. Foust, 442 U.S. 32 (1979); see Decision No. B-16-79.

enforcement of which may be obtained by any affected citizen through free access to the courts. In the latter case, the union does not control the sole access to the forum through which rights may be vindicated, and thus there exists no policy reason why the union should be held responsible for protecting those rights.

This view of the scope of the duty of fair representation has been accepted by the courts.[11] We believe that it strikes an appropriate balance between the rights and interests of unions and employees. To impose a broader scope of duty upon unions would be, in our view, unwarranted and unduly burdensome.

In the present case, the Union does not control the sole means of obtaining enforcement of employees' rights under the Civil Service Law. To the contrary, any affected employee has access to the courts to challenge the alleged violation of these rights by the employer. In fact, petitioners McAllan and Taylor, together with others, have availed themselves of their right by commencing a proceeding in State Supreme Court challenging HHC's em-

[11] Black Musicians of Pittsburgh v. Local 6071, American Federation of Musicians, 375 F Supp. 902, 86 LRRM 2296 (W.D. Pa. 1974), aff'd, 544 F. 2d 512 (3d Cir. 1975); see, Hawkins v. Babcock & Wilcox Co., 105 LRRM 3438 (N.D. Ohio 1980); Lacy v. Local 287, United Auto Workers, 102 LRRM 2847 (S.D. Ind. 1979).

ployment practices. Under these circumstances, we hold that D.C. 37 owed no legal duty to petitioners to institute a lawsuit challenging HHC's alleged violations of the Civil Service Law. In the absence of such a duty, the Union cannot have committed an improper practice. Additionally, we note that the New York State Public Employment Relations Board ("PERB") has held expressly that:

> "... an employee organization's duty of fair representation does not include the obligation to prosecute lawsuits on behalf of members of the unit it represents unless it has provided that service for others and it can be shown that the employee organization is discriminating against the charging party in not providing it to him.."[12]

In reaching this conclusion, PERB affirmed the decision of its Hearing Officer who stated:

> "While a union is not privileged to refuse to examine the merits of a grievance even though its informed judgment results in a decision not to prosecute it, lawsuits and extra-contractual proceedings are governed by different considerations. Absent its provision to members or others within the unit with respect to matters affecting their employment relationship, a union is under no obligation to furnish a service extraneous to its statutory mandate. ...
>
> ... [Wlhen the institution of a proceeding for judicial review of agency action which affects a unit member is

[12] Public Employees Federation (Hartner), 15 PERB ¶3066 (1982).

> neither statutorily or contractually compelled, the charging party must show that the union has voluntarily granted such assistance to its members (or to unit members generally) and that it has discriminated against him 'by reason of improper motives or of grossly negligent or irresponsible conduct.'"[13]

Applying these principles to the instant matter, the record shows that the petitioners have not alleged that the Union has commenced similar lawsuits on behalf of other employees, or that its failure to do so on behalf of the employees involved herein was discriminatorily motivated. For this further reason, we find that petitioners have failed to establish that D.C. 37 breached its duty of fair representation, and, accordingly, their claim must be dismissed.

The petitioners challenge HHC's program of broadbanding the four former titles in the Ambulance Corpsman series into the two new titles in the Emergency Medical Service Specialist series on the grounds that this program constitutes, an attempt to circumvent the Civil Service Law, and has been designed so that it may be utilized by HHC to discriminate against and/or coerce employees in the exercise of rights granted under the NYCCBL. As to the first part of this claim, clearly this Board lacks jurisdiction to determine whether HHC's broadbanding program is consistent with the provisions of the Civil Service Law. Within the

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[13] Id., 14 PERB ¶4671 (1981).

scope of our jurisdiction, however, we note that NYCCBL §1173-4.3(b) provides that it is the right of a public employer "to determine the content of job classifications", and that the public employer's decisions concerning that subject are not within the scope of collective bargaining. Additionally, we observe that Unconsolidated Law §7385(12) expressly authorizes HHC to determine classes of positions, position classifications, title structure, and class specifications, and to prescribe employees' duties and fix their qualifications. Based upon these provisions of law, we find that HHC's decision to broadband the titles involved in this case constitutes an exercise of its statutory management prerogative.

The second part of this claim, to the effect that the broadbanding program is designed to be used for discriminatory purposes, is not substantiated by any factual allegations. The petitioners again argue, in reliance upon the decision in Great Dane Trailers, supra, that HHC's actions in broadbanding the affected titles are so "inherently destructive of employee interests" that they should be found to constitute an improper practice "without need for proof of an underlying improper motive". However, not only have the petitioners failed to allege facts sufficient to establish an improper motive, but they have failed to allege

facts sufficient to show why the rationale of the court in Great Dane Trailers should be held applicable to the present case.

We have discussed previously the facts and holding of the court in Great Dane Trailers, supra, in connection with our ruling on the petitioners' challenge to HHC's utilization of provisional employees. Our discussion there is equally applicable to the present claim. The petitioners have failed entirely to demonstrate that broadbanding has been used to differentiate between employees solely because of their union membership or involvement in union activity. Petitioners' argument that broadbanding could be so used is merely speculative. There has been no showing of actual discriminatory treatment, as was present in Great Dane Trailers. Accordingly, the language from the court's decision which is relied upon petitioners is inapplicable to the present case. Moreover, even if that language were relevant here, we would hold that this exercise of HHC's statutory management prerogative is not "inherently destructive of employee interests". For these reasons, we will dismiss this claim.

The petitioners charge that the Union improperly "allowed" HHC to raise this issue of broadbanding, and "entertained" the broadbanding proposal presented by HHC. Petitioners assert that these actions by the Union constitute a breach of the duty of fair representation.

This claim may be disposed of summarily. We have held that the broadbanding program constitutes an exercise of HHC's statutory management prerogative. Therefore, the Union possessed no power to prevent HHC from taking the proposed actions. manifestly, the Union has no duty to attempt that which it has no legal right to do. For this reason, the Union cannot have breached a non-existent duty. The fact that the parties voluntarily discussed the broadbanding proposal does not alter our conclusion. The collective bargaining agreement requires that HHC give the union notice prior to implementation of such changes. The fact that the Union used this notice period to discuss with HHC ways of avoiding any practical impact which might flow from management's decisions, serves to indicate, if anything, that the Union satisfied, rather than breached, its duty of fair representation. Therefore, the petitioners, claim must be dismissed.

Another claim raised by petitioners relates to the termination of petitioner Engstrom's employment after completion of the originally-indicated 6 month probationary term but prior to completion of the extended one year probationary period. We have already ruled that petitioners' challenges to HHC's extension of the probationary period are barred by the statute of limitations. We hold that the

assertion, in the petition herein, of claims relating to Engstrom's termination, which occurred on September 11, 1981, is also barred by the four month statute of limitations. Moreover, even if such claims were timely, we would decline to consider them in this proceeding on the ground that these claims are already pending before this Board in other proceedings[14] as well as before the courts in several proceedings commenced by petitioner Engstrom. Accordingly, we will dismiss these claims.

Finally, we have considered petitioner McAllan's objections to the respondents' submission of sur-replies. As stated in the Trial Examiner's letter to the parties, dated March 25, 1983, the submission of a sur-reply is not authorized under the Revised Consolidated Rules of the Office of Collective Bargaining. It has been the policy of this Board to discourage the filing of pleadings subsequent to a reply, absent special circumstances. However, we have agreed to consider written responses to a reply in several instances in which we found that new facts or legal theories were raised for the first time in the reply, warranting a response by the opposing party,[15] or where, under the circumstances of a particularly complex case, such a response helped to clarify the record.[16]

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[14] Docket Nos. BCB-499-81 and BCB-501-81.

[15] Decision No. B-27-80, p.2., fn.1.

[16] Decision No. B-23-82, p.3., fn.2.

In the present case, we do not believe that the submission of sur-replies was warranted, except to the extent that they responded to the allegations concerning the actual implementation of broadbanding, which were raised for the first time in petitioners' replies. The remainder of the respondents' sur-replies consist substantially of elaboration or extension of arguments previously advanced. We do not find the existence of special circumstances warranting submission of such material in the form of a sur-reply.[17] Accordingly, we have not considered the respondents' sur-replies, except to the extent that they concern the implementation of the broadbanding program.

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

[17] Better practice would have been for the respondents to seek leave to serve and file a memorandum of law responding to petitioners' arguments, rather than submitting an additional pleading.

ORDERED, that the improper practice petition herein be, and the same hereby is, dismissed in all respects.

DATED: New York, N.Y.
May 18, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F.X. MULHEARN
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER