

Engstrom v. Emergency Medical Services, 31 OCB 7 (BCB 1983)
[Decision No. B-7-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

GEORGE ENGSTROM,

DECISION NO. B-7-83

Petitioner,

DOCKET NO. BCB-611-82

-and-

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

Respondents.

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In the Matter of

GEORGE ENGSTROM,

DOCKET NO. BCB-619-82

Petitioner,

-and-

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

Respondents.

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DECISION AND ORDER

Petitioner George Engstrom filed a verified improper practice petition (BCB-611-82) on August 25, 1982, in which he charged that respondent Emergency Medical Services (hereinafter "EMS"), a division of the New York City Health and Hospitals Corporation (hereinafter "HHC"), was discriminating against him for the purpose of dis-

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couraging his membership and participation in the activities of Local 2507, District Council 37, AFSCME, and in order to coerce and restrain him in the exercise of his rights under the New York City Collective Bargaining Law (hereinafter "NYCCBL"). Specifically, petitioner alleged that EMS was discriminating against him by denying him free admission to a required paramedic refresher course, which was being sponsored by EMS.

Respondents EMS and HHC filed their answer on September 7, 1982, in which they denied that their actions were violative of any provisions of the NYCCBL. The petitioner filed his reply to the answer on September 24, 1982.

Subsequently, George Engstrom submitted another improper practice petition (BCB-619-82) on October 26, 1982, in which he alleged that the same respondents had again discriminated against him and attempted to coerce and restrain him in the exercise of legally protected rights by continuing to deny him access to the paramedic refresher course and by stigmatizing, humiliating and embarrassing him before his fellow classmates and union members when he sought to participate in the course.

The respondents submitted a motion to dismiss the petition on November 24, 1982, on the grounds that the Board of Collective Bargaining lacks jurisdiction over the

subject matter of this dispute, and that the petitioner has elected another forum in which to pursue his claim. The petitioner filed an affidavit in opposition to the respondents' motion on December 17, 1982.

Background

Petitioner is or was an employee of EMS, serving in the titles of Ambulance Corpsman and Paramedic Ambulance Corpsman.¹ As a condition of employment, all employees working in these titles are required to maintain New York State certification as Emergency Medical Technicians. Ambulance Corpsmen must maintain an "EMT-1" certification, and Paramedics must maintain both an "EMT-1" and an "EMT-4" certification. State regulations require that persons in any of the Emergency Medical Technician classifications be recertified every three years, following successful completion off inter alia, a State-approved refresher course. Thus, in order to maintain his State certification, as required as a condition of employment by EMS, it was necessary for the petitioner to complete a refresher

¹ Petitioner's current employment status, as well as the nature of his civil service status in each of the titles in which he served, are matters in dispute which are the subject of ongoing court litigation, as will be discussed infra. It is undisputed, however, that petitioner has not performed services for EMS nor been paid salary by EMS since September 11, 1981.

course every three years.

The petitioner alleges that his State "EMT-4" certification was to expire on December 31, 1982, and his "EMT-1" certification will expire on March 31, 1983. Consequently, the petitioner desired to complete a State-approved refresher course prior to December 31, 1982.

EMS, as well as certain other private health care institutions, offer State-approved paramedic recertification refresher courses. EMS's course is conducted at the EMS Academy at Queens Hospital Center, and is open to employees and non-employees. EMS offers the course free of charge to those of its employees, including Paramedics and Supervising Ambulance Corpsmen, whose work duties require that they be proficient in advanced emergency medical service knowledge and skills. Others, including non-employees, are admitted into the course only upon payment of a \$300 fee.

The petitioner applied for free admission to EMS's paramedic refresher course scheduled to commence on September 2, 1982. His application was denied, and he was informed by EMS that he would be admitted to the course only upon payment of the course fee of \$300. This denial of free admission to the course forms the basis of the

petition in BCB-611-82. The petitioner simultaneously challenged this denial of free admission in a proceeding brought on by order to show cause in the New York State Supreme Court, Queens County (Index No.13604/81).

In the Court proceeding, the Supreme Court (Herbert Miller, J.) rendered a decision, dated August 30, 1982, which held that the petitioner was entitled to attend the refresher course without the imposition of a fee. Although the decision stated "Settle order", no order has been presented to the Court for signature. HHC asserts that it did not receive a copy of the decision until September 3, 1982, that it respectfully disagrees with the decision, and that it intends to appeal it as soon as an order is entered. Pursuant to §5519 of the Civil Practice Law and Rules, the respondents will automatically obtain a stay of enforcement of the order at the time they file their notice of appeal.

The petitioner appeared at the EMS Academy on September 3, 1982, presented an unsigned copy of Justice Miller's decision to EMS personnel, and requested admission to the paramedic refresher course. Representatives of the Academy did not permit the petitioner to participate in any skill practice or testing sessions. He was able, however, to attend several lectures over

the course of three days of classes. He was informed that his participation in the paramedic refresher course would not be counted in any fashion. Therefore, after his third day of attendance, the petitioner failed to appear for the remainder of the course.

The petitioner claims that during his three days of attendance, he was subjected to mental anguish, embarrassment, humiliation, and discrimination before his classmates and fellow union members. These claims form the basis of the petition in BCB-619-82.

Positions of the Parties

Petitioner's Position

The petitioner contends that EMS's attempts to bar him from a refresher course required for continued certification as an Emergency Medical Technician, are only the latest acts in a continuing scheme to isolate petitioner from other Local 2507 members, to penalize petitioner for his legitimate union activities, to silence petitioner in order to prevent him from uncovering "scandalous mismanagement", and to prevent petitioner from pursuing union members' grievances concerning safety matters and the inadequacies of the EMS ambulance fleet.

The petitioner notes that he has contested EMS's discriminatory actions in other proceedings before the Board of Collective Bargaining, the HHC Personnel Review Board, and the State Supreme Court. He asserts that the respondents have exercised every delaying tactic available in each of these forums. Petitioner contends that the respondents' actions in excluding him from the paramedic refresher course constitute an attempt, by the respondents, to usurp the power exercised by the above adjudicative bodies.

The petitioner attempts to substantiate his entitlement to free admission to the paramedic refresher course by reviewing the history of his employment and of his civil service status. He characterizes his civil service status as "very confused", and blames this "confusion" on the respondents' alleged failure to comply with the provisions of the Civil Service Law. Part of the confusion relates to a dispute over the length of petitioner's probationary period in the title of Ambulance Corpsman, as well as to the question of his status in the title of Paramedic Ambulance Corpsman, which EMS asserts was a mere provisional appointment. The petitioner states that he has attempted "several times" to clarify his civil service status, and has litigated this subject in the courts.

In fact, the petitioner indicates that he has commenced several proceedings in State Supreme Court involving various aspects of his disputes with the respondents. He claims that the respondents have resisted compliance with several court orders which he obtained, including an order of Justice Edwin Kassoff directing his reinstatement as a probationary Ambulance Corpsman, pending the holding of a hearing by the respondents on the reasons for his termination, and a decision by Justice Miller holding that petitioner is entitled to attend the paramedic refresher course without charge.

The petitioner submits that the courts have held that he is entitled to reinstatement as an employee of EMS, and that as an employee, he is entitled to admission to the paramedic refresher course without charge. He concludes that the respondents' continued refusal to grant him free admission to the course is discriminatory and constitutes an improper practice, in violation of his rights under the NYCCBL.

Respondents' Position

The respondents assert that the petitioner was refused free admission to the paramedic refresher course because, at that time, he was no longer employed by EMS as a Paramedic Ambulance Corpsman. It is the respondents'

contention that the petitioner was not discriminated against, but rather was treated the same as every other non-employee applicant for admission to the course, i.e., his admission was conditioned upon payment of a \$300 fee, which petitioner declined to pay.

The respondents recite the chronology of the petitioner's termination and his subsequent litigation in court concerning his civil service status, the propriety of his termination, and his entitlement to free admission to the paramedic refresher course. In pertinent part, the respondents allege that Supreme Court Justice Kassoff ruled that petitioner had no vested right to the position of Paramedic Ambulance Corpsman, because his appointment to that position was merely provisional; that he had no tenure in the position of Ambulance Corpsman, because his termination occurred during the term of his probationary period in that title; and that he should be reinstated in the title of Ambulance Corpsman pending a hearing to be held by the respondents to determine whether he was terminated for reasons other than unsatisfactory performance.

The respondents allege that pursuant to Justice Kassoff's order, they notified petitioner to report for duty as an Ambulance Corpsman to the respondents' facility

in Maspeth, Queens. However, the petitioner refused to report, indicating that he was available to report for assignment as a Paramedic at his old work location, Lincoln Hospital. Thereafter, the petitioner moved in court to hold the respondents in contempt of Justice Kassoff's order for reinstating him only to the position of Ambulance Corpsman. This contempt motion was denied by Justice Graci, who held that the respondents had complied with Justice Kassoff's order.

Subsequently, the petitioner moved in court, by order to show cause, for an order directing respondents to admit him to the paramedic refresher course without charge. The respondents opposed this motion, on the grounds that the petitioner was no longer an employee of EMS, since he had refused to report for duty, and that, in any event, the court had ordered his reinstatement as an Ambulance Corpsman, not as a Paramedic; employees in the former title, claimed EMS, were not and never had been eligible for free admission to the paramedic refresher course. Justice Miller, in a decision dated August 30, 1982, but served on the respondents on September 3, 1982, after the paramedic refresher course had already begun, ruled that the petitioner was entitled to free admission to the course because Justice Kassoff

had ordered his reinstatement to employment and, in Justice Miller's view, all employees of EMS who held State EMT certifications were eligible for free admission to the course, regardless of whether they were employed as Paramedics. The respondents state that they disagree with Justice Miller's decision and intend to appeal it as soon as an order is entered in accordance with the decision. They note that pursuant to section 5519 of the Civil Practice Law and Rules, they will be granted an automatic stay of enforcement of the order at the time they file their notice of appeal. However, the respondents assert that, to the present time, no order has been entered from which they can, appeal. Similarly, the petitioner's failure to settle an order, as directed by the court, has left Justice Miller's decision with no binding effect up to this time.

The respondents argue that the NYCCBL does not confer on the Board of Collective Bargaining the power or duty to review matters raised in judicial proceedings or to enforce rights of parties established by court decision or order. Moreover, the respondents submit that the NYCCBL's definition of improper practices does not include an alleged failure to follow a court decision or order.

The respondents contend that petitioner's claims in both BCB-611-82 and BCB-619-82, based upon the respondents' alleged failure to admit petitioner to a paramedic refresher course without charge, are matters which the petitioner has also pursued in a proceeding in State Supreme Court. The respondents assert that the petitioner has elected the judicial forum to pursue his claim and should not be permitted to litigate this matter in the courts and before this Board simultaneously. Further, the respondents submit that this Board is without jurisdiction to hear, decide, or enforce the petitioner's rights under a court decision or order. Finally, the respondents argue that petitioner's eligibility for admission to the paramedic refresher course is dependent upon the question of his civil service status, a matter previously raised in the courts, which is now res judicata. For these reasons, the respondents request that the petitions be dismissed.

Discussion

Because the claims raised in the petitions in BCB-611-82 and BCB-619-82 are essentially the same, we have consolidated these two proceedings for purposes of determination. At the outset, we take administrative notice of the fact that the petitioner in these two matters

is also a party to four other improper practice proceedings² against the same respondents involving claims of discrimination and harassment because of union activity. The petitioner contends that the acts complained of in the instant proceeding are only another example of the respondents' "continuing scheme" of discrimination and harassment, and as such, constitute improper practices under the NYCCBL. In the view of this Board, however, the instant petitions are based upon a claim outside of our jurisdiction under the NYCCBL, and involve matters which the petitioner has already litigated in another forum, the State Supreme Court.

While the petitions herein, allege discrimination and harassment, such allegations are merely conclusory. The real issues raised in these proceedings relate to the petitioner's civil service and employment status, and compliance with prior orders of the courts. The petitioner's entitlement to free admission to the EMS - sponsored paramedic refresher course is a dependent upon such factors as his correct civil service title, whether Ambulance Corpsman

² Docket Nos. BCB-499-81, BCB-501-81, BCB-519-81, and BCB-632-82. The petitioner is also a party to another proceeding against these respondents, which is, for the most part, unrelated to the claims raised in the foregoing cases. See BCB-621-82.

or Paramedic; the sufficiency of the respondents' compliance with the reinstatement order of Justice Kassoff (a matter already adjudicated by Justice Graci); the effect, if any, of petitioner's refusal to report for duty as an Ambulance Corpsman following Justice Kassoff's decision; and the effect, if any, of Justice Kassoff's order upon petitioner's eligibility for the refresher course under existing EMS admissions standards (a matter adjudicated by Justice Miller).

In effect, the petitioner is attempting to relitigate before this Board, under the guise of an improper practice, matters already contested in court proceedings. 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.

Inasmuch as the petitioner's entitlement to free admission to the paramedic refresher course is dependent upon his civil service and employment status, as determined by the courts, it was incumbent upon the petitioner

to allege how he was treated differently than other similarly situated employees of EMS with respect to admission to the refresher course, in order to establish his claim of discrimination. We find that the petitioner has failed to make such a showing. His allegations with respect to other union members who were admitted to the course are not persuasive, since he has not alleged that any other employee serving as an Ambulance Corpsman, the title to which petitioner was reinstated pursuant to court order, was admitted to the refresher course without payment of the fee. Thus, this case turns on the issue of petitioner's legal entitlements under various orders of the courts, and not on his conclusory and unsubstantiated allegations of discrimination. For this reason, we will dismiss these improper practice petitions, and leave the petitioner to his remedies in the courts for the alleged violations of prior court orders.

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

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ORDERED, that the improper practice petitions of George Engstrom docketed as BCB-611-82 and BCB-619-82 be, and the same hereby are dismissed.

DATED: New York, N.Y.
February 28, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER

PATRICK F.X. MULHEARN
MEMBER

EDWARD SILVER
MEMBER