OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

MICHAEL CROMWELL,
Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY
and TEAMSTERS LOCAL 237,

Respondents.
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DECISION NO. B-4-93

DOCKET NO. BCB-1493-92

INTERIM DECISION AND ORDER

On May 18, 1992, Michael Cromwell ("the Petitioner") filed a verified improper practice petition against the New York City Housing Authority and against City Employees Union Local No. 237, International Brotherhood of Teamsters, AFL-CIO ("Local 237" or "the Union"). The petition alleges that the Housing Authority improperly subjected Petitioner to a physical examination, and that the Union, instead of protecting him, sanctioned the employer's alleged improper conduct, thereby breaching its duty of fair representation, and interfering with the statutory rights of employees under Section 12-306 of the New York City Collective

Bargaining Law ("NYCCBL").[1]

Local 237 filed its answer on May 29, 1992.

The Housing Authority, appearing by its Law Department, did not answer, but, instead, submitted a motion to dismiss the petition on June 23, 1992, on jurisdictional and procedural grounds. This Interim Decision and Order is limited strictly to the merits of the Authority's motion to dismiss the petition.

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[1] NYCCBL §12-306 provides, in pertinent part, as follows:

> **Improper practices; good faith bargaining.**
> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization or its agents:
> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 1173-4.1 (now re-numbered as section 12-305) of this chapter, or to cause, or attempt to cause, a public employer to do so;
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representa-tive of public employees of such employer.

NYCCBL §12-305 provides, in pertinent part, as follows:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all such activities. * * * A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

BACKGROUND

The Petitioner is employed by the Authority as a Housing Assistant. During the times relevant to this proceeding, he was assigned to the Kingsborough Houses project located in the Bedford-Stuyvesant section of Brooklyn.

According to information provided by the Petitioner and not denied by the Authority, on April 8, 1992, the Petitioner was summoned to the Authority's Personnel Office, where he submitted a urine specimen for analysis, and may have undergone a physical and psychiatric evaluation as well. Prior to his arrival at the Personnel Office, the Petitioner contacted Local 237 seeking its counsel.

In the Petitioner's view, there was insufficient cause for making him submit to these tests. Rather than protect his interest, however, his Union allegedly "sanctioned the referral of the employee for the action."

POSITION OF THE AUTHORITY

In its motion to dismiss the improper practice petition, the Authority contends that the Petitioner has no standing to commence this improper practice proceeding; that he alleged no conduct by the Authority that would have violated the rights granted him under Section 12-306(a) of the NYCCBL;[2]

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[2] NYCCBL §12-306a. provides as follows:

Improper practices: good faith bargaining.

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 12-305 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 discourag-

and that this Board has no jurisdiction to decide a matter that, in essence, is a contractual dispute.

On the issue of standing, the Authority contends that when public employees are represented by a union, only their union is permitted to initiate an improper practice proceeding against the employer. Individual union members, according to the Authority, may not bring these proceedings on their own.[3]

With respect to protected activity, the Authority claims that the Petitioner has stated no facts that demonstrate, or even allege, that the employer violated the NYCCBL. Therefore, it concludes, there exists no cause of action that this Board may consider.

Finally, the Authority notes that the Petitioner's grievance underlying this case is subject to a contractual grievance and arbitration procedure. It argues that this Board has no jurisdiction to resolve disputes over the interpretation and application of provisions of the collective bargaining agreement in the context of an improper practice proceeding.

Discussion

The improper practice charged in this case stems from the Petitioner's belief that his Union violated the duty of fair representation that it owed to him, by allowing his employer to subject him to a urinalysis and a physical and psychiatric examination. Thus, the issue to be considered is whether the

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> ing membership in, or participation in the activities of, any public employee organization;
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> (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.

[3] Relying on Decision Nos. B-53-89; B-25-83; B-1-83; and B-13-81.

Union protected Petitioner's rights adequately with respect to his submission to the examination. The main thrust of the Authority's motion to dismiss the petition, however, is based upon its assertion that the Petitioner has no standing to bring an action against the employer for an alleged violation of NYCCBL §12-306a. We find that the Authority's arguments in support of its motion are not relevant to the complaint as lodged, for the Petitioner's charge is directed toward conduct by the Union, not the employer. The cases cited by the Authority involve the duty to bargain, and have no application in the present dispute.

Under the current state of the law, if a union is charged with having neglected an obligation to one of its members impermissibly, the employer must be included as a respondent, even if the evidence indicates that the employer was not responsible for the union's conduct. A brief review of the law will clarify this point.

During its regular 1990 session, the State Legislature passed a bill concerning claimed breaches of the duty of fair representation. The Governor signed the bill into law, effective July 11, 1990.[4] This legislation effected several changes, including an amendment to Section 209-a. of the Taylor Law ("Improper employer practices; improper organization practices; application").

Previously, the duty of fair representation was a common law doctrine developed by the federal judiciary and adopted by the State courts in a line of public sector employment cases.[5] The doctrine balances the union's right as the exclusive bargaining representative against its correlative duty arising from the possession of this right. It is the duty of a union, under this doctrine, to act fairly toward all employees that it represents without hostility or discrimination toward any, to exercise its discretion with

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[4] Laws of 1990, Ch. 467.

[5] See Interim Decision No. B-51-90, pp. 15-19 for a thorough review of the caselaw behind this doctrine.

complete good faith and honesty, and to avoid arbitrary conduct. A breach of the duty occurs when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[6]

Chapter 467 of the Laws of 1990 both codified the duty of fair representation doctrine and authorized the Public Employment Relations Board (PERB) to retain jurisdiction and apportion liability between the union and the employer according to the damage caused by the fault of each in cases where the union has been found to have breached its duty by processing grievances improperly. New subdivision 3. of Section 209-a. of the Taylor Law reads as follows:

> The public employer shall be made a party to any charge filed under [the improper employee organization practices section] which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

This new section is an adjunct to the remedial power of the PERB's improper practice jurisdiction, set forth in Section 205.5(d) of the Taylor Law (as amended), which reads, in pertinent part, as follows:

> To establish procedures for the prevention of improper employer and employee organization practices as provided in [§209-a. of the Taylor Law], and to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article (but not to assess exemplary damages), including but not limited to the reinstatement of employees with or without back pay;
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> When the board has determined that a duly recognized or certified employee organization representing public employees has breached its duty of fair representation in the pro-cessing or failure to process a claim alleg-ing that a public employer has breached its agreement with such employee organization, the board may direct the employee organiza-tion and the public employer to process the contract claim in accordance with the parties' grievance procedure. The board may, in its discretion, retain jurisdiction to apportion between such employee organization and public employer

[6] Decision No. B-5-91.

> any damages assessed as a result of such grievance procedure.

This remedial power, with respect to duty of fair representation jurisdiction, authorizes the PERB, as necessary, to apportion between the union and the employer any damages assessed through the grievance procedure in light of the DFR breach found.[7]

Pursuant to Section 212 of the Taylor Law ("the local option section"), which authorizes the existence of the NYCCBL and of the Office of Collective Bargaining, the provisions of the 1990 Taylor Law amendments pertaining to the duty of fair representation are applicable to this Board.

The reason in general for the change in the law with respect to public employees in duty of fair representation cases is to have all parties appear at whichever step of the grievance procedure is appropriate when a breach of a collective bargaining agreement has been alleged, and, as is charged here, the aggrieved unit member claimed that his contractual rights have been diminished by the Union's alleged improprieties in its representation of him. It is true that the employer in such a situation may have done nothing to prevent the enforcement of the contractual rights to which it agreed in the collective bargaining agreement. But if the employer has breached the agreement, and if the breach could have been mitigated or prevented by the employee's representative, were it not for the Union's breach of its duty of fair representation to the employee, the employer should not be shielded from the natural consequences of its breach of the agreement by wrongful union conduct.

The governing principle, then, in a case where it has been proved that the union breached its duty of fair representation, and that an asserted right is meritorious, thus making the employer liable, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of

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[7] See Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369, 2379 (1967).

contract should not be charged to the union, but increases, if any, in those damages caused by the union's failure to process the grievance properly should not be charged to the employer.

With regard to a motion to dismiss an improper practice petition, we deem the moving party to concede the truth of the facts alleged by the Petitioner. In addition, the petition is entitled to every favorable inference, and it will be taken to allege whatever may be implied from its statements by reasonable and fair intendment.[8]

Thus, for the purposes of deciding the Authority's motion now before us, we must accept the Petitioner's contention that his Union breached its duty of fair representation and acted arbitrarily, discriminatorily, or in bad faith by permitting him to attend a physical examination.

We are satisfied that the Petitioner has presented sufficient unrebutted material allegations to withstand the Authority's motion to dismiss. Although incomplete, the Petitioner's claim as a whole manifests a cause of action cognizable under the NYCCBL, and sufficiently puts the Authority on notice of the charge to be met to enable it to formulate a meaningful response.

We note in this regard that the Petitioner's claim of improper conduct by the employer relates to actions that the Union allegedly was in a position to defend against, but chose not to. This is the issue that forms the basis for the Petitioner's claim against Local 237. In other words, the alleged actions by the Authority are being challenged on the ground that they violated contractual rights and/or policies dealing with drug testing, physical examinations, and psychiatric evaluations. In such a case, by law, joinder of the employer as a party is mandated by subdivision 3. of Section 209-a.

In these circumstances, the Petitioner's allegation that his Union failed to protect his contractual rights fits squarely within coverage contemplated by the new addition to Section

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[8] Decision Nos. B-36-91; B-34-91; B-32-90 and B-34-89.

209-a. of the Taylor Law, and the Authority may be liable for a portion of any damages that may be determined to have accrued if the Union is found to have breached its duty.[9] On the other hand, if it can be shown that the Union did not breach its duty of fair representation with regard to its representation of the Petitioner; and/or that the Petitioner had no contractual right which the Union could have asserted before or during the examinations in question, the employer would have no liability.

We shall, therefore, order the Authority to serve and file its answer to the petition within seven days of receipt of this determination.

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 motion of the New York City Housing Authority to dismiss the improper practice petition docketed as BCB-1493-92 be, and the same hereby is, denied; and it is further

ORDERED, that the New York City Housing Authority shall serve and file an answer to the improper practice petition docketed as BCB-1493-92 within seven (7) days of receipt of this Interim Decision and Order.

DATED: New York, N.Y.
January 12, 1993

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

GEORGE B. DANIELS

[9] An apportionment of damages is provided for in Section 205.5(d) of the Taylor Law (as amended).

MEMBER

STEVEN H. WRIGHT
MEMBER

JEROME E. JOSEPH
MEMBER