

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice

-between-

DECISION NO. B-8-85

COMMITTEE OF INTERNS AND RESIDENTS,

DOCKET NO. BCB-711-84

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Respondent.

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INTERIM DETERMINATION AND ORDER

This proceeding was commenced on June 19, 1984, when the Committee of Interns and Residents ("CIR" or "the Union") filed a verified improper practice petition charging that

[b]y repeated threats of retaliation at staff meetings in May 1984, and acts of retaliation against employees exercising their contractual grievance rights under the Collective Bargaining Agreement between the HHC and CIR, respondents have violated Subsections (1) through (4) of Section 1173-4.2, of the NYC Collective Bargaining Law.¹

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The appropriate reference is to Section 1173-4.2a of the New York City Collective Bargaining Law ("NYCCBL") which provides:

a. 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

In addition, Union asserted,

respondent has engaged in systematic violation of the collective bargaining agreement with regard to excessive night duty and refusal to renew four individual contracts of employment and failure to provide information to petitioner required by the contract.

For a remedy, the petition requests that the Board direct respondent to

compensate residents for all excessive on-calls under the contract, reinstate all untimely non-renewed residents, (and) cease and desist from impeding the administration of the CIR contract and from depriving residents of their contractual rights.

The respondent, New York City Health and Hospitals Corporation ("HHC"), filed a motion to dismiss the petition and an affirmation in support of the motion on June 29, 1984. CIR responded to the motion on July 19, 1984.

chapter; (more)

(Footnote 1/ continued)

(2) to dominate or interfere with the formation 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;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Positions of the Parties

HHC's Position

Respondent advances two separate but related grounds for its motion:

- (1) the petition lacks sufficient specificity under section 7.5 of the Revised Consolidated Rules of the office of Collective Bargaining ("Rules");
- (2) the petition fails to state a cause of action for which relief may be granted.

HHC asserts that CIR has failed to comply with section 7.5 in that:

- (a) the petition contains no statement of the nature of the controversy and is not accompanied by material and relevant documents;
- (b) petitioner has not identified the person or persons who allegedly engaged in threats and acts of retaliation, the person or persons against whom such retaliation was directed, the dates when such threats and acts occurred and the nature of same;
- (c) petitioner has not specified how HHC allegedly violated the collective bargaining agreement and has failed to state a nexus between alleged contract violations and the NYCCBL.

Moreover, respondent asserts, due to the lack of specificity in the Union's pleading, it is impossible to determine whether the petition was timely filed under section 7.4 of the Rules. Therefore, it is argued, the Board should dismiss as untimely any allegation of the petition for which no date has been provided.

HHC argues further that CIR's allegations of: contract violation should be dismissed because an improper practice petition is not the proper vehicle for the institution of a grievance. Moreover, respondent asserts, such allegations are not within the jurisdiction of this Board.

HHC requests that we dismiss the improper practice petition without further proceedings. In the alternative, respondent urges that we either direct petitioner to clarify its allegations of improper practice to comply with section 7.5 of the Rules, or permit HHC to answer the petition within ten days of receipt of the Board's decision.

CIR's Position

In its answer to respondent's motion, CIR elaborated upon the allegations of its petition, asserting as follows:

- (a) in May or June 1984, the Director of the OBS/GYN Department at Lincoln Hospital ("the Director") instructed residents not to file

grievances relating to the on-call schedule or non-renewals of four individual contracts of employment, and threatened to cancel the vacation of any resident who complained about excessive night duty assignments;

- (b) after a Step I grievance concerning the on-call schedule was filed on April 30, 1984, the Director, at a staff meeting in early May, threatened to close the residency program if there were any further complaints;
- (c) in early May, the Chairman of the OBS/GYN Program at New York Medical College asserted that all residents could be replaced, which statement intimidated the residents and discourage them from seeking union assistance with regard to grievable matters;
- (d) HHC failed to notify the Union of decisions concerning the accreditation status of the OBS/GYN Program in the years 1981-82, 1982-83 and 1983-84 (in the 1983-84 period accreditation allegedly was contingent upon a reduction in the number of intern and resident positions);
- (e) HHC failed to respond in a timely manner to grievances filed by the Union concerning excessive on-call assignments and the non-renewal of certain residents; and
- (f) on or about March 6, 1984, the contracts of four residents (whose names are known to the respondent) were not renewed, despite a statement by the Director to the effect that residents who stayed with the program would be permitted to complete their residencies.

The above-recited events are alleged to state violations of sections 1173-4.2a(1) through (4) of the NYCCBL. It is also asserted that, by the conduct of its agents, described above, HHC has violated Article V (Vacation and Leave Time), Article VI (Individual Contracts), Article VII (Work Schedules), Article XIV (Grievance Procedure), and Article XVI (Prohibition Against Discrimination) of the collective bargaining agreement.

In support of a finding that it has complied with section 7.5, CIR points to the fact that the Executive Secretary of the office of Collective Bargaining ("OCB"), reviewing the improper practice petition pursuant to section 7.4 of the Rules, determined that the petition was not so untimely or insufficient on its face as to warrant summary dismissal.

The Union further contends that the events which gave rise to its claims of improper practice occurred within the applicable four-month statute of limitations. Accordingly, the petition was not untimely under Rule 7.4

Finally, CIR-asserts that its petition is intended not as a means of instituting contract grievances, but as a means of ensuring that the statutory rights of its members will be protected.

Petitioner requests that the motion to dismiss be denied and further proceedings ordered, or that the Board grant such relief as it deems just and proper.

Discussion

The sole question presented on a motion to dismiss is whether, taking the facts alleged by the petitioner to be true, a cause of action has been stated. By way of the instant motion, respondent asserts that the improper practice petition fails to state a cause of action because it lacks the specificity required by section 7:5 of our Rules and because it complains of contract violations, which are not within the jurisdiction of this Board to consider.

Section 7.5 of the Rules provides as follows:

Petition Contents. A petition filed pursuant to Rule 7.2, 7.3 or 7.4 shall be verified and shall contain:

- a. The name and address of the petitioner;
- b. The name and address of the other party (respondent);
- c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
- d. Such additional matters as may be relevant and material.

It is the Board's policy to favor a liberal construction of "he Rules."² Thus, where section 7.5 is involved, we have not required that a petitioner set forth every detail of its claim. Section 7.5 is satisfied if the petitioner sets forth the material elements of its claim with sufficient clarity to afford the respondent notice of the transactions or occurrences complained of and to enable it to formulate a response thereto.

The allegations of the petition in this case, as supplemented by CIR's answer to the motion, satisfy the requirements of section 7.5. Although the names of the respondent's agents who are alleged to have authored the threats and acts of retaliation complained of in the petition are not provided, these persons are clearly identified by title. Moreover, the month and year during which most of the acts complained of occurred are stated and, where specific dates are not provided, for the allegation that respondent failed to respond in a timely manner to the Union's on-call grievance, the time frame is readily ascertainable - in that instance, by reference to the collective bargaining agreement and

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²Decision Nos. B-5-74; B-9-76; B-8-77; B-23-82; B1-83. OCB Rules §15.1.

³Decision Nos. B-23-82; B-1-83.

to Step I and Step II grievances, copies of which are appended to respondent's motion. Furthermore, petitioner has specified in its answer the provisions of the statute and of the collective bargaining agreement alleged to have been violated, if not the precise manner of their alleged violation. Finally, the Union has included, as "Exhibit B" to its answer, a letter dated April 30, 1984 to the Director of OBS/GYN at Lincoln Hospital, reiterating a prior oral request for specific documents which, it is asserted, were never supplied. Based upon the foregoing, it is clear that, even though all of the details of the several claims have not been provided, the allegations are sufficiently clear to afford respondent notice of the matters complained of and to enable it to formulate a response thereto. Therefore, we find that there has been substantial compliance with the pleading requirements of section 7.5.

Since our adoption, on November 30, 1983, of amended section 7.4 of the Rules, the Executive Secretary of the OCB is charged with reviewing every improper practice petition filed with the OCB to determine "whether the facts as alleged may constitute an improper practice". We note, however, that under the amended rule, the fact

that the Executive Secretary has determined that a petition "is not, on its face, untimely or insufficient," does not constitute

a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent.⁴

Accordingly, we reject petitioner's implicit argument that a petition which survives the Executive Secretary's review under Rule 7.4 is not subject to dismissal for failure to comply with Rule 7.5.

We now consider whether, notwithstanding our finding of pleading sufficiency, the petition herein should be dismissed for failing to state a prima facie case of improper practice under NYCCBL section 1173-4.2a. Section 1173-4.2a(1) makes it an improper practice for a public employer or its agents to interfere with, restrain or coerce public employees in the exercise of rights guaranteed by section 1173-4.1;⁵ section 1173-4.2a(2) prohibits

⁴OCB Rules §7.4.

⁵Section 1173-4.1 protects the right of public employees "to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and ... to refrain from any or all of such activities".

employer interference with the formation or administration of a public employee organization; section 1173-4.2a (3) forbids discrimination against public employees on account of their union activity; and section 1173-4.2a(4) ensures employer compliance with its duty to bargain collectively in good faith.

In the instant matter, CIR has alleged that agents of the respondent instructed residents not to file grievances and threatened them with reprisals if they did so. Clearly, such an attempt to discourage employee access to the grievance procedure, if proven to be true, would constitute an impediment to the exercise of rights granted by NYCCBL section 1173-4.1 and, thus, would violate section 1173-4.2a(1). Accordingly, we find that these allegations do state a prima facie claim of improper practice.

The remaining allegations of the petition deal with what petitioner has characterized as "systematic violation of the collective bargaining agreement". These include HHC's alleged failure to respond to grievances in a timely manner, alleged violations of terms of the agreement concerning, inter alia, work schedules and individual contracts, and the alleged failure to provide information required by the agreement.

Whether a failure or refusal to comply with the terms of a collective agreement may be found to state an

improper practice under the NYCCBL is a question that we have not previously determined.⁶ We have recognized that we have no authority to interpret or to enforce collective bargaining agreements except for limited purposes, e.g., of determining whether a dispute is arbitrable⁷ or whether there has been a violation of our statute.⁸ Moreover, we governed in such matters by section 205.5(d) of the Taylor Law,⁹ which is applicable to this Board pursuant to Section 212 of that Law, and which expressly provides that

the (Board shall not have authority to enforce an agreement between the an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

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In Decision No. B-13-83, we stated that a failure to take the steps necessary to implement an agreement would constitute an improper practice under NYCCBL section 1173-4.2a(4). In Decision No. B-14-83, we suggested that an alleged failure to adhere to the terms of an agreement could, if proven, constitute a breach of the duty to bargain in good faith in violation of section 1173-4.2a(4). In neither case, however, were we required to reach that ultimate issue.

⁷Decision Nos. B-6-76; B-10-79; B-19-81.

⁸Decision No. B-7-72.

⁹N.Y. Civ. Serv. Law, Art. 14, §§200 et seq. (McKinney).

It is thus clear that, absent an independent issue of statutory violation, we are without jurisdiction to consider claims of contract breach.¹⁰

We have carefully considered petitioner's allegations of contract violation and find that no independent claim of improper practice has been stated in this case. The alleged failure timely to respond to grievances filed by CIR cannot be said, on its face, to constitute a refusal to bargain in good faith where, as here, the contract expressly permits the grievant or the Union to invoke the next step of the procedure up to and including arbitration if the employer exceeds any time limit prescribed therein.¹¹ Even when we consider this allegation together with other stated incidents of contract violation, we do not find the kind of systematic and flagrant violation which might justify our assertion of improper practice jurisdiction. Therefore, we shall grant HHC's motion with respect to these allegations.

¹⁰See, St. Lawrence County, 10 PERB ¶3058 (1977); Levittown Union Free School District, 13 PERB ¶3014 (1980)

¹¹1982-84 Agreement between the City of New York/New York City Health and Hospitals Corporation and the Committee of Interns and Residents, Article XIV, Section 5.

With respect to the claim that respondent failed to provide information required by the contract, we note that a duty to provide information which may reasonably be required by the certified bargaining representative for the fulfillment of its representative duties is a component of an employer's obligation to bargain in good faith under our statute.¹² This obligation would be enforceable under the NYCCBL notwithstanding the existence of a contractual duty to provide information. However, in the instant matter, the petitioner has failed to allege, as it must, that the information requested is relevant to and reasonably necessary for purposes of collective negotiations or contract administration which our statute and the processes of this Board are designed to protect. As CIR has made no attempt to establish a nexus between the information it seeks and rights protected by the NYCCBL, we shall dismiss this allegation as failing to state a claim of improper practice under our Law.

Additionally, we note that CIR has alleged no facts which, if proven, would constitute a prima facie case

¹² NYCCBL §1173-4.2c(4). See also, *NLRB v. Acme Industrial Co.*, 385 U.S. 422, 64 LR ~1206-9 (1967).

of employer interference with the administration of the Union in violation of NYCCBL section 1173-4-2,a(2), or of discrimination against public employees for the purpose of discouraging union activity in violation of NYCCBL section 1173-4.2a(3). Accordingly, the petition is dismissed as to these claims as well.

Finally, with respect to HHC's assertion that certain allegations as to which no time frame was provided should be dismissed as untimely under section 7.4 of the Rules, we note that the allegations which we have found to state a prima facie claim involve events and occurrences which the Union asserts took place in May or June of 1984. Clearly, as to these claims, the petition filed on June 19, 1984 was timely under the four-month statute of limitations of Rule 7.4.

Based upon the above, therefore, we shall deny HHC's motion to dismiss the petition insofar as it concerns allegations of employer threats and acts of retaliation for the exercise of rights protected by NYCCBL section 1173-4.1, and we shall direct respondent to submit an answer with respect to those claims. We shall grant HHC's motion to dismiss the petition insofar as it concerns matters of alleged contract violation. The granting of the motion in this respect is, of course, without prejudice to the

pursuit of any contract remedies which may be available to the Union.

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

DETERMINED, that the petition filed by the Committee of Interns and Residents states a prima facie claim of improper practice under section 1173-4.2a(1) of the New York City Collective Bargaining Law insofar as it complains of threats and acts of retaliation for the filing of grievances under the collective bargaining agreement; and it is further

ORDERED, that the motion to dismiss filed by the New York City Health and Hospitals Corporation be, and the same hereby is, denied to the extent that it concerns allegations of threats and acts of retaliation for the filing of grievances; and it is further

ORDERED, that the motion to dismiss be, and the same hereby is, granted to the extent that it concerns allegations of contract violation; and it is further

DIRECTED, that the respondent serve and file its answer to the petition, as limited by our decision

herein, within ten days of receipt of this Interim Determination and order.

DATED: New York, N.Y.
March 27, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

JOHN D. FEERICK
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DEAN L. SILVERBERG
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