

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

JOSEPH BOWMAN and DISTRICT  
COUNCIL 37, AFSCME, AFL-CIO,

Petitioners,

DECISION NO. B-51-87

-and-

DOCKET NO. BCB-854-86

CITY OF NEW YORK: JUDITH LEVITT,  
as Personnel Director of the  
City of New York; and WILLIAM  
GRINKER, as Commissioner of the  
Department of Social Service  
and Administrator of the Human  
Resources Administration,

Respondents.

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DECISION AND ORDER

On March 5, 1986, Joseph Bowman, an individual, and District Council 37, AFSCME, AFL-CIO ("petitioners") filed an improper practice petition against the City of New York; Judith Levitt as Personnel Director of the City of New York; and George Gross as Commissioner of the Department of Social Services and Administrator of the Human Resources Administration ("City" or "respondents").<sup>1</sup> On April 18, 1986, the respondents submitted an answer. A reply was filed on June 2, 1986. An amended petition was

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<sup>1</sup>The case caption has been amended to reflect the replacement of George Gross by William Grinker.

filed on December 12, 1986, an amended answer on January 30, 1987, and an amended reply on February 20, 1987.

The amended improper practice petition alleges that respondents violated Section 12-306(a)(1) and (3) (formerly §1173-4.2(a)(1) and (3)) of the New York City Collective Bargaining Law ("NYCCBL") on or about November 6, 1985 by revoking the promotion of petitioner Bowman to Eligibility Specialist, and in or about August, 1986, by refusing to appoint Bowman provisionally to the title of Office Associate, by assigning Bowman different duties from those he had been performing, and by assigning a person holding a provisional Office Associate appointment to perform Bowman's former duties. Petitioners allege that respondents took these actions because Bowman filed an out-of-title grievance, improper practice petition, Article 78 petition, and because of his other union activity.

Respondents' amended answer denies the allegations of unlawful conduct and generally asserts that the decisions not to promote Bowman and to change his duties were based on his past performance and not on any union activity.

A hearing was held in this matter on May 18, 19, June 4, and August 20, 1987 before a Trial Examiner designated by the Board of Collective Bargaining, at which

time the parties were afforded a full opportunity to offer evidence and argument and to present, examine, and cross-examine witnesses. A transcript of the proceedings was taken. Briefs were submitted on September 30, 1987 and October 1, 1987.

We have considered the entire record in this matter, including the briefs submitted by the parties.

Statement of Facts

Petitioner Bowman has been employed by the New York City Department of Income Maintenance ("IM"), Department of Social Services ("DSS"), Human Resources Administration ("HRA") since approximately 1969. During his employment by HRA, Bowman has been a member of Local 1549. He served on the Local 1549 Executive Board in 1980, 1982 and 1983. He was a shop steward from 1972 to 1979, and from approximately January to September 1986.

Bowman began in the Civil Service title of Clerk. In 1973, he was permanently appointed to Senior Clerk and provisionally appointed to Supervising Clerk. In 1979, City clerical titles were broadbanded; as a result, Bowman's permanent title became Office Aide Level III and his provisional title became Office Associate.

In the Clerk/Office Aide titles, Bowman's duties included filing, working in the mail room, distributing

supplies and pulling files for caseworkers. When he became a provisional Office Associate, he received a case load, and his duties included, inter alia, interviewing clients in order to verify eligibility for assistance, authorizing payments and responding to telephone inquiries.

In April 1982, the title of Eligibility Specialist was created and various duties of the Office Associate title related to eligibility were transferred to the new title. Bowman became a provisional Eligibility Specialist.

On January 4, 1983, while working as an Eligibility Specialist in the Boulevard Income Maintenance Center, Bowman addressed a letter to the HRA Office of Personnel Services ("OPS") stating:

I am asking that you except [sic] my decision to take a change in title from Eligibility Specialist to Office Associate. I tried very hard but the work is too much.

Thank you for your kindness and I would like to thank all my co workers who tried to help me.

At the same time he addressed a letter to his immediate supervisor, in which he wrote:

I enjoyed working with you and the little group you had .... You are great and I must say, you have to be great to put up with me so long. My decision is to take a change in title from Eligibility Specialist to Office Associate.

On this same date, Center Director Heasty addressed a memorandum to Income Maintenance Personnel Director Demopoulos recommending that, on the basis of his poor performance as an Eligibility Specialist III, Bowman be demoted and assigned elsewhere. Bowman's two January 4, 1983 letters were attached to Heasty's memorandum.

On January 11, 1983, Bowman received and signed an evaluation which gave him an overall rating of "unsatisfactory" and recommended that he be demoted.

On January 17, 1983, IM Personnel Director Demopoulos addressed a memorandum to the HRA Office of Personnel Services requesting that Bowman be demoted to Office Aide III. Thereafter, according to Demopoulos, at the request of Local 1549 grievance representative Harris, she agreed to cease processing the demotion request and to accept Bowman's voluntary return to Office Aide III.

In connection with his return to the Office Aide title, Bowman testified that he was not aware of any problems with his performance and had not been informed that he was being considered for demotion prior to his request to be relieved of Eligibility Specialist duties. He testified that he initiated this request because his doctor said the work was too strenuous for him, and because he had been threatened by clients. Local 1549 re-

representative Harris, however, testified that he, Harris, was aware that charges of incompetence against Bowman were being considered, and he suggested to Bowman that Bowman request a demotion.

When he reverted to Office Aide, Bowman was transferred to the Kingsbridge Maintenance Center, where his duties included processing clients' checks. At the request of Local 1549 representative Harris, around the beginning of 1984, IM Personnel Director Demopoulos transferred Bowman to the Income Clearance Program ("ICP"), where he would not come directly into contact with clients.

At ICP, Bowman was first assigned to the "newborn unit," next to a computer matching group, and then to work under Supply Coordinator Ward in the stockroom. There Bowman's duties included keeping employee time records, ordering and distributing supplies, maintaining the copy machines. ICP Deputy Director Cruse testified that Bowman was transferred out of his first two assignments at ICP because his performance in them was not satisfactory. Neither party introduced an evaluation of Bowman for any period of his assignment at the ICP. However, both Cruse and Ward commended Bowman on his performance during Ward's two-week absence in August 1985. According to Cruse, she hoped that the commendation would inspire

Bowman to continue at the same level, but his performance deteriorated after Ward returned.

After he had returned to the Office Aide title, in June, 1984, Bowman took a promotional civil service examination for the title of Eligibility Specialist. Before the publication of the Eligibility Specialist list in September 1985, because of the large number of positions in that title, representatives of the Income Maintenance Department, including Personnel Director Demopoulos, met with representatives of Local 1549, including Harris, to discuss how the IM Department was going to proceed. The possibility of simply changing those in the equivalent title, Office Associate, to Eligibility Specialist, was discussed. In this connection, Harris mentioned to Demopoulos the name of Bowman, among others.

In September 1985 an eligible list was promulgated as a result of the examination. Bowman was notified that he should report to the DSS Office of Personnel Services for an interview on October 16, 1985. According to IM Personnel Director Demopoulos, after a list is received, her office sends to each location the names of employees being considered for promotion, so that the location manager has the opportunity to comment. Such a list was sent to ICP, Bowman's job location. Both ICP Director Paolicelli

and Deputy Director Cruse testified that, although the list sent by III Personnel of ICP employees eligible for promotion was stamped "received" by ICP on October 11, 1985, neither saw the list before Bowman's interview took place.

On October 16, 1985, Bowman was interviewed at DSS by Alice Barbosa and Shirley Frank of the IM Personnel Department. He was offered and accepted a position as Eligibility Specialist, and told to report for training on November 6, 1985.

Bowman testified that the interviewers had his personnel records for a long period "all spread out" and that he saw papers he had signed years before. He testified that he told the interviewers of his demotion but did not explain the circumstances. Demopoulos, Barbosa, and Rosalind Clarke, who was then Civil Service List Coordinator,<sup>2</sup> testified that at such interviews the interviewers do not have the personnel files of the candidates, but only a Form DSS-800. This one-page form is completed by the candidate and contains a summary of educational background and previous job experience. According to Demopoulos, any review of a candidate's per-

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<sup>2</sup>Ms. Clarke will be referred to herein as "Civil Service List Coordinator," although her title has since become "Deputy Director of Employment, OPS, Dss."



sonnel files takes place after this initial interview. Interviewer Barbosa testified that occasionally the name of a questionable candidate is highlighted on her print-out of the list, but Bowman's was not.

On October 16, after the interview, Bowman returned to the ICP office and informed Director Paolicelli and Deputy Director Cruse that he was going to be trained as an Eligibility Specialist. On the same day, Bowman filed with Paolicelli an out-of-title grievance alleging that he was performing the duties of an office Associate. It is unclear from the record whether Bowman informed his supervisors of the interview and the grievance at the same time. Both Paolicelli and Cruse recalled that Bowman said he had not yet accepted the Eligibility Specialist position and that he suggested that they make him an Office Associate at ICP. Paolicelli refused.

Paolicelli testified that he contacted IM Personnel Department immediately concerning Bowman's Eligibility Specialist interviewer and was told they would look into the matter. Paolicelli further testified that between October 16 and November 6, he had two or three conversations with Personnel, including Demopoulos, and that he was informed that Bowman had accepted the Eligibility Specialist position. Personnel asked Paolicelli for his

recommendation. Director Paolicelli testified that, based on reports from Deputy Director Cruse and his own predecessor concerning Mr. Bowman's performance prior to Paolicelli's assumption of the Director position in May 1985, Cruse's report that Bowman had taken a demotion from the Eligibility Specialist position before, information contained in Bowman's personnel folder, and his own observations of Bowman's performance, Paolicelli recommended that he be bypassed.

According to Local 1549 representative Harris, "a couple of days" after Bowman's October 16 interview, he and IM Personnel Director Demopoulos attended a meeting on an unrelated topic. Harris asked about Bowman, and Demopoulos reported that he was not performing the duties of an office Associate, and would not be promoted to that title. Harris then informed Demopoulos that Bowman had already been promoted to Eligibility Specialist. According to Harris, Demopoulos said she "would do what she could to stop the promotion." According to Demopoulos, she stated to Harris that she thought Bowman was unsuitable and would check the matter. After Demopoulos returned to her office, she called ICP Director Paolicelli and they agreed that Bowman was unsuitable for the position. She then contacted the HRA Office of Personnel Services and

requested that Bowman be bypassed.

Demopoulos testified that she learned of Bowman's grievance on October 23, 1985, when Paolicelli called to request guidance as to how to respond because the grievance requested a promotion to Office Associate while Bowman was apparently also seeking a promotion to Eligibility Specialist. Bowman also filed his grievance at Step II on October 23.

The Step I grievance was denied on October 25, 1985 by Deputy Director Cruse.

HRA's Director of Employment Feliciano sent Bowman a letter, dated October 29, 1985, informing him that he had not been selected for promotion. Civil Service List Coordinator Clarke, Interviewer Barbosa, and ICP Director Paolicelli testified that other employees had been bypassed in the past.

On November 6, 1985, Bowman reported to training. (He had not yet received Feliciano's letter stating that he had not been selected for promotion).

On November 6, 1985, Shirley Frank, as Supervisor of the Transfer Unit in Income Maintenance Personnel, received from the training program the names of those, including Bowman, who had reported. As Bowman was not on Frank's list of employees scheduled for training, she checked with Personnel Director Demopoulos, who instructed Frank to tell Bowman to report back to his income Clearance Program location immediately. Frank did so, by telephone.

Bowman testified that in the telephone conversation with Frank he told her that he was going to call his union, and Frank told him that if he did, he would "really be in trouble." Frank denied making this statement.

After Bowman was informed that he would not be promoted to Eligibility Specialist, he returned to his stockroom and timekeeping duties at the income Clearance Program.

Bowman's grievance was denied at Step II on December 30, 1985. The first petition in the instant case and an Article 78 petition were filed on March 5, 1986. The grievance was denied at Step III on March 25, 1986. A request for arbitration was filed on April 25, 1986.

In August 1986, Bowman's stockroom and timekeeping duties were changed. According to Director Paolicelli and Deputy Director Cruse, both Bowman and his supervisor, Supply Coordinator Ward, were reassigned at this time because the two men were not getting along and because supplies were not being distributed. Cruse testified that she had held several "conferences" with Ward and Bowman concerning these problems. Bowman was reassigned to packing materials in the processing unit, under the supervision of Ms. Briggs and Mr. Christian, whose re-

sponsibilities also include the stockroom. The timekeeping duties were assigned to Ward.

According to Bowman, on August 28, 1986, he met with Director Paolicelli and Deputy Director Cruse, with Shop Steward Roman also present. Bowman stated that he had requested the meeting to give consideration to changing him to the Office Associate title, although his out-of-title grievance was still pending. Bowman testified that during this meeting Director Paolicelli stated that Personnel Director Demopoulos had instructed him not to give Bowman a promotion because of his "union activity." Paolicelli denied making such a statement or receiving such instructions from Demopoulos. Cruse denied hearing Paolicelli make such a statement. Shop Steward Roman did not testify.

### Positions of the Parties

#### The Petitioners' Position

With respect to Bowman's union activities, petitioners point to Bowman's service as shop steward and executive board member for Local 1549, as well as his own out-of-title grievance. Petitioners claim that Union representative Harris informed IM Personnel Director Demopoulos of Bowman's potential grievance in September 1985, before the actual October 16, 1985 filing of the grievance. Petitioners also argue that Demopoulos "learn-

ed of Bowman's promotion in the context of a discussion of Bowman's alleged out-of-title grievance," and that this discussion precipitated the respondents' decision to stop the promotion process "when the internal procedures of the employer itself would not have independently resulted in that action." The petitioners allege that anti-union animus is shown by Demopoulos' alleged statement to Harris that she was going to stop the promotion, and by the alleged statement of Ms. Frank of September 6, 1985, warning Bowman not to contact his union or he would "really be in trouble."

The petitioners also argue that the decision to reassign Bowman and to deny him a provisional Office Associate appointment in August 1986 was a result of his union activity, as shown by ICP Director Paolicelli's alleged statement that Demopoulos had instructed him never to give Bowman a promotion because of his union activity .

#### The City's Position

The City takes the position that promotional decisions are within the City's statutory rights under NYCCBL Section 12-307b (old §1173-4.3b) and that petitioners failed to establish either animus or disparate treatment in the City's decisions with respect to Bowman. The City also states that the City's determinations complied with Sec-

tions 61 and 65 of the Civil Service Law. Thus, the City concludes, petitioners did not make out a prima facie case.

#### Discussion

Pursuant to Section 12-305 (formerly §1173-4.1) of the NYCCBL, public employees are granted 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 ... to refrain from any or all of such activities.

Invasions of these rights, called improper practices, are set forth in NYCCBL Section 12-306 (formerly §1173-4.2) which states, in relevant part, that it shall be an improper practice for an employer:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 (formerly §1173-4.1) 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;...

Pursuant to Section 12-307 (formerly §1173-4.3b) of the NYCCBL, the City is granted the right, inter alia:

to determine the standards of services to be offered by its agencies;  
determine the standards of selection for

employment; direct its employees; take disciplinary action.; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

It is not contested that promotion decisions are within the scope of management's statutory prerogatives. The City argues that a proper exercise of a management prerogative under the NYCCBL and Civil Service Law cannot constitute an improper practice. Nevertheless, we have long held that acts taken within the scope of management's statutory rights may constitute improper practices if taken for coercive or discriminatory reasons.<sup>3</sup>

In previous cases alleging discrimination against an employee because of union activity, this Board has held that the petitioner must show that:

1. the employer's agent responsible for the alleged discriminatory actions had knowledge of the employee's union activity.

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<sup>3</sup>Decisions No. B-22-84, B-3-84, B-25-81.



2. this agent harbored anti-union animus,  
and

3. the alleged discriminatory action  
would not have occurred when it did but  
for the union activity.<sup>4</sup>

Under this formulation, to establish an improper practice where anti-union animus coexists with a legitimate business motive, the burden is on the petitioner to prove not only that the improper motive exists but that it was the dominant motive for the alleged discriminatory action. This test is generally referred to as the "dominant motive" or "but for" test. PERB, however, has applied a different test in cases alleging violations parallel to those of Section 12-306a(1) and (3) (formerly §1173-4.2a(1) and (3)).<sup>5</sup> Under this test the petitioner still has the burden of proving that the employee's protected activity contributed to the decision alleged to be unlawful. The burden of persuasion then shifts to the employer to establish that the disputed action would have been taken whether or not the protected activity had been engaged in. The Salamanca test is substantially the same as that set forth by the National Labor Relations Board in its 1980

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<sup>4</sup>Decision Nos. B-10-72, B-35-80, B-43-82, B-24-84.

<sup>5</sup>City of Salamanca, 18 PERB ¶3012 (1985).

Wright Line decision,<sup>6</sup> and endorsed by the U.S. Supreme Court in Transportation Management Corp.<sup>7</sup>

We have carefully considered these matters and elements and conclude that, henceforth, in cases involving allegations that the respondent has violated NYCCBL Section 12-306a (formerly §1173-4.2a) by acting with improper motivation, we adopt the test of causation and allocation of the burden of proof set forth in City of Salamanca, supra. We believe that the adoption of this clearly articulated and widely accepted standard will best protect the rights of employees and the legitimate management considerations of the City, as well as effectuate the purposes of the NYCCBL.

Thus, in cases involving an alleged violation of NYCCBL Section 12-306a(3) (formerly §1173-4.2a(3)), the petitioner must show that:

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

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<sup>6</sup>Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, 105 L.R.R.M. 1169; enforced 662 F2d 899, 108 L.R.R.M. 2513 (1st Cir. 1981); cert. denied 455 U.S. 989, 109 L.R.R.M. 2779 (1982).

<sup>7</sup>103 S. Ct. 2469, 113 L.R.R.M. 2857 (1983).

2. the employee's union activity was a motivating factor in the employer's decision.

If this is established, the burden will shift to the employer to show that the same action would have taken place even in the absence of the protected conduct.

With these principles in mind, we turn to the allegations before us.

1. November 1985 Bypass

Although it is not disputed that Bowman served as shop steward in the 1970's or as a member of the Local 1549 executive board in the early 1980's, the record does not establish that those responsible for the decision to bypass Bowman -- Paolicelli, Cruse, and Demopoulos -- were aware of this activity. Bowman did not begin his stewardship at ICP until approximately January 1986, after he was passed over for the Eligibility Specialist position. Thus, it appears that management's knowledge of Bowman's union activity in November 1985 was confined to his own out-of-title grievance.

Although Bowman's grievance was not filed until October 16, 1986, petitioners argue that management knew it was in the air for at least a month before that. Petitioners contend (Brief, p. 10) that Union representative Harris first raised the issue of a "potential out-of-title grievance" with Demopoulos in September 1985. The record

does not support this assertion. Rather, Harris testified that he raised the possibility that Bowman was working out of title "indirectly" in discussions concerning moving employees on the Eligibility Specialist list already in equivalent titles to the title of Eligibility Specialist, and that some, including Bowman, might be doing equivalent work. Harris did not testify that he mentioned a potential grievance to Demopoulos at this time (T. 254-56, 268-69, 276). Nor does the record support the petitioner's assertion (Brief p. 10) that Demopoulos learned of Bowman's promotion "in the context of a discussion of Bowman's alleged out-of-title grievance." Harris testified that their second conversation took place at a meeting unrelated to Bowman; he did not testify that it was in the context of a discussion of Bowman's grievance, or that the possibility of a grievance was raised (T. 257, 269-70, 277).

ICP Director Paolicelli became aware of Bowman's out-of-title grievance on October 16, 1985, when it was filed with him. The record indicates that while Paolicelli spoke on that day to representatives of the Personnel Department concerning Bowman's Eligibility Specialist interview, he did not speak to Demopoulos about that or the grievance until some time later. Demopoulos recalled learning of the grievance a week later, on October 23.

With respect to the question whether the City's representatives responsible for the decision to bypass Bowman were motivated by anti-union animus prompted by Bowman's grievance, petitioners rely on certain alleged statements of Demopoulos and Frank.

Harris testified that "a couple of days" after Bowman's October 16 interview, he informed Demopoulos that Bowman had been offered the Eligibility Specialist position, and that Demopoulos responded that she would "do what she could to stop the promotion." This, petitioners contend, shows that Demopoulos harbored animus inspired by Bowman's grievance. We do not agree, for the record convinces us that until Harris spoke, Demopoulos knew neither of Bowman's grievance nor of the offer of the Eligibility Specialist position. Thus, at the time of their conversation, Demopoulos had no reason to hold animus. Assuming, arguendo, that Demopoulos uttered the words attributed to her, we also note that they are ambiguous, open to more than one interpretation,, and could as well reflect Demopoulos' judgment of Bowman's suitability for the position based upon her knowledge of his record.

Secondly, petitioners claim that animus is shown by statements allegedly made by Transfer Unit Supervisor Frank on November 6, 1985, at the time she told Bowman

to leave the training program. Bowman testified twice about this conversation and how it came about. There are many differences between the two accounts, as well as embellishments in the second, that suggest that Bowman's perception is not accurate or reliable. Frank denied making any statements threatening adverse consequences if Bowman turned to his union. Assuming, arguendo, that she had, this board still requires that petitioners establish anti-union animus on the part of the employer's agent responsible for the alleged discriminatory action (supra at 18-19). There is no evidence in the record that Frank played any part in the decision to deny Bowman a promotion, or to reassign his duties later.

We also conclude that the record does not support petitioners' assertions that the employer's internal procedures would have resulted in Bowman's promotion absent the alleged unlawful intervention.

We found credible, given the bureaucratic context, the testimony of Paolicelli and Cruse that although it had been received at the ICP premises, they did not see, before October 16, the notification that Bowman was on the Eligibility Specialist list. Moreover, three City witnesses, Clarke, Demopoulos and Barbosar testified concerning procedures used in interviewing Civil Service

list candidates. The testimony of each was sensible and consistent with that of the others. From it, we conclude that the interviewers did not have the details of Bowman's job history at the time he was offered the Eligibility Specialist position, and that this was in conformity with usual procedures, as was the subsequent review of his job history.

On the record as a whole, we conclude that the City had legitimate business reasons for its decision to bypass Bowman for the Eligibility Specialist position. The circumstances surrounding Bowman's 1983 change of title, i.e., poor evaluation, memos recommending demotion, and Local 1549 representative Harris' awareness that charges of incompetence were being considered, all corroborate Demopoulos' testimony that Bowman's request was an alternative to formal demotion. The language of Bowman's letters to management, e.g., "... [Y]ou have been great to put up with me for so long. My decision is to take a change in title...." also supports the conclusion that Bowman was given such a choice. Thus, we cannot credit Bowman's testimony that he requested a demotion for personal and health reasons, unaware of any problems with his performance. Personnel Director Demopoulos, who had effected Bowman's 1983 change of status, was aware of

this, and ICP Director Paolicelli became aware of the change, if not the details of how it came about. ICP Deputy Director Cruse testified without contradiction that Bowman had been moved from his first two assignments at ICP because of poor performance, and both she and the previous director apprised Paolicelli of Bowman's job history at ICP. Although Bowman did receive commendation for his performance during Ward's two-week absence, management was justified in considering this in the context of Bowman's 1983 reassignment and ICP performance generally.

Although it is unusual to bypass employees offered jobs at the OPS interviews, petitioners did not establish that the employer applied different standards to Bowman from those applied to similarly situated employees, or that the City departed from usual procedures in this case. The petitioners argue that the timing of the bypass indicates that it must have been prompted by the grievance, but under the facts herein we cannot reach that conclusion. The grievance and promotion processes were begun almost simultaneously, and both required examination of the employee's record to determine whether Bowman was performing out-of-title duties and was qualified for promotion. The promotion process was not initiated by agents of the employer, but by Bowman's taking the exam. If



there were any evidence that those who participated in the decision to bypass (Demopoulos, Paolicelli, and Cruse) had indicated to Bowman or Harris that they were considering the possibility of promoting him, and had changed their minds after learning of the grievance, we might draw a different inference.

In view of the above, we conclude that the petitioners have failed to meet their burden of establishing that those responsible for bypassing Bowman harbored anti-union animus. Moreover, on the basis of the record before us there is ample business justification for the City's decision.

Accordingly, we dismiss the allegation of the amended petition that, in November 1985, the respondents revoked or rescinded the promotion of Joseph Bowman in violation of Section 12-306a(1) and (3) (formerly §1173-4.2a(1) and (3)) of the NYCCBL.

2. August 1986 Reassignment and Denial of Provisional Appointment

To establish that, in August 1986, Bowman's duties were reassigned and he was denied a provisional Office Associate appointment for unlawful reasons, petitioners rely on two factors: 1) his union activity; and 2) Paolicelli's alleged statement to the effect that Person-

nel Director Demopoulos had decreed that Bowman would not receive a promotion because of his union activity.

The record establishes that, after Bowman was denied the Eligibility Specialist position, his out-of-title grievance continued to be processed. The Step III denial was issued on December 30, 1985. A request for arbitration was filed in February 1986. The record does not show any further activity with respect to Bowman's grievance before August 1986.

The instant improper practice and an Article 78 proceeding were filed on March 5, 1986. There is no evidence in the record to indicate when Demopoulos, Paolicelli, and Cruse became aware of these proceedings or their reactions thereto.

Bowman also served temporarily as shop steward from approximately January to September 1986, and Demopoulos and Paolicelli were aware of this. No evidence was introduced as to the specifics of his activity, nor was there any testimony tending to show that there was any acrimony between him and management caused by his activities as steward. The fact that Bowman served as an active shop steward does not, without more, merit an inference that management harbored animus on account of it.

Turning to the statements alleged to have been made by Director Paolicelli in August 1986, we find it

highly improbable that Personnel Director Demopoulos, also the labor relations liaison for the IM Department, would direct a supervisor not to promote an employee because of his "union activity," and it is also improbable that Director Paolicelli would repeat this direction verbatim to the employee concerned. Even if that were the gravamen of the statement, it is unlikely that either would use the legally significant words, "union activity," as claimed by Bowman, rather than some more general description. We note also that shop steward Roman, alleged by Bowman to have been present when this statement was made, was not called by the petitioners, and infer from this that his testimony would not have supported Bowman's version.<sup>8</sup>

On the other hand, Cruse testified without contradiction that Bowman had been "conferenced" several times concerning his performance in the stockroom. Moreover, the fact that Ward was replaced as stockroom supervisor and assigned different duties at the same time as Bowman suggests that these changes were made in an effort to resolve the stockroom problems rather than to "single out" Bowman.<sup>9</sup> Under these circumstances we find that the

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<sup>8</sup>Richardson on Evidence, 10th Edition, §92.

<sup>9</sup>See Decision No. B-28-86.

employer had legitimate business reasons for not placing Bowman provisionally in the higher Office Associate title, for assigning Bowman to different duties, and for re-assigning Bowman's duties to other employees.

In view of the above, we conclude that the petitioners have failed to meet their burden of establishing that those responsible for the decision to reassign Bowman and to deny him a provisional Office Associate appointment harbored anti-union animus. Moreover, on the basis of the record before us there is ample business justification for the City's decision.

Accordingly, we dismiss the allegation of the amended petition that, in August 1986, the respondents refused to appoint Bowman provisionally to the Office Associate title, assigned Bowman to different duties from those he had been performing, and assigned his duties to a provisional Office Associate in violation of Section 12-306a(1) and (3) (formerly §1173-4.2a(1) and (3) of the NYCCBL.

Q R D E R

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 of Joseph Bowman and District Council 37, AFSCME, AFL-CIO in Docket No. BCB-854-86 be, and the same hereby is, dismissed.

DATED: New York, N.Y.  
October 26, 1987

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE NICOLAU  
MEMBER

DEAN L. SILVERBERG  
MEMBER

CAROLYN GENTILE  
MEMBER

EDWARD F. GRAY  
MEMBER