

Engstrom v. Emergency Medical Services, 31 OCB 21 (BCB 1983)
[Decision No. B-21-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

GEORGE ENGSTROM,
Petitioner,

DECISION NO. B-21-83

DOCKET NO. BCB-609-82

-and-

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

Respondent.

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DECISION AND ORDER

This proceeding was commenced on August 6, 1982 by the filing of a verified improper practice petition. Petitioner, George Engstrom, alleges that respondent Emergency Medical Services (hereinafter "EMS"), a division of the New York City Health and Hospitals Corporation (hereinafter "HHC" or "the Corporation"), committed violations of Section 1173-4.2a (1), (2) and (3) of the New York City Collective Bargaining Law (hereinafter "NYCCBL") by its "punitive transfer" and "demotion" of petitioner.

On September 10, 1982, respondent HHC filed a motion to dismiss the petition on the ground that petitioner failed to comply with Section 7.4 of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "OCB

Rules"), which requires that an improper practice petition be filed within four months of the alleged statutory violation.

Petitioner filed an affidavit in opposition to respondent's motion on September 23, 1982.

Background

In September 1978, petitioner was employed by HHC (EMS) as a provisional Ambulance Corpsman. In January (or April) 1980, petitioner accepted a position as a provisional Paramedic Ambulance Corpsman. On February 9, 1981, he was appointed from an eligible list as a permanent Ambulance Corpsman, but continued to serve in the provisional Paramedic position until his termination on September 11, 1981. While HHC asserted that it terminated petitioner for unsatisfactory job performance, petitioner maintains that he was terminated because of his participation in union activity. Upon application to the New York Supreme, Court, Petitioner obtained a stay of the termination pending a hearing on his application for declaratory judgment and injunctive relief.¹

Pursuant to the court-ordered stay, HHC directed petitioner to report on September 24, 1981 to the EMS facility at Maspeth, Queens for his next tour of duty. Petitioner did not report to Maspeth.

¹ N.Y.. Sup. Ct., Queens Cty, Sept. 17, 1981 (Lerner, J.).

On September 28, 1981, a hearing was held before State Supreme Court Justice Edwin Kassoff. On the issue of petitioner's civil service status, Justice Kassoff found that Mr. Engstrom had not acquired permanent status in either corpsman title. However, the judge held that petitioner was entitled to a hearing before HHC to determine whether his termination was due to causes unrelated to work performance. The matter was remanded to HHC and petitioner was ordered reinstated to the position of Ambulance Corpsman. Judgment was entered on March 3, 1982.² Petitioner has appealed this decision to the Appellate Division of the Supreme Court, contesting the lower court's finding with respect to his civil service status and the nature of the hearing directed.³

On April 1, 1982, respondent sent petitioner a mailgram directing him a second time to report for duty to Maspeth as an Ambulance Corpsman. On April 2, 1982, petitioner informed respondent by telegram that he was available for assignment as a Paramedic Ambulance Corpsman at Lincoln Hospital, his prior work location, during his normal tour of duty.

² Engstrom v. Kerr, No. 13604/81 (Sup. Ct., Queens Cty. Spec. Term, Pt.1, Mar. 3, 1982).

³ Exhibit 3 to petitioner's affidavit in opposition to the respondent's motion to dismiss is a copy of a notice of appeal in Engstrom v. Kerr, No. 13604/81 (Sup. Ct., Queens Cty. Apr. 1, 1982) signed by petitioner's former attorney, Joseph Dubowski, Esq.

Positions of the Parties

Petitioner's Position

Petitioner's claims of improper practice arise out of his reinstatement by HHC to the position of Ambulance Corpsman, which petitioner characterizes as a "demotion", and his assignment to the Psychiatric Emergency Transfer Unit (hereinafter "PET Unit") at Maspeth, deemed by petitioner to be a "punitive transfer".

In August 1980, petitioner commenced serving as shop steward for the bargaining unit represented by Local 2507 of District Council 37 (hereinafter "D.C. 37") at EMS's Lincoln Hospital facility.⁴ In addition, petitioner asserts that he served at various times as a member of Local 2507's Executive Board, as a union delegate to the New York City Central Labor Council, as a member of the Lincoln Hospital Labor Productivity Committee, as co-chairman of the Union occupational Safety and Health Committee, and as a D.C. 37 delegate. Petitioner also asserts that he served on the Local 2507 negotiating committee and raised issues with management concerning, inter alia, salary disparity with paramedics in the private sector and ambulance maintenance. He also filed numerous grievances. Based upon these activities, petitioner

⁴ Events surrounding petitioner's bid for reelection to this position are the subject of another proceeding pending before this Board and docketed as BCB-641-83. See Decision No. B-17-83.

concludes that "EMS would very-clearly view petitioner as a union activist."⁵

According to petitioner, HHC interfered with, restrained and coerced him in the performance of the legitimate functions of a union officer (NYCCBL Section 1173-4.2a(1)) by forcing him to vacate his shop steward office at Lincoln Hospital and to abandon all union-related activities at that facility. Petitioner notes that there are no Paramedic Ambulance Corpsmen assigned to the PET Unit at Maspeth and that the few Ambulance Corpsmen permanently assigned to that location requested their assignments. According to petitioner, any assignment of a Paramedic and any involuntary, permanent assignment of an Ambulance Corpsman to Maspeth would be viewed as punitive and designed to coerce the resignation of the employee so assigned.

Petitioner asserts further that, by transferring him to Maspeth, removing him from the center of union activity, and placing him in a position where he could not properly represent the interests of his shop, HHC sought to dominate and interfere with the administration of Local 2507 (NYCCBL Section 1173-4.2a(2)).

Petitioner also claims that HHC discriminated against him for the purpose of discouraging his participation in the

⁵ Verified Improper Practice Petition, p. 5.

activities of Local 2507 (NYCCBL Section 1173-4.2a (3)). In support of this charge, in addition to the above allegations, petitioner claims that the transfer and demotion, which also resulted in his receiving a considerably lower salary, were effected without due process. Petitioner alleges that other members of Local 2507, although accused of misconduct, were not treated in the same manner.

Petitioner also contends that, by its actions toward petitioner, HHC attempted to intimidate other members of Local 2507 at the Lincoln Hospital facility and to discourage their participation in union activity.

For a remedy, petitioner seeks reinstatement to Lincoln Hospital as a Paramedic Ambulance Corpsman with back pay and all accrued benefits; all costs and expenses incurred in this proceeding; an order directing HHC to cease and desist its harassment of petitioner; and the posting of a notice declaring that EMS committed an improper practice.

The Motion to Dismiss

HHC moves this Board for an order dismissing the improper practice petition on the ground that it was not timely filed within four months of the alleged improper practice. The Corporation argues that the petition, filed with the Office of Collective Bargaining (hereinafter "OCB") on August 6, 1982, was untimely as it was filed eleven months

after the initial transfer of-petitioner to Maspeth on September 24, 1981, and five months after the New York Supreme Court ordered petitioner reinstated, which order issued on March 3, 1982.

HHC also asserts that the assignment of petitioner to Maspeth was a proper exercise of its management authority to deploy the workforce as needed.

HHC requests that the Board dismiss the improper practice petition without further proceedings or, if its motion is denied, requests that HHC be given ten days within which to serve and file an answer to the petition.

Petitioner's Response to HHC's Motion

In an affidavit in opposition to respondent's motion, petitioner asserts that he complied in all respects with the requirements of the OCB Rules both as to proper service of papers by a party (Section 13.3) and as to time limitations for service (Sections 13.4 and 13.5). By petitioner's calculation, service of the petition by depositing it in the mail on July 30, 1982 was timely as it was within four, months of April 5, 1982, the effective date of respondent's April 1, 1982 order directing petitioner to report to Maspeth. Even if service is deemed to be effective only on August 6, 1982, when the petition was filed with OCB, petitioner contends

that service was timely. He argues that when three days are added to the prescribed period because service was by mail (OCB Rules Section 13.5), the period for timely service is extended until August 8, 1982.

Petitioner's affidavit in opposition to the motion also includes allegations of violations by HHC relating to its compliance with other court orders, challenges the procedure by which he was "demoted", and offers citations to legal authority that, in petitioner's view, support his position on the issues raised in his improper practice petition.

Discussion

This is yet another case in a web of proceedings that the petitioner herein has initiated, individually or in collaboration with other EMS employees, before this Board⁶ and before the

⁶ The improper practice proceedings commenced by petitioner before this Board include docket numbers:

BCB-499-81 and BCB-501-81 (consolidated for hearing in Decision No. B-25-81; motion to amend petition granted in Decision No. B-2-83; hearings to be continued);

BCB-500-81 (petition dismissed in Decision No. B-25-81);

BCB-519-81 (case pending);

BCB-609-82 (the instant case);

BCB-611-82 and BCB-619-82 (consolidated for decision; petitions dismissed in Decision No. B-7-83);

BCB-621-82 (petition dismissed in Decision No. B-14-83);

BCB-632-82 (case pending); and
BCB-641-83 (HHC's motion to dismiss denied in Decision No. B-17-83; proceeding continues).

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courts of New York State in which he charges HHC with retaliation for union activity.

The acts complained of in this case are HHC's assignment of petitioner, formerly a provisional Paramedic Ambulance Corpsman at Lincoln Hospital, to the position of Ambulance Corpsman at EMS's Maspeth facility in Queens. By this assignment, which removed petitioner from the locus of his activities on behalf of Local 2507, petitioner alleges that HHC interfered with the exercise by him of protected public employee rights, sought to dominate and interfere with the administration of Local 2507, and discriminated against petitioner for the purpose of discouraging his union activity, in violation of NYCCBL Section 1173-4.2a.⁷

In our view, HHC's acts, which petitioner characterizes as punitive transfer and demotion, must be considered in the context of a course of litigation that petitioner is pursuing before the New York courts, which litigation, initiated in the wake of HHC's termination of petitioner's employment, seeks to adjudicate his civil service and employment status. We note that HHC's directives of September 24, 1981

⁷ NYCCBL Section 1173-4.2a provides in pertinent part:

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

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

and April 1, 1982, ordering petitioner to report to Maspeth as an Ambulance Corpsman,⁸ responded to two orders of the State Supreme Court: the first staying HHC's termination of petitioner's employment pending a hearing before the court on the question of petitioner's permanent civil service status,⁹ the second ordering the Corporation to reinstate petitioner pending a hearing before HHC to determine whether petitioner's termination was for a reason unrelated to work performance.¹⁰ It is fair to say that the acts of the employer alleged to constitute improper practices would not have occurred had petitioner not challenged HHC's termination of his employment. Whatever other legal implications may inhere in the "transfer" and "demotion" of petitioner by HHC, these directives to petitioner constitute the employer's compliance with orders of the Supreme Court, orders obtained at petitioner's instance and for his benefit. In our view, since petitioner's claims concern HHC's implementation of court orders, his remedy, if any, lies in that forum. It is not for this, Board to interpret or review the decisions of the New York courts or to speculate concerning what the court must have

⁸ Only the April 1, 1982 directive specified the position to which petitioner would be assigned at Maspeth.

⁹ N.Y. Sup. Ct., Queens Cty., Sept. 17, 1981 (Lerner, J.).

¹⁰ Engstrom v. Kerr, No. 13604/81 (Sup. Ct., Queens Cty., Spec. Term, Pt. 1, Mar. 3, 1982).

intended to the extent that it did not make explicit all aspects of the ordered remedy.

That the sufficiency of compliance with a court order may properly be tested before the court that issued the order is not unknown to petitioner who, in July 1982, brought a contempt proceeding charging that HHC violated Justice Kassoff' s reinstatement order of March 3, 1982. Justice Angelo Graci dismissed the motion, finding that HHC had complied with the order to reinstate petitioner as an Ambulance Corpsman rather than as a Paramedic.¹¹

In a recent decision dismissing two other petitions filed by Mr. Engstrom, we noted:

. . . It appears that the petitioner would have this Board review, interpret, and enforce orders of the State Supreme Court. Manifestly, it is beyond the power of this Board to perform the function sought by the petitioner, and we refuse to do so. The petitioner chose to determine his rights in the courts, and, therefore, it is only proper that he look to the courts to interpret and enforce the rights which they have declared.¹²

Although the situation presented in the case at bar is not identical to the circumstances presented in the above-cited case, we nevertheless adhere to the view of our role as expressed therein. We note further that the propriety of any future

¹¹ N.Y. Sup. Ct., Queens Cty., July 14, 1982.

¹² Decision No. B-7-83 at 14.

assignment that petitioner may receive will depend, at least in part, upon petitioner's correct civil service title, an issue that is still before the courts, and upon petitioner's employment status which, pursuant to court order, is presently before HHC's Personnel Review Board.

Thus, while it is clear that this Board has exclusive, non-delegable jurisdiction over improper practices committed by parties subject to the NYCCBL,¹³ we shall decline to exercise our jurisdiction in this case. Accordingly, we do not reach the merits of petitioner's allegations of interference, coercion, domination and discrimination and make no judgment concerning whether, in another case, such allegations, if proven, would warrant a finding of improper practice. Nor do we examine the statute of limitations defense interposed by HHC.

For the aforementioned reasons, we shall dismiss the improper practice petition and leave the petitioner to seek a remedy in the courts for violations, if any, of rights which the courts have granted him.¹⁴

¹³ See NYCCBL §1173-5.0a(4); N.Y.S. Civ. Serv. Law §205.5d (McKinney 1983).

¹⁴ We take administrative notice of the recent decision-in Engstrom v. Kerr, No.13604/81 (Sup. Ct., Queens Cty., Spec. Term, Pt. 1, Aug. 12, 1983), in which petitioner's application, inter alia, for an additional court order compelling HHC to reinstate him pursuant to the March 3, 1982 order of Justice Kassoff was granted and a request for back pay was denied. It is clear from this decision that the state supreme court continues to hear and to remedy, where appropriate, petitioner's complaints concerning compliance by HHC with the orders of that court. Therefore, we find that this decision supports our rationale for refusing to take jurisdiction over the instant claim.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-609-82 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
August 24, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIED
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER

PATRICK F.X. MULHEARN
MEMBER

EDWARD SILVER
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