McAllen, et. al v. Emergency Medical Services,et. al, 31 OCB 2 (BCB 1983) [Decision No. B-2-83(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice — DECISION NO. B-2-83

-between- — DOCKET NO. BCB-499-81

RICHARD McALLAN, GEORGE ENGSTROM,

Petitioners,

-and-

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

Respondent.

- X

In the Matter of the improper Practice

-between-

FRED WILLIAMS, GEORGE ENGSTROM, — DOCKET NO. BCB-501-81

Petitioners,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Respondent.

- X

SECOND INTERIM DECISION AND ORDER

Verified improper practice petitions were filed in the above-captioned cases on June 11, 1981 (BCB-499-81) and June 22, 1981 (BCB-501-81). After joinder of issue, these two proceedings, together with one other not relevant

herein[1], were consolidated for decision.[2] In Decision No. B-25-81, this Board denied the respondent's motions to dismiss these cases, and directed that these matters be consolidated for purposes of hearings to be held before a Trial Examiner designated by the Office of Collective Bar gaining.

Hearings were held on January 27, February 10, March 5, and March 8, 1982. Pursuant to the direction of the Trial Examiner, further hearings were adjourned sine die, pending submission and determination of the petitioners' motion to amend their improper practice petition. On March 31, 1982, petitioners submitted a motion to amend and proposed amended petition and exhibits. After several extensions of time were granted, the respondent Health and Hospitals Corporation submitted a cross-motion to deny amendment of the petition and to dismiss the proposed amended petition, on June 7, 1982. The petitioners' attorney submitted a reply affirmation on June 24, 1982, in opposition to the respondent's cross-motion to dismiss, and in support of petitioners' request to enter a default against the respondents. The respondents submitted a reply

[1] BCB-500-81, which was subsequently dismissed in its entirety.

[2] The petitioners' joint attorney had requested consolidation, which was granted by this Board over the objection of the respondent.

affirmation on July 6, 1982, in opposition to the petitioners' request to enter a default.

Background

The original petitions herein were filed by three employees of the Emergency Medical Services division of the respondent Health and Hospitals Corporation (hereinafter referred to as "EMS" and "HHC" respectively). The original petitions alleged specific acts taken by representatives of EMS and HHC and directed against one or more of the petitioners, which were alleged 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 claimed that representatives of management interfered with, coerced, and discriminated against them as part of a scheme to interfere with and affect the outcome of an internal union election (in which petitioners McAllan and Engstrom were candidates) and in an effort to interfere with and prevent the petitioners' investigation and handling of grievances relating to safety matters.

At the opening of the hearing before the Trial Examiner, petitioners' counsel moved orally for leave to amend the petition to include additional acts (the termi-

nation of Engstrom's and Williams' employment) and an additional request for relief (Tr.3-4).[3] The Trial Examiner granted the motion to amend, over the respondent's objection (Tr.5-7), to the extent of permitting amendment of the petition to include the allegation of acts claimed to be related to or a consequence of matters pleaded in the original cause of action, but which occurred subsequently to the filing of the petition. (Tr.8). The Trial Examiner also directed that the proposed amendment be submitted in writing before the next hearing date, in form specific enough to place the respondent on notice as to what it was being required to defend against. (Tr.9). The Trial Examiner further stated that he would grant the respondent time, if requested, to respond to the new allegations. Thereafter, the hearing continued.

At the second day of hearings, on February 10, 1982, petitioner's counsel submitted a written motion to amend the petitions solely to include various additional forms of relief, including reinstatement with back pay, costs, and counsel fees. Counsel for respondent reiterated his opposition to such amendment (Tr.215-216).

[3] References to pages of the transcript of the hearing are indicated by (Tr.).

In the course of the fourth day of hearings, on March 8, 1982, the petitioners attempted to introduce testimony concerning additional alleged incidents which were not pleaded in the original petition. Upon the respondent's strenuous objection 613-615), after hearing arguments presented by respective counsel for both parties, the Trial Examiner directed that the petitioners submit a further amended petition, in writing, raising all factual incidents involving or arising out of the original cause of action which were alleged to have occurred subsequent to the filing of the original petition. The Trial Examiner emphasized that he was not granting petitioners leave to expand beyond the cause of action originally pleaded. He further directed that the respondent be given the opportunity to respond, in writing, to the proposed amendment. (Tr.633-637). Finally, he adjourned the hearings sine die, until such time as the issue of the amendment to the petition could be determined. The instant motion and cross-motion were submitted thereafter.

Positions of the Parties

Petitioners' Position

The petitioners submit that the allegations set forth in their amended petition are clearly relevant to

their claims of (a) management interference in the internal union election in which some of the petitioners were candidates, and (b) management harassment and discrimination in retaliation for and in an effort to stop the petitioners' active participation in matters relating to safety grievances. The petitioners assert that both of these basic claims were alleged in the original pleadings in these cases, and that the present amendment only serves to supplement the original claims by including additional facts which either occurred or became known to petitioners subsequent to the filing of the original petitions. Petitioners maintain that all of the alleged incidents are part of a "common scheme" to discredit, interfere with, and discriminate against the petitioners.

The petitioners also submit that pleadings are to be liberally construed., and that the sole requirement of a pleading is to:

> ... identify the transaction and indicate the elements of the cause of action or defense with sufficient precision to permit the adversary to prepare his case and the court to control the proceedings...."[4]

[4] Petitioners' attorney's reply affirmation, quoting Wachtell, New York Practice Under the CPLR, 2nd Edition, p.106.

The petitioners argue that their original pleadings satisfied the quoted standard, and were not required to specify in detail each and every fact which might be adduced at a hearing. They contend that the amended petition does not raise new claims, but merely fills in factual details within the scope of the original claims.

Additionally, the petitioners assert that the respondent should have filed an answer to the amended petition, rather than moving to deny the amendment. The petitioners allege that the respondent's cross-motion is intended to delay the determination of this proceeding. For this reason, the petitioners request that a default be entered against the respondent.

Respondent's Position

The respondent interprets the original petitions and the Board's Interim Decision No. B-25-81 to limit the petitioners' claims to those relating to the internal union election and the petitioners' candidacy for union office. HHC asserts that the allegations of the amended petition are in no way connected to the petitioners' original claims. Moreover, HHC contends that many of the events alleged in the amended petition took place either before the petitioners' candidacy for office, or after

the internal union election was held. Respondent HHC submits that these allegations can have no bearing on the claims pleaded in the original petition, and are, on their face, beyond the scope of the Trial Examiner's grant of leave to amend the petition.

HHC further contends that the amended petition raises new claims concerning events which occurred more than four months prior to the filing of the petition, and is thus barred by the statute of limitations.[5] For this additional reason, HHC requests that the amended petition be dismissed.

Discussion

Initially, we hold that the petitioners' request that a default be entered because of the respondent's failure to file answer to the amended petition, is without merit. Clearly, the respondent objected to the petitioners' attempts to amend their petition throughout the hearings, and the Trial Examiner's ruling directing the submission of an amended petition expressly contemplated that the respondent might properly elect to either answer or move to oppose the amended petition to be submitted (Tr.639-641). The cross-motion to deny the amendment and to dismiss the

[5] §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules")

amended petition is responsive to petitioners' motion to amend and is properly before us for determination. Accordingly, the application to enter a default is denied.

We find that one aspect of the respondent's opposition to the amended petition is based upon a misinterpretation of the scope of the claims raised by petitioners in the original pleadings. The respondent views those claims, or causes of action, as limited to claimed violations of the NYCCBL relating to the internal union election campaign and two of the petitioners' candidacy for office therein. This view is perhaps understandable, since the factual allegations of original petitions, as well as the verified replies, deal predominantly with such claims. However, as petitioners point out, it is alleged in paragraph 2 of each of the original petitions that the respondent has interfered with petitioners McAllan's and Engstrom's attempts to represent members of the union, Local 2507. The original pleadings also indicate that, at the times in question, McAllan was the Local's Secretary-Treasurer and a member of its Safety Committee, and Engstrom was the union's Lincoln Hospital Shop Steward and Co-Chairman of its Safety Committee. It is further alleged, in the verified replies, that both men were active in safety matters on behalf of the members of the union. It is

implicit in these pleadings that the petitioners' attempts at representation, with which HHC allegedly interfered, related to safety matters.

In the face of the petition's express claim of interference with the petitioners' attempts to represent members of the union, and the allegations of the petitioners' involvement in safety matters, contained in the petitions and the replies, we are unable to find that the cause of action pleaded in the petition is limited to acts relating to the internal union election campaign, as asserted by the respondent. Certainly, the thrust of the original pleadings was an attack on the alleged interference by HHC with petitioners' participation in the election. But the issue of interference with petitioners' involvement in safety matters on behalf of the union was also raised, if not fully developed, and we will not preclude the petitioners from amending their petition to further develop that claim at this time. The hearing record supports the respondent's contention that the petitioners have, in effect, changed the theory of their case, from the election matter to the safety matter; but we hold that the petitioners are within their rights to do so, since both claims were raised in the original pleadings.

We have reviewed the lengthy (25 pages plus approximately 90 pages of exhibits) proposed amended petition and have found its contents generally to be consistent with the claims raised in the original pleadings as we have construed them. However, several allegations of the amended petition go beyond the scope of these claims or are otherwise legally deficient. 'Vie will identify these allegations and order that they be stricken from the amended petition, or that limitations be placed on their use in these proceedings.

1. Allegations contained on pages 2-4 of the amended petition, concerning the petitioner's tour of a proposed building to house the EMS Webster Facility, involve a date more than four months prior to the filing of the original petitions. Accordingly, any challenge to the respondent's actions concerning that incident is barred by the statute of limitations.[6] However, testimony concerning that incident may be admissible as background evidence bearing upon the respondent's motion for subsequent acts occurring within the statute of limitations and included within the scope of the petition. Therefore, we will not order that these allegations be stricken, but we hold that they may not be used for the purposes of establishing any independent improper practice occurring more than four months before the petitions were filed.

[6] OCB Rules §7.4.

2. The allegations contained on pages 4-5 of the amended petition concerning the petitioners' dealings with District Council 37 Representative Joseph Barriteau are irrelevant to the question of improper practices by the respondent employer. Moreover, we take administrative notice of the fact that these allegations form the basis of a separate improper practice proceeding now pending before this Board, to which respondent HHC is not a party.[7] For these reasons, we order that these allegations be stricken from the amended petition.

3. The allegations contained in various parts of the amended petition (see pages 4,12,18,24) pertaining to alleged acts of harassment and retaliation directed toward petitioner Engstrom's partner, Joseph Ruanova, should be stricken. Neither the original petition nor petitioners, reply contained any mention of Mr. Ruanova. Additionally, petitioners allege that Ruanova's employment by HHC was terminated in September, 1981, a date more than four months prior to the filing of the amended petition which, for the first time, mentioned Ruanova's claim. We hold that Ruanova's claims are beyond the scope of the original petitions, and that the introduction of his claims at this time is barred by the statute of limitations. Accordingly,

[7] McAllan v. Barriteau and District Council 37, Docket No. BCB-509-81.

we order that all references to Ruanova be stricken from the amended petition.

4. The allegations contained on pages 12-13 of the amended petition concerning the general competence of EMS supervisors, certified as EMT-1s, to evaluate the performance of paramedics, certified as EMT-lVs, are unrelated to the issue of interference with petitioners' union activity. The problem raised in these allegations involves questions of medical judgment and managerial prerogative. These matters are outside the scope of petitioners' improper practice claims. Accordingly, we order that these allegations be stricken from the amended petition. We note, however, that the allegations of petitioners' favorable evaluations may remain in the amended petition.

5. The allegations contained in the first sentence of paragraph Al on page 18 of the amended petition, concerning a purported systematic disregard of Civil Service Law through the employment of a substantial number of persons in provisional status, are beyond the scope of the petitions herein. Additionally, we take administrative notice of the fact that these allegations have also been raised in another improper practice proceeding now pending before this Board.[8] Therefore, we order that these allegations

[8] McAllan v. EMS and Local 2507 and District Council 37, Docket No. BCB-621-82.

be stricken from the amended petition.

6. The allegations contained in the first paragraph A4 on page 20 of the amended petition, concerning a purported attempt by HHC to block all "PERV" [sic; should be "PRB"[9]] hearings for all provisional and probationary employees, are unrelated to the petitioners' claims of harassment and discrimination because of their own union activity, and thus are outside the scope of the petitions herein. We order that these allegations be stricken from the amended petition.

7. The allegations contained on pages 21-22 of the amended petition concerning reports and audits issued by the New York City Comptroller, the United States Department of Health and Human Services, and the President of the City Council with respect to alleged mismanagement by EMS, are of questionable relevance to the petitioners' claims. However, we have determined that the petitioners should not be precluded from attempting to show that these documents supported their union activity in the area of safety, since arguably, this might be a factor in determining the motivation for the respondent's acts. Therefore, we will permit these allegations to remain in the amended petition, subject to connection by petitioners at the hearing.

[9] HHC's Personnel Review Board.

The remainder of the amended petition appears to be within the scope of the original causes of action, and so we will permit the amendment and will give the respondent an opportunity to file an answer thereto.

We emphasize that in permitting the instant amendment, we are granting the petitioners leave to include in their petition only allegations of additional incidents claimed to be part of a continuing pattern of harassment, interference, and discrimination arising out of the cause of action set forth in the original pleadings. Nothing contained herein shall be construed as the grant of leave to raise new and independent claims of improper practices in this proceeding.

One other point must be considered. We take administrative notice of the fact that one or more of the petitioners have filed ten additional improper practice petitions against respondent HHC since the date of the petitions under consideration herein.[10] Our review of the pleadings in these cases indicates that eight of these proceedings involve issues which are the same or substantially similar to those presented in the instant case.[11] However,

[10] One or more of the petitioners have also filed three improper practice petitions against Local 2507 and/or District Council 37 during the same period.

[11] We observe, however, that the claims raised by the petitioners in Docket Nos. BCB-614-82 and BCB-621-82 are unrelated to the other cases mentioned. These two proceedings shall not be consolidated with any of the others.

several of these proceedings also involve legal questions which may be dispostive of those cases, and which must be addressed by this Board prior to any hearing. lie believe that in the interest of making the most efficient use of the time of this Board, the parties, and their Attorneys, those related proceedings which do not involve a potentially-dispositive legal issue should be consolidated for hearing with the present matters. We reach this conclusion even though four days of hearings already have been held in this case. All of these matters involve one or more of the original petitioners, as well as others, and HHC is the respondent in each case. The claim in each case to be consolidated is derived from the same basic causes of action alleged in the present cases. To conduct separate hearings in each of these related cases in piecemeal fashion would lead to an inordinate delay, and would place an unnecessary and heavy burden on all involved. We do not believe that any party will be prejudiced by consolidation; to the contrary, we believe all will benefit from the conservation of time and elimination of repetition it will enable.

Accordingly, we authorize the Chairman of this Board to designate which of the related improper practice proceedings between these parties should be consolidated for

hearing, and which require the determination by this Board of legal issues prior to any hearing. The latter category of cases shall not be consolidated, and shall proceed independently.

We further direct the Trial Examiner designated by the Office of Collective Bargaining to conduct an informal conference in those cases selected for consolidation, for the purpose of establishing the order of proof and discussing such other matters affecting the conduct of the consolidated hearing as the parties or the Trial Examiner may deem necessary or appropriate.

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 petitioners' motion to amend their petition be, and the same hereby is, granted, to the extent indicated in the decision herein; and it is further

ORDERED, that the respondent's cross-motion to dismiss the amended petition be, and the same hereby is, denied; and it is further

ORDERED, that the respondent serve and file an answer to the amended petition within 10 days after receipt of this decision; and it is further

ORDERED, that the Chairman of the Board of Collective Bargaining be, and the same hereby is, authorized to designate which additional improper practice proceedings between these parties shall be consolidated with the instant proceedings for further hearings; and it is further

DIRECTED, that an informal conference be held before a Trial Examiner designated by the office of Collective Bargaining for the purpose of facilitating the conduct of the consolidated hearings to be held.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

PATRICK F.X. MULHEARN
MEMBER