BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding	
— between —	
JOHN J. FABBRICANTE, Petitioner,	DECISION NO. B-46-98
	DOCKET NO. BCB-1964-98
— and —	
NEW YORK CITY FIRE DEPARTMENT and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 3, Respondents.	

INTERIM DECISION AND ORDER

On March 23, 1998, John J. Fabbricante ("Petitioner"), appearing *pro se*, filed a verified improper practice petition against the New York City Fire Department ("City" or "Department") and the International Brotherhood of Electrical Workers, Local 3 ("Union" or "Local 3"). By letter dated March 30, 1998, the General Counsel of the Office of Collective Bargaining ("OCB") advised the parties that submission of responsive pleadings in the instant matter would be held in abeyance until further notice pending mediation. The issues were not resolved in mediation, and, in a letter dated April 10, 1998, to Petitioner, the OCB's General Counsel informed the Petitioner that the petition as originally submitted did not conform to the requirements of the Rules of the Office of Collective Bargaining ("OCB Rules").[1] On April 27, 1998, Petitioner filed an amended

[1] The OCB Rules, at 61 RCNY § 1-13(c)(2), require that service of a petition be made upon the designated agent of the public employer and/or public employee organization, whichever is applicable. In addition, the OCB Rules, at § 1-07(e)(3), require that an improper practice petition shall contain a statement of the nature of the controversy "using numbered paragraphs," which was not done in the petition as originally filed.

In her letter to the Petitioner of April 10, 1998, the OCB General Counsel also

improper practice petition with the OCB. On May 11, 1998, the Union served a motion to dismiss the improper practice petition. On May 18, 1998, Petitioner filed a position letter in opposition to the motion to dismiss on grounds, *inter alia*, that the motion was not timely filed and should be barred from consideration. Following a request for an extension of time which was granted, the City filed an answer on June 12, 1998.

A meeting was held on June 29, 1998, at the OCB to review the status of several cases then pending involving the same parties. Petitioner requested, and was granted, an extension of time, until August 12, 1998, to respond to the Department's answer. Given the then-pending motions to dismiss,[2] the parties agreed to hold a second conference at a later date to identify issues of law for which factual evidence would be received and testimony would be taken at a hearing with respect to any issues not disposed of by the interlocutory motions.

On August 4, 1998, the Petitioner filed a letter objecting to consideration by the Board of Collective Bargaining ("Board") of a motion to dismiss in the other case involving the same parties,[3] and asserting that, in the instant proceeding, the Union had defaulted or at least answered in an untimely manner and by regular mail, not certified, as Petitioner contends is

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informed Counsel for the Respondents that their respective answers were due within ten days after service of the amended petition.

[2] Motions to dismiss were filed, not only in the instant proceeding, but also in the proceeding docketed as BCB-1913-97.

[3] On September 28, 1998, the Board issued an interim decision with respect to the Union's motion to dismiss a petition docketed as BCB-1913-97.

required for service of a responsive pleading under OCB Rules.[4] On August 11, 1998, Petitioner filed a reply to the City's answer.

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.[5] Generally, the previous petitions asserted failure by the Union to process grievances filed by the Petitioner, and 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 improper practice petitions based on the handling of the grievances. The instant petition complains of, *inter alia*, disparities in overtime assignments as well as disparate treatment in the Petitioner's being considered for a job promotion, assertedly as a result of his pursuing claims under the New York City Collective Bargaining Law ("NYCCBL").[6] It also complains that the Union interfered with the Petitioner's

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[4] The OCB Rules, at 61 RCNY § 1-13(c)(1), state that improper practice petitions and other papers served on behalf of a party "shall be served personally or by mail...." The Rules, at § 1-07(h), also require that service of an answer to an improper practice petition be made within ten (10) business days after service of the notice of finding by the Executive Secretary of the Board, under § 1-07(d) of the Rules, that the petition is not, on its face, untimely or insufficient.

[5] Petitions docketed as BCB-1708-94, BCB-1774-95, BCB-1761-95, and BCB-1913-97.

[6] New York City Administrative Code, Title 12-301 *et seq.*, as amended, comprising the NYCCBL.

speech at Union membership meetings and that it attempted to belittle him.

Positions of the Parties

Union's Position

In the instant motion to dismiss, Local 3 asserts that Petitioner's complaint against the Union consists of his contention that the Union interfered with his "speeches" at general membership meetings and "'intentionally spew[ed] lies and misinformation to the membership and tr[ied] to belittle the Petitioner,'" violating the Labor-Management Reporting and Disclosure Act ["LMRDA"] § 411.a. The Union maintains that this Board lacks jurisdiction to enforce the LMRDA.

The Union notes that the Petitioner seeks, as relief, "[b]ack Union dues since dues check-off started, and [f]ormal written apology from . . . Local 3 Pres[ident] for wrongdoing of their staff." Intraunion conduct, the Union argues, is also a matter over which this Board has no jurisdiction to enforce. Therefore, the Union urges the Board to dismiss the instant petition.

In a cover letter dated May 11, 1998, Counsel for the Union asserts that he "belatedly" received the instant petition.[7] He also observes that the petition "*was* sworn to . . . on *May 20, 1998*." (Emphasis in original.) "[T]herefore," he adds, it "appears" that the motion to dismiss is timely.

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[7] Petitioner's proof of service on Local 3 indicated that the Union's Business Agent, Joseph Vicari, the Union's designated agent for service of process pursuant to § 1-13(c)(2) of the OCB Rules, received the amended petition on April 21, 1998.

City's Position

The City argues that the Petitioner fails to plead a *prima facie* case of improper practice. The City asserts that the allegations in the improper practice petition relate to its managerial prerogative to assign overtime, to determine who will be promoted, to direct an employee to keep City work vehicle windows clear of signs obstructing view for safety purposes, and to compensate witnesses called by the City at workers' compensation hearings. The City contends that the petition also fails to allege facts as to any improper motivation under the NYCCBL by any agent of the City with respect to these matters. The City also contends that the petition fails, as well, to allege facts as to any responsibility for any damage incurred by Petitioner with respect to any fair representation claims against the Union. The City urges that the instant petition be dismissed.

Petitioner's Position

As to the Union's contention that its motion to dismiss is timely, Petitioner argues that it is untimely, because the Union filed no answer within ten days after service of the petition. Petitioner asserts that the notary mistakenly wrote "May" for the month where it should have been April 20, 1998 for the correct date, but that "this error in no way" makes the motion to dismiss timely. Petitioner further asserts "this [is] not the first time Local 3 has defaulted in its response. . . ." In short, Petitioner contends, "Local 3's response is time barred and not in accordance with OCB Rules § 1-07(f),[8] (g),[9] thus in default." He argues, "Under no

[8] The cited section of the OCB Rules states that one copy of an improper practice petition shall be served upon the respondent and the original and three copies of it shall be filed

circumstances should this motion be honored."

Discussion

As to the timeliness question which the Petitioner raises at the outset, we note that § 1-13 of the OCB Rules permits a party upon whom service has been made by mail an additional five days in which to respond. Here, the Petitioner served the amended improper practice petition by U.S. Postal Service Express Mail service. If the Union were serving an answer, it would be permitted to take advantage of the five-day grace period. Service of a motion within the time permitted for filing an answer is timely. Here, the Union served an interlocutory motion to dismiss, claiming a failure to state a claim under the NYCCBL, within ten business days plus five days on account of having been served by mail. The Union's motion is, therefore, timely.

When deciding a motion to dismiss a petition that alleges a violation of the NYCCBL,[10]

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with the Board, along with proof of service. This section of the Rules was amended, effective September, 1997, to require that a public employer be made a party to an improper practice charge, under NYCCBL § 12-306(d), effective July, 1998. Petitioner's compliance with these requirements is not an issue here.

[9] The cited section of the OCB Rules states that a respondent's answer to an improper practice petition shall be verified and shall contain admissions or denials, a statement of the nature of the controversy, any additional facts relevant and material, and such affirmative matter or defenses as may be appropriate.

[10] Section 12-306 of the NYCCBL provide, 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;

we deem the moving party to concede the truth of the facts alleged by the petitioner. More than that, we will accord the petition every favorable inference, and we will construe it to allege whatever may be implied from its statements by reasonable and fair intendment.[11] Thus, for purposes of the instant motion to dismiss, we deem as true the factual allegations made by Petitioner in support of his claim that he experienced retaliation, intimidation, and disparity of treatment by agents of the Union and of the Department as a result of his having filed the improper practice petition from which Decision No. B-43-97 issued.[12]

Petitioner alleges that officers and other agents of the Union intimidated him before and during general membership meetings on January 28, 1998, and March 11, 1998. Specifically, he alleges that these individuals prevented or attempted to prevent him from speaking with fellow Union members at the Union meetings about a petition he had earlier filed with the OCB which

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> (3) to discriminate against any employee for the purpose of ... discouraging membership in, or participation in the activities of, any public employee organization ...
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> **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.

[11] *Sciarillo v. New York City Dep't of Sanitation et al.,*Decision No. B-15-94; *Cunningham v. New York City Dep't of Probation*, Decision No. B-15-93; and *Nelson v. New York City Dep't of Sanitation*, Decision No. B-36-91.

[12] In that decision, the Board directed the Union to represent the Petitioner herein or to pay for representation of his case in arbitration against the City.

resulted in a final determination.[13]

Even taking these allegations as true, we must dismiss them as not falling within the ambit of the NYCCBL. We have long recognized that the NYCCBL does not empower this Board to inquire into internal union matters, including the conduct of union membership meetings, absent factual allegations showing that the union's conduct in such matters adversely affects a petitioner's terms and conditions of employment or the union's representation of the petitioner's interests as a member of the bargaining unit.[14] The petition herein does not contain factual allegations that make such a showing. Accordingly, it concerns an internal union matter outside our jurisdiction. Additionally, this Board has no authority, under the NYCCBL, to adjudicate an employee's right to freedom of speech under statutes other than our own. Clearly, we possess no authority to enforce the provisions of the LMRDA. For these reasons, we must dismiss the petitioner's claims against the Union.

With respect to the complaints against the Department, we recognize that the employer contends that each action challenged herein by the Petitioner constitutes a matter within its

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[13] *Fabbricante v. Al Somma, Shop Steward, FDNY Electric Shop, Local 3, IBEW and Anthony Bianchino, Supervisor Electrician, FDNY, and City of New York,* Decision No. B-43-97 (holding that Union's failure to file responsive pleading requires the conclusion that Shop Steward Somma and the Union breached the duty of fair representation by failing to exercise good faith in handling Petitioner's arguably meritorious contractual grievance; directing the Union and the Department to process Petitioner's grievance in accordance with the contractual grievance procedure; and retaining jurisdiction in the event apportionment of damages need be considered).

[14] *Rothberger v. Communications Workers of America*, Decision No. B-11-93 at 6-8; *Fortunato, et al., v. Correction Officers Benevolent Assn.*, Decision No. B-23-84 at 11-18; *McAllan v. Emergency Medical Services Division of New York Health and Hospitals Corporation and Local 2587, District Council 37, AFSCME, AFL-CIO*, Decision No. B-15-83 at 24-25; *Velez v. Local 237, I.B.T.*, Decision No. B-1-79 at 3-9.

managerial prerogative. However, we note that even matters within the scope of management's statutory prerogatives may form the basis of an improper practice claim if it is shown that that prerogative was exercised in a particular manner for an improper motive. Here, the Petitioner alleges that the actions taken by management with respect to the allegedly disparate assignment of overtime and in passing over the Petitioner for promotion were in retaliation for his initiating the proceeding which resulted in Decision No. B-43-97. The City denies the allegations. Given the material nature of the factual disputes which the allegations and denials raise, we shall permit the parties to make their respective cases at an evidentiary hearing.

Accordingly, the Union's motion to dismiss the instant petition is granted. The hearing will proceed, however, with respect to claims in the instant proceeding against the employer.

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 Union to dismiss the improper practice petition docketed as BCB-1964-98, be, and the same hereby is, granted.

DATED: New York, N.Y.

September 26, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

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SAUL G. KRAMER
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