L.1180, CWA (behalf of Nicoll) v. City, et. al, 45 OCB 24 (BCB 1990) [Decision No. B-24-90 (IP)]

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

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1180, on Behalf of MARY NICOLL,

Petitioners, DECISION NO. B-24-90

-and- DOCKET NO. BCB-1136-89

THE CITY OF NEW YORK and THE NEW
YORK CITY TEACHERS' RETIREMENT
SYSTEM,

Respondents.
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DECISION AND ORDER

On February 8, 1989, the Communications Workers of America, Local 1180 ("CWA" or "the Union"), filed a verified improper practice petition on behalf of its member, Mary Nicoll, against the City of New York ("the City") and the New York City Teachers' Retirement System ("TRS" or "the Agency"). The petition, which was amended on February 10, 1989, asserts that Donald Miller, Executive Director, TRS, committed an improper practice in violation of the New York City Collective Bargaining Law ("NYCCBL") when he did not promote Nicoll allegedly because of her union activities.[1]

The Agency, through its representative, the Office of Municipal Labor Relations ("OMLR"), filed a verified answer to the petition on March 13, 1989. The Union, after receiving several extensions of time with the consent of OMLR, filed a verified reply on July 26, 1989.

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[1] The original petition alleged that Claire Moses, Assistant Deputy Director, TRS, committed the improper practice.

On December 12, 1989, a hearing was held before a Trial Examiner designated by the Board of Collective Bargaining ("Board"), 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. Post-hearing briefs were submitted in February, 1990.

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

Background

Petitioner Nicoll, employed by the Agency since 1969, was promoted to Principal Administrative Associate ("PAA"), Level I in 1983. Nicoll served in several functional titles within that civil service title since 1983, i.e., Supervisor of Death Benefits (1983-86); Correspondence Typist (1986-87);[2] Mail Clerk (1987-88). In January 1988, Nicoll was asked to assume the responsibilities previously assigned to an Office Associate, who had resigned on three days notice, to perform the duties of the Agency's Disability Division Administrator.

There is no dispute that Nicoll's immediate predecessor, who held that position for nine years, left the Disability Division with a backlog of work, in a disorganized state and that the existing procedure manual for the Division was both incomplete and out-of-date. However, it is also undisputed that Miller initially told Nicoll that he thought the position could evolve

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[2] Nicoll testified that she took a maternity leave of absence in February, 1986 and was placed in the Correspondence Department as a Typist upon her return to work in September 1986.

into a part-time job once the Division was "straightened out" and that, in the meantime, she should bring any questions she had concerning the operation to him. The testimony indicates that Nicoll often found it necessary to consult with Miller and that within a few weeks, Miller designated Claire Moses, an Assistant Deputy Director of the Agency, as Nicoll's resource person. Allegedly, Moses assured Nicoll that together, they would salvage the department.

In or about February 1988, Nicoll was elected a CWA Shop Steward, representing approximately 10 PAAs employed by the TRS. In early April, Nicoll met individually with Miller to discuss promotional and career opportunities for female PAAs at the Agency prompted, in part, by rumors that a PAA, Level III position had been filled by a provisional appointee who had less seniority than other permanent PAAs on staff (and who also happened to be a male). Approximately one week later, Miller met with nine of the ten female PAAs on staff, at their request, to discuss the same issues.

No satisfactory resolution of the matter having been reached, on May 19, 1988, Nicoll filed a Step I group grievance on behalf of herself and eight other female employees holding the title PAA, Level I,[3] alleging that the Agency failed to post a promotional vacancy in violation of Article XI, Section 1 of the Citywide Agreement (Union Ex. No. 3).[4] Miller denied the

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[3] Nicoll testified that because the tenth PAA, Level I was a provisional appointee, she was fearful of participating in the group grievance.

[4] Article XI, Section 1 of the Citywide Agreement provides:

> When vacancies in promotional titles covered by this Agreement are authorized to be filled by the

(continued...)

grievance in a letter dated May 24, 1988 (Union Ex. No. 4), in which he maintained that "[m]oving from one level to another level in the same title is not considered a promotion." The grievance was not appealed to Step II.

Lyne Payne, a Grievance Representative employed by CWA, testified that because Nicoll and the CWA Grievance Representative handling the matter at that time were both new, they were unaware that an appeal to Step II must be presented in writing within five (5) days of receipt of the Step I determination.[5] Payne stated further that the Union, realizing that the oversight precluded them from pursuing the matter in the arbitral forum, decided to file a discrimination claim with the Commission on Human Rights on December 12, 1988. The parties agree that the matter is still pending before that forum.

The Union alleges that the following sequence of events establish that a pattern of differential and retaliatory treatment toward Nicoll emerged after Miller became aware of her Shop Steward status. There is no dispute that she did not quickly adapt to the demands of her new position as Disability Division Administrator. Nicoll testified that because of the lack of

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[4](...continued)
appropriate body and the agency with such vacancies decides to fill them, a notice of such vacancies shall be posted in all relevant areas of the agency involved at least five (5) working days prior to filling except when such vacancies are to be filled on an emergency basis. Present agency agreement on this subject shall not be affected by this Section.

[5] See Article XV, Section 2, Step II of the Citywide Agreement.

training, resource material, and the constant flow of new applications, she could neither keep up with current work nor address the backlog. On May 17, 1988, Nicoll submitted the following memorandum to Moses, with a copy to Miller (Union Ex. No. 5):

> This memo is to inform you that a backlog on [sic] disability retirement cases is being greatly increased due to a lack of specific procedures and information concerning problem cases.
>
> I feel that disability retirements should be completed on a timely bases [sic]. However, Since I have received very little training in the processing of these disability retirements, I am unable to meet the demands of this assignment [emphasis in original].
>
> Lack of training and correct procedures to follow has caused me great stress and concern. I have always completed my assignments competently and accurately.
>
> When I accepted this assignment, I was advised that I would receive specific instruction and procedures to follow so that eventually this assignment would turn into a "part-time job" and I would be able to take on other tasks as well. I find this statement to be greatly exaggerated since I am faced with many unanswerable problems. Under these circumstances, I am now unable to comply with Mr. Miller's request for weekly reports, as stated in his memo dated May 11, 1988, since the major part of my day is spent on problem cases.
>
> I would like to meet with you so that specific procedures can be worked out and how I can reduce the tremendous backlog.

A meeting was held on May 18th. Nicoll testified that soon after the meeting started, she became upset by what she characterized as Miller's "intimidating" demeanor, which was the reason why she "didn't say much for the rest of the meeting." Nicoll's handwritten account of this meeting (Union Ex. No. 6), reads as follows:

> Mr. Miller appeared to be very annoyed about the memo I sent him. He asked me how to clear up the backlog. I told him I was looking for answers from him on how to do this. He intimidated me, made me feel very stupid and I hate to admit it, but twice I

> almost came to tears. It was not what he said to me, but how he said it. He repeatedly questioned me on why I did not know everything since I had written materials, and that everything was so simple and plain to understand. ... At one point, I said to Mr. Miller "You go right for the juglar [sic]." He glared at me and said "You're damn straight." Mr. Miller loudly demanded to know if I wanted out of the division and I informed him that I wanted to stay and try and make it work.

The following memorandum dated May 24, 1988 (Union Ex. No. 7), was prepared by Miller and placed in Nicoll's personnel file:

> On May 18, 1988 a meeting was held for the purpose of discussing Mrs. Nicoll's memorandum of May 17, 1988.
>
> * * *
>
> It should be noted that despite Mrs. Nicoll's contentions concerning lack of training, what I believe to be a sufficient time and instruction have been provided by Mrs. Moses and myself in this effort. Mrs. Nicoll has been provided with a procedure manual and has had other written materials available to her for reference. With regard to these materials Mrs. Nicoll in response to certain questions displayed a poor knowledge of even the fundamentals of our benefit plans.
>
> My interpretation of certain remarks made by Mrs. Nicoll is that she has no desire or intention to expand herself or to broaden her knowledge in the operations of the Medical Board or disability retirement benefits. Her attitude appears to be that if a matter involves anything but the absolute minimum routine; it becomes a problem that Mrs. Moses and/or myself are responsible for the solution.
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> It is quite true that Mrs. Nicoll was given this assignment with short notice. It is also true that the system used by her predecessor is sloppy and disorganized. However, one would certainly expect Mrs. Nicoll a Principal Administrative Associate, in title, would have been better acclamated [sic] at this point and would have developed a plan of action.
>
> In response to my several inquiries to Mrs. Nicoll as to how we could resolve these problems Mrs. Nicoll continued to reply "I don't know."
>
> * * *
>
> Overall, it seems to me that Mrs. Nicoll is floundering in this situation. She was asked by me directly if she wanted to be relieved of these duties. She replied that she did not want that.

She stated that she likes the assignment and wants to do a good job.

This situation at this point is one of mutual disappointment. Mrs. Nicoll feels that she is not receiving the proper support level. Mrs. Nicoll has not been able to understand fundamental functions. She raises the same questions over and over. She has not displayed the ability to organize the matters before her and gives the impression of being overwhelmed. In certain respects her attitude is poor. I believe this is related to a Step I grievance procedure initiated by a number of our Principal Administrative Associates including Mrs. Nicoll.

... I agreed that Mrs. Nicoll would need clerical assistance to assist her in dissolving the backlogs and organizing the division. I will see to acquiring this assistance. We also agree that in the longer range we would see to Personal Computer applications for the Medical Board and its disability retirements.

I believe that this entire solution bears continual scrutiny. It is a difficult assignment to begin with. It has been complicated by other matters.

On May 27, 1988, Nicoll acknowledged receipt of Miller's May 24th memorandum and submitted the following in rebuttal, to Miller (Union Ex. No. 8):

This memo is in reply to your memo dated May 24, 1988.

I must dispute your accusation that I am unable to do my job assignment. When I took over this assignment, I was informed that I would have proper training. Most times when I approached you for answers, I was made to feel that I was bothering you.

In my memo to you dated 3/14/88, I had offered to work through my lunch hour to try and clear up the backlog created in this area. I was not permitted to do this. Does this sound like an uncooperative person who doesn't want to extend herself or broaden her knowledge? It may appear to you that my attitude is just the 'absolute minimum' but in reality I am trying and intend to keep trying to understand with the minimum instructions I have been given.

* * *

The Step I Grievance procedure has absolutely nothing to do with my performance. I want to continue, as I have done in the

> past, to complete all my tasks with utmost accuracy and work well with my co-workers and Executive Staff.

* * *

It is the Union's contention that Miller's hostility toward Nicoll was directly related to her union activity, evidenced by the fact that up until the time she had become Shop Steward, they enjoyed a good personal and professional rapport. The Union alleges that only after Nicoll attempted to address the issues raised in the group grievance, concerning career advancement for female PAAs at the Agency, did their relationship "sour" (Tr. 64-65, 80-81).

In addition to Miller's alleged hostility, Nicoll claims that other agents of TRS management also have subjected her to disparate treatment since she became Shop Steward. Specifically, Nicoll alleges that Lillian McBride, the Agency's head of Personnel, "unquestionabl[y] harass[ed]" Nicoll when she delayed giving her Tasks and Standards in May 1988 allegedly because McBride found out that Nicoll was going to file the group grievance (Union Ex. Nos. 9 & 10) (Tr. 64-65, 80-81); and that Stan Kessock, the Deputy Director and second in command to Miller, departed from the Agency's usual practice of allowing a co-worker to escort home an employee who becomes ill on the job, when Nicoll became ill in June 1988 (Tr. 62-64).

Nicoll testified that she had the Division running smoothly by September, 1988 (Tr. 68). Miller, in rebuttal, testified it was not until 1989, when the Agency hired someone to work with Nicoll, that the Division got to the point of "operating at least satisfactorily" (Tr. 108).

CWA contends that anti-union animus toward Nicoll became manifest when on October 7, 1988, Miller issued a memorandum to all TRS Staff, announcing

the Agency's decision to grant promotions and/or raises to nine TRS employees (Union Ex. Nos. 11 & 12).[6] The memo reads as follows:

> I am pleased to announce our successful efforts in upgrading titles and providing merit increases for several members of the staff to be implemented on the next payroll. These individuals, named below, have distinguished themselves by their outstanding job performance and/or willingness and ability to take on increasingly responsible and difficult duties.
>
> In addition to the individuals named below, we recognize that there are a number of other staff members deserving of similar recognition and reward. I expect that, over time, with continued careful management of our always tight agency budget and with the needed cooperation of the Mayors' Office, the Office of Management and Budget and the Department of Personnel, we will continue our success in this area for our deserving staff members.
>
> The individuals listed have received either a Promotion/Title Upgrade or a Merit Increase. These individuals will also receive a personalized memorandum from Lillian McBride, Director of Administration, which will detail the particulars of the upgrade or merit increase in each case. I congratulate each one of them...[nine names were listed].

Of the individuals listed in the October 7th memo, five of the nine PAAs who had filed the group grievance in May 1988, had received an upgrade to PAA, Level II or PAA, Level III. Nicoll was not among this group of five. Of the five PAAs that were upgraded, Miller testified that each had taken on more responsibilities and displayed problem-solving skills that were worthy of recognition (Tr. 129-133). The record also reveals that since the October 7th memo issued, Miller has offered either an upgrade or more money in exchange for taking on more duties to two of the remaining three PAAs (not counting Nicoll) who had participated in the group grievance (Tr. 90). The third PAA has retired. Nicoll stated that she suspected, since she is the only

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[6] Union Ex. Nos. 11 & 12 are two versions of the same memorandum and are not significantly different from one another.

participant in the group grievance who had not been upgraded, or at least been offered an upgrade, that she was singled out on account of her union activity. This belief, Nicoll testified, was reinforced when in November 1988, she overheard Kessock tell a secretary:

> The way Don [Miller] feels about Mary, it would be a million years before she gets anything (Tr. 50-51).

As further evidence of Miller's anti-union animus toward her, Nicoll submits that in January 1989, Moses confided in her and said:

> You know, Mary, Donald told me if you hadn't started with the Union business, you would have gotten your raise (Tr. 52).

On February 10, 1989, the Union filed the instant petition alleging that Miller committed an improper practice in violation of Sections 12-306a(1) and 12-306a(3) of the NYCCBL.[7] As a remedy, CWA seeks a Board order directing the Agency to (1) upgrade Nicoll to PAA, Level II retroactive to October 7, 1988; (2) cease and desist from violating the NYCCBL in the manner alleged; and (3) direct Miller to apologize to Nicoll.

Positions of the Parties

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[7] Sections 12-306a(1) and 12-306a(3) of the NYCCBL provide:

> a. **Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
>
> > (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> >
> > (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;

Petitioner

CWA contends that the record clearly establishes that Nicoll was retaliated against because of her union activities. Specifically, the Union points to the following circumstances:

1. Miller displayed confidence in Nicoll's abilities by appointing her to a position of greater responsibility in January 1988. The Union alleges that "[e]arly on Donald Miller told Mary Nicoll that she could be a star in the position."

2. In April 1988, in her first opportunity to act as Shop Steward, Nicoll sought to address a perceived lack of promotional opportunities for female PAAs employed by the Agency. Following this effort, CWA contends, there was an abrupt change in Miller's attitude toward Nicoll.

3. Miller's criticism of Nicoll's job performance in May 1988, CWA alleges, "was clouded by his hostility and displeasure with her union involvement." The Union points to Miller's May 24th memo, which alludes to the group grievance she filed on behalf of nine PAAs at the Agency.

4. On October 7, 1988, Miller announced the upgrade of five of the nine PAAs involved in the group grievance. Two of the remaining four have been offered an upgrade since October 1988. The third retired. The Union maintains that Nicoll, the only PAA of the nine still on staff who had not been upgraded or offered an upgrade, was passed over in retaliation for having initiated the group grievance.

The Union argues that, not only does this chain of events support the conclusion that Miller harbored anti-union animus toward Nicoll, but that the behavior and statements by other members of the Executive Staff of the Agency should be considered probative of Miller's motivation. In this connection, CWA attributes a statement allegedly made by Kessock, the Deputy Executive Director of the Agency, to a third party, as evidence of Miller's hostility toward Nicoll. Finally, CWA submits that Miller admitted to Moses, his Deputy Director for Operations, that Nicoll would have gotten a raise "if she hadn't

started with this union business." The Union asserts that these statements should be accorded great weight inasmuch as Kessock and Moses were privy to discussions which led to the upgrades and merit increases Miller announced on October 7, 1988.

Based on the totality of the circumstances, CWA contends that it has met its burden to establish that Miller's decision to deny Nicoll an upgrade was motivated by a desire to punish her for engaging in protected union activity.

Respondent

The City advances two arguments in support of its position that the petition should be dismissed. First, it asserts that, applying the test adopted by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985), and by this Board in Decision Nos. B-46-88 and B-51-87, petitioner has failed to establish a prima facie case under the NYCCBL. According to the City, the Union has failed to allege facts, which if proven, would demonstrate a causal connection between Nicoll's union activities and Miller's decision not to reward her work performance with an upgrade or merit increase. Such causal connection, respondent argues, must be based upon statements of probative facts; not on the recital of unsubstantiated hearsay as was submitted by petitioner in this matter.

The City submits that the record reflects numerous difficulties with the operation of the Disability Division after Nicoll's appointment to that section, including Nicoll's inability to effectively supervise its operation without the close intervention of management and the hiring of clerical assistance. The City argues that other than the recitation of hearsay

statements allegedly made by Kessock and Moses, the Union offers no competent evidence to establish improper motive or to rebut Miller's testimony concerning his assessment of Nicoll's work performance.

Second, the City contends that, even assuming, arguendo, that the Union has established a prima facie case, the petition should be dismissed because Miller's decision not to upgrade Nicoll would have been the same even in the absence of union activity. The City submits that the question at hand is not whether Miller's actions were correct, but whether Miller's decision, in the final analysis, was based on lawful considerations. In this connection, the City asserts that Miller's unrefuted testimony concerning Nicoll's lack of initiative, creativity and problem-solving skills, her less than outstanding work performance, and tight budgetary constraints clearly outweigh the unsubstantiated hearsay offered by petitioner.

For the foregoing reasons, the City seeks an order dismissing the petition in its entirety.

Discussion

In cases in which a violation of Section 12-306a(1) and 12-306a(3) of the NYCCBL is alleged, we have applied the test adopted by PERB in City of Salamanca,[8] which provides that the petitioner has the burden of showing that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

If the petitioner succeeds in establishing the above, the burden will shift to the employer to show that the same action would have been taken even in the absence of the protected conduct. In other words, if the petitioner satisfies both parts of this test, it will have made a

> ... prima facie case of improper motivation, [and] the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons.[9]

In the instant matter, the evidence clearly establishes that as early as April 1988, Miller was aware of Nicoll's role in advancing the group grievance she ultimately filed on May 19, 1988, on behalf of nine PAAs employed by the Agency. Thus, there is no dispute that the first element of the above test is satisfied. At issue is whether, as the Union alleges, Nicoll's union activity was a motivating factor in Miller's decision not to upgrade her in October 1988.

CWA asserts, inter alia, that Miller's animus toward Nicoll is evidenced by an otherwise inexplicable change in his demeanor, harsh criticism of her

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[8] 18 PERB ¶3012 (1985).

[9] Id., at 3027. See also, Decision Nos. B-17-89; B-7-89.

performance inconsistent with the circum-stances, and an attribution made by him that her participation in the group grievance was responsible for her poor attitude. Most telling of all, the Union contends, is the fact that Miller did not upgrade Nicoll on October 7, 1988, while similarly situated employees were upgraded or at least offered an upgrade. The City maintains that the Union's offers of proof are conclusory and carry no weight when compared with Miller's enunciated rationale for his decision. In any event, respondent argues, Nicoll's performance was undeserving of an upgrade.

In previous decisions, we have recognized that proof of improper motivation is a difficult burden to satisfy. In Decision No. B-17-89, we stated:

> Examination of whether an employee's union activity was a motivating factor in an employer's decision to act requires that we try to ascertain the employer's state of mind when the challenged decision was made. In the absence of an outright admission of improper motive, proof of this element necessarily must be circumstantial.[10]

Such offers of proof, however, necessarily must be weighed in light of all the relevant circumstances.

Based on our review of the entire record in the instant matter, we are not persuaded that the Union has demonstrated a prima facie showing that anti-union animus was a motivating factor in the denial of an upgrade to Nicoll. We base this finding on the Union's presentation of wholly circumstantial evidence, which is unsupported by either the direct evidence or testimony offered at the hearing.

Specifically, we reject the inference that Miller's demeanor during the May 18th meeting was provocative because of Nicoll's union activity. The

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[10] Decision Nos. B-17-89; B-8-89.

record amply demonstrates that Miller was, by that time, disappointed by the lack of Nicoll's progress in acclimating to the demands of the position after four months on the job, impatient with what he considered to be repetitive and routine questions, and frustrated by her failure to bring creativity and initiative to the job. The purpose of the meeting, held at Nicoll's request, was to devise solutions to operational problems. However, as both parties agree, Nicoll was noncommunicative and proposed no suggestions to resolve the issues. The fact that Miller may have felt that Nicoll's "attitude [was] poor," in part, because of her involvement in the group grievance she had filed earlier that month is not particularly supportive of the inference the Union urges. In contrast to CWA's argument on this point, under these circumstances it is also reasonable to conclude that Miller believed Nicoll's attitude "was clouded with hostility" because of the nature of the group grievance that she had been a party to.

Furthermore, Nicoll's transcript of the May 18th meeting (Union Ex. No. 6) and the correspondence that followed, dated May 24th and May 27th (Union Ex. Nos. 7 & 8, respectively), reveal that the personal rapport between Miller and Nicoll had, indeed, "soured." However, we have found that "[e]ven where the supervisor allows his personal feelings to affect his treatment of the subordinate there can be no finding of improper practice unless it can be shown that the action complained of is in specific violation of the rights granted by Section [12-305] of the NYCCBL and protected by Section [12-306]."[11] In this connection, it is also reasonable to infer that, disappointed with Nicoll's performance as Miller evidently was, his remarks

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[11] Decision No. B-30-81.

concerning her union activity (i.e., that a difficult assignment has become "complicated by other matters"), was an attempt by him to understand why she had failed to fulfill his expectations, rather than indicative of his displeasure with her union activity.

There is no dispute that when Nicoll was asked to assume the position of Administrator of the Disability Division under adverse circumstances in January 1988, Miller expressed confidence in her abilities. In fact, he offered to help her overcome the difficulties she would inevitably face in "straightening out" the Disability Division, by designating himself and then Moses as Nicoll's resource person. Nicoll admits that she took advantage of this assistance on a daily basis and that Moses "helped [her] a lot" (Tr. 29). Despite these efforts, the record reveals that Nicoll still became overwhelmed by the assignment and that resolution of these difficulties did not begin to occur until additional clerical help was assigned to work with her. In attempting to ascertain Miller's state of mind, therefore, we contrast Nicoll's performance against Miller's testimony concerning the rationale he applied when it became apparent that he would have money available in the budget to provide promotions or merit increases in October 1988. Miller maintains that he decided to reward those employees who, in his judgment, had taken on additional duties under adverse circumstances and, "in effect, became part of the solution rather than part of the problem (Tr. 110)."

What emerges from the record, as Miller expressed in his memo of May 24th, is a circumstance of "mutual disappointment." There is no indication, other than the proximity in time, that the initiation of the group grievance and the perceived change in Miller's demeanor in May 1988 is causally

connected.[12] What we do find probative of Miller's state of mind is evidence in the record which reveals that, although Miller acknowledged Nicoll was given a difficult assignment, that he thought she was not performing to the level he expected of a PAA.

We are convinced that the criteria Miller relied upon in assessing Nicoll's performance and in awarding upgrades and merit increases and the selection process he used in these matters were based on lawful considerations. In reaching this conclusion, we examine Nicoll's employment history with the TRS prior to appointment to her current position. Nicoll, herself, testified that upon her return from a maternity leave in 1986, she was placed in less demanding positions, which were "definitely" below her civil service title (Tr. 9-10). In January 1988, she was given the first opportunity in several years to demonstrate her possession of skills commensurate with the title of PAA. It is quite clear that during the time period that Miller was assessing her performance, Nicoll was struggling with the demands of her new position and was far from resolving many of the problems of the Disability Division. This assessment was a significant part of the process of determining which employees were to receive upgrades or merit increases. In this connection, Miller, in response to an inquiry on

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[12] We have said that the mere fact that an employee acted for a period of time as a Shop Steward is not sufficient to support a conclusion that the employer harbored anti-union animus. See e.g., Decision No. B-28-86. Moreover, we have also held that "the mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity,... does not state a violation where no causal connection has been demonstrated." Decision No. B-2-87. See also, Decision Nos. B-28-86; B-18-86; B-12-85; B-3-84; B-25-81; B-35-80.

direct examination as to why some employees and not others had received favorable consideration, testified:

> The people [who were upgraded] specifically had taken on more responsibilities, had seen an opportunity to solve a problem for us or create a solution ... and, in effect, created a situation where they solved ... a continuing problem, assumed greater responsibilities and deserved an increase. They also had a long track history of doing this type of thing and it was an opportunity to reward them [emphasis added] (Tr. 113-114).

On cross examination, Miller specifically recounted the accomplishments of each of those employees who had been upgraded or received a merit increase (Tr. 129-134). Based on his testimony and on the undisputed facts, we are persuaded that Miller applied his judgment in a nondiscriminatory manner.

We also note that there is no evidence of union activity or, for that matter, any interaction between Nicoll and Miller during the interim period from May through October 1988. For reasons explained by Payne, CWA's Grievance Representative, the group grievance filed on May 19th was not pursued further than Step I. The Human Rights complaint, which the Union alleges was a follow-up to the May 1988 group grievance, was not filed until December 12, 1988.

In addition, we find that the allegations concerning the behavior of McBride and Kessock in May and June of 1988 respectively, are immaterial to the issue of Miller's state of mind. Nicoll's written complaint that McBride was generally uncooperative in prior dealings (Union Ex. No. 10) does not lend support to the speculative allegation later made, at the hearing, that McBride delayed giving Nicoll her Tasks and Standards because she somehow found out that Nicoll was about to file a grievance. The allegation that Kessock did

not allow a co-worker to accompany Nicoll home in June 1988, because of her union activity, is, at best, conclusory and speculative.

Finally, we do not credit the testimony of Nicoll concerning statements allegedly made by Kessock and Moses after October 7, 1988. First, we do not find that the statement Nicoll allegedly overheard Kessock make (i.e., "The way Don feels about Mary, it will be a million years before she gets anything"), even if true, is probative of anti-union animus. Second, the statement attributed to Moses (i.e., "You know Mary, Donald told me if you hadn't started with the union business, you would have gotten your raise"), constitutes hearsay lacking any indicia of reliability.[13] On the other hand, Miller unequivocally denied ever making this statement (Tr. 119). We find that the Union's burden of proof is not advanced by this unsubstantiated and controverted statement. It is well settled that "allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation and surmise."[14]

Accordingly, we are not persuaded that the evidence supports the inference that Miller harbored anti-union animus, culminating in his decision to purposefully upgrade others and not Nicoll in retaliation for her union activity. Therefore, we find that the Union has not satisfied its prima facie burden under the City of Salamanca test. Furthermore, although we need not

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[13] We take administrative notice of the fact that Moses retired from TRS approximately six months before the hearing in this matter was held. According to information supplied by both parties, she has relocated out-of-state and is unavailable to testify.

[14] Decision Nos. B-28-89; B-28-86; B-18-86; B-12-85; B-25-81; B-35-80.

reach the question in the instant matter, even if the evidence presented was sufficient to shift the burden, we would find that the record supports the conclusion that, for sound business reasons, Nicoll would not have been upgraded at that time, even in the absence of union activity.

For all these reasons, we dismiss the improper practice 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 submitted by the Communications Workers of America be, and the same hereby is, dismissed.

DATED: New York, New York
May 24, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

DEAN L. SILVERBERG
MEMBER