

McAllen v. Emergency Medical Ser., 33 OCB 3 (BCB 1984) [Decision No. B-3-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice

-between-

RICHARD McALLAN,

DECISION NO. B-3-84
DOCKET NO. BCB-616-82

Petitioner

-and-

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

Respondent.

DECISION AND ORDER

_____ On September 27, 1982, Richard McAllan (hereinafter "petitioner") filed an improper practice petition against the Emergency Medical Services Division of the New York City Health and Hospitals Corporation (hereinafter "EMS", "HHC" or "EMS/HHC") charging EMS with "systematic harassment and discrimination" in violation of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). Respondent HHC filed an answer to the petition on October 21, 1982 to which petitioner replied on November 18, 1982.¹

¹ The Reply initially served was deemed defective as no proof of service on respondent was submitted. The Reply was properly served and filed on December 6, 1983.

Background

_____ On May 23, 1982, petitioner, a paramedic employed by EMS/HHC, was involved in an accident when the ambulance he was driving collided with another vehicle. Accompanied by Paramedic Barbara Taylor, petitioner had just completed an assignment when he learned via the patrol car radio of two Housing Police officers that a police officer had been shot at a proximate location. Petitioner decided to respond to the incident, concededly without reporting to EMS the disposition of the assigned call (the patient refused medical assistance) and without requesting permission to proceed to a second emergency. The collision occurred while petitioner was en route to the second call.

EMS supervisor, Captain Paul Sanders was assigned to investigate the ambulance accident. Over the next several days, Sanders completed his investigation and, on May 26, 1982, recommended that disciplinary charges be brought against petitioner as a result of the accident.²

Thereafter, two charges of gross misconduct were preferred against petitioner. The first charge alleged that petitioner falsified the motor vehicle report concerning the

² Affidavit of EMS Captain Paul Sanders, dated October 21, 1982, para. 17. Exhibit 2 to HHC's Answer.

accident.³ The second charge alleged a violation of EMS standard operating procedures in that petitioner responded to the radio call of another agency (Housing Police Department) without permission from EMS. By letters dated June 30, 1982⁴ and August 5, 1982,⁵ EMS notified petitioner of the charges against him and of an informal conference scheduled for September 2, 1982 to discuss the charges.

At the time of the accident, petitioner was a candidate for election as President of Local 2507 of District Council 37 (hereinafter "Local 2507" or "the Union"). Ballots for a re-run election were to be mailed to the membership on June 1, 1982. Petitioner lost the election.

The gravamen of the instant petition is that EMS, with improper motives and in violation of the NYCCBL, conducted an "instance" investigation of, petitioner's ambulance accident

³ Apparently petitioner reported that he was responding to a call with two Housing Police Officers, who were holding traffic in the intersection to allow petitioner's ambulance to proceed, when the accident occurred. The Housing Police officers denied that they were holding traffic for petitioner or that they had any knowledge of the accident. The statement of Officers David Washington and Wilfredo Torres, dated May 26, 1982, is included in Exhibit 2 to HHC's Answer.

⁴ Letter from EMS Captain Paul Sanders to Richard McAllan.

⁵ Letter from William M. Leask, Assistant Director for Labor Relations, EMS/HHC to Richard J. McAllan.

and preferred disciplinary charges against him in advance of the Union election, thereby interfering with petitioner's campaign for union office, effectively dominating Local 2507, and discriminating against petitioner for the purpose of discouraging his participation in the activities of the Union.

Positions of the Parties

Petitioner's Position

_____ While conceding that it is management's statutory prerogative to investigate ambulance accidents and to determine whether an employee acted properly in the discharge of his duties, petitioner contends that the investigation in this case, just days before a union election in which he was a candidate, violated his rights under the NYCCBL. According to petitioner, the promptness of the investigation was contrary to normal procedures, in contravention of executive orders, and illegally motivated, having as its purpose the development of negative information about petitioner which would interfere with his election campaign. Citing the routine nature of the accident, petitioner asserts that EMS management gave disproportionate weight to the investigation. Petitioner also alleges that the "negative information"

developed during the investigation was channeled to various EMS locations in order to discredit his candidacy.

Petitioner challenges the decision to prefer disciplinary charges against him, arguing that the initiation by a paramedic of a response to a potentially life-threatening emergency is a practice routinely accepted and encouraged by EMS. Since the investigation allegedly failed to establish any wrongdoing on his part, petitioner contends that the filing of charges, in the context of an ongoing union election campaign, was discriminatory and improper.

Petitioner recites at length the basis for his contention that EMS' actions were improperly motivated in violation of the NYCCBL. The focal point of this recitation is petitioner's union activity which, he comments, is well-known to EMS. Petitioner refers to numerous improper practice petitions grievances and complaints filed by him singly or with other union members and officers, challenging a variety of management practices including, in particular, the alleged use by EMS of substandard ambulances and the alleged failure to comply with government safety regulations. Petitioner attributes such improper motivation to EMS "upper level management", specifically stating that he does not claim that the supervisor who investigated the May 23rd accident harbored improper motives.

Petitioner requests a hearing to develop further the facts alleged in his pleadings. In the alternative, he seeks "summary judgment" against EMS/HHC. For a remedy, petitioner requests an order that (a) voids the charges against him; (b) sets aside the outcome of the Local 2507 election and provides for supervision by this Board 'of any re-run election that may be held; and (c) directs HHC to cease and desist from such violations in the future.

Respondent's Position

EMS/HHC denies any violation of the NYCCBL.

With respect to the investigation of the ambulance accident, HHC asserts that EMS Operating Procedure 3-1 requires that the assigned supervisor complete his investigation and report within 48 hours of the occurrence.⁶ HHC maintains

⁶ EMS Operating Procedure 3-1 provides in relevant part as follows:

1. Purpose.

The purpose of this procedure is to set forth guidelines for prompt reporting and complete documentation of accidents. In order for the Legal Department to defend the Health and Hospitals Corporation against possible litigation, it is essential that all accident information is obtained and recorded promptly and accurately.

3. Responsibility

In the event of an accident:

c. Supervisors shall:

5) submit to the borough chief a written report which will include supervisor's findings, and provide recommendations regarding disciplinary action(s) required, or state that the employee is not at fault and performed within EMS regulations

8) insure that all reports are filled out and signed within forty-eight (48) hours from the time at which the accident occurred,.... (Exhibit I to HHC's Answer)

that Captain Sanders, the supervisor assigned to investigate the accident, complied in all respects with the standard operating procedure. In addition, HHC submits the supervisor's sworn affidavit⁷ in which he detailed the steps taken in conducting the investigation and asserted that

"the internal union election, and the circumstances surrounding it, played no part and in no way was considered in the conduct of the investigation of the accident".

HHC notes that the promulgation and implementation of a standard operating procedure is within its management rights to

"determine the methods, means and personnel by which government operations are to be conducted, to take necessary action when an emergency occurs and to review employee action and take disciplinary action based on such review."⁸

HHC argues that there is nothing illegal or improper about the prompt exercise of managerial rights, commenting that

⁷Affidavit of Captain Paul Sanders, dated October 21, 1982. Exhibit 2 to HHC's Answer.

⁸HHC's Answer, para. 22, paraphrasing NYCCBL section 1173-4.3b.

prompt response is particularly appropriate in an emergency situation such as an ambulance accident.

HHC maintains that the disciplinary action taken against petitioner was also an appropriate exercise of its management rights under NYCCBL section 1173-4.3b. According to HHC, there is no basis for a finding of improper practice where charges are preferred because of misconduct arising out of the unauthorized use of an ambulance. Also, HHC asserts that the charges were filed on August 5, 1982, nearly two months after petitioner was defeated in the Local 2507 election.

HHC argues that actions taken in accordance with EMS standard operating procedure must be presumed to be proper. Moreover, the affidavit of Captain Sanders establishes that the investigation in this case was properly conducted. HHC notes, additionally, that petitioner does not contest the motives of the supervisor, but only those of "upper level management".

HHC concludes that, since petitioner has offered no evidence of any impropriety in the investigation, he has failed to state a cause of action under the NYCCBL. HHC urges that the petition be dismissed without a hearing.

Discussion

Although petitioner has not cited any section of the NYCCBL which he deems to have been violated, it is clear that his allegations refer to section 1173-4.2a which provides in relevant part:

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;

After careful review of petitioner's extensive and detailed submissions and of HHC's response, we find no evidence either of improper acts or of proper acts improperly motivated such as would constitute a violation of section 1173-4.2a.

We note that much of the evidence offered by petitioner in this case relates to his past and continuing active participation in Local 2507, as a member and, for a time, as an officer of the Union. This evidence documents his ongoing pursuit of grievances and complaints relating, in particular, to ambulance safety. Reference is also made to other improper practice petitions filed by petitioner in an effort to address incidents of alleged incompetency on the part of management. We recognize that, by submitting such evidence, petitioner seeks to establish a motive for retaliation by EMS and to demonstrate that EMS might have wished to prevent an activist such as

himself from becoming President of Local 2507. Such a motive, if proved, would, of course, state a violation of the NYCCBL. However, the mere allegation of improper motive, as we have in the case at bar, even accompanied by an exhaustive recitation of a petitioner's union activity, does not state a violation where the petitioner has failed to demonstrate a nexus between the management acts complained of and the union activity recited.⁹

In this case, the facts are essentially undisputed. Petitioner was involved in an ambulance accident, investigation of which was promptly concluded in conformity with EMS Operating Procedure 3-1, which requires that all reports be completed within 48 hours of the occurrence under investigation. Petitioner does not refute the applicability to this matter of Procedure 3-1. Nor does he allege that the supervisor was influenced in his investigation by any improper motive of his own. Rather, petitioner alleges that EMS "upper level management" harbors improper motives toward him. Having so alleged, however, petitioner fails to indicate how this animus should be imputed to the supervisor so as to taint an otherwise concededly proper investigation.¹⁰

⁹ Decisions Nos. B-10-72; B-35-80; B-25-81.

¹⁰ Petitioner suggests in his Reply that HHC ought to have indicated whether Captain Sanders was pressured into completing an immediate investigation and recommending disciplinary charges. We disagree. Since petitioner offers affirmative evidence that this was the case, HHC cannot be required to prove that no pressure was applied to the supervisor.

The fact that an investigation that undisputedly complies with a four-year old published procedure¹¹ is conducted during the week before a union election and results in charges being filed against a candidate for union office does not, without more, establish a violation of the NYCCBL.

Petitioner also contends that the filing of disciplinary charges was improper and further illustrates a pattern of harassment and discrimination against him. However, the only basis offered for opposition to the charges is that petitioner's decision to respond to a call received by the Housing Police, while not authorized by EMS, was, under the circumstances, not a ground for disciplinary action. This argument addresses the merits of the charges which are a matter for resolution through HHC's internal disciplinary procedures and not by this Board. Moreover, we fail to see how the filing of charges on June 30, 1982,¹² two weeks after the election by mail ballot was completed,¹³ may be said to have interfered with petitioner's campaign. Nor has petitioner offered any evidence that he was treated differently with respect to the filing of

¹¹ EMS Operating Procedure 3-1 was promulgated in 1978 and revised in 1979.

¹² See notes 4 and 5 supra. It is unclear whether petitioner twice received notice of the charges or whether, as alleged by HHC, such notice was given only by Mr. Leask's letter of August 5, 1982. It does appear, however, that the charges were filed on June 30, 1982. No earlier date is alleged.

¹³ In its Answer, HHC asserts, "upon information and belief", that the election was concluded on June 14, 1982. Petitioner does not refute this statement in his Reply. Accordingly, we have relied upon the accuracy or approximate accuracy of HHC's statement. See Revised Consolidated Rules of the Office of Collective Bargaining, §7.9.

disciplinary charges than any other candidate for union office was or would be treated, so as to establish a colorable claim of discrimination under the NYCCBL. In this regard, it is interesting to note that petitioner also points to a practice of awaiting the outcome of an election before filing charges against candidates for union office; he concludes that this very delay is evidence of discrimination. The obvious inconsistency in petitioner's arguments bolsters our conclusion that no improper motivation on the part of EMS has been established with respect to the filing of charges and that no violation of the NYCCBL has been stated.

Turning to petitioner's allegation that negative information developed during the investigation was channeled to various EMS locations in order to discredit his candidacy for union office, we note that the charge is entirely unsubstantiated. Petitioner does not indicate the nature of the "negative information" developed, who disseminated and who received the information, or the form of its communication; nor does he offer any evidence of the effect of the alleged communication on the outcome of the union election. Since HHC denies the allegation, it was incumbent upon petitioner, in his reply, to provide additional information in support of the claim sufficient to raise a material issue of fact. Since he failed to do so,

we shall dismiss the claim without further investigation.

Petitioner does not deny that the investigation of ambulance accidents and preferring of disciplinary charges are management rights under NYCCBL section 1173-4.3b. Rather, his allegations concern the purpose and effect of the actions taken. That acts properly within the scope of management's statutory prerogatives may constitute improper practices, if taken for coercive or discriminatory purposes, is well-established.¹⁴ Based upon all the evidence presented, however, we find that HHC's exercise of its prerogatives under the circumstances alleged herein was reasonable and proper. We are not persuaded either by the substance or by the "weight" of the evidence offered by petitioner that HHC's actions were taken for the purpose of, or that they did, in fact, deprive petitioner of any rights granted under the NYCCBL. Accordingly, we shall dismiss petitioner's claims in their entirety.

We note, finally, that OCB Docket No. BCB-499-81 (Richard McAllan and George Engstrom v. Emergency Medical Services, Division of New York City Health and Hospitals Corporation), still pending before us, involves, inter alia, allegations of interference, coercion and discrimination

¹⁴ See, e.g., Decisions Nos. B-4-79; B-25-81; B-43-82.

against petitioners McAllan and Engstrom, as part of a scheme to affect the outcome of a union election in which both petitioners were candidates. Petitioners therein allege that representatives of the employer knew of their internal union activity and sought to discredit them and to bolster the candidacy of the incumbent union officers. Two interim decisions have issued in that case.¹⁵ Although the claims in that case are similar to those before us, they arise out of a different set of facts, namely, an earlier union election. Our decision in this case therefore has no bearing on the continuing proceedings in the pending matter.

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 filed by

¹⁵ Decisions Nos. B-25-81 and B-2-83.

Decision No. B-3-84
Docket No. BCB-616-84

15.

Richard McAllan be, and the same hereby is, dismissed.

DATED: New York, N.Y.
March 5, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER