OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding :

— between —

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JOHN J. FABBRICANTE, Petitioner, : DECISION NO. B-38-98

DOCKET NO. BCB-1913-97

— and — :

CITY OF NEW YORK; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 3, *et al.*, Respondents. :

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INTERIM DECISION AND ORDER

On June 9, 1997, John J. Fabbricante ("Petitioner"), appearing *pro se*, filed a verified improper practice petition against the International Brotherhood of Electrical Workers; J.J. Barry, president of the International; Dennis McSpedon, president of Local 3; and Joseph Vicari, business agent of Local 3 ("Union"). In a letter dated June 17, 1997, to Petitioner, the General Counsel of the Office of Collective Bargaining ("OCB") instructed Petitioner to amend the improper practice petition to include the public employer as a co-respondent under the requirements of § 209-a(3) of the Taylor Law,[1] and to serve the employer as well as Local 3 within ten days of receipt of the letter. On June 25, 1997, Petitioner called the OCB for clarification of the General Counsel's letter. Pending a return phone call, Petitioner served the amended petition on the Fire Commissioner and the president of the International Union. On

[1] Article 14, New York State Civil Service Law (Public Employees' Fair Employment Act), Chapter 392 of the Laws of 1967, effective September 1, 1967.

July 2, 1997, Petitioner served Local 3. On July 29, 1997, counsel for the City phoned the Trial Examiner assigned to the case to inquire whether the Executive Secretary of the Board of Collective Bargaining ("Board") had rendered a determination as to the legal sufficiency and timeliness of the instant petition. He was referred to the June 17, 1997, letter of the OCB General Counsel, a copy of which he acknowledged receiving. Counsel for the City averred that the petition had been served directly on the Department, rather than the New York City Office of Labor Relations ("OLR").[2] The Trial Examiner informed him that, if he were requesting an extension of time to file an answer, she would entertain the request. The City did request such an extension and filed an answer on August 15, 1997. On August 27, 1997, the Trial Examiner received and granted Petitioner's request for an extension of time to reply to the City's answer. By way of copies of the Trial Examiner's letter to Petitioner granting that extension, she also informed Dennis McSpedon, President of Local 3, and Joseph Vicari, Business Agent of Local 3, that the Union's answer was at that time forty-five (45) days overdue. Petitioner's reply to the City's answer was filed on September 15, 1997.

On December 23, 1997, the Union filed the instant motion to dismiss the petition in the underlying improper practice proceeding. On December 24, 1997, by facsimile transmission, Petitioner filed a memorandum opposing the motion to dismiss on the ground that the Union had defaulted by not filing a timely answer.

On January 16, 1998, the Director of the OCB convened a conference of the parties herein to discuss the instant motion to dismiss as well as several other improper practice petitions

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[2] It should be noted that, effective September 6, 1997, the OCB Rules were amended to require service of papers upon the "designated agent," in this case OLR.

involving the same parties then pending before the Board and one petition in which the Board had rendered a final determination, which the Petitioner sought to enforce because of the Union's alleged failure to comply.[3] In an attempt to clarify the issues, the OCB Director invited the Union to submit a statement in support of its position with respect to these various matters. Following unsuccessful attempts to resolve the instant dispute and the related claims through mediation, a conference was held on June 29, 1998. At that time, the parties agreed to meet a second time in October, 1998. It was agreed that, if an interim decision were not dispositive of the underlying improper practice petition by then, a hearing would ensue. On July 21, 1998, the Union filed a memorandum in support of the instant motion to dismiss. On July 24, 1998, the City filed a letter stating that it joins in the motion. Petitioner filed a letter on August 4, 1998, objecting to consideration by the Board of the Union's motion.

Background

Petitioner is a licensed electrician with the Fire Department in a bargaining unit represented by the Union. Beginning in 1994 and continuing up to the filing of the instant petition, Petitioner initiated several improper practice proceedings variously naming the Union and the City as respondents.[4] Generally, the previous petitions asserted retaliation by the Union shop steward as well as by Department supervisors for, *inter alia,* the filing of grievances concerning alleged disparities in the assignment of overtime and for the filing of subsequent

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[3] Petitions docketed as BCB-1708-94, BCB-1774-95, and BCB-1781-95; also, enforcement of Decision No. B-43-97. A related petition, docketed as BCB-1964-98, was filed on March 23, 1998, but amended and subsequently filed on April 27, 1998. A motion to dismiss was also filed in that matter; it is not the subject of the instant interim decision.

[4] *See* Note 3, *supra*.

improper practice petitions based on the handling of the grievances.

The complaint underlying the instant proceeding concerns a grievance originally filed on February 21, 1997, in which Petitioner alleged, *inter alia*, that a maintenance worker has been performing work regularly assigned to Petitioner's bargaining unit and that overtime assignments have been distributed unequally among members of the bargaining unit. The underlying improper practice petition alleges that the Union was aware of the grievance but "took no interest" in it. The petition also asserts that Shop Steward Al Somma was "uncooperative" and "looking for a way not to represent Petitioner or proceed" with the processing of the grievance. It further alleges that the Union "is looking the other way" while Supervisor Anthony Bianchino, who is a member of the same bargaining unit to which Petitioner belongs, fosters reverse out-of-title work. Petitioner states that he spoke with a Gary Lane at the Union, who informed him that the Union was not willing to take the grievance to arbitration because it would be "futile" to do so. Petitioner contends that the Union has acted in bad faith by not pursuing the matter to arbitration. He further contends that the Union retaliated against him for "past petitions" that he has filed against the Union alleging a breach of the duty of fair representation.

Positions of the Parties

Union's Position

In the instant motion to dismiss, the Union asserts that the petition fails to articulate claims for which relief may be granted. The complaints, it contends, do not state grievable claims under the parties' collective bargaining agreement.

The Union argues that the Petitioner in the underlying improper practice petition has no

standing to bring a reverse out-of-title claim such as is stated in the Petitioner's grievance which, he contends, the Union would not consider or process. Moreover, the Union argues that *it* has no duty to process such a grievance on behalf of public employees other than those whom it represents in its bargaining unit.

The Union further argues that it has no duty under the New York City Collective Bargaining Law ("NYCCBL") to process unit member complaints alleging failure to promote, failure to equalize assignment of overtime, and failure to meet departmental standards with respect to the quality and safety implications of work performed by its employees. It also argues that it has no duty under either the Civil Service Law or the parties' collective bargaining agreement to pursue Petitioner's complaints alleging favoritism.

Finally, the Union argues that it had no duty to investigate any of the above-referenced grievances for Petitioner and that it never investigated or processed any such grievances for any other unit member. In fact, the Union argues that this Board has no jurisdiction over claims of retaliation by a union against a member of its bargaining unit. The Union requests that, if the motion to dismiss is denied, any hearing which may be held in the matter be held before the Office of Administrative Trials and Hearings ("OATH").

City's Position

The City states that it agrees with the Union's arguments and joins in the instant motion to dismiss.

Petitioner's Position

Petitioner strenuously objects to consideration of the instant motion to dismiss on the ground that the Union's motion and memo in support are not in compliance with Subsections (g) and (h) of § 1-07 of the Rules of the Office of Collective Bargaining ("OCB Rules").[5] He points to the Trial Examiner's letter of August 27, 1997, advising the Union that its time to respond to the underlying improper practice petition was then forty-five days overdue. The Union, he states, had "more than a fair opportunity [to respond to the petition] and defaulted." He further states that the Board would have to "bend the rules" to permit the instant petition to be considered. That would permit the Union an unfair advantage, he contends, which would prejudice his case. He concludes that, by "choosing *not* to respond is a response in itself and should be weighted as such." (Emphasis in original.)

As to the Union's request for the petition to be heard by OATH, Petitioner states that OATH is an improper forum for the adjudication of improper practice petitions. With respect to the City's position supporting the motion to dismiss, Petitioner states that it appears to be "schismatic, while on the one hand claiming to represent the City, yet on the other hand siding with [the Union's] misapplied and misinterpreted facts and illegitimate motions."

Discussion

[5] Those subsections of the OCB Rules govern the contents, service and filing of an answer to an improper practice petition. Previous to amendments which were promulgated and made effective on September 6, 1997, the rules specified that answering papers were required to be served within ten (10) days after receipt of notice of a finding of the Executive Secretary of the Board that the petition is not, on its face, untimely or insufficient. After the effective date of the amendments, the Rules provided that answering papers were required to be served within ten *business* days of *service* of the Executive Secretary's notice.

As a preliminary matter, we must address the argument of the Petitioner in the underlying improper practice petition as to the timeliness of the instant motion to dismiss. On one hand, the Petitioner argues that, since the motion was filed some six months after the amended improper practice petition was filed, the Board should refuse to consider it. On the other hand, the Union argues that the OCB Rules are silent as to the timeliness of the filing of a motion to dismiss. The Union also argues that , under the Civil Practice Law and Rules ("CPLR"), a motion to dismiss based on a failure to state a claim may be brought at any time. The Union alleges that the instant improper practice petition does not state a claim upon which relief may be granted by this Board; therefore, it contends, its motion to dismiss can be brought at anytime.

The Union is correct that the OCB Rules are silent as to the timeliness of the filing of a motion to dismiss, and, in the absence of any such rule, it may not appear to be unreasonable for a party such as the Union to rely on the CPLR for guidance with respect to procedural matters such as the filing of the instant motion to dismiss. However, we find it reasonable for the Petitioner in the underlying improper practice proceeding to object to the Union's filing such a motion given the Union's default in answering or moving within the time to answer, and its failure even to request an extension of time to file a responsive pleading. The OCB Rules do not countenance a failure to do *anything* within the time prescribed for answering, and, although the OCB Rules do not require such a request, courtesy dictates, and most parties comply with the common practice, that a request for an extension of time to move or file any other pleading be made within the time to answer. Extensions of time are granted liberally for good cause shown. No such cause has been offered by the Union in this instance.

Mindful of the Petitioner's strenuous objection to our consideration of the instant motion to dismiss, nonetheless, we shall entertain the motion to the extent that it challenges the underlying petition on the ground that the petition fails to state a claim under the NYCCBL. We are guided by the CPLR in this regard.

We have long held that, when deciding a motion to dismiss a petition that alleges violation of the NYCCBL,[6] we deem the moving party to concede the truth of the facts alleged by the petitioner. More than that, we accord the petition every favorable inference, and we construe it to allege whatever may be implied from its statements by reasonable and fair intendment.[7] Thus, for purposes of the instant motion to dismiss, we deem as true Petitioner's allegations that

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[6] Section 12-306 of the NYCCBL, as amended, provides, in relevant part, as follows:

> **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 ... administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of ... discouraging membership in, or participation in the activities of, any public employee organization ...
>
> **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 rights granted in § 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 representative of public employees of such employer ....

[7] Decision Nos. B-15-94; B-15-93; B-36-91.

the Union knew of the grievance he filed but "took no interest" in it. We further deem as true the contention that the Union and Shop Steward Al Somma were uncooperative towards him and that the Union retaliated against him for filing past improper practice petitions. Under these favorable inferences and assumptions, for purposes of deciding this motion, we also must deem Petitioner to have been engaged in protected activity when he filed the underlying grievance herein as well as other improper practice petitions decided or pending before this Board.

Within this framework, we find as follows: Petitioner has failed to state a *prima facie* claim of improper practice against the Union for its asserted failure to pursue a reverse out-of-title claim on Petitioner's behalf. A union is under no duty to pursue a complaint to arbitration which does not fall under a collective bargaining agreement's definition of a grievance. [8]

In the applicable contract, we take notice that the contractual definitions of a grievance include "a claimed assignment of employees to duties substantially different from those stated in their job specifications." (Article V [Grievance Procedure], § 1 (Definition), Subsection "c"). We also take notice that the contractual definition of an "employee" refers only to those employees serving in titles specified in the contract, including various electrician and engineering titles and helpers. (Article I [Union Recognition and Unit Designation]) It does not include maintenance workers, such as the employee of whom Petitioner herein complains. Thus, the reverse out-of-title complaint by the Petitioner, *i.e.*, that an employee outside Petitioner's bargaining unit is or may be performing work customarily assigned to members of Petitioner's

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[8] We take administrative notice of the applicable collective bargaining agreement to which the Union and the City are parties, *i.e.*, the Electricians' contract, dated June 6, 1991, for the term July 1, 1989, — June 30, 1992, whose terms continued in effect throughout the relevant time period herein pursuant to the *status quo* provisions of NYCCBL § 12-311.

bargaining unit, does not state an arguable grievance under the applicable contract and, therefore, could not provide a basis for any duty on the part of the Union to pursue such a grievance to arbitration.[9] Therefore, so much of the petition as is based on the Union's failure to pursue the reverse out-of-title claim must be dismissed.

Petitioner also has shown no duty on the part of the Union to process unit member complaints alleging failure by management to equalize assignment of overtime or failure to meet departmental standards with regard to quality and safety implications of work performed. Unless limited by contractual agreement, these would constitute matters of management prerogative that would not be subject to grievance and arbitration. The instant petition points to no contractual basis for grieving such claims. In the absence of a contractual limitation on management's rights, we find the Union was under no duty to pursue any such claims relating to equal assignment of overtime or failure to meet departmental standards. Therefore, we shall dismiss so much of the petition as is based on the Union's failure to pursue these claims.

Any claims which Petitioner has articulated which arise separately under the New York State Civil Service Law do not automatically articulate claims under the NYCCBL. Moreover, this Board does not have jurisdiction to enforce the provisions of the Civil Service Law (other than Article 14 thereof). Here, however, Petitioner alleges that, in retaliation for his filing of grievances pursuant to the contractually provided procedure and earlier improper practice petitions, he was passed over for promotion. To the limited extent that the petition alleges motivation that is improper under our law, the petition states a *prima facie* claim under the

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[9] *See*, *e.g.*, Decision Nos. B-10-92, B-35-89.

NYCCBL. Consequently, to the extent that the instant petition articulates claims that the employer failed to promote the Petitioner and that the Union failed to represent him in a grievance over his failure to be promoted, as a result of both the City's and the Union's allegedly retaliating against him for having engaged in activity protected under the NYCCBL, we shall entertain such a claim.

As to the Union's assertion that this Board has no jurisdiction to entertain claims of retaliation by a union against a member of its bargaining unit, the Union is incorrect in this regard. Were the conduct about which the Petitioner complains entirely limited to internal union business, the Union would be correct in its analysis. But the conduct at issue goes to the very heart of the employment relationship between the Petitioner and the public employer. In this respect, the issues his complaint raises fall entirely within the jurisdiction of this Board to inquire.[10] Petitioner alleges retaliation affecting his employment relationship as a result of his filing petitions with the OCB under the NYCCBL. Petitioner has clearly stated a claim which we have jurisdiction to address. The Union's motion to dismiss, in this respect, is denied. As for the Union's request for any hearing to be held in this matter be conducted by OATH, this request is inappropriate, inasmuch as matters arising under the NYCCBL are properly heard by the OCB, not by OATH, which has no jurisdiction over such matters.

ORDER

[10] This Board has jurisdiction over internal union matters only if they affect terms and conditions of employment or the nature of the representation accorded an employee with respect to his employment. *See* Decision Nos. B-48-97 and B-56-91; *see*, *also*, Decision Nos. B-26-90, B-23-84, B-15-83, B-18-79.

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 Union, joined by the City, to dismiss the improper practice petition docketed as BCB-1913-97, be, and the same hereby is, granted in part and denied in part, in accordance with the Decision as described hereinabove.

DATED: New York, N.Y.
Sept. 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER