McAllen v. Emergency Medical Services, et. al, 31 OCB 15 (BCB 1983) [Decision No. B-15-83]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

RICHARD J. McALLAN — DECISION NO. B-15-83

Petitioner,

DOCKET NO. BCB-614-82

and

EMERGENCY MEDICAL SERVICES DIVISION OF NEW YORK HEALTH AND HOSPITALS CORPORATION AND LOCAL 2587 DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.
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DECISION AND ORDER

On September 15, 1982, Richard J. McAllan, a Paramedic Ambulance Corpsman employed in the Emergency Medical Services Division of the New York City Health and Hospitals Corporation (hereinafter "EMS" and/or "HHC" or "the Corporation") filed a petition charging EMS/HHC and Local 2507 of District Council 37 (hereinafter "Local 2507" and/or "D.C. 37" or "the Union") with the commission of a number of improper practices against EMS employees in the Ambulance Corpsman series of titles. on October 18 and 19, 1982, respectively, D.C. 37 and HHC filed answers to the petition, to which petitioner replied in a single submission on November 23, 1982. On December 13, 1982, D.C. 37 filed

a sur-reply.[1]

BACKGROUND

The instant controversy arises out of HHC's announced intention to implement the terms of an impasse panel's award,[2] incorporated into the 1980-1982 Citywide Agreement, which abolished the shortened summer workday schedule, or heat days in lieu thereof, for employees who work in air-conditioned facilities, out-of-doors or in the field.[3] Among those titles affected by the impasse award are the Ambulance Corpsman series, consisting of Ambulance Corpsman, Paramedic Ambulance Corpsman, Supervisory Ambulance Corpsman and Chief Ambulance Corpsman. Employees in these titles work only for EMS/HHC and are represented for collective bargaining at the unit level by Local 2507 of

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[1] While the OCB Rules do not provide for the filing of pleadings subsequent to the reply, and while we discourage such additional pleadings, no objection is raised in this proceeding to D.C. 37's filing of a sur-reply. For the additional reason that the sur-reply is responsive to new matter raised in petitioner's reply, we shall consider the evidence offered and defenses raised in the sur-reply. This is also consistent with our policy of eschewing an overly technical application of rules of pleading. Decision No. B-21-82.

[2] City of New York and District Council 37, No. I-161-81 (Seitz, Arb.) (Oct. 15, 1981), aff'd, City of New York and District Council 37, Decision No. B-29-81.

[3] 1980-1982 Citywide Agreement, Article V, Section 18b. This benefit continues to be enjoyed by other groups of employees.

D.C. 3 7.[4]

EMS employees have a rotating work schedule consisting of five days on duty followed by two days off, followed by five days on duty and three days off (hereinafter "5-2/5-3 schedule"). This schedule results in a total of 243 tours of duty per year. The three heat days that EMS employees received under the prior citywide agreement were incorporated into the 5-2/5-3 schedule; that is, the three days were not subtracted from the total number of tours of duty required to be worked per year.

Even with the heat days already accounted for, however, employees on the 5-2/5-3 schedule performed four fewer tours of duty per year than traditional employees (employees whose weekly schedule consists in five days on duty followed by two days off). For some period of time, it appears that HHC forgave the "shortfall" in the total number of hours worked annually by these employees. Subsequently, however, HHC sought to retrieve the days previously forgiven. Rather than having the 5-2/5-3 schedule disrupted by the addition of four work days, Local 2507 agreed to forfeit the half-hour "duty-free meal period" benefit enjoyed by its members.

During the 1980 unit negotiations between HHC and

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[4] Certification No. 62D-75, as amended, is held jointly by Local 237, IBT; D.C. 37, AFSCME; and Local 144, SEIU.

D.C. 37, it came to light that the meal period giveback more than compensated for the hours sought to be recouped by the Corporation. The Union therefore sought repayment of the difference. This matter was severed from unit negotiations, which also involved other groups of employees and other issues, and was resolved in a separate agreement(hereinafter "lunchtime supplementary agreement").[5]

On August 31, 1982, Thomas Doherty, Deputy Director of Labor Relations, HHC, wrote a letter to Alan R. Viani, Director of Research and Negotiations, D.C. 37 (hereinafter "Doherty letter"), informing the Union that the abolishment of heat days for outdoor and field employees pursuant to the 1980-1982 Citywide Agreement would require modification of the 5-2/5-3 schedule. The letter indicated that the three days would be recouped through the forfeiture of one 5-3 rotation in each of three selected months each year. The letter invited questions or comments from the Union on the planned schedule changes.

Upon receipt of the Doherty letter, D.C. 37 claims to have notified HHC of its desire to discuss implementation of the recoupment plan described therein. While petitioner disputes this assertion, contending that the Union has "produced no evidence of negotiations or even correspondence

[5] Stipulation of Settlement dated July 23, 1981. Exhibit A to HHC's answer.

between the parties,"[6] HHC asserts that it is holding implementation of the proposed schedule changes in abeyance at the Union's request.

POSITIONS OF THE PARTIES

Petitioner's Position

In the petitioner's view, HHC is not presently entitled to recover three heat days from EMS employees. According to petitioner's calculations, which are set forth in detail in both the petition and the reply, the heat days previously incorporated into the 5-2/5-3 schedule have already been recovered by HHC as a result of the duty-free meal period giveback and the lunchtime supplementary agreement. Petitioner maintains that the giveback, even after adjustment in the lunchtime supplementary agreement, absorbed the three heat days as well as the four-day shortfall which it was intended to correct. Thus, petitioner contends, the recoupment of three heat days is unwarranted.

A. Charges against EMS/HHC

Petitioner alleges that EMS/HHC's decision to recoup three days from the EMS schedule constitutes a unilateral change in terms and conditions of employment and violates both the lunchtime supplementary agreement and the 1980-1982 Citywide Agreement. Although petitioner concedes that the recoupment of

[6] Petitioner's reply, p.8.

heat days has not been implemented, he claims that the schedule changes outlined in the Doherty letter would have been imposed had petitioner not filed the instant improper practice charges.

Petitioner asserts that implementation of the contemplated schedule changes will have a practical impact on terms and conditions of employment of EMS employees, in that the number of hours they are required to work will be increased and will exceed the number of hours prescribed by the citywide agreement.

Petitioner also contends that HHC's attempt to recoup three days which EMS employees allegedly have already given back, arid thereby to "coerce" EMS employees into working an additional 24 hours per year (8 hours per day x 3 days) without compensation constitutes discrimination, bad faith dealing and coercive bargaining.[7]

As a remedy for these alleged improper practices, petitioner seeks an order permanently enjoining implementation of HHC's announced plan for recoupment of heat days from EMS employees. Petitioner also requests that the Board oversee the belated negotiations concerning this matter which, petitioner concedes, are presently taking place.

[7] Petitioner's reply, pp. 5-7.

B. Charges against Local 2507/D.C. 37

Petitioner claims that the union violated its duty of fair representation by allowing EMS/HHC to change the 5-2/5-3 schedule and to increase the total number of hours worked by EMS employees without demanding negotiations on the subject.

Petitioner also charges that D.C. 37 breached the duty of fair representation by refusing either to cooperate with petitioner in the present action against HHC or to file a separate improper practice petition. Petitioner suggests that the Union's refusal was motivated by a desire to discredit him (a former Union officer) in the eyes of the membership.

Petitioner further complains that D.C. 37 urged him to abandon his claim against EMS/HHC because, in the Union's view, the claim lacked merit while, at the same time, refusing petitioner's request for a written statement of the Union's position concerning petitioner's allegations of improper practice.

Because D.C. 37 refused to take a position in the instant proceeding on the merits of the proposed recoupment of heat days, petitioner claims that the Union is avoiding, in derogation of its duty of fair representation,

the issue of whether HHC's proposal is in compliance with the citywide contract. Petitioner acknowledges that the Union created a review committee (to which petitioner was appointed) to determine whether HHC had already recovered the heat days by virtue of the lunchtime supplementary agreement. However, since this action was not taken until after the instant charges were filed, petitioner alleges that a breach of the duty of fair representation has occurred.

Petitioner further contends that Local 2507 failed to inform the membership about the ongoing dispute over recoupment of heat days until after the instant petition was filed. In this connection, petitioner charges that the Union has failed to hold monthly membership meetings as required by the AFSCME Constitution and that this omission prevented the members of Local 2507 from learning of the heat day dispute and from participating in the formulation of the Union's position.

According to petitioner, the failure to keep Local 2507 members informed of its actions also violates "OCB requirements" and is further evidence of the Union's bad faith and arbitrary and discriminatory treatment of petitioner and of

other Union members.

As a remedy for the improper practices allegedly committed by the Union, petitioner requests that the Board order the Union to submit a detailed statement of its position on the proposed recoupment of heat days. Petitioner also seeks an order directing Local 2507 to keep its membership informed of any changes in terms and conditions of employment presently being negotiated so that Union members may participate in the collective bargaining process.

HHC's Position

Respondent HHC argues that since the planned recoupment of three heat days has not been implemented, and since EMS has agreed to hold implementation in abeyance in order that the Union may present alternatives to modification of the 5-2/5-3 schedule, petitioner's claim of a unilateral change in terms and conditions of employment is premature.

In addition, HHC submits that EMS has negotiated and reached agreement with the certified bargaining representative for EMS employees concerning work schedules, compensation for work performed during meal periods, total number of days worked per year, and other matters involving wages, hours,

and conditions of employment, and, therefore, has not violated its statutory duty to bargain in good faith.

HHC maintains further that EMS has not violated the terms of any existing agreements on wages, hours and working conditions, including the 1980-1982 Citywide Contrast and the lunchtime supplementary agreement. Since it has a contractual right to recoup the three heat days from EMS employees, HHC asserts that its dealings with Local 2507/D.C. 37 concerning this issue have been in good faith. In this connection, the Corporation adds that petitioner has failed to demonstrate how HHC has discriminated against Local 2507 members for the purpose of encouraging or discouraging union activity or how it has coerced public employees in the exercise of statutorily protected rights.

For the foregoing reasons, HHC requests that the improper practice petition herein be dismissed as a matter of law.

The Union's Position

Local 2507/D.C. 37 denies that it has violated the duty of fair representation. To the contrary, the Union points out that, upon receipt of the Doherty letter, it

demanded that HHC discuss the intended alteration of the 5-2/5-3 schedule and that, as a result of this demand, HHC has not implemented and continues to hold in abeyance implementation of any schedule change. D.C. 37 emphasizes that it persuaded HHC not to implement the recoupment provision, thus affording the Union the opportunity to discuss alternatives to modification of the 5-2/5-3 schedule, which the majority of Local 2507 members wish to preserve. Since HHC continues to hold implementation in abeyance, the Union urges that the petition be dismissed as presenting issues not yet ripe for Board review.

D.C. 37 denies that it failed to inform the membership of a dispute concerning the 5-2/5-3 schedule. It asserts that announcements of September and October 1982 general membership meetings were sent to Local 2507 members and that meetings were held. In any event, any failure to hold membership meetings prior to that time did not prevent discussion of the hours dispute, according to D.C. 37. The Union notes that the petitioner attended and participated in meetings of a committee appointed by Local 2507 to determine whether HHC was entitled to recoup the heat days from EMS employees.

The Union argues that a cause of action for breach

of the duty of fair representation lies only if a union fails to act fairly, impartially and nonarbitrarily in negotiating, administering and enforcing collective bargaining agreements. It is submitted that petitioner has not demonstrated any of the above omissions with regard to the Union herein and therefore has failed to state a cause of action.

Concerning the alleged violation of the AFSCME Constitution, D.C. 37 argues that the Board lacks Jurisdiction to entertain such a claim which, it is asserted, concerns strictly internal union matters.

For all of the aforementioned reasons, D.C. 37 urges that the petition be dismissed.

DISCUSSION

The instant improper practice petition presents two main issues for our consideration, which may be outlined as follows:

1) Whether EMS/HHC has committed improper practices in violation of sections 1173-4.2a (1), (3) and (4), respectively, of the New York City Collective Bargaining Law (hereinafter "NYCCBL")[8] by:

   (a) coercing EMS employees to work an additional 24 hours per year;

   (b) discriminating against petitioner and/or all EMS employees by seeking to recoup three days from the 5-2/5-3 schedule; and

   (c) refusing to bargain over a change in a term or condition of employment (hours) of EMS employees.

2) Whether Local 2507/D.C. 37 has breached its duty of fair representation and thereby violated NYCCBL section 1173-4.2b (1) and (2),[9] respectively, by:

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[8] NYCCBL, §1173-4.2a provides in pertinent part:

> 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 chapter; ...
>
> (3) to discriminate against any employee for the purpose cf 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.

[9] NYCCBL §1173-4.2b provides in pertinent part:

> 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

a) restraining EMS employees in the exercise of rights granted in NYCCBL section 1173-4.1[10] in that it failed to inform the Union membership of a proposed change in a term or condition of employment;

(b) refusing to negotiate with EMS/HHC concerning the proposed unilateral change in the 5-2/5-3 schedule.

We shall deal first with petitioner's allegations that EMS/HHC improperly changed a term or condition of employment of EMS employees without bargaining and that D.C. 37 breached the duty of fair representation by allegedly "allowing" HHC to take its proposed action. Specifically, petitioner challenges HHC's right unilaterally to recoup the three heat days previously enjoyed by EMS employees and, in accomplishing this goal, to modify the 5-2/5-3 schedule without bargaining with the Union.

HHC denies petitioner's allegations, pointing out that no unilateral action has been taken, as the Corporation is holding in abeyance any implementation of its proposal for recoupment of heat days in order to entertain

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employees in the exercise of rights granted in section 1173-4.1 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.

[10] NYCCBL §1173.4.1 provides in pertinent part:

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 ....

alternatives to modification of the 5-2/5-3 schedule. The Union also denies petitioner's claims, pointing out that, at its request, HHC continues to hold implementation in abeyance in order that alternatives to the recoupment plan may be explored. Both respondents argue that petitioner's allegations of unilateral change should be dismissed as premature.

We find that petitioner, as an individual member of the bargaining unit represented by D.C. 37, lacks standing to assert either that HHC has taken improper unilateral action or that the Union has permitted HHC to take unilateral action with respect to matters concerning which both respondents allegedly have a duty to bargain. We have previously held that the duty of a public employer to bargaining good faith is a duty owed to the certified representative of its employees and that it does not extend to an individual bargaining unit member.[11] By the same token, the duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not to the union's members.[12]

[11] Decision No. B-13-81. See East Ramapo Cent. School Dist. v. Kalin, 12 PERB ¶3121 (1979); State v. Robinson, 13 PERB ¶3063 (1980); NYCCBL §1173-4.2a(4).

[12] NYCCBL §1173-4.2b(2).

We note that HHC and D.C. 37 urge us to dismiss petitioner's allegation of an improper unilateral change in a term or condition of employment as premature, as implementation of the proposal for recoupment of heat days is in abeyance while discussions concerning alternatives to modification of the 5-2/5-3 schedule are voluntarily pursued. We agree with the respondents' position. The fact that HHC and D.C. 37 may not have agreed to discuss the recoupment plan announced in the Doherty letter of August 31, 1982 until after petitioner filed the instant petition does not alter the facts that (a) no unilateral action has been taken with respect to a term or condition of employment, and (b) the Corporation has indicated its willingness to discuss and apparently is discussing implementation of its plan with the Union. This Board has previously indicated that it will not decide a matter where no real controversy exists.[13]

Accordingly, even if petitioner had standing to advance a refusal to bargain charge against respondents, we would dismiss the claim as premature.

Petitioner's claim that the propose d recoupment of heat days has a practical impact on hours worked by EMS employees will also be dismissed. Allegations of a practical impact resulting from unilateral management action and

[13] Decision No. B-22-79.

questions concerning management's duty to alleviate or to bargain concerning the alleviation of impact are inseparable from the bargaining obligation which, we noted above, runs only between a public employer and a public employee organization. Accordingly, petitioner also lacks standing to assert this claim.[14]

Petitioner alleges that HHC's attempt to, recoup three days from the schedule of EMS employees pursuant to the terms of an impasse panel award incorporated into the 1980-1982 Citywide Agreement is "coercive" and "discriminatory". However, petitioner does not claim that the Corporation coerced him or other EMS employees in the exercise of statutorily protected rights to participate in the activities of a public employee organization. Neither does petitioner attempt to demonstrate that he, as an individual, is being discriminated against vis-a-vis other EMS employees, or that EMS employees, as a group, have been or will be treated differently from other HHC employees with respect to the recoupment of heat days, or that any EMS employee is being subjected to discriminatory treatment in order to affect his participation in activities of a public employee organization. While allegations of

[14] See Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "OCB Rules") §7.3, which provides that a disagreement as to whether a matter is within the scope of collective bargaining may be submitted to the Board (only) by a public employer or by a certified public employee organization.

"coercion" and "discrimination" by a public employer, if proven, may state a cause of action under NYCCBL sections 1173-4.2a (1) and (3) respectively, in the absence of a nexus between the acts complained of and protected unionrelated activity and, in the absence of evidence which would support any such allegation, we shall dismiss these conclusory charges without further discussion.

We note that petitioner requests that this Board permanently enjoin the implementation of HHC's announced recoupment plan for EMS employees, thus implying that this Board might make a ruling as to the propriety of the giveback of three heat days.[15] In this connection, we point out that a determination of the Corporation's entitlement to recoup heat days from EMS employees would involve interpretation of the 1980-1982 Citywide Agreement and of the lunchtime supplementary agreement referred to above. Questions concerning the alleged misinterpretation or misapplication of the terms of a collective bargaining agreement should be raised in the context of a grievance pro-

[15] In a letter dated December 6, 1982 from petitioner to the OCB Trial Examiner, petitioner expressly stated his view that "OCB could rule that no giveback of any type was necessary under existing agreements." We do not consider the contents of this letter in our decision of the case, except insofar as they clarify the nature of the relief petitioner is seeking.

cedure and not in an improper practice proceeding, however.[16]

We now turn to petitioner's allegation that D.C. 37 breached its duty of fair representation. In support of this claim, petitioner points to the facts that D.C. 37 refused: (1) to cooperate with petitioner in his action against HHC or to file a separate improper practice petition (petitioner suggests that this refusal was motivated by a desire to discredit him in the eyes of the Union membership); (2) to provide him with a written statement of its position concerning petitioner's claims against HHC; and (3) to take a position in this proceeding on the merits of the proposed recoupment of heat days, thereby allegedly avoiding taking a position as to whether or not HHC's proposal violates the citywide agreement.

D.C. 37 denies the substance of petitioner's allegations pointing out, inter alia, that, at its October 1982 general membership meeting, it appointed a committee to determine whether HHC had a right to recoup three days from EMS employees or whether these days had already been recovered. The Union notes that petitioner was appointed to this committee. Also it is not contested that the Union took the initiative in seeking discussions with HHC concerning alternatives to modification of the 5-2/5-3 schedule.

[16] Decision No. B-10-80.

The above listed allegations, taken together, amount to a claim that D.C. 37 has failed to do all that it should have done, in petitioner's view, to challenge HHC's action and to provide adequate representation of its members' interests in the matter of the proposed recovery of heat days. As we have previously held, a union breaches its duty of fair representation if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements.[17] In its application, this standard has been held to mean that, absent a showing of hostile discrimination, a union does not breach its duty of fair representation simply because all employees the union represents are not satisfied with the results of its representation.[18] Since no showing of discrimination or improper motivation has been made in this case, we shall dismiss this aspect of petitioner's claim.

Petitioner also asserts that the Union breached the duty of fair representation by failing to inform the membership about the proposed heat day recoupment until

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[17] Decision Nos. B-16-79; B-39-82. See Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

[18] Ford Motor Co. v. Huffman, 345 U.*S. 330, 31 LRRM 2548, 2551 (1953); Professional Staff Congress v. Adjunct Faculty Ass'n, 7 PERB ¶4529 at 4592 (H.O. 1974); Decision No. B-13-81.

after the petitioner filed his claim, thus allegedly preventing EMS employees from participating in the formulation of the Union's position. Related to this charge are allegations that the Union failed to hold monthly membership meetings in violation of the AFSCME Constitution, and that its failure to keep the membership informed of its actions violates "OCB requirements". Additionally, petitioner states that the Union's failure to provide information is evidence of its bad faith in dealing with its members.

The Union responds that it held general membership meetings in September and October of 1982, at which time officers of Local 2507 and Union members, including petitioner, voiced their opposition to HHC's intended alteration of the 5-2/5-3 schedule. The Union denies that it acted arbitrarily, discriminatorily or in bad faith.

The allegation that a union has failed to inform its membership of the status of a matter which could result in a change in terms and conditions of employment presents a question of first impression for this Board. A "duty to inform" has been recognized by courts and labor boards, however, and we find guidance for our first ruling on the question in two cases. In DeHart v. United Steelworkers of America and Jones & Laughlin Steel Corporation,[19] a federal district court held that a claim did not rise to

[19] 110 LRRM 3275 (N.D.N.Y. 1982).

the level of a breach of the duty of fair representation where the plaintiffs did not establish that a failure, if any, to inform them concerning the status of joint unionmanagement task force plaintiffs. Not only were the negotiations the specific responsibility of the task force under the collective bargaining agreement, but the plaintiffs had no right to ratify or reject the agreement reached by the task force. Accordingly, any lack of knowledge could not have prejudiced them.[20]

PERB also has considered this "duty to inform" and reached a similar result. In Meany v. East Ramapo Central School District and East Ramapo Teachers Association,[21] the hearing officer found no breach of the duty of fair representation in the union's failure to disclose to its membership all requirements for participation in a sick leave bank jointly administered by the school district and the union. The decision stated:

> ... unless a duty ... to disclose information is imposed upon the Association such that its failure is a per se breach of its duty of fair representation, there is no violation for there is neither allegation nor offer of proof which would evidence improper motivation, fraud, arbitrary decision or grossly negligent conduct.[22]

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[20] Id. at 3278. See Anderson v. United Paperworkers Int'l Union, 641 F.26 574, 580; 106 LRRM,, 2513, 2516 (1981).

[21] 14 PERB ¶4540 (H.O. 1981).

[22] Id. at 4586.

The opinion distinguishes between circumstances deemed to warrant the application of an inflexible per se standard, which it likens to the obligation owed by a fiduciary,[23] and the more usual case in which "a wide range of reasonableness ... [is] accorded the union in its unit representation."[24]

In the instant matter, it may be that Local 2507 did not inform or discuss with its members the issue of recoupment of heat days prior to its September membership meeting. We note that the impasse panel's report and recommendations providing for the recoupment issued on October 18, 1981, and was appealed to this Board, which affirmed the panel's award on November 6, 1981 (Decision No. B-29-81). However, the citywide agreement incorporating the terms of the award was not executed until June 17, 1982, and the Doherty letter announcing the Corporation's intention to implement the recoupment provision by modifying the 5-2/5-3 schedule did not issue until August 31, 1982. If the Union

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[23] Such an affirmative duty of disclosure has been imposed by PERB in only one instance. That is the requirement that an employee organization receiving agency fees from non-members provide to persons seeking a refund information pertaining to the calculation of the refund even in the absence of a specific request therefor. See United University Professions, Inc., 13 PERB ¶3090 (1980).

[24] 14 PERB at 4586.

was aware of any proposed alteration in the work schedule and hours of its members prior to receipt of the Doherty letter, we have been offered no proof of this fact. In any event, we would not rule that Local 2507 and/or D.C. 37 had a duty to discuss the recoupment with the membership at any particular moment in time. As noted above, a wide range of reasonableness is generally accorded a union in unit representation.[25]

Where, as here, there is no evidence that the Union's failure, if any, to inform its members of an allegedly ongoing dispute concerning the recoupment of hours and/or modification of the 5-2/5-3 work schedule prior to its September and October 1982 membership meetings resulted from or reflected improper motivation, arbitrariness or grossly negligent conduct, and where petitioner cannot establish that he has been, or will be prejudiced or injured by any failure to inform, there is no basis for a finding of a breach of the duty of fair representation.

Petitioner also claims, in this proceeding, that Local 2507's alleged failure to hold monthly membership meetings violated the AFSCME Constitution and "OCB requirements", and evidenced the Union's "bad faith". Petitioner's allegation of a violation of the union constitution concerns an internal union matter, however. We have held

[25] Id.; Ford Motor Co., 31 LRRM at 2551.

that we will not exercise jurisdiction over internal union affairs unless they affect the nature of the representation accorded the employees by the union with respect to negotiating and maintaining terms and conditions of employment.[26] PERB agrees with this view.[27] This is not to say that a failure to comply with a union constitutional requirement might not result in a denial of rights guaranteed to public employees under the NYCCBL which we would deem ourselves mandated to adjudicate. Here, however, the substance of such a claim has been independently asserted as a failure to inform union members of matters affecting the terms and conditions of their employment, and we have dealt with that claim. An alleged violation of the AFSCME Constitution per se is beyond our jurisdiction to hear or to remedy. Accordingly, we shall dismiss this claim.

Petitioner's claim that the Union's alleged failure to inform also violates "OCB requirements" is entirely unsubstantiated. Petitioner does not indicate what these "requirements" might be or where they are found. Therefore,

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[26] Decision Nos. B-1-79; B-18-79; B-1-81.

[27] See, e.g., CSEA, Inc. and Bogack, 9 PERB ¶3064 (1976); Niagara Falls -Teachers and Niagara Falls Educational Ass'n, 10 PERB ¶4571 (H.O. 1977).

we shall dismiss this allegation as failing to state a claim of improper practice. Petitioner's assertion that the alleged violations of the AFSCME Constitution and of "OCB requirements" evidence bad faith on the part of the Union is dismissed as it is conclusory and unsupported by the record.

We emphasize that the substantive issues raised by the instant petition are presently the subject of discussions between respondents HHC and D.C. 37. It is undisputed that HHC continues to hold in abeyance its proposed implementation of a schedule change for EMS employees and that it has agreed to consider alternative means of recoupment which may be proposed by the Union. Thus, all of the claims concerning HHC's alleged unilateral change in a term or condition of employment and the Union's alleged breach of the duty of fair representation in "allowing" such a change are, at best, premature.

For all of the reasons set forth above, therefore, we shall dismiss the improper practice petition.

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 herein be, and the same hereby is, dismissed in its entirety.

Dated: New York, N.Y.
May 18, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F.X. MULHEARN
MEMBER

MARK J. CHERNOFF
MEMBER

CAROLYN GENTILE
MEMBER