DEA, 2 OCB2d 21 (BCB 2009)

(IP) (Docket No. BCB-2714-08).

Summary of Decision: Petitioner alleged that after a Union member was involved in a shooting and an initial breathalyzer reading showed him to be over the legal limit, the NYPD improperly suspended him because its representatives intervened and attempted to obtain medical treatment for him instead of allowing him to be transported to another facility for a second, more accurate breathalyzer test. The Union alleged that in doing so, the NYPD violated NYCCBL § 12-306(a)(1), (2), and (3). The Board found that the NYPD did not discriminate or retaliate against the Detective by taking such actions and further find that the NYPD had legitimate business reasons for suspending him because its actions comported with official procedure. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DETECTIVES' ENDOWMENT ASSOCIATION,

Petitioner,

- and -

THE CITY OF NEW YORK and THE POLICE DEPARTMENT OF NEW YORK CITY,

Respondents.

DECISION AND ORDER

On August 1, 2008, the Detectives' Endowment Association ("DEA" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"), claiming that the NYPD violated § 12-306 (a)(1), (2), and (3) of the

New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union alleges that the NYPD improperly suspended a Union member in retaliation for the Union's protected activity of representing him and obtaining medical treatment for him after the member was involved in a shooting incident instead of first complying with the NYPD's demand that the member submit to a second, more accurate alcohol test. The NYPD argues that the Union failed to state a *prima facie* case of discrimination, that it had a legitimate business reason for suspending the detective, and that it did not dominate or otherwise interfere with the Union. This Board finds that the NYPD did not discriminate or retaliate against the Union member by taking such actions and further find that the NYPD had legitimate business reasons for suspending him because the NYPD's actions was required under pre-existing applicable procedures.

BACKGROUND

On Sunday, July 13, 2008, off-duty NYPD Detective Ivan Davison was outside a social club known as Club "X," on Linden Boulevard in Queens. At approximately 1:55 a.m., an altercation occurred in which Detective Davison and an assailant exchanged gunfire outside the club. The assailant fled the scene with three male accomplices. Detective Davison immediately called 911 and reported the incident. At approximately 1:58 a.m., members of the 113th Precinct, including the Patrol Supervisor, responded to the scene and confirmed that a police-involved shooting had occurred. The Internal Affairs Bureau ("IAB") was notified, and members of the IAB responded to the scene a short time later. A Queens County Assistant District Attorney also responded to the scene and, according to the City, requested that the IAB refrain from interviewing Detective Davison regarding the shooting until the criminal investigation was completed. Further, the City asserts that,

since it was a complex situation and Detective Davison could not be interviewed, it took several hours to ascertain the circumstances of the firearm discharge. The Union denies that it took several hours to ascertain those circumstances.

Detective Davison was transported to Jamaica Hospital for evaluation because he had previously been diagnosed with hypertension. There, an IAB Captain administered a portable breathalyzer test ("PBT") to Detective Davison, which the City asserts was performed pursuant to Interim Order 52 series 2007, titled "Alcohol Testing for Uniformed Members of the Service Involved in Firearms Discharges Resulting in Injury or Death of a Person" ("IO 52"). IO 52 states, in part: "In an effort to ensure the highest levels of integrity at the scene of firearms discharges, all uniformed members of the service involved in firearms discharges, which result in injury to or death of a person, will be subject to Department administered alcohol testing." (Ans. Ex. B). The PBT test indicated that Detective Davison had a blood alcohol reading of .09 at 3:35 a.m., which, according to the City, exceeds the legal limit of .08 under § 1192 of the New York State Vehicle and Traffic Law. At the time, IO 52 was relatively new, and the circumstances here were the first occasion to which the IO was applied.[1]

Under IO 52, the IAB Captain was required to subsequently complete a "Supervisor's Fitness for Duty Report." On his report, the IAB Captain noted that Detective Davison was unfit for duty because of the PBT reading and other factors, such as a faint odor of alcohol on his breath and glassy/watery and bloodshot eyes. If a member of service is found to be unfit for duty pursuant to

[1] The Union claims that IO 52 did not apply to the Detective because at that point, it was not yet known that the assailant had been injured as a result of Detective Davison's firearm discharge.

IO 52, it then directs the Commanding Officer or Duty Captain to adhere to the mandates of Patrol Guide 206-12, titled, "Removal of Firearms from Intoxicated Uniformed Member of the Service." Patrol Guide 206-12 states, among other things, that the Commanding Officer/Duty Captain should:

6. Remove firearms when it is determined that member is intoxicated. . . .

7. Place member on modified assignment or suspend from duty, as appropriate . . .

(Ans., Ex. I). IO 52 also mandates that an officer with a PBT reading of greater than .08 be tested using the Intoxilyzer, a more reliable method of testing levels of intoxication. IO 52 directs that the test be conducted at the nearest Intoxicated Driver Testing Unit ("I.D.T.U.") by an I.D.T.U. technician. The nearest I.D.T.U. was at the 112th Precinct in Queens, some 20 minutes away from Jamaica Hospital. At some point after the PBT was administered, Detectives Ciccone and Cunningham, both Union representatives; the Chief of IAB, Chief Campisi; and others arrived at the hospital.

According to the City, Chief Campisi asked Detective Davison how he was doing and then spoke to the treating physician. Chief Campisi asked the treating physician if there were any medical reason for Detective Davison to remain at the hospital, and the treating physician answered, "No." The City asserts that, at that point, Chief Campisi asked Davison if he would go to the I.D.T.U. facility, and he agreed. However, according to the Union, Chief Campisi ordered Detective Davison to go, waved his arms, and repeatedly said, "Let's go, let's go." The Union contends that despite the objections of Union representatives Detectives Ciccone and Cunningham, Detective Davison was escorted by Chief Campisi, an Inspector, and the Captain who administered the PBT, to Chief Campisi's vehicle. At that point, according to the Union, the Union representatives inquired whether Detective Davison had been officially discharged from the hospital and whether there was any

paperwork to confirm his discharge. Detective Davison advised the Union representatives that he had not been medically discharged, had not yet seen the doctor, and was not feeling well because his head and chest hurt. The City claims that Davison had not mentioned to Chief Campisi that he had been feeling ill prior to that point.

The Union representatives then informed Chief Campisi that Detective Davison could not go to the I.D.T.U. because he had not been properly discharged from the hospital. The City asserts that Chief Campisi advised the Union delegates that based upon the currently available facts, including the IAB Captain's assessment that Detective Davison was not fit for duty and the PBT reading of .09, Detective Davison would be declared not fit for duty and suspended; however, if Detective Davison took the Intoxilyzer test and it resulted in a .08 reading or lower, there would be no reason to suspend him. The Union asserts that Chief Campisi was highly agitated and repeatedly warned that Detective Davison would be suspended if he refused the Intoxilyzer test. Detectives Ciccone, Cunningham, and Davison responded that Detective Davison was not refusing to take the test, but simply needed to first receive the appropriate medical attention. The City claims that the Union representatives then stated that they did not like the new procedure of forcing members to take PBTs whenever an officer was involved in a shooting causing injury or death and that they were challenging the system. According to the City, at one point, Chief Campisi expressed his opinion to the Union representatives that sometimes they do more harm than good for their members, especially in situations in which they could avoid subjecting a member to potential suspension and/or disciplinary action.

It is undisputed that in front of Chief Campisi, the Union representatives asked Detective Davison how he was feeling, and he responded that he did not feel well and that he had chest pains.

Those present re-entered the hospital and conferred with the treating physician, who now said that he would not discharge Detective Davison if he was not feeling well. According to the City, once Chief Campisi was aware that Detective Davison was not feeling well, he did not again request or require Detective Davison to go to the I.D.T.U. facility.

Shortly thereafter, in a telephone conversation, the DEA President told Chief Campisi that Davison should be allowed to receive medical treatment, and then take the alcohol test, to which Chief Campisi allegedly responded that Detective Davison's insistence on receiving treatment meant that he was refusing the Intoxilyzer test. According to Union, Chief Campisi said, "[y]ou are going to get this guy suspended," threatened to seek a search warrant for Davison's blood, and stated that "union guys are supposed to help their people and not get them into trouble." (Rep. Mem. of Law, p. 4). According to the Union, Chief Campisi subsequently made these same statements to the Union representatives that he made to the DEA President. The City asserts that during the telephone conversation with the DEA President, the DEA President repeatedly referred to the fact that IO 52 was still being challenged by the Union in court and to the length of time it was taking the judge to decide the matter. According to the City, Chief Campisi reiterated that at that point, based on the evidence uncovered by the investigation, which included a .09 reading on the PBT, he would have no choice but to find Detective Davison unfit for duty, but that if he was tested at the I.D.T.U. facility and registered a .08 or lower, Detective Davison would not be suspended.

The Union claims that after talking to the DEA President, Chief Campisi went back to Davison and asked him several more times if he was refusing to go to the I.D.T.U. facility. When Detective Davison insisted he was not refusing the test and that he wanted medical attention, Chief Campisi replied, "so you are refusing to go." (*Id.*). Chief Campisi then notified Detective Davison

that he was suspended. The City claims that Chief Campisi made the declaration at 5:35 a.m. on July 13, 2008, while the Union claims that it occurred at an earlier, unspecified time. Detective Davison was subsequently released from Jamaica Hospital on the morning of July 13, 2008. He did not go to the I.D.T.U. facility and was not given an Intoxilyzer test. According to the Union, Chief Campisi subsequently directed members of IAB to the Queens County District Attorney's office to apply for search warrants to obtain Detective Davison's blood and search his personal vehicle. The search warrants were issued based an affidavit from an IAB Sergeant, where he averred that after the shooting, he noted "a bottle of Chivas Regal containing liquid and additional alcohol packaging" in a vehicle registered to Detective Davison. (Ans., Ex. K). Davison's blood samples were seized, and his vehicle searched and held.

The shooting incident and suspension was widely reported in the media, and the Union contends that Detective Davison was grossly and unfairly subjected to contempt and ridicule. Several hours later, when the circumstances of the shooting became clear to Chief Campisi, he determined that the shooting likely fell within departmental guidelines, and Detective Davison was relieved from suspension, retroactive to 5:35 a.m., July 13, 2008, the time that the City claims that Davison was initially suspended. He was placed on Modified Assignment pending the outcome of further investigation and was restored to full duty on July 15, 2008, at 9:00 a.m. The City asserts that Detective Davison lost no monetary or ancillary benefits as a result of being suspended and retroactively placed on Modified Assignment and that he was expeditiously returned to full duty by the NYPD. The Union admits these allegations but emphasizes that Detective Davison was subjected to public contempt and ridicule.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City and the NYPD committed an improper practice in violation of NYCCBL § 12-306(a)(1) and (3) when, in retaliation for protected activity, it suspended Detective Davison from duty.[2] Here, the Union President and two Union representatives were representing Detective Davidson, and the Chief of IAB had knowledge of that activity. Furthermore, the Chief of IAB took action that negatively impacted Detective Davison and adversely impacted the Union, and a clear nexus exists between the protected activity and the adverse action.

In this matter, the best evidence of Chief Campisi's improper motivation for his action to suspend Detective Davison lies in his own words and hostile behavior on the morning of July 13, 2008, at Jamaica Hospital. The tone and content of Chief Campisi's spoken words toward the DEA President and the two Union representatives establishes that he was motivated by anti-union animus when he suspended Detective Davison. This suspension would not have occurred but for his exercise of his right to have Union representation.

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[2] NYCCBL § 12-306(a)(1) provides, in pertinent part:
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;

* * *

(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;

NYCCBL § 12-305 provides, in relevant 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 of such activities.

The City cannot meet its burden to establish a legitimate business reason for suspending Detective Davison. The events of this case, both inside and outside of Jamaica Hospital, and the reality of the hostile and angry conduct of Chief Campisi belie the City's stated justification that discharging a firearm while exceeding the legal limit for intoxication provided the NYPD with a legitimate business reason for the subsequent suspension.

The lack of credibility with regard to the City's purported business reason for the adverse employment action in this case is "severely exposed" by the City's answer, wherein it unfairly argues that "empty" alcohol containers in Davison's automobile led to a reasonable inference that his fitness for full duty was questionable. (Rep. Mem. of Law, p. 11). The search warrant of Davison's vehicle was not issued based upon proof of empty alcohol containers inside, as the City asserts. Instead, in paragraph 5G of the affidavit in support of the search warrant application for Detective Davison's vehicle, a Sergeant in the IAB swore that he observed "a bottle of Chivas Regal containing liquid. . . ." (Ans., Ex. K).

Furthermore, the Union claims that the City's effort to "nullify the blatant improper labor practice committed in this case by blindly maintaining that the '[NYPD] followed Interim Orders and departmental guidelines' is similarly false and pretextual." (Rep., Mem. of Law p. 12). Thus, a hearing will be required to demonstrate that the City's asserted justification is false and that the Respondents engaged in unlawful activity with respect to the DEA and Detective Davison.

As a remedy, the Union asks that the Board determine that Chief Campisi's actions constitute an improper practice as defined in NYCCBL § 12-306(a)(1) and (3), order Chief Campisi to cease and desist from interfering with the DEA and its delegates' rights to represent their members; cease and desist from discriminating against the DEA and its officers, delegates, and members; and post

notices in applicable places throughout the NYPD that Respondents have violated the NYCCBL.

City's Position

The City argues that the Union has failed to state a *prima facie* case of discrimination. In the instant matter, there was no causal connection between Detective Davison's Union activity–his conferral with the two Union representatives at Jamaica Hospital–and the actions taken by the NYPD. Chief Campisi's decision that Detective Davison was unfit for duty was based upon the fact that Detective Davison discharged his firearm while off duty, when his blood alcohol content was .09, along with the assessments made by two IAB officers. Moreover, any alleged causal connection the Union attempts to establish in this matter is undermined by the fact that Detective Davison was returned to full duty less than 48 hours after the investigation into the events of July 13, 2008. The City would also like to note that since more than an hour had passed since the original PBT, it was reasonable to believe that a second alcohol test have would have resulted in a finding of .08 or lower, and Detective Davison could then have avoided being suspended.

The City argues that it also had a legitimate business reason for its actions. Here, Detective Davison's discharge of a firearm while exceeding the legal limit for intoxication provided the NYPD with a legitimate reason for his subsequent suspension, irrespective of Detective Davison's Union activities. The NYPD followed Interim Orders and departmental guidelines when making the determinations with respect to Detective Davison. Moreover, preliminary circumstances in this case, such as empty alcohol containers in Detective Davison's automobile, led to a reasonable inference that Detective Davison's fitness for full duty was questionable. The NYPD has the right to address this situation as it deemed fit, especially considering that many of the events that led to this Detective's expeditious restoration to full duty were unknown to IAB when the initial fitness for duty

determination was made. Absent a showing of pretext on the Union's part, the NYPD must be found to have acted within its managerial rights. The City argues that since they have proffered a legitimate business reason for the actions taken with respect to Detective Davison, the petition must be dismissed in its entirety.

Finally, any claim the Union makes under NYCCBL § 12-307(a)(2) must also be dismissed. Petitioner offers no facts or argument relevant to that provision other than a simple recitation of words contained therein. Given that the NYPD clearly has not interfered with or dominated the administration of the DEA, the instant matter must be dismissed.

DISCUSSION

At issue in the instant matter is whether the NYPD suspended Detective Davison in retaliation for Detectives Ciccone and Cunningham's intervention to secure medical attention for Detective Davison, and thereby violated NYCCBL § 12-306(a)(1) and/or (3). We find that the NYPD did not discriminate or retaliate against Detective Davison by taking such actions and further find that the NYPD had legitimate business reasons for suspending him because the NYPD's actions comported with the applicable NYPD guidelines.

In considering discrimination and/or retaliation cases under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, which states that, to establish a *prima facie* case, a petitioner must demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. The employee's union activity was a motivating factor in the employer's decision. *Bowman*, 39 OCB 51, at 18-19; *see also COBA*, 2 OCB2d 7, at 40-41 (BCB 2009).

If the petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *Local 371, SSEU*, 1 OCB2d 25, at 16 (BCB 2008) (citing *SBA*, 75 OCB 22, at 22 (BCB 2005)); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Since the City does not dispute that Petitioner was involved in protected union activity and that the City was aware of that activity, thereby fulfilling the first prong of the *Bowman-Salamanca prima facie* test, we move to the second prong of the test. The second prong of the test addresses the motivation behind the employment action in question. "[T]ypically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Local 1087, DC 37,* 1 OCB2d 44, at 26 (BCB 2008); *see also CEU, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). However, our consideration of circumstantial or indirect evidence does not constitute a waiver of our pleading requirements, as "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Edwards*, 1 OCB2d 22, at 17 (BCB 2008); *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006). If a *prima facie* case is established, "then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU, Local 371*, 77 OCB 35, at 18; *see also Lamberti*, 77 OCB 21,

at 17 (BCB 2006).

In *DEA*, 79 OCB 40 (BCB 2007), the union argued that the City retaliated against a member for engaging in protected union activity by denying him a promotion despite a positive recommendation, restricting his ability to work overtime, revoking his internet privileges and departmental mobile phone, and by making him walk foot patrol. However, the Board dismissed many of the claims because many of the adverse actions predated any protected activity, and any management knowledge thereof. (*Id.* at 22). In so holding, we quoted *Wilson v. New York City Housing Auth.,* 2007 U.S. Dist. LEXIS 25258, at *30 (S.D.N.Y. Apr. 2, 2007), which stated: "Where the decision to take adverse employment action is reached prior to a plaintiff's protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking." *Id.*

Similarly, we find here that the Union's conduct in this matter was not cause for the NYPD's behavior towards Detective Davison because the observations and testing which led to the mandatory action against him transpired prior to the Union's intervention. Before the Union was involved, Detective Davison had discharged his firearm while off-duty; the NYPD administered a PBT pursuant to IO 52, which is mandated in such circumstances; Detective Davison's blood alcohol level was found to be .09; and observations had been made regarding Detective Davison's sobriety/intoxication. Patrol Guide 206-12 mandates that the member of service should have his or her firearm removed and be placed on modified assignment or suspended from duty if found to be intoxicated. The NYPD's suspension of Detective Davison was consistent with Patrol Guide

mandates.[3] In sum, the observations and objective testing–the precipitating events which led to Detective Davison's mandated-by-policy suspension–all occurred prior to the Union's intervention. Moreover, any alleged causal connection the Union attempts to establish in this matter is undermined by the fact that Detective Davison was returned to full duty less than 48 hours after the investigation into the events of July 13, 2008. The Board has consistently held that "the mere allegation of an improper motive, even if accompanied by an exhaustive recitation of union activity . . ., does not state a violation where no causal connection has been demonstrated." *UFOA*, 69 OCB 5, at 4-5 (BCB 2002); *Procida*, 39 OCB 2, at 13 (BCB 1987).

In the instant matter, there was animosity in the exchanges between the Chief and the Union representatives. However, the nature of the exchanges, even if we were to take the Union's allegations as true, evince more of a conflict over the nature and the implementation of the alcohol testing policy rather than a conflict based on situational anti-union animus. *Edwards,* 1 OCB2d 22, at 18 (BCB 2008) citing *Warlick*, 29 OCB 1, at 3 and 7 (BCB 1982) (finding that "personality conflict with one of his superiors" does not fall within the prohibited conduct contemplated by the NYCCBL); *see Norwich City School Dist.*, 26 PERB ¶ 4533 (1993) (union's charge of retaliation was dismissed where evidence showed that employer was motivated by employee's insubordinate conduct in context of personality conflict with a supervisor); *State of New York (Dept. of Transp.)*, 29 PERB ¶ 3011; *see generally, Hale*, 37 OCB 8, at 6 (BCB 1986). In so noting, we stress that in this situation, some sort of action, either suspension or modified duty, was mandatory under the language of Patrol Guide 206-12. Furthermore, before it was apparent that Detective Davison was

[3] We note that the Union does not argue that by suspending Detective Davison rather than placing him on modified assignment, the NYPD treated him any differently than another officer.

feeling ill, the Union was actively advising him to violate the Patrol Guide by refusing to be transported to the I.D.T.U. facility. From an examination of the NYPD policies involved and undisputed facts of this matter, Detective Davison's retroactively retracted suspension is more closely linked to strict compliance with NYPD policy rather than anti-union animus. Therefore, we find that the Union has not alleged sufficient facts concerning the first two elements of the *Bowman-Salamanca* test to make out a *prima facie* case.

Further, we find that even if Detective Davison's union activity was found to be a motivating factor in the NYPD's decision to suspend him, the NYPD had a legitimate business reason for its decision. In circumstances where the Board has found that union activity is a motivating factor in an employer's decision to undertake a negative employment action against an employee, yet that action would have occurred anyway because of a legitimate business reason, the Board has dismissed the petition. *Local 768, DC 37*, 63 OCB 15 (BCB 1999). For all the reasons mentioned above, the NYPD's actions comported with applicable procedures, and the Union has not presented any persuasive arguments regarding pretext. Detective Davison discharged his firearm while exceeding the legal limit for intoxication, and declined a second test, which provided the NYPD with a legitimate reason for the subsequent suspension.

Therefore, we find that the Union failed to show that the NYPD retaliated against Detective Davison for engaging in protected Union activity in violation of NYCCBl § 12-306(a)(1) or (3). Further, the Union did not present any evidence or allegation, other than the mere citation of the provision in its petition, that the NYPD dominated or interfered with the Union in violation of NYCCBL § 12-306(a)(2). Accordingly, we dismiss the petition in its entirety.

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 docketed as BCB-2714-08, be and the same hereby is, dismissed as to any claims arising under NYCCBL § 12-306(a)(1), (2), and (3).

Dated: New York, New York
June 29, 2009

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER