

SSEU, Local 371, 3 OCB2d 47 (BCB 2010)

(IP) (Docket No. BCB-2758-09).

Summary of Decision: Petitioners alleged that the Department of Homeless Services improperly passed over them for promotions because of their union activities in violation of NYCCBL 12-306(a)(1) and (3). The City maintained that Petitioners failed to establish a prima facie case and that DHS demonstrated a legitimate business reason for passing over Petitioners. The record does not establish evidence of anti-union animus in the promotional process and therefore, the petition was denied. ***(Official decision follows.)***

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Petition

-between-

**SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, GREG SCOTT, MICHELE BLACKSTOCK,
NATASHA JACKSON, RICHARD MONZETTI,
and GWENDOLYN SHANNON,**

Petitioners,

-and-

**THE CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,**

Respondents.

DECISION AND ORDER

On April 20, 2009, Social Service Employees Union, Local 371 (“Union” or “Local 371”), in conjunction with Greg Scott, Michele Blackstock, Natasha Jackson, Richard Monzetti, and Gwendolyn Shannon (collectively, “Petitioners”) filed a verified improper practice petition against the New York City Department of Homeless Services (“DHS”) and the City of New York (“City”)

alleging that DHS violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (3). The Union, on behalf of Petitioners, claims that DHS failed to promote Petitioners because they engaged in union activity on behalf of Local 371. The City maintains that Local 371 failed to show a *prima facie* case of retaliation and discrimination because the individuals who made the decisions concerning the promotions in the instant matter had no knowledge of Petitioners’ union activity and/or lacked anti-union animus when they decided to promote persons other than Petitioners. Furthermore, the City argues that, even if the Union establishes a causal connection between Petitioners’ protected activities and their failure to receive promotions, DHS exercised its managerial right and discretion over promotions when it failed to promote Petitioners and had legitimate business reasons for passing over Petitioners. The Board finds that there was insufficient evidence to demonstrate that the City’s failure to promote Petitioners’ was based on their union activity. Therefore, the Union’s petition is denied.

BACKGROUND

Three days of hearings were conducted in the instant matter. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

DHS provides temporary, emergency shelter for eligible homeless people in the City of New York. Its mission is to support the delivery of vital social services by creating the safest environment possible for its clients, staff, and the community, by maintaining public peace, valuing human life, respecting each individual and rendering its services with courtesy, pride and civility while maintaining the highest standard of integrity. The Prevention Assistance and Temporary Housing

program (“PATH”) is a unit within DHS that serves as an intake center for families with minor children or pregnant women who are seeking shelter assistance. PATH is staffed by employees in various civil service titles including Clerical Associate, Community Associate, Fraud Investigator (“FI”), and Associate Fraud Investigator (“AFI”), which is the promotional title for FI.

FIs and AFIs work primarily in three areas within PATH: intake, field investigation, and programs. In the intake department, FIs and AFIs meet with families, determine eligibility for services, make referrals, and secure transportation for the clients from PATH to various shelters throughout the City of New York. FIs and AFIs in the field investigations department conduct investigations of clients’ claims, check last known addresses, ensure that investigations are conducted properly, and resolve issues concerning DHS equipment, such as laptops and field vehicles. FIs and AFIs in the programs department review case records and eligibility determinations, and handle re-applications from clients who had been previously denied benefits. Overall, AFIs are the first line supervisors at PATH; they oversee and review the FIs work, monitor work flow and consult with FIs on various matters.

Petitioners’ Union Activity

John Talbutt, the Executive Assistant for Local 371, is assigned to DHS and represents employees in the titles of FI and AFI at PATH. Talbutt testified that there are approximately 300 Local 371 members at PATH and therefore the Union has a large number of delegates and alternate delegates at that location in order to properly address member concerns.¹

¹ The number of delegates and alternate delegates is based typically upon the number of members at a work location. The difference between delegates and alternate delegates is not indicative of the particular individual’s authority within the Union. Members who receive the highest number of votes are awarded the title of delegate while the next highest vote recipients are awarded the title of alternate delegate.

There is no dispute that the Petitioners herein had engaged in union activity. FI Scott has been a Union delegate at PATH for at least three years.² FI Blackstock has been an alternate Union delegate since 2006. For the last seven years, FI Shannon held the position of Union delegate and FI Monzietti has been either a delegate or alternate delegate for some number of years. As Union delegates or alternates, Petitioners filed grievances and represented PATH employees in the titles of FI and AFI. Executive Assistant Talbutt, and FIs Blackstock and Shannon testified that prior to the commencement of the promotional process, Petitioners had been involved with numerous Union issues at PATH including: the misplacement of computer equipment and assignment of faulty equipment; denial of a five-minute grace period; vacation request denials; unprofessional behavior; health and safety issues and other violations of the parties' collective bargaining agreement. Petitioners who were delegates regularly met with PATH management, including Deborah Harper, Director of PATH, to discuss these and other workplace issues. Although Director Harper did not recall any specific meetings on the subjects testified to by Petitioners, she acknowledged that FIs Shannon, Blackstock and Monzietti were all Union delegates. In addition, she testified that after the promotional process she recalled that FI Scott may have attended a union-management meeting.

FI Jackson was not a Union delegate or alternate delegate, but was routinely the Chair of the Local 371 Election Committee for PATH. The annual Union delegate election process takes place at PATH. Members nominate delegates in April and election results are posted in May. DHS provides facilities and authorizes time-off for employees so that they may attend certain election-

² The Union did not call FIs Scott, Monzietti, or Jackson to testify. Thus, all information regarding these individuals is taken from the parties' pleadings, the testimony of the other witnesses, including Executive Assistant Talbutt and FIs Blackstock and Shannon, and the documentary evidence submitted by the Union and/or the City.

related meetings and vote in the election. As the Election Committee Chair, FI Jackson was a liaison between DHS and the Union. She interacted with PATH management to secure necessary PATH facilities and employee time-off for conducting such an election, and “supervised” the overall election process. FI Jackson was responsible for posting a post-election Delegate Designation Sheet listing the names of all delegates and alternate delegates at PATH. Talbutt testified that this sheet is also provided to management. Yvette Pilgrim, DHS’s Deputy Director of Employment Services, and Director Harper testified that they did not recall ever seeing the Delegate Designation Sheet posted anywhere within PATH. Director Harper denied that she had any knowledge that FI Jackson had any involvement in the Union.

Executive Assistant Talbutt testified to a contentious relationship between PATH management and the Union. He stated that there are frequent disputes involving violations of the parties’ collective bargaining agreement, the NYCCBL, as well as DHS rules, policies and procedures. Prior to the AFI promotions, these disputes concerned such matters as failure to provide a five minute grace period to FIs and AFIs, misuse of compressed schedule assignments, failure to address problems with the heating and cooling systems, denial of representation at disciplinary meetings and issues concerning vehicles assigned to FIs and AFIs. Executive Assistant Talbutt stated that Union delegates and alternate delegates have frequent and occasionally contentious interactions with PATH management either during the filing of grievances or when representing other Local 371 members at Step I conferences.

In addition, FI Blackstock testified that in four instances since late 2007, PATH management objected to or prevented her or another union representative from representing a co-worker at a meeting with management. While the Union believed each of these instances involved employee

Weingarten rights, it is not clear from the record that any of the cited incidents involved formal disciplinary discussions.

The Promotional Process

According to Deputy Director Pilgrim, the Department of Citywide Administrative Services (“DCAS”) ordered DHS to replace provisional employees with employees who had been certified and approved for permanent civil service titles, including AFI. Martha Pierre, Director of Certification for DCAS, testified that an examination was offered for the AFI title and an official certified list of eligible employees ranked by their scores was created. Agencies must make their selections from this certified eligibility list. One limitation on the agencies’ discretion in making these selections is Personnel Rules and Regulations of the City of New York, Rule 4 §7.1(c), more commonly known as the “one-in-three” rule. The one-in-three rule permits the hiring agency to consider three candidates for each vacancy, and each candidate, if not selected, is entitled to be considered three times in consecutive groups. However, once a candidate is considered and not selected in three consecutive groups, then that candidate is put “offside” and cannot be considered again unless the agency petitions DCAS to place the candidate on a subsequent certified eligibility list. (Tr. 178).³

After an agency selects candidates from the certified eligibility list, the agency returns a certified disposition report to DCAS. DCAS then audits the report to ensure that the agency has complied with the one-in-three rule. If the agency failed to comply with this rule, the certified disposition report is rejected. The agency is then informed that such an error occurred and is

³ References to the official transcript are noted herein as “Tr. ____.” References to Exhibits are noted as, “Ex. ____.”

instructed to rectify the situation by correctly appointing a candidate who was improperly passed over. This audit process is done electronically using a computer program.

On October 17, 2008, DCAS certified an eligibility list for the AFI title, which consisted of 156 individuals who were all qualified by DCAS to be promoted into the AFI title.⁴ DHS interviewed 39 candidates for the AFI promotion on November 17, 2008, including FIs Scott, Blackstock and Jackson. On the certified eligibility list, FI Scott was number 4, FI Blackstock was number 12 and FI Jackson was number 23. At the interview, candidates completed pre-employment packages and provided copies of their resumes. Copies of the candidates' resumes, the completed pre-employment package, and a copy of the certified eligibility list were given to each interviewer. The interviewers were Director Harper, Rosy Gelin, Director of the Adult Family Intake Center ("AFIC"), and Deputy Directors of PATH Maria Rodriguez and Moses Ajasin.

To begin the interview process, the interviewers made opening remarks to the group of candidates. They described the position, qualities and qualifications for the position, and gave information regarding the work shifts. Deputy Director Pilgrim explained some basic logistical information regarding the interview process and informed the candidates that no decisions would be announced at that time.⁵ According to Deputy Director Pilgrim and Director Harper, the interviews

⁴ Director Pierre testified that a certified eligibility list is valid for only 30 days after certification. After this period, DCAS is required to re-certify another list using the same results from the examination and taking into account whether the agency hired, passed over, and/or rejected candidates off the previous list. DCAS also issued certified eligibility lists for the AFI title to DHS on December 16, 2008 and on February 24, 2009.

⁵ According to Executive Assistant Talbutt, who attended the November 17, 2008 interview session and has represented the Union in approximately 20 such hiring pools, DHS's decision not to inform candidates about the promotional decisions immediately after the interview differed from the normal protocol of informing candidates immediately after the interview whether they received
(continued...)

lasted between five and ten minutes and the candidates were asked the same seven questions, which had been developed by Director Harper and the Deputy Directors at PATH. The questions included: “What interests you about the position?”; “What, if any, supervisory experience do you have?”; “What would you describe as a difficult supervisory situation?”; and “In this supervisory position, how would you assist a Fraud Investigator who has been dealing with a difficult client?” (Union Ex. 4). Director Harper testified that depending on the candidate’s response to the seven questions, additional questions may have been asked. The interviewers did not discuss the previous candidate in between interviews but took that time to review the next candidate’s resume and application.

In support of the Union’s claim that there were some irregularities in the interview process, FI Blackstock testified that the first person on the AFI eligibility list, Iris Rodriguez, was barely interviewed. She stated that when Rodriguez arrived at the interview, she said, “Where do I sign my papers to be rolled over?” (Tr. 118). According to Blackstock, an unnamed DHS employee immediately tried to quiet Rodriguez and then walked her to the room where the interviews were being conducted. FI Blackstock testified that only moments later, Rodriguez emerged from that room and left the interview location. Deputy Director Pilgrim observed Rodriguez enter the interview location and testified that no such encounter with this candidate occurred. Deputy Director Pilgrim and Director Harper stated that DHS interviewed every candidate, including Rodriguez.⁶

FI Blackstock also testified that other candidates who were interviewed before her, including

⁵(...continued)
the promotion.

⁶ DCAS Director Pierre testified that DCAS does not mandate that agencies conduct interviews when hiring or promoting candidates off a certified eligibility list, but it is within the agency’s discretion to do so.

FI Scott, were subjected to lengthy interviews, upwards of 15 minutes in duration. However, FI Blackstock's interview was different than the others because it was short, lasting only about four or five minutes. The interviewers asked FI Blackstock some questions, but she contends that they did not seem to be paying attention to anything she said. She admitted that during the interview she did not ask any questions of the interviewers.

Director Harper, Deputy Directors Rodriguez and Ajasin met the next day and made their promotional selections. Director Harper credibly acknowledged that given her position, her opinion carried "a little bit more weight" than the other interviewers in the selection process. (Tr. 301). She stated that the qualities she looks for in an AFI are "good basic judgment," ability to "think on their feet," "remain calm under . . . very stressful circumstances," "motivate their staff," and gain the confidence of their staff. (Tr. 291). She testified that during the promotional selections, a candidate's union activity was not discussed or even considered. Director Harper acknowledged that one of the selected candidates was a Union delegate. In addition, she noted that some of the candidates promoted into the AFI title had filed grievances against DHS in the past. Of the 39 candidates interviewed, the certified disposition report shows that 31 were promoted, including one Union delegate, Janet Vasquez, who was number 40 on the certified eligibility list. (Ans. Ex. 2.)

With respect to the failure to select FIs Scott, Blackstock and Jackson for promotion, Director Harper testified that she did not recall the specific discussion concerning each of these applicants, but explained why she had concluded that each one was not as highly qualified as the other candidates. Specifically, Director Harper testified that FI Scott, "was not as strong a candidate as I would have liked," because she was not certain about his leadership ability and his ability to act under pressure. (Tr. 334). Director Harper stated that FI Blackstock had pending disciplinary and

work performance issues. FI Blackstock's 2006-07 and 2007-08 performance evaluations confirm that she was rated "unsatisfactory." Further, Director Harper testified that she was aware of several instances when FI Jackson "was disruptive to the work of her colleagues," and was uncooperative, which she did not consider to be qualities of a good supervisor. (Tr. 337-338). A few weeks after the November 2008 interviews, candidates were given letters with the results of the promotional process. FIs Scott, Blackstock and Jackson were informed that they had not been promoted.

On December 18, 2008, DCAS issued DHS another certified eligibility list for the AFI title. DHS again conducted interviews of 23 candidates on January 5, 2009, including FI Monzietti.⁷ According to Deputy Director Pilgrim these interviews were conducted in the same fashion as were the ones conducted on November 17, 2008, following the same procedure and utilizing the same interviewers.

On January 9, 2009, DHS interviewed 11 more candidates for the AFI promotion and on January 26, 2009, DHS interviewed 15 candidates for the AFI promotion, including FI Shannon. According to Director Harper, these interviews were conducted in the same fashion as were the ones conducted on November 17, 2008 and January 5, 2009, used the same interviewers and followed the same procedure.⁸ FI Shannon testified that she was interviewed by Director Harper, Deputy Director Rodriguez and another individual she believed to be Director Gelin. Over the course of ten minutes, the interviewers asked FI Shannon questions about her experiences in PATH and her previous employment history within DHS. FI Shannon further testified that she believed she was the perfect

⁷ As stated above, FI Monzietti did not testify in the proceedings in the instant matter, nor did any of the witnesses provide specifics concerning his interview or the reason he was not selected.

⁸ According to City Ex. 4, DHS interviewed 8 more candidates on February 11, 2009.

candidate for a promotion because she had worked in various aspects of PATH, and had experience within the agency. When asked by the interviewers if she had any questions, FI Shannon stated she did not because they had her resume. FI Shannon was informed in March 2009 that she had not been promoted.

According to FI Shannon, after she received her March 2009 letter she asked Director Harper why she had not been selected for promotion. FI Shannon testified that Director Harper replied saying, “something about not being loyal.” (Tr. 126). She testified that nothing else was said by either party after that statement.⁹ Director Harper denies that she had any conversation with FI Shannon concerning the promotions and specifically denied that she made such a comment to FI Shannon.

Of the approximately 57 candidates interviewed after November 2008, the February 13, 2009 certified disposition report shows that 24 were promoted. Interview records indicate that 33 candidates were interviewed but passed over, including FIs Monzietti and Shannon. These numbers are derived from Ex. 8 to the City’s Answer to the Improper Practice Petition and City Ex. 4. The February 13, 2009 certified disposition report does not indicate that any candidates interviewed on January 26 and February 11, 2009, were promoted by DHS. To the contrary, Union Ex. 1, a summary of eligibles and appointments, indicates that an additional 13 candidates who were interviewed on January 26 or February 11, 2009, were promoted by DHS. However, there were several inconsistencies between the two DCAS certified disposition reports [Ans. Ex. 2 and 8] and Union Ex. 1, concerning the appointments from the first and second certified disposition reports. Because

⁹ This remark was not alleged in the Union’s improper practice petition, or an amended petition. It was only when Shannon was recalled to testify a second time on the Union’s case in chief that she even asserted the remark had been made.

the DCAS disposition reports were certified by DCAS and relied upon by the City during the promotional process we find them reliable and credit the promotional data set forth therein.¹⁰ In summary, overall DHS interviewed 96 candidates, selected 55 candidates, and passed over 41 candidates.

On April 13, 2009, the Union filed the improper practice petition alleging that DHS's refusal to promote FIs Scott, Blackstock, Jackson, Monzetti, and Shannon into the title of AFI constituted a violation of the NYCCBL.¹¹ Local 371 asserted that DHS's conduct was discriminatory and in retaliation for Petitioners' union activity. The Union seeks as a remedy in the instant matter an order directing DHS: to cease and desist from retaliating against Petitioners, to appoint Petitioners to the title of AFI, and to pay Petitioners back pay and benefits in the amount equaling the difference between what they received as compensation and what they should have received had they been rightfully promoted into the AFI title.

POSITION OF THE PARTIES

Union's Position

The Union contends that DHS violated NYCCBL § 12-306(a)(1) and (3) by denying Petitioners promotions from the FI title to the AFI title because such decisions were based upon Petitioners' union activity. Petitioners all held an official role within the Union, either as a delegate,

¹⁰ Union Ex. 1 is the only document or evidence in the record that shows that promotions were made after February 13, 2009. Accordingly, there is no reliable evidence in the record concerning promotions made after February 13, 2009.

¹¹ The Union's petition in the instant matter was amended on April 20, 2009, to provide the dates on which each individual Petitioner was interviewed and passed over for promotion.

alternate delegate, or chairperson of a Union committee. Their respective status was known by management at PATH primarily because Petitioners took an extremely active role in advocating for their constituency. In addition, their names and union positions were posted at PATH. Further, testimony indicates that the individuals at DHS who made the decisions regarding the AFI promotions, specifically Director Harper and Deputy Directors Ajasin and Rodriguez, had direct knowledge of Petitioners' respective roles within the Union because Petitioners had met with these individuals on several occasions to discuss Union-related matters.

The Union further argues that DHS's decisions not to promote Petitioners were clearly motivated by anti-union animus. Due to the disproportionate ratio of Union officials who were not selected, in comparison to the number of candidates who were selected, the only conclusion that can be drawn from this statistical evidence is that Petitioners were singled out due to their respective roles within the Union. In addition, FI Shannon testified that Director Harper told her that DHS's decision not to promote her into the AFI title was based on a question of FI Shannon's "loyalty." An inference can be drawn that Director Harper was referring to FI Shannon's position with Local 371, showing animus. Further, certain irregularities in the promotional process suggest animus. In past hiring pools Union delegates had been promoted. Also, Director Harper failed to keep notes of the reasons she did not promote Petitioners and gave vague and incomplete reasons to justify her decisions. Accordingly, the evidence shows that DHS failed to promote Petitioners because of their union activity.

City's Position

The City argues that the Union has not demonstrated a violation of the NYCCBL because the individuals who made the decisions not to promote Petitioners had no actual knowledge that

these individuals were engaged in union activity. Specifically, DCAS Director Pierre, who audited the certified disposition list, and Deputy Director Pilgrim, who oversaw the promotion process, had no knowledge of Petitioners' respective roles within the Union. Although Director Harper admitted that she knew that some Petitioners were involved in the Union, she could not attest as to their specific roles, titles or posts within Local 371. Accordingly, the Union cannot fulfill the first prong of the standard establishing DHS discriminated against Petitioners in contravention of the NYCCBL.

The City further argues that the decisions not to promote Petitioners were not motivated by anti-union animus. The fact that DHS promoted Janet Vasquez, a Union delegate, belies any assertion that union activity was considered in the promotion process. In addition, Director Harper credibly testified that she did not have any conversation with FI Shannon concerning the reasons she was not promoted and denied that she stated it was due to a concern regarding her "loyalty." Further, there was simply no evidence that union activity was considered in the selection of candidates for promotion. Director Harper stated clear criteria that they were looking for in candidates and articulated reasons why FIs Blackstock and Jackson did not possess the qualities that were essential to performance of the AFI job. The other Petitioners similarly lacked the qualities necessary for the job and were not the best candidates for the positions.

Further, assuming the Board finds evidence of animus, the City argues that they acted within the confines of the NYCCBL when they did not promote Petitioners because DHS acted in accordance with NYCCBL § 12-307(b) and the one-in-three rule."¹² In analyzing Petitioners and

¹² NYCCBL § 12-307(b) provides, in pertinent part:

It is the right of the city, or any other public employer, acting through its agencies, . . . to maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization

(continued...)

other candidates competing for the AFI promotion, the one-in-three rule allowed DHS to select superior candidates without running afoul of any statute, rule or regulation. As required by law, Petitioners were considered three times for the promotion, and were not selected. Accordingly, DHS acted within its authority and consistent with the law.

DISCUSSION

Local 371 claims that DHS refused to promote Petitioners into the title of AFI because they engaged in union activity, and that DHS's failure to promote Petitioners constituted a violation of NYCCBL § 12-306(a)(1) and (3). Based upon a review of the record, we do not find that the failure to promote Petitioners was based on their union activity. Accordingly, we dismiss Local 371's petition.

At the outset, we address the City's contention that adherence to the one-in-three rule as set forth in the Personnel Rules and Regulations of the City of New York, Rule 4 §7.1(c), necessitates the conclusion that the promotional process was fair and non-discriminatory. There is no dispute that in this instance DCAS' rules were followed and DHS applied the one-in-three rule during the promotion process. This procedure permits the agency to exercise discretion in its selection of promotional appointees. Because the promotional rules do not eliminate an agency's ability to select from among those on the certified eligibility list, it remains possible to apply discriminatory criteria

¹²(...continued)

Personnel Rules and Regulations of the City of New York, Rule 4 §7.1(c), provides, in pertinent part:

Promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by . . . the head of the certifying agency, as standing highest on such established list who are qualified and willing to accept such . . . promotion.

to the selection, as is alleged here. As a result, the mere application of the one-in-three rule does not insulate promotions from discrimination claims under the NYCCBL.

To establish discrimination under the NYCCBL, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny such as *State of New York (Division of State Police)*, 36 PERB ¶ 4521 (2003), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). 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 DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

Once a petitioner establishes a *prima facie* case of retaliation, the burden then shifts to the employer who 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. *See DC 37*, 1 OCB2d 5, at 64 (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); *SSEU, Local 371*, 77 OCB 35, at 18; *Lamberti*, 77 OCB 21, at 17 (BCB 2006).

Here, we find that the Union has satisfied the first element of the *Salamanca* test. Based upon the testimony of FIs Blackstock and Shannon and Executive Assistant Talbutt, all Petitioners were active participants in the Union. Since at least 2008, FIs Scott, Blackstock, Monzietti and Shannon were delegates or alternate delegates and advocated for Local 371 members and/or attended labor-management meetings with Director Harper and other members of PATH's management. The evidence established that there were numerous union issues raised by the Petitioners at PATH. The

Union delegates and alternates were very active in trying to resolve or advocate for members on these issues and attended many labor/management meetings on behalf of their members. Unlike the other Petitioners, FI Jackson was not a delegate, but was the chairperson of the delegate election process. The City's witness, Director Harper, admitted that she knew that FIs Shannon, Blackstock, and Monzietti were Union delegates. Director Harper stated that at the time of the promotional interviews she did not recall that FI Scott was a Union delegate, but later remembered that he may have been at a labor-management meeting. Director Harper testified that she did not have any knowledge of FI Jackson's union activity. Nevertheless, it is undisputed that FI Jackson's delegate election responsibilities occurred during the workday at PATH and that she interacted with PATH management to obtain approval for use of PATH facilities and time for members to vote. Accordingly, we find sufficient evidence upon which to conclude that the Petitioners engaged in union activity and that their protected activity was known to management. We find that the Union satisfied the first prong of the *Bowman-Salamanca* test.

Regarding the second prong of the *Salamanca* test, which concerns the motivation behind the City's failure to promote Petitioners, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, Local 237*, 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). However, "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; *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006).

On this record, we find that DHS's refusal to promote Petitioners was not motivated by anti-union animus. The Union argues that several factors demonstrate DHS' anti-union animus: Harper's

alleged statement to Shannon regarding loyalty; Union members at PATH having had a contentious relationship with management; a disproportionate number of Union advocates not being promoted; in past hiring pools having promoted Union delegates; and Director Harper's failing to keep notes of the reasons she did not promote Petitioners, instead giving vague and incomplete reasons to justify her decisions.

First, we do not find credible FI Shannon's assertion that Director Harper told her the reason she was not promoted was "something about not being loyal." Director Harper credibly stated that she had no such conversation with FI Shannon regarding the promotions. Overall, Director Harper was forthcoming in her testimony concerning the promotional process. She readily admitted when she did not recall certain facts, and was candid concerning her after-the-fact recollection of FI Scott's union activity. In addition, she credibly testified that she knew that some of the FIs who were promoted to AFI had filed grievances, but added that this factor did not enter into her promotional considerations.

In contrast, FI Shannon did not have a clear recollection of the alleged statement that Director Harper made. Her only testimony was that immediately after receiving her March 2009 letter, she asked Director Harper to explain why she was not promoted and Harper responded by stating, "something about not being loyal." (Tr.126) If the comment had been made, it would be likely that FI Shannon, a union official, would have immediately noted it and considered it important. Based on the significance of the alleged comment, presumably she would have been able to testify as to the exact remark allegedly made, which she could not do. Thus, we do not credit FI Shannon's testimony and find that Director Harper did not tell FI Shannon that she was not promoted because of a perceived lack of loyalty.

Second, there is no evidence that PATH management was hostile to the Union or its members. Executive Assistant Talbutt, and FIs Blackstock and Shannon all testified that PATH is a location where grievances are frequently filed and Union advocates are often advocating for members with DHS management. Additionally, they testified to alleged violations of the parties' collective bargaining agreement and DHS's rules and regulations, all of which were addressed by the Union with PATH management, including Director Harper. This un rebutted testimony demonstrates that the PATH division is an active union environment in which the Union representatives are frequently called upon to assert the interests of its members. However, the mere fact that the Union was active at PATH and an aggressive advocate for its members does not demonstrate that management had any hostility to the Union's efforts to enforce its members rights.¹³ Accordingly, we cannot conclude that the evidence concerning union activity at PATH is indicia of animus.

Third, we are not persuaded by the Union's assertion that animus can be established based on the fact that a disproportionate number of candidates selected for AFI positions were not Union officials, in comparison to the number of candidates who were Union officials but were not selected. The record established that approximately 96 candidates were considered for promotion. Fifty-five employees were selected and 41 were rejected. Of the 96 candidates considered, seven were active union officials.¹⁴ Contrary to the Union's claim, one of the 55 candidates selected for promotion by

¹³ Although FI Blackstock testified that she or other union representatives were precluded from participating in employee disciplinary meetings, the record does not establish that these meetings were disciplinary interviews, or that Union representatives were improperly prohibited from participating in them.

¹⁴ In the pleadings Cheryl Williams was also listed as a petitioner who, according to the Union, had been improperly passed over for a promotion due to her union activity. On the first day of the hearing, the Union moved to voluntarily dismiss any and all claims asserted on Williams' (continued...)

DHS was Janet Vasquez, a Union delegate. In addition, Director Harper testified without contradiction that she was aware that some of the FIs who were appointed had engaged in union activity, such as filing grievances. Indeed, these facts undermine the assertion that union activity was the reason that Petitioners were not promoted. Among the 41 candidates who were passed over for promotion six were union officials. We cannot conclude that standing alone, these numbers establish proof that DHS' failure to promote Petitioners was based on their union activity. Accordingly, we find insufficient evidence to establish a prima facie case of discrimination.

Moreover, even assuming that the number of union officials not selected for AFI were considered sufficient to show union animus, the City has demonstrated legitimate business reasons for its failure to promote three Petitioners. With respect to the first three Petitioners interviewed, Director Harper credibly articulated her reasons as to why they were not as qualified as other candidates.¹⁵ Specifically, she stated that FI Scott had not demonstrated leadership qualities and the ability to act under pressure. Further, Director Harper cited FI Blackstock's disciplinary and work performance issues as raising questions concerning her ability to lead by example. Indeed, FI Blackstock's performance evaluations from 2006-07 and 2007-08 show that overall her work performance had been rated unsatisfactory. Similarly, Director Harper described FI Jackson to be unqualified for promotion because of several instances when FI Jackson was disruptive to the work

¹⁴(...continued)

behalf and withdraw her name from the instant matter. The City did not object to the motion and all claims alleged on Williams' behalf were dismissed. Therefore, no evidence was presented with regard to her being passed over for a promotion.

¹⁵ Director Harper credibly testified that DHS was looking for candidates who possessed specific characteristics, such as the ability to command the confidence of their subordinates, to act under pressure, and to work well with others. The questions asked during the interviews were intended to allow the interviewers to assess these skills, including prior supervisory experience.

of her colleagues and she was uncooperative. FI Jackson also failed to demonstrate supervisory qualities.¹⁶ See *Communications Workers of America, Local 1180*, 43 OCB 17 at 17 (BCB 1989), (quoting *Local One, Amalgamated Lithographers of America v. NLRB*, 729 F.2d 172, 175 (2nd Cir. 1984)) (no violation of the NYCCBL where union activity is a motivating factor but the employer shows that the action complained of would have occurred in any event and for valid reasons); *Assessors, Appraisers and Mortgage Analysts, L. 1757, DC 37*, 53 OCB 1 at 50 (BCB 1994) (where employer shows that anti-union animus was not the “substantial or motivating factor in the decision” to pass over the employee for promotion, no violation can be found.) Of the three remaining Petitioners interviewed, one Union delegate, Vasquez, was promoted to AFI. Therefore, the number of union officials passed over is reduced to only two of 38 other candidates not selected. Director Harper had no specific recollection of the reasons why any of the 38 candidates, including FIs Monzietti and Shannon, were passed over. Nevertheless, given Director Harper’s credible explanations for the non-selection of FIs Scott, Blackstock and Jackson, along with the fact that Vasquez and other employees who filed grievances were promoted, we find that DHS has rebutted the claim that it failed to promote Petitioners based on their union activity.¹⁷

¹⁶ While Director Harper’s failure to take notes on the reasons candidates were not selected for promotion may not have been desirable, it does not indicate that she was biased against union adherents. As stated earlier, her answers to questions on direct and cross-examination were candid. She readily admitted that she did not recall certain facts and her overall her testimony was reasonable and thoughtful.

¹⁷ Even assuming *arguendo* that the data on Union Ex. 1 was accurate as to promotions that occurred after the third certification issued, there were a total of 68 promotions and 28 candidates rejected, including the five Petitioners. Although these numbers show the Union delegates to be a higher percentage of those candidates who were rejected, we do not find that DHS discriminated based on union activity since DHS has shown a legitimate business reason for its failure to promote three of the five Petitioners.

For the reasons set forth above, we find that the second prong of the *Bowman-Salamanca* test has not been satisfied. DHS did not violate the NYCCBL by its failure to promote Petitioners to AFI because the evidence does not support a finding of a causal connection between Petitioners' protected union activity and DHS's decision not to promote them. Thus, we deny Local 371's 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 filed by Social Service Employees Union, Local 371, on behalf of Greg Scott, Michele Blackstock, Natasha Jackson, Richard Monzetti, Gwendolyn Shannon, docketed as BCB-2758-09 be, and the same hereby is, denied.

Dated: New York, New York
October 26, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER