Local 376, DC 37, 4 OCB2d 58 (BCB 2011)

(IP) (Docket No. BCB-2917-10).

Summary of Decision: The Union alleges that DEP violated NYCCBL § 12-306 (a)(1) and (3) by bringing disciplinary charges against an employee in retaliation for conveying complaints to management in his role as shop steward. DEP contends that the Union failed to establish a *prima facie* case because the employee did not engage in protected union activity, it did not have knowledge that the employee was a shop steward, and the Union failed to demonstrate a causal link between the alleged protected activity and DEP's alleged retaliatory action. DEP also asserts that, even if the Union established a *prima facie* case, it had a legitimate business reason for bringing disciplinary charges. The Board finds that a *prima facie* case was not established. Accordingly, the Board denied the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 376, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

DECISION AND ORDER

Petitioner Local 376, District Council 37, AFSCME, AFL-CIO ("Union") filed a Verified Improper Practice Petition on December 15, 2010 against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP"). The Union alleges that DEP violated § 12-306(a)(1) and (3) of the New York City Collective

Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by bringing disciplinary charges against DEP employee Fitzroy Augustus in retaliation for conveying employee complaints in his capacity as shop steward to Richard Quick, DEP's Superintendent of Water and Sewer Systems. DEP argues that Augustus' conversation with Quick is not protected union activity and that, even if the Board finds that it is protected, Quick had no knowledge that Augustus was the Union's shop steward. DEP contends that the Union has not established a causal link between the alleged protected Union activity and the issuance of disciplinary charges. Finally, DEP asserts that to the extent the Union has established a *prima facie* claim, DEP has proffered a legitimate business reason for its actions. This Board finds that a *prima facie* case was not established. Accordingly, the Petition was denied.

BACKGROUND

The Trial Examiner held one day of hearings and found that the totality of the record established the following relevant facts.

The Union is an employee organization certified to represent employees in various titles, including that of Construction Laborer. Augustus has been employed by DEP as a Construction Laborer since February 5, 2001, and was the Union shop steward at DEP's Remsen Avenue repair yard at the time of the relevant events. Quick has worked at DEP for over 30 years and has been the night manager at DEP's Bureau of Water and Sewer Operations for the 4 p.m. to midnight shift since 1996. During his shift, Quick is in charge of all crews in the field in the five boroughs, including anyone repairing water mains and sewers. Quick's job is to monitor crews as they work to make

sure they operate safely and follow DEP rules and regulations. He also acts as a DEP liaison at emergency sites.

On August 10, 2010, Augustus was working the 4 p.m. to midnight shift at a jobsite located at North Conduit and Lincoln Avenues in Brooklyn. At approximately 7:15 p.m., Quick arrived at the job site. He approached Augustus and two other laborers, Anthony Sanfilippo and Roy Viechweg, who were repairing a catch basin together on the site. Quick complimented the laborers on the job they were doing.

Augustus then proceeded to raise a series of concerns with Quick pertaining to working conditions and deficiencies in training and equipment.[1] He testified regarding some of the issues he raised:

> So I tell [Quick] we had a little concern because we aren't getting enough time to do the laundry. So he tell me we're not supposed to be doing any laundry.
>
> I said, [w]ell, if we're not supposed to be doing any laundry, why would they give us a washer and a dryer.
>
> And I tell him about like some of the tools that we have, like some of the tools that we have are like the wrong tools, and it wouldn't make any sense. . . .
>
> I asked him, you know, how comes DEP doesn't have like a training facility, because a lot of these guys that come on the job have no clue, you know, what is going on.

(Tr. 18-20). Quick responded to some of the concerns with comments. For example, in response to a complaint about working conditions, Quick testified that he told Augustus that he had worked for the City for 30 years and felt that the conditions now are safer

[1] On cross-examination, Augustus confirmed that Quick was not his direct supervisor, but stated that he had raised his concerns with Quick because he knew that Quick was "in charge of the five boroughs." (Tr. 23).

than when he started working. (Tr. 41; City Ex. 1). In response to Augustus' concern about having to work outside in the rain, Quick responded that "we were not office people, we work outside in the field." (Tr. 40). To other concerns, Quick responded by stating that he couldn't discuss the issues because it wasn't his "realm of responsibility." (Tr. 33). Regarding those concerns, Quick testified that he told Augustus that "he should go to [the] union, address them to the union so they could be addressed with management." (Tr. 44).[2]

The parties disagree as to what occurred thereafter between Quick and the laborers, and the testimony reflects the parties' divergent accounts of the remainder of the encounter. Quick testified that at some point thereafter the conversation began to turn "offensive." (Tr. 33). He stated that Augustus told him that all the supervisors at DEP headquarters were "bad laborers," and that Quick was a "political hack and appointee." (Tr. 34). Quick asked Augustus multiple times to stop attacking him because he was not there to be offended "about how I got my job or who gave me my job." (Tr. 33-34). He testified that Augustus refused to stop. As Quick started to walk away, Sanfilippo called him a series of names, including "political bitch." (Tr. 34-35; City Ex. 1). He testified that Sanfilippo told him, "Why don't you just get off the job and get that shit off your face." (Tr. 35). Quick told the laborers that it was inappropriate to give a superintendent orders and that he did not like the language they were using. (City Ex. 1). He informed

[2] There is contradictory testimony on the subject of whether Augustus told Quick that he was the shop steward during the course of the conversation. Augustus testified that he told Quick at the onset of their conversation that he had "a couple of questions as the shop steward of Remsen Avenue." (Tr. 20). Quick denied this, claiming that Augustus never identified himself as a shop steward and that he did not know Augustus was the shop steward at the time of the encounter. (Tr. 46).

the laborers that he was not leaving because they were telling him to leave, but because he was "being offended" and that he was not what he was there for. (Tr. 35).

Shortly thereafter, Quick contacted James Jefferson, one of the supervisors on the jobsite. Quick asked Jefferson whether there was something going on that day that would cause a work crew to "jump me." (Tr. 36). Jefferson responded that, to the best of his knowledge, he didn't know of anything that would have precipitated the incident. Quick subsequently spoke to the borough manager as well as his immediate supervisor about the incident.

Quick documented his recollection of the incident and submitted it to his supervisor the following day, on August 11, 2010, as part of a disciplinary complaint against Augustus. Quick's documentation provides a detailed account of the events that occurred during the encounter.

In his testimony, Augustus contradicted Quick's account of the remainder of the encounter. Augustus testified that he never called Quick a "political hack" or accused him of getting his job as a political appointment. (Tr. 21). In response to the question of whether he ever mentioned laborers at LeFrak, DEP's headquarters, Augustus responded, "Why would I talk about laborers at Le[F]rak when there's no laborers at Le[F]rak?" (*Id.*). When asked whether Sanfilippo made any of the alleged comments to Quick, Augustus generally could not recall whether Sanfilippo made them. However, he conceded that Sanfilippo was subsequently disciplined by DEP for his comments and had accepted DEP's recommended penalty.

On or about August 27, 2010, DEP issued a Notice and Statement of Charges ("Notice") against Augustus. The Notice provides that Augustus violated Rule E. 6 of the Uniform Code of Discipline ("Code"), and states:

> On or about August 10, 2010, you did engage in conduct prejudicial to good order and discipline; in that you did use improper language toward a Superior, specifically:
>
> Specification 1: You did say those "laborers in Lefrak were bad laborers, and that is how they got their jobs" or words to that effect.
>
> Specification 2: You did tell your superior that he "got his job as a political appointment" or words to that effect[.]
>
> Specification 3: You did call your superior a "political hack" or words to that effect.

(Ans. Ex. 3).

On September 22, 2010, DEP held an informal conference at which it sustained the charges in the Notice and recommended a penalty of three days suspension without pay. On December 14, 2010, DEP held a Step II hearing pertaining to the charges. DEP is holding its decision on the charges in abeyance pending the outcome of the instant matter.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that, under the NYCCBL, an activity is protected if it is related either directly or indirectly to the employment relationship and consists of participation in the activities of an employee organization. It contends that Augustus was engaged in

protected Union activity during the course of his conversation with Quick when he conveyed grievances on behalf of his fellow workers in his role as shop steward. The Union alleges that DEP violated NYCCBL § 12-306(a)(1) and (3) when it disciplined Augustus in retaliation for this protected activity. [3]

According to the Union, Augustus' entire conversation with Quick, including his "supposed reflections on the competence of DEP officials" is protected Union speech. (Pet. Brief at 6). It contends that it is black-letter labor relations law that a shop steward may not be disciplined for using "strong, even insulting, abusive, or obscene language" in a grievance presentation. (Pet. Brief at 1). The Union asserts that decisions construing § 158(a)(3) of the National Labor Relations Act ("NLRA"), which is nearly identical to NYCCBL § 12-306(a)(3), have long held that in order for a shop steward's grievance presentation to lose statutory protection, his behavior must be "so violent, or of such an

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[3] NYCCBL § 12-306(a) 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 pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any of all of such activities.

obnoxious character, as to render him wholly unfit for further service." *Clara Barton Terrance Convalescent Center*, 225 NLRB 1028, 1034 (1976).[4] It cites numerous National Labor Relations Board ("NLRB") decisions supporting this standard. The Union asserts that the New York Public Employment Relations Board's ("PERB") caselaw reflects a similar standard.

The Union contends that, even if Augustus called Quick a "political hack," told him that he "got his job as a political appointment," and that "laborers in Lefrak were bad laborers, and that is how they got their jobs," or words to that effect, this language does not even approach the standard for egregious behavior relied upon by the NLRB. (Pet. Brief at 6). Moreover, the fact that Quick could not even provide the precise language used by Augustus weakens DEP's charge. Therefore, such comments may not form the basis for discipline.

As a remedy, the Union seeks an order directing the DEP to expunge the disciplinary charges from Augustus' record. It further requests that the Board make Augustus whole in every way, including but not limited to compensation for any lost pay or benefits arising from the incidents at issue in this proceeding.

City's Position

The City argues that the Board should deny the Union's claim in its entirety because it has failed to establish a *prima facie* case of retaliation. It contends that, to the extent the Board finds that the Union established a *prima facie* claim, the City has

[4] Section 158(a)(3) of the NLRA provides, in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination . . . to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

demonstrated that DEP would have taken disciplinary action against Augustus even in the absence of protected activity.

The City asserts that Augustus' interaction with Quick on August 10, 2010, does not constitute activity protected by the NYCCBL because Augustus never voiced any complaints regarding working conditions in an "official union capacity." (Resp. Brief at 11). In addition, Quick had no knowledge that Augustus was a shop steward at the time of the interaction and, according to Quick, Augustus never articulated that he was speaking on behalf of the Union or in his role as shop steward. The City additionally argues that the Union has failed to produce probative facts relating to whether Augustus was in fact a shop steward at the time of the incident in question.

The City contends that the Union also cannot establish a *prima facie* case because it has failed to demonstrate the requisite causal link between the alleged protected Union activity and DEP's decision to issue disciplinary charges against Augustus. Contrary to the Board's requirements, the Union did not allege any probative facts or offer evidence that the disciplinary action taken by DEP was improperly motivated. Instead, it provided only "speculative conclusory allegations" that DEP's action was taken in retaliation for Union activity. (Resp. Brief at 19). In fact, the City contends, Quick was "responsive and mindful" of any alleged Union concerns by referring Augustus to proper personnel to address his complaints. (Resp. Brief at 20).

Finally, the City argues that even if the Board finds that the Union has established a *prima facie* case, legitimate business reasons would have caused DEP to take disciplinary action in the absence of the protected activity. DEP has a "common practice" of taking disciplinary action for insubordinate, offensive comments to a

supervisor and failure to obey a supervisor's directives. (Resp. Brief at 22). Moreover, DEP's Uniform Code of Discipline authorizes DEP to discipline an employee for engaging in conduct "prejudicial to good order and discipline." (Ans. ¶ 72).

The City argues that it presented factual evidence to demonstrate that the encounter with Augustus presented an "offensive and uncomfortable" environment for Quick. (Resp. Brief at 21). DEP issued charges against Augustus for his insubordination and the "insubordinate, offensive and confrontational" comments he made to Quick. In addition to the comments, Augustus "encouraged and set up the conditions" for Sanfilippo to be insubordinate to Quick, and defied a lawful order of a superior when he continued to use "improper and offensive" language even after Quick repeatedly asked him to stop. (*Id.* at 23-24).[5] Quick wrote a report contemporaneous to the incident that supported his testimony. The testimony and the report together demonstrate that Quick acted in a "professional supervisory manner." (*Id.*).

DISCUSSION

The issue before the Board is whether DEP discriminated or retaliated against Augustus as a result of his Union activity, in violation of NYCCBL § 12-306(a)(1) and (3). To determine whether an alleged action constitutes impermissible discrimination or retaliation based on anti-union animus, the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca,* 18 PERB ¶ 3012 (1985), and its

[5] The City also argues that the Union failed to establish an independent violation of NYCCBL § 12-306(a)(1). While the Union alleged violations of NYCCBL § 12-306(a)(1) and (3) in its Petition, it never asserted an independent violation of NYCCBL § 12-306(a)(1).

progeny. The test provides that, to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, the 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 Local 1181, CWA*, 3 OCB2d 23 (BCB 2010).

If a petitioner alleges sufficient facts concerning these two elements to establish a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements, or 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*, 77 OCB 35, at 18 (BCB 2006).

With regard to the first prong of the *Bowman* test, the petitioner must show that the union activity was protected and also that management had knowledge of that activity. We have long held that an activity that the Board would deem to fall within the protection of NYCCBL § 12-305 must be related, even if indirectly, to the employment relationship between the City and bargaining unit employees and must be in furtherance of the collective welfare of employees. *See Local 1087, DC 37*, 1 OCB2d 44, at 26 (BCB 2008); *COBA*, 53 OCB 17, at 11 (BCB 1994). If management has knowledge of the protected union activity, then the first prong of the *prima facie* case is met. *See Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004).

We find that Augustus engaged in protected Union activity when he raised workplace issues with Quick on behalf of his fellow laborers in his capacity as shop steward. It is undisputed that the substantive issues he raised pertained to the laborers'

working conditions, including insufficient time allotted for washing clothing, insufficient equipment, and lack of proper training.

We also find that management was aware of Augustus' protected Union activity. Although Quick may not have known of Augustus' status as shop steward at the time of the August 10, 2010 encounter, he identified the complaints Augustus raised during the course of their conversation as labor-management issues and referred Augustus to his Union for their resolution. Thus, he was aware of the protected nature of Augustus' activity. Accordingly, we are satisfied that management had knowledge of the protected Union activity.

The City asserts, however, that it did not discipline Augustus for raising workplace issues but rather because of the derogatory remarks that he made to Quick subsequent to their conversation about working conditions. Augustus denied that he made any derogatory remarks to Quick. On the record hearing, we credit Quick's version of the remainder of the encounter over Augustus' version of the same event. Quick documented the encounter shortly after it occurred and he submitted his written recollection of the encounter to his supervisor the following day as part of a disciplinary complaint against Augustus and Sanfilippo. The writing provides a detailed account of the incident. Quick's testimony during the hearing was similarly detailed and consistent with his written record of the incident.

On the other hand, Augustus appeared to have a selective memory of the encounter's critical events. He testified evasively regarding the derogatory remarks that he and Sanfilippo made to Quick. When questioned on cross-examination about these remarks, Augustus denied having made any of them. When questioned about remarks

made by Sanfilippo for which Sanfilippo was later disciplined, Augustus testified that he could not recall whether Sanfilippo made them. However, Augustus was able to fully recount the portion of the conversation in which he relayed his complaints about working conditions to Quick. He also acknowledged that Sanfilippo had been brought up on DEP disciplinary charges for making inappropriate remarks and accepted the recommended penalty.

Accordingly, we find that after raising concerns about working conditions to Quick, Augustus did call Quick a "political hack," and did tell Quick that he "got his job as a political appointment," and that "laborers in Lefrak were bad laborers, and that is how they got their jobs." Further, based on the particular facts and circumstances in this record, we disagree with the Union's conclusion that Augustus' derogatory remarks cannot form the basis for discipline.

We are mindful of persuasive authority giving a broad scope to what constitutes protected employee speech under state and federal labor law. *See, e.g., Village of Scotia*, 29 PERB ¶ 3071 (1996) ("We have protected a range of employee speech because we believe firmly that the labor relations process must tolerate robust debate of employment issues, even if occasionally intemperate."); *Hawthorne Mazda, Inc.*, 251 NLRB 313, 319-20 (1980) (the "use of strong language in the course of protected activities supplies no legal justification for disciplining an employee except in those circumstances where the conduct is flagrant or egregious"). Nonetheless, it is not necessarily the specific words used, but the context in which the remarks are made that is often dispositive of when an employee's comments are considered protected. Accordingly, PERB has emphasized the importance of examining the specific facts and circumstances surrounding the conduct at

issue when making this determination. See *City of Utica*, 33 PERB ¶ 3039 (2000) ("We are cognizant of the need to consider the context and the recipients of the words and the message conveyed to them in determining whether statements are protected by the [Taylor] Act.") (citing *Village of Scotia*, 29 PERB ¶ 3071 (1996)).

PERB has held that the "fundamental right of an employee to participate in the activities of the employee organization of his choosing and the employer[']s right to maintain order and respect must be balanced one against the other." *N.Y.C. Transit Auth.*, 34 PERB ¶ 3025 (2001). In *New York City Transit Authority*, PERB expounded that:

> On occasion, the [union] representative may engage in impulsive behavior that an employer would not have to tolerate from an employee who is engaged in his normal tasks. Although an employer may not ordinarily discipline the employee representative for such behavior, there are circumstances in which overzealous behavior on his part may constitute misconduct. Consequently, inappropriate conduct, even if part of a union activity which is protected, will not shield an employee from its consequences.

34 PERB ¶ 3025 (2001) (quotation and citation omitted).[6]

Moreover, PERB has clarified that conduct engaged in by an employee may be used to that employee's disadvantage, even when it occurs in a protected forum. *See State of N.Y. (OMRDD)*, 24 PERB ¶ 3036 (1991) (holding that employee's articulated opposition to program administered by his employer is protected speech but may be considered in determining whether to eliminate his position if commitment to program is

[6] *See also Cibao Meat Products*, 338 NLRB 934, 935 (2003) (an "employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect"); *North American Refractories Co.*, 331 NLRB 1640, 2000 WL 1449838, at **6-7 (N.L.R.B.) (2000) (distinguishing between swear words used to "color conversation" and "angry use of those words" directed at someone in "attack fashion," the latter of which the employee used while engaging in activity "ordinarily protected under Section 7 of the [NLRA]," and consequently forfeited that protection).

necessary part of job). Thus, certain inappropriate activities that occur in the context of otherwise protected activity may provide the basis for disciplinary action.

PERB's reasoning is applicable to the instant scenario. Augustus, *sua sponte*, raised complaints with Quick at the worksite regarding various employee working conditions. Quick clarified that he was unqualified to assist him and directed Augustus to speak with the Union. Augustus thereafter proceeded to lash out against Quick with a series of derogatory and insulting remarks. Critically, Quick told the laborers that he was offended by their remarks and asked them to stop attacking him, but they ignored his request and continued to insult him until he left the premises.

There is no evidence in the record that Quick said or did anything to any of the laborers to provoke the type of response he received.[7] There also exists no allegation that Quick expressed hostility or demonstrated any improper behavior towards the laborers before or during the course of their conversation. We cannot find that this conduct furthers the collective welfare of the Union's employees or that it has any relation to the collective bargaining process. Nor can we find any justification for this conduct under the circumstances in which it occurred. Taken together on this particular record, the facts and circumstances presented are sufficient to persuade the Board that Augustus' remarks, while made in the context of protected Union activity, fail to protect him against the consequences of his actions. The discipline of Augustus was not based on his protected activity, but instead on his derogatory comments to his supervisor. Because we find that a *prima facie* case has not been established, our inquiry ends here. We therefore find no

[7] Indeed, Quick, apparently confused by the response, subsequently asked Jefferson, one of the jobsite supervisors, what might have prompted the laborers to "jump me." (Tr. 36).

violation of NYCCBL § 12-306(a)(1) and (3) and dismiss the Union's Improper Practice Petition.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the Improper Practice Petition filed by Local 376, District Council 37, AFSCME, AFL-CIO, docketed as BCB-2917-10, be, and the same hereby is, denied.

Dated: November 16, 2011
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER